

COURT DOCUMENTS

IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV 2076 of 2009

B E T W E E N :

MARK ASHLEY PAXTON

Plaintiff

-and-

JON FORD, MINISTER FOR FISHERIES

First Defendant

-and-

PETER ROGERS

Second Defendant

DRAFT AMENDED STATEMENT OF CLAIM
Filed pursuant to the Order of Registrar Dixon made 23 March 2010

Date of Document : 13 April 2010

Filed on behalf of : Plaintiff

Date of Filing : 13 April 2010

Prepared by :
Leask & Co
26 Cliff Street
Fremantle
WA 6160

Telephone: (08) 9430 6688
Fax: (08) 9430 4044
Reference: 1334/DL
David Leask

-
1. The Plaintiff:
 - (a) is and was at all material times a commercial fisherman;
 - (b) on 19 November 1986, was granted a Limited Entry Fishing Licence authorising the Plaintiff to operate in the Abrolhos Islands & Mid West Trawl Limited Entry Fishery ("the Fishery") which Limited Entry Fishing Licence ("the LEFL") was identified and known as "LEFL 1921", and is, together with the associated unit entitlement ("the unit"), together hereinafter referred to as "the fishing right"; and
 - (c) has fished in the Fishery from December 1981.

 2. The Second Defendant was at all material times the Chief Executive Officer of the Fisheries Department of Western Australia ("the Department").

3. The Fishery was:
 - (a) from 15 March 1986 - 29 May 1990, regulated by the *Abrolhos Islands Limited Entry Otter Trawl Fishery Notice* (“the 1986 Notice”);
 - (b) from 30 March 1990 until 24 May 1993, the Fishery was regulated by the *Abrolhos Islands & Mid West Trawl Limited Entry Fishery Notice, 1990* (“the 1990 Notice”); and
 - (c) from 25 May 1993 and thereafter, the Fishery has been regulated by the *Abrolhos Islands & Mid West Trawl Limited Entry Fishery Notice, 1993* (“the 1993 Notice”).

4. In order to lawfully participate in a Limited Entry Fishery, such as the Fishery, it is necessary either to hold what was known as a Limited Entry fishing Licence (“LEFL”) and is now known as a Managed Fishery Licence (“MFL”) relating to that Fishery, or to hold an Exemption issued under section 7 of the *Fish Resources Management Act, 1994* (“the Act”), exempting the holder from the requirement to hold a Managed Fishery Licence.

5. On 23 August 1988, the fishing right was transferred from the Plaintiff to Mandare Holdings Pty Ltd (“the Mandare transfer”).

6. On 4 April 1990, at the Plaintiff’s request and direction, Mandare applied to transfer the fishing right to JF & KA Fay and Blenkinsop Nominees Pty Ltd (“Fay & Blenkinsop”) (“the application to transfer”), which application was granted, and by virtue of which the unit attached to the vessel LFBG 249 (“FV *Panama*”).

7. As at 4 April 1990, Fay & Blenkinsop were the holders of a MFL in the Fishery (LEFL 1890) which authorised the vessel FV “*Victorious*” to operate in the Fishery.

8. In April 1990, at a meeting held at the Fisheries Department’s Perth office between the Plaintiff and Peter Millington (“Millington”), who was then responsible for the management of the Fishery:

- (a) the Plaintiff requested that he be permitted to fish the unit, notwithstanding that the Fay & Blenkinsop transfer had not been registered;
 - (b) Millington granted the Plaintiff's request on the basis that the Plaintiff was, and was recognised by the Department to be, the beneficial owner of the fishing right.
9. Contemporaneously with the application to transfer, Fay & Blenkinsop applied to replace the FV "*Victorious*" as the vessel authorised by LEFL 1890 to operate in the Fishery, with the FV "*Panama*" which application was approved by the Second Defendant.
10. On 15 May 1990, pursuant to the application to transfer, the fishing right was transferred from Mandare to Fay & Blenkinsop ("the F&B transfer") as a result of which:
 - (a) LEFL 1890 and the fishing right were amalgamated into a single authorisation;
 - (b) LEFL 1890 continued in existence as a single amalgamated authorisation and authorised a single vessel to use two trawl nets in the Fishery;
 - (c) the LEFL 1921 was cancelled on 20 July 1990; and
 - (d) LEFL 1890 became, or was known as, a "twin rig" licence and entitled the licensee to lawfully operate two trawl nets.
11. The Plaintiff remained the beneficial owner of the fishing right following and notwithstanding:
 - (a) the Mandare transfer; and
 - (b) the F&B transfer.
12. On 3 May 1991, the gear units associated with LEFL 1890 were transferred to LEFLs of third parties (the Transfer"), as a result of which LEFL 1890 was cancelled ("the Cancellation") as all gear unit entitlements associated with that LEFL had been transferred to other LEFLs, thereby depriving the Plaintiff of the opportunity to have the fishing right transferred as he, as beneficial owner of the fishing right, may have directed.

13. At all material times, the First Defendant and the Second Defendant and each of them, knew that the Plaintiff was the beneficial owner of the unit as at April 1990 and at all material times thereafter.

PARTICULARS OF KNOWLEDGE

- (a) The Department, through Millington, agreed to convene and attend a meeting with the Plaintiff to discuss a request by the Plaintiff to transfer ~~Fay and Blenkinsop~~ the unit from Mandare to Faye & Blenkinsop;
- (b) The Plaintiff attended the meeting with Millington and Alex Cechner (“Cechner”) of the Department at the Department’s offices in early April 1990, in which meeting the Plaintiff:
- (i) explained to Millington and Cechner that, notwithstanding that the fishing right was registered in the name of Mandare, he retained beneficial ownership of the fishing right;
- (ii) stated that he wished to transfer the fishing right from Mandare to Fay and Blenkinsop so that he could fish the fishing right with his vessel, the FV “*Panama*”, in conjunction with various other authorisations which were owned by Fay and Blenkinsop; and
- (c) stated that he wished to commence fishing the fishing right in conjunction with the other authorisation prior to the registration of the transfer referred to in subparagraph 13(ii) above, if the said transfer had not been registered prior to the commencement of the 1990 fishery season; and
- (d) the Department, in the person of Millington, agreed to the Plaintiff’s requests.
14. The ~~third party~~ Transfer was applied for and registered without the knowledge or consent of the Plaintiff.
15. The Department owed the Plaintiff a duty of care in respect of the fishing right:
- (a) not to transfer the unit from Fay and Blenkinsop without first notifying the Plaintiff of any application to transfer; and
- (b) to notify the Plaintiff of any application to transfer or otherwise deal with the unit.

16. The Department at all material times maintained an informal system of recognising beneficial interests in authorisations.
17. The Plaintiff has at all material times, since the ~~third party~~ TTransfer, continued to claim that the third party transfer was unlawful.
18. On 23 July 2003, Kim Chance, the then Minister for Agriculture, Forestry and Fisheries, met with the Plaintiff at Dumas House, West Perth (“the Dumas House meeting”), following an invitation by the Minister for the Plaintiff to discuss the circumstances and issues arising from facts and matters pleaded at paragraphs 1 to 17 above and in particular the ~~T~~TTransfer and the ~~C~~Cancellation. The issues raised by the Plaintiff included:
 - (a) whether or not the Plaintiff was, as at the date of the TTransfer, the beneficial owner of the fishing right;
 - (b) whether, as at the date of the TTransfer, the Department recognised the Plaintiff as the beneficial owner of the fishing right;
 - (c) whether or not the Department owed the Plaintiff a duty of care to safeguard the Plaintiff’s beneficial interest in the fishing right and if so whether that duty had been discharged;
 - (d) the inadequacies of the Department’s informal register of beneficial interests to safeguard the Plaintiff’s interest in the fishing right;
 - (e) why the Plaintiff was not notified of a transfer of the entitlements of which he was beneficial owner to any third party;
 - (f) whether or not the licensing system had been used by Faye and Blenkinsop to commit a fraud in relation to the TTransfer;
 - (g) the significance of the prosecution of Mace & Hoskins to the Plaintiff’s case with particular reference to:
 - (i) the adequacy of the licencing system to protect the beneficial owners of fishing rights;
 - (ii) the licensing system having been used to commit fraud on the beneficial owner of a fishing right; and
 - (iii) the distinction between the “considered” and the “beneficial” owner of a fishing right;

- (h) the acts or defaults of the Department in relation to its knowledge of the matters referred to in paragraph 17(a)-(d) above;
 - (i) Peter Rogers failure to
 - (i) clarify to all interested parties, when requested to do so, the legal and beneficial interests of those parties in the fishing right;
 - (ii) advise Fay and Blenkinsop and their legal advisors that their claimed ownership of the fishing right could not be based, as they contended, on the written contract whereby the Plaintiff had agreed to purchase various licences owned by Fay and Blenkinsop.
- ("the Issues").

19. At the conclusion of the Dumas House meeting, the Minister verbally stated to the Plaintiff that:

- (a) he would conduct an investigation into the Issues, and
- (b) if he was satisfied that the Plaintiff had made good his concerns in respect of the Issues, he would consider amending the Management Plan for the Fishery to make provision for the grant to the Plaintiff of a Managed Fishery Licence for the Fishery to replace the fishing right (hereinafter referred to as "a licence")

as he was under a duty to do by sections 9 and 10(2) Public Sector Management Act 1994 (WA) and clause 4 of the Ministerial Code of Conduct 2006 (WA).

20. By his letter dated 13 August 2003 to the Plaintiff's solicitor, the Minister confirmed the statement referred to in paragraph 19 above.

~~21. On 19 August 2004, the Honourable Bruce Donaldson responded to the question put to him in the Legislative Council:-~~

~~"Given the circumstances surrounding the cancelled fishing licence of Mr Mark Paxton to operate in the Abrolhos Islands and Mid West Trawl Fishery for scallops, and with your granting an Exemption for Mr Mark Paxton to fish until December 2004 in this fishery;~~

~~(1) Will you consider granting a further one year's Exemption to December 2005 to Mr Paxton, so this issue can be finally brought to resolution?"~~

~~-with the answer:-~~

~~“I thank the Honourable Member for some notice of this question.~~

~~-(a) — Yes, on submission of an application for Exemption from Mr Paxton.”~~

21 ~~22~~. By his letter to the Plaintiff dated 22 December 2003, the Minister *inter alia*:

- (a) (i) confirmed that he was continuing to consider the Issues;
- (ii) if appropriate, he would amend the 1993 Management Plan to provide the Plaintiff with the opportunity to apply for the grant of a new licence; and
- (iii) he would grant the Plaintiff an Exemption to enable the Plaintiff to legally operate in the Fishery in the 2004 season without being the holder of a MFL;
- (b) stated:
 - (i) “I have given further consideration to the matters you have raised and to advice from the Executive Director of Fisheries and I have formed the view that until the departmental investigation into your claims has been concluded, you should be subject to the same requirements as persons who hold a Managed Fishery Licence (MFL) to operate in the fishery.”; and
 - (ii) “You will be notified of the outcomes of the departmental investigation into the matters you have raised with me in due course.”

22 ~~23~~. On 24 November 2004, the Minister wrote to the Plaintiff offering to extend the Exemption to allow it to remain in force for the 2005 fishery season, on the basis that the Minister, on granting the Exemption, intended that it remain in force until the Department finalised an investigation into the Issues. The Plaintiff accepted the said offer and the Exemption was accordingly extended by Variation to Exemption Administrative No 545, dated 18 December 2004.

23 ~~24~~. On 9 March 2005, the Minister wrote to the Plaintiff stating *inter alia* that:

- (a) the Plaintiff should, whilst operating in the Fishery, be subject to the same requirements as persons who hold a MFL to operate in the Fishery until the Department’s investigation into the Issues had been concluded;

- (b) the Plaintiff would be notified of the outcomes of the Departmental investigation into the matters he had raised, in due course.

24-25. By his letter dated 25 October 2005, the Second Defendant advised the Plaintiff that any claim the Plaintiff may have had against the Director of Fisheries in connection with the third party transfer was statute barred and there were no remedies available to the Plaintiff at law.

25-26. By his letter dated 21 October 2005, the First Defendant advised the Plaintiff *inter alia* that:

- (a) the Department had finalised its investigation following receipt of advice from the Office of the State Solicitor;
- (b) the outcome of the investigation was that the Plaintiff's claim was dismissed;
- (c) the Plaintiff would receive the Executive Director's detailed response to the Plaintiff's letter of February 2004 "*in the near future*";
- (d) in light of the outcome of the investigation, the Exemption would not be renewed or extended further; and
- (e) the First Defendant viewed the matter of the Plaintiff's claim of a lost right to fish in the Fishery as concluded.

26. Contrary to the advice referred to at subparagraph 25(a) and in breach of the statement to the Plaintiff by Kim Chance that he would conduct an investigation into the Issues as pleaded at paragraph 19(a) and his obligation to do so as pleaded at paragraph 19 no investigation into the issues was conducted.

27. On or about 11 November 2005, the 1993 Management Plan was amended ("the Amendment"), the effects of the Amendments relevantly being that:

- (a) no application for the grant of a licence could be made after 15 November 2005; and
- (b) the maximum head rope length of net pulled officially was 336.26m; and
- (c) a person must not fish in the Fishery by means of a try net or otter trawl net, unless fishing under the authority of a licence that authorises the use of not less than one (1) gear unit

such amendments being contrary to the statement referred to in paragraph 19 and the confirmation referred to at paragraph 21(a)(iii).

28. On 16 November 2005, the First Defendant advised the Plaintiff that he had amended the 1993 Management Plan to create a seventeenth (17th) licence so as to allow for the issue to the Plaintiff of a MFL (“the Assurance”).

PARTICULARS

The advice was given verbally by the First Defendant to the Plaintiff in a meeting at Parliament House, Perth, Western Australia, on 16 November 2005, when the First Defendant said to the Plaintiff: *“I have made amendments to the management plan – I have created a seventeenth licence”*

- ~~29.~~ ~~On 29 November 2005, whilst responding to a question from the said Bruce Donaldson as to why the Management Plan for the Fishery had been amended, the First Defendant made a statement in the West Australian Parliament that there was a vacant licence in the Management Plan for the Fishery.~~

- 29-30. The amendment was in breach of the Aassurance and the ~~statement~~ duty pleaded at paragraph 19 above in that:

- (a) no further MFL was made available by the A amendment, whether to the Plaintiff or otherwise; and
- (b) the effect of the A amendment was to preclude any further application for a MFL in the Fishery being made.

- 30-31. ~~Contrary to the statements referred to in para. 28~~ Assurance

- (a) there was no 17th licence created;
- (b) the criteria for the grant of a licence had not been amended, other than to require that the application be made on or before 15 November 2005;
- (c) the Exemption was not capable of being fished in its own right as a result of the amendment prohibiting by means of a try net or otter trawl net only.

31 ~~32~~. The effect of the addition of clause 10(8) was to prevent the Plaintiff from fishing the Exemption by means of a try net only, it being impossible for the holder of a licence to fish by means of a try net only as a result of clause 13(4).

32 ~~33~~. By reason of:

- (a) the failure of the Defendants to conduct the investigation; and
- (b) the 2005 amendments,

the Plaintiff has been prevented from operating within the Fishery consistent with the statements referred to in para ~~23~~22, as a result of which the Plaintiff has suffered loss and damage.

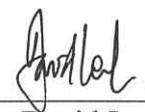
PARTICULARS OF LOSS AND DAMAGE

- A. Loss of profit for the 2006, 2007, 2008 seasons and continuing, full particulars of which will be delivered prior to trial.
- B. Loss of opportunity to apply for and, if considered appropriate, be granted, a licence.

AND THE PLAINTIFFS CLAIMS against the First and Second Defendants:

1. Damages to be assessed,
2. Interest pursuant to section 32, *Supreme Court Act*, 1935, at such rate and for such time and on such sum as the Court should deem appropriate.
3. Costs.

Dated 13 April 2010



David Leask
Plaintiff's Counsel

To: The Defendants
And to: Their solicitors
State Solicitors Office
141 St George's Terrace
PERTH WA 6000
Ref: 4301-07

B E T W E E N:

MARK ASHLEY PAXTON

Plaintiff

- and -

JOHN FORD, MINISTER FOR FISHERIES

First Defendant

- and -

PETER ROGERS

Second Defendant

**APPLICATION TO CASE MANAGEMENT REGISTRAR
ORDER 29A RULE 12: FORM 18A
SPRINGING ORDER**

Date of Document: 2 March 2010
Filed on behalf of: First and Second Defendants
Date of Filing: 2 March 2010
Prepared by:

TIMOTHY SHARP
STATE SOLICITOR FOR WESTERN AUSTRALIA TELEPHONE: 9264 1888
141 ST GEORGES TERRACE REF: SSO 4301/07
PERTH WA 6000

The Defendants apply to the Case Management Registrar for the following orders:

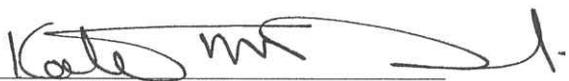
1. Unless the Plaintiff file and serve any draft Statement of Claim within 7 days of the making of this order, the action be dismissed, with costs including reserved costs.

2. The Plaintiff pay the First and Second Defendants' costs of this application.

The ground for this application is that the Plaintiff has failed to comply with the order of Acting Master Chapman made on 28 January 2010, namely, that the Plaintiff file and serve any draft Statement of Claim by 25 February 2010.

A copy of the Memorandum referred to in Order 59 rule 9, and a copy of the order made by Acting Master Chapman on 28 January 2010 is attached to this application.

Dated the 2nd day of March 2010


for
TIMOTHY SHARP
STATE SOLICITOR FOR WESTERN AUSTRALIA
SOLICITOR FOR THE FIRST AND SECOND
DEFENDANTS

TO: The Plaintiff and his solicitors
Leask & Co
26 Cliff Street
FREMANTLE WA 6160

B E T W E E N:

MARK ASHLEY PAXTON

Plaintiff

- and -

JON FORD, MINISTER FOR FISHERIES

First Defendant

- and -

PETER ROGERS

Second Defendant

**ORDER 59 RULE 9(1)
MEMORANDUM OF CONFERRAL
RE: DEFENDANTS' APPLICATION DATED 2 MARCH 2010 FOR
SPRINGING ORDER**

Date of Document: 2 March 2010
Filed on behalf of: First and Second Defendants
Date of Filing: 2 March 2010
Prepared by:
TIMOTHY SHARP
STATE SOLICITOR FOR WESTERN AUSTRALIA TELEPHONE: 9264 1888
141 ST GEORGES TERRACE REF: SSO 4301/07
PERTH WA 6000
SOLICITOR FOR THE
FIRST AND SECOND DEFENDANTS

Conferral

1. The solicitor for the First and Second Defendants confirm that there has been attempted conferral with the Plaintiff's solicitors to try and resolve the matters giving rise to the application dated 2 March 2010 in support of which the Memorandum is filed.

2. On 28 January 2010 the parties appeared before Acting Master Chapman in chambers to hear the First and Second Defendants' application to strike out the Plaintiff's Statement of Claim. The history of the matter prior to that hearing is set out in the Memorandum of Conferral dated 27 October 2009 accompanying the strike out application.
3. Acting Master Chapman made orders that the Statement of Claim be struck out, that the Plaintiff file and serve a draft Statement of Claim by 25 February 2010 and the Plaintiff pay the Defendants' costs of the application forthwith. A copy of the extracted orders of Acting Master Chapman is attached and marked with the letter "A".
4. On 25 February 2010 the Plaintiff had not filed and served any draft Statement of Claim.
5. On 25 February 2010 Ms Kate McDonald of the State Solicitor's Office telephoned the Plaintiff's solicitors and left a message for Mr David Leask to call her.
6. On 26 February 2010 a copy of the proposed application was sent to the Plaintiff's solicitors under cover of a letter of the same date to ascertain if the issue could be resolved or if not, unavailable dates. A copy of the letter is attached and marked with the letter "B".
7. As of 2 March 2010 and at the time of filing no response has been received from the Plaintiff's solicitors to the letter or the phone call.

Matters in Dispute

8. All the matters giving rise to the Summons dated 2 March 2010 still remain in dispute.

Hearing

9. Subject to the direction of the Court, the application should be listed for hearing as follows:
- a. Status Conference;
 - b. No programming orders are required;
 - c. The time required for oral argument is 15 minutes;
 - d. Unavailable dates: Mondays and Fridays,
9-15 April 2010.

DATED the 2nd day of March 2010



for TIMOTHY SHARP
STATE SOLICITOR FOR WESTERN AUSTRALIA
SOLICITOR FOR THE FIRST AND SECOND DEFENDANTS

TO: The Plaintiff's solicitors
Leask & Co
26 Cliff Street
FREMANTLE WA 6160

IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV 2076 OF 2007

BETWEEN:



MARK ASHLEY PAXTON

Plaintiff

and

JON FORD, MINISTER FOR FISHERIES

First Defendant

- and -

PETER ROGERS

Second Defendant

**ORDERS ALLOWING STRIKE OUT APPLICATION
BEFORE ACTING MASTER CHAPMAN IN CHAMBERS
28 JANUARY 2010**

Date of Document: 16 February 2010
Filed on behalf of: First and Second Defendants
Date of Filing: 16 February 2010
Prepared by:
TIMOTHY SHARP
STATE SOLICITOR FOR WESTERN AUSTRALIA TELEPHONE: 9264 1888
141 ST GEORGES TERRACE REF: SSO 4301/07
PERTH WA 6000
SOLICITOR FOR THE
FIRST AND SECOND DEFENDANTS

UPON the Application of the first and second defendants dated 27 October 2009 and
UPON HEARING Mr D. Leask of Counsel for the Plaintiff and Ms K. McDonald of
Counsel for the Defendants IT IS ORDERED THAT:

1. The Statement of Claim be struck out.
2. By 25 February 2010 the plaintiff file and serve any draft Statement of Claim.
3. The plaintiff pay the defendants' costs fixed in the sum of \$6,500 such sum to be paid forthwith.

BY THE COURT

A handwritten signature in cursive script, appearing to read "Hamer", written in black ink.

REGISTRAR



"B"

FAXED

COPY

STATE SOLICITOR'S OFFICE

SSO Ref: 4301-07 **Your Ref:** 1334/DL
Enquiries: Kate McDonald
Telephone: 9264 1655
Email: k.mcdonald@sso.wa.gov.au

Westralia Square
141 St Georges Terrace
Perth, Western Australia 6000

GPO Box B83 Perth W.A. 6838
Telephone (08) 9264 1888
Email sso@sso.wa.gov.au
Fax (08) 9264 1440
DX 175

Date: 26 February 2010

Leask & Co
Barristers and Solicitors
PO Box 1161
FREMANTLE WA 6959
Attention: Mr David Leask
By Facsimile: 9430 4044

Dear Sir

PAXTON V MINISTER FOR FISHERIES & PETER ROGERS

I refer to the above matter.

As you are aware, Master Chapman ordered on 28 January 2010 that by 25 February 2010 the Plaintiff file and serve any draft Statement of Claim. As that has not occurred, I have instructions to make the attached application.

For the purposes of Order 59 rule 9 could you advise if this matter can be resolved in any way and if not, your unavailable dates, by close of business today. It is my view that the matter will take no longer than 15 minutes and can be heard in the general list of the Case Management Registrar.

Yours sincerely

Kate McDonald
Senior Assistant State Counsel

IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV 2076 OF 2007

B E T W E E N:

MARK ASHLEY PAXTON

Plaintiff

- and -

JOHN FORD, MINISTER FOR FISHERIES

First Defendant

- and -

PETER ROGERS

Second Defendant

**APPLICATION TO CASE MANAGEMENT REGISTRAR
ORDER 29A RULE 12: FORM 18A**

Date of Document:

Filed on behalf of:

First and Second Defendants

Date of Filing:

Prepared by:

TIMOTHY SHARP
STATE SOLICITOR FOR WESTERN AUSTRALIA TELEPHONE: 9264 1888
141 ST GEORGES TERRACE REF: SSO 4301/07
PERTH WA 6000

The Defendants apply to the Case Management Registrar for the following orders:

1. Unless the Plaintiff file and serve any draft Statement of Claim within 7 days of the making of this order, the action be dismissed, with costs including reserved costs.

2. The Plaintiff pay the First and Second Defendants' costs of this application.

The ground for this application is that the Plaintiff has failed to comply with the order of Acting Master Chapman made on 28 January 2010, namely, that the Plaintiff file and serve any draft Statement of Claim by 25 February 2010.

A copy of the Memorandum referred to in Order 59 rule 9, and a copy of the order made by Acting Master Chapman on 28 January 2010 is attached to this application.

Dated the 26th day of February 2010

for _____
TIMOTHY SHARP
STATE SOLICITOR FOR WESTERN AUSTRALIA
SOLICITOR FOR THE FIRST AND SECOND
DEFENDANTS

TO: The Plaintiff and his solicitors
Leask & Co
26 Cliff Street
FREMANTLE WA 6160

B E T W E E N:

MARK ASHLEY PAXTON

Plaintiff

- and -

JOHN FORD, MINISTER FOR FISHERIES

First Defendant

- and -

PETER ROGERS

Second Defendant

**APPLICATION TO CASE MANAGEMENT REGISTRAR
ORDER 29A RULE 12: FORM 18A**

Date of Document:

Filed on behalf of:

First and Second Defendants

Date of Filing:

Prepared by:

TIMOTHY SHARP
STATE SOLICITOR FOR WESTERN AUSTRALIA TELEPHONE: 9264 1888
141 ST GEORGES TERRACE REF: SSO 4301/07
PERTH WA 6000

The Defendants apply to the Case Management Registrar for the following orders:

1. Unless the Plaintiff file and serve any draft Statement of Claim within 7 days of the making of this order, the action be dismissed, with costs including reserved costs.

2. The Plaintiff pay the First and Second Defendants' costs of this application.

The ground for this application is that the Plaintiff has failed to comply with the order of Acting Master Chapman made on 28 January 2010, namely, that the Plaintiff file and serve any draft Statement of Claim by 25 February 2010.

A copy of the Memorandum referred to in Order 59 rule 9, and a copy of the order made by Acting Master Chapman on 28 January 2010 is attached to this application.

Dated the 26th day of February 2010

for TIMOTHY SHARP
STATE SOLICITOR FOR WESTERN AUSTRALIA
SOLICITOR FOR THE FIRST AND SECOND
DEFENDANTS

TO: The Plaintiff and his solicitors
Leask & Co
26 Cliff Street
FREMANTLE WA 6160

IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV 2076 OF 2007

BETWEEN:



MARK ASHLEY PAXTON

Plaintiff

and

JOY FORD, MINISTER FOR FISHERIES

First Defendant

and -

PETER ROGERS

Second Defendant

**ORDERS ALLOWING STRIKE OUT APPLICATION
BEFORE ACTING MASTER CHAPMAN IN CHAMBERS
28 JANUARY 2010**

Date of Document: 16 February 2010

Filed on behalf of: First and Second Defendants

Date of Filing: 16 February 2010

Prepared by:

TIMOTHY SHARP

STATE SOLICITOR FOR WESTERN AUSTRALIA TELEPHONE: 9264 1888

141 ST GEORGES TERRACE REF: SSO 4301/07

PERTH WA 6000

SOLICITOR FOR THE

FIRST AND SECOND DEFENDANTS

UPON the Application of the first and second defendants dated 27 October 2009 and
UPON HEARING Mr D. Leask of Counsel for the Plaintiff and Ms K. McDonald of
Counsel for the Defendants IT IS ORDERED THAT:

1. The Statement of Claim be struck out.
2. By 25 February 2010 the plaintiff file and serve any draft Statement of Claim.
3. The plaintiff pay the defendants' costs fixed in the sum of \$6,500 such sum to be paid forthwith.

BY THE COURT

A handwritten signature in cursive script, appearing to read "Hamer".

REGISTRAR

IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV 2076 OF 2007

BETWEEN:

MARK ASHLEY PAXTON

Plaintiff

- and -

JON FORD, MINISTER FOR FISHERIES

First Defendant

- and -

PETER ROGERS

Second Defendant

**DEFENDANTS' OUTLINE OF SUBMISSIONS AND AUTHORITIES IN
SUPPORT OF APPLICATION TO STRIKE OUT STATEMENT OF CLAIM**

Date of Document:

25 November 2009

Filed on behalf of:

First and Second Defendants

Date of Filing:

25 November 2009

Prepared by:

TIMOTHY SHARP
STATE SOLICITOR FOR WESTERN AUSTRALIA
141 ST GEORGES TERRACE
PERTH WA 6000
SOLICITOR FOR THE
FIRST AND SECOND DEFENDANTS

TELEPHONE: 9264 1888
REF: SSO 4301/07

1. This application is brought pursuant to Order 20 rule 19 of the *Rules of the Supreme Court* and the orders of Registrar Dixon dated 29 September 2009 permitting a strike out application in the event the Plaintiff failed to file and serve any amended Statement of Claim.
2. It is accepted that interlocutory disputes involving applications to strike out pleadings are discouraged. However, they will be entertained by the Court if the time and expense involved in their resolution is proportionate to the

significance of the dispute to the just and effective resolution of the case (*Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd and ors* [2006] WASC 161; 33 WAR 1 per Martin CJ at [2]).

3. This application will advance the interests of case management as the Plaintiff's action in its current form has no reasonable prospects of success and would therefore unnecessarily protract the time taken in the preparation for trial and the conduct of the trial itself (see *Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd* (supra) per Martin CJ at [19]; *Lowmond Pty Ltd v Town of Fremantle and Anor* [2007] WASC 67 per Sanderson M at [6]).
4. What sets this application apart from that which arose in *Youlden Enterprises Pty Ltd* (above) is that, should the Plaintiff be permitted to proceed with the Statement of Claim as currently drafted, it would cause irreparable prejudice to the Defendants and the trial process. The facts set out in the Statement of Claim canvass a 20 year period without defining what is the cause of action or when it accrued. The alleged defects identified are not mere pedantry but go to primary purpose of contemporary pleadings namely "whether they give rise to an arguable cause of action ... and apprising the other parties to the proceedings of the case that they have to meet " (*Barclay Mowlem Construction Ltd v Dampier Port Authority* [2006] WASC 281 per Martin CJ at [4] and [7]). Further, unlike those cases where strike out applications have been discouraged, this application has been brought at the earliest opportunity.
5. Ground 1 of the application concerns section 47A of the *Limitation Act 1935*. But as Ground 1 also relies in part on the failure to identify a cause of action, it

is more convenient to first deal with Grounds 2 and 3 which relate directly to this issue.

Ground 2 - Whole Statement of Claim

6. The whole of the Statement of Claim should be struck out for failing to disclose a reasonable cause of action (O20r19(1)(a)).
7. A pleading must contain, and contain only, a statement in summary form of the "material facts" on which the party pleading relies for his claim, but not the evidence by which those facts are to be proved (O20r8(1)).
8. The word "material" means necessary for the purpose of formulating a complete cause of action; and if any one material fact is omitted, the statement of claim is bad and liable to be struck out or a further and better statement of claim may be ordered (*Bruce Oldhams Press Ltd* [1936] 1 KB 697 per Scott LJ at 712-13; *Hart-Roach v Public Trustee* unreported; WASC, Library No 980044; 11 February 1998 per Murray J at 37).
9. In this case, accepting that all the facts alleged in the Statement of Claim are true, as is required (*Kimberley Downs Pty Ltd v Western Australia* (WASC, Staples M, Library No 6414, 25 August 1986) the Statement of Claim discloses no cause of action against the Defendants.
10. The Indorsement on the Writ dated 24 October 2007 alleges negligence against the Defendants in failing to:
 - a. conduct or cause to be conducted any or any proper enquiry into the Plaintiff's complaints;

- b. amend the Management Plan to allow for the grant to the Plaintiff of a managed fishery licence.

The claim in the Writ for a Declaration is abandoned having been omitted from the Statement of Claim (*Cargill v Bower* (1878) 10 Ch D 502 at 517).

11. In order to establish a cause of action in negligence it is necessary to plead material facts that give rise to a duty of care, a breach of that duty and consequent damage or loss.
12. Based on the Indorsement on the Writ and what is pleaded at paragraph 33, it is assumed that the Plaintiff is seeking to assert that the Defendants owed the Plaintiff a duty to conduct an investigation and amend the Management Plan in a particular way. However, no such duty is pleaded nor are there any material facts pleaded that could give rise to such a duty. The only duty pleaded is at paragraph 15 of the Statement of Claim, but that has no nexus with the alleged negligent breach, if "breach" is what paragraph 33 is purporting to allege (although it is not specifically pleaded).
13. In the absence of asserting that the Defendants were the repository of some statutory power which gave rise to an obligation to investigate or amend the Management Plan in a particular way, (which would, in any event, be outside the scope of the Indorsement of the Writ and contrary to what was found by this Court in *Paxton v Jon Ford, Minister for Fisheries and Peter Rogers* [2006] WASC 194 per Newnes M at [40]) the Plaintiff needs to assert a novel duty of care in these circumstances. That has not been pleaded.
14. Similarly there is no breach pleaded. At paragraph 33 it is asserted that by reason of a failure to conduct an investigation or amend the Management Plan

in a particular way, the Plaintiff incurred losses, without stating what legal obligation was breached.

15. In relation to the failure to conduct an investigation, there are no material facts pleaded to establish such a failure. Paragraph 26 asserts that the Plaintiff received from the First Defendant a letter advising that the investigation had been finalised. There are no facts pleaded asserting that this was incorrect. Therefore, the statement in paragraph 33 that by reason of the "failure to investigate" simply assumes rather than pleads that this is the case.
16. While there is no statutory duty to investigate or conduct an inquiry (*Paxton v Jon Ford, Minister for Fisheries and Peter Rogers* [2006] WASC 194 per Newnes M at [40]), amending the Management Plan is governed by the *Fish Resources Management Act 1994*. The issue is not whether the Plaintiff suffered loss as a result of the amendment, but if the amendment breached any duty. A duty of care cannot be imposed on a statutory duty if the observation of such a duty would be inconsistent with, or have the tendency to discourage the due performance by the authority of its statutory duties (*X (Minors) v Bedfordshire County Council*) [1995] 2 AC 633 per Lord Browne Wilkinson at 739). It is not pleaded what legal obligation was breached by amending the Management Plan in the way asserted in paragraphs 27 and 32.
17. By reason of the above the Defendants are unable to mount a defence, among other things, of whether conformity with the statutory regime would negate the imputation of any duty or whether the protection from liability clause in section 244 of the *Fish Resources Management Act 1994* would apply, or whether a

duty of care exists at all. The Statement of Claim reveals no reasonable cause of action against either Defendant and should be struck out (O20r19(1)(a)).

Ground 3 – As to Part of the Statement of Claim

18. Paragraphs 5 to 17 assert facts that are entirely irrelevant and would inordinately delay the hearing of any action. The historical context which culminated in the Plaintiff's request for an investigation is irrelevant. What is relevant is the power or duty or obligation that required an investigation and/or an amendment to the Management Plan to grant a Managed Fishery licence, which has not been pleaded. These facts should be struck out (O20r19(1)(c); *Ron Hodgson (Trading) Pty Ltd v Belvedere Motors (Hurstville) Pty Ltd* [1971] 1 NSWLR 472 per Asprey JA at 477).
19. No cause of action could arise from the facts asserted at paragraphs 5 to 17 in any event as, on their face, any such action is clearly time barred (see in particular paragraphs 13 to 15); (O20r19(1)(d); *Moullin v Westralian Farmers Co-op Ltd* WASC, White M, Library No 8455, 31 August 1990).
20. Contrary to O20r8, paragraph 26 pleads evidence rather than material fact. Proof that a letter was sent to the Plaintiff is not proof of what is said in that letter. Nowhere else is it pleaded that there was or was not an investigation. The pleading should be struck out as embarrassing (O2019(1)(c)).
21. Paragraph 30 is entirely confusing. The terms "amendment", "assurance" and "statement" are not defined or referable to particular events and the pleading is therefore unclear and is prejudicial, embarrassing and likely to delay the fair trial of the action (O20r19(1)(c)).

22. In the absence of a cause of action the relevance of the statements in paragraphs 21 and 29 is unclear. However, to the extent they are relied upon for the purposes of proving the truth of the statements they are embarrassing and prejudicial as they refer to comments that are inadmissible by reason of section 1 of the *Parliamentary Privileges Act 1891 (WA)*; (*Mees v Roads Corporation* [2003] FCA 306; 28 FCR 418 per Gray J at [76], [80], [81] and [85]-[86]; *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 per PC at 333-334, 337.)
23. Paragraph 33, for the reasons stated in Ground 2 above, fails to disclose a cause of action, is frivolous, prejudicial, embarrassing and likely to delay the fair trial of the action in that:
- (a) it refers to consequences arising from a failure to investigate, when no such failure is pleaded in the Statement of Claim (O20r19(1)(a), (b), (c));
 - (b) in any event pleads no material facts in support of any failure to investigate, even if the fact of such a failure was pleaded (O20r19(1)(a));
 - (c) is irrelevant when no duty to conduct an investigation or amend the Management Plan in the way asserted is pleaded (O20r19(1)(a)(c));
 - (d) by referring to paragraph 23 confines the claim to fishing in the 2005 season, but then claims losses for subsequent seasons without any material facts to support the same; (O20r19(1)(a) (b) and (c)).

24. No reasonable cause of action is disclosed entitling the Plaintiff to damages and judgement contained in the prayer for the relief (O20r19(1)(a)).
25. If embarrassing material is difficult to separate from the rest of the pleading the whole of the pleading may be struck out (*Coe v Commonwealth* (1979) 24 ALR 118 per Jacob J at 132).

Ground 1 - Section 47A Limitation Act 1935

26. Section 47A of the *Limitation Act* 1935 applies to:
- a. an action brought;
 - b. against a person;
 - c. for an act done in pursuance or execution or intended execution of any Act, or of any public duty or authority, or in respect of any neglect or default in the execution of the Act, duty or authority;
- provided the cause of action accrued prior to 15 November 2005.¹
27. Clearly there is an "action" brought against a "person" within the meaning of the section 47A of the *Limitation Act* 1935. The test for determining whether there has been "any act done in pursuance or execution or intended execution of any Act, or of any public duty or authority, or in respect of any neglect or default in the execution of the Act, duty or authority" is whether the Defendant is exercising, for the benefit of the public, a public duty or authority which is not merely an incidental, ie subsidiary or auxiliary power (*Alcoa of Australia v SEC(WA)* (1995) 17 WAR 112 per Parker J at 129 approved by the Full Court in *SEC(WA) v Alcoa of Australia Ltd* (1995) 17 WAR 131 per Pidgeon J at 138, per Franklyn J at 157).

¹ *Limitation Act* 2005

28. It is first necessary to identify the act done or the neglect or default in respect of which the action is brought (*Alcoa of Australia v SEC(WA)* (supra) per Parker J at 114; *Australian National Airlines Commission v Newman* (1987) 162 CLR 466 per Mason CJ, Deane, Toohey and Gaudron JJ at 471-472). That exercise should be done on the assumption that the facts pleaded in the Statement of Claim are accepted, as is the case with a strike out application (*Alcoa of Australia v SEC(WA)* (supra) per Parker J at 114).
29. In relation to amending the Management Plan, the governing Act is the *Fish Resources Management Act 1994* ("the FRMA"). Section 54(2) permits the Minister to amend a Management Plan. There are detailed provisions governing the content of a Management Plan (see sections 58 to 62 of the FRMA) including a broad discretion vested in the Minister to include any provision that, in the Minister's opinion, is necessary for the protection or management of the fishery or any part of the fishery (section 56(3) of the FRMA).
30. A statutory function which is imposed on a public authority as a matter of positive duty, is unlikely to be merely incidental to the authority's public functions. Each case depends upon the particular functions imposed on the particular body, and it may be that what is merely incidental, ie subsidiary or auxiliary power, to one authority is essential to another (*Alcoa of Australia v SEC(WA)* (supra) per Parker J at 129 approved by the Full Court in *SEC(WA) v Alcoa of Australia Ltd* (supra).
31. The act of amending a Management Plan is clearly an act to which section 47A applies. In relation to allegation of failing to conduct an investigation, without

identifying the source of the obligation to conduct an investigation the task of characterising the relevant act, neglect or default is not possible.

32. To the extent section 47A does apply, the Plaintiff has failed as soon as practicable after the cause of action accrued, to give notice to the Defendants in writing of the circumstances upon which the proposed action will be based and commence the action within one year from the date on which the cause of action accrued. Further, the Defendants did not consent in writing to the bringing of action nor has the Plaintiff obtained leave of the Court to bring an action (Affidavit of Michael Andrew Cuomo sworn 27 October 2009).
33. Further, it would not be just to grant leave pursuant to section 47A(3)(b) of the *Limitation Act 1935* on the ground that the action has no reasonable prospect of success (*Commissioner of Main Roads v Highway Construction Pty Ltd* [2001] WASCA 158 at [12]; *Minister for Community Welfare v Bennett* (Unreported, WASC, Library No. 5060, 2 September 1983) Burt CJ at 3.)

Ground 4 – Abuse of Process

34. In *Paxton v Jon Ford, Minister for Fisheries and Peter Rogers* [2006] WASC 194 the Applicant (currently the Plaintiff in these proceedings) sought an order nisi for a writ of certiorari to have quashed a decision made on 21 October 2005 by the First Respondent (in this action, the First Defendant) that the Applicant's claim to a "lost right to fish" was concluded and the Ministerial exemption granted to him would not be further extended or renewed, and a decision made on 25 October 2005 by the Second Respondent (in this action, the Second Defendant) refusing to recognise the Applicant's claimed right to a managed fishery licence.

35. The findings made by Master Newnes were:
- a. The decision relied upon by the Applicant was not amenable to review [38] and the Applicant did not have an arguable case [46];
 - b. The inquiries conducted by the Department to ascertain if there was any substance in the Applicant's claim that the Department had been at fault in allowing the Managed Fishery Licence to be transferred beyond the Applicant's reach, were not conducted pursuant to any statutory or other legal obligation or any established practice [40];
 - c. The purpose of the inquiries was not to decide whether or not the Applicant had any entitlement to have restored to him the Managed Fishery licence, nor to whether a new managed fishery licence for the Fishery should be granted to Applicant [40];
 - d. Whether a managed fishery licence should be granted involved consideration of a range of issues quite separate to the matters raised by the Applicant, including, among other things, the state of the Fishery;
 - e. The Applicant's claim was made on the basis that the Department was responsible for his loss of the managed fishery licence so it was just and equitable that he be granted a replacement [43];
 - f. The contrary conclusion at which the Second Respondent arrived as a result of the internal inquiries, as set out in the letter of 25 October 2005 did not constitute a decision which determined or affect the Applicant's rights. It did not deal with any right of the Applicant, or satisfy and condition precedent to the exercise of the power which would in turn

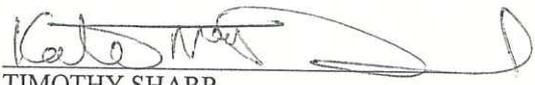
affect the Applicant's rights or otherwise give rise to legal consequences [43].

36. Where a question has been disposed of in one civil case and one of the parties sets up the same question again by bringing proceedings in a different form in such a way that there is no issue estoppel,² the new proceedings may be an abuse of process (*Reichel v Magrath* (1889) 14 App Cas 666 at 668).
37. For the abuse to arise the proponent of the question must have been unsuccessful in the earlier proceeding, the question must have necessary to have been determined and of importance in the earlier proceedings, and fully argued by proper contradictors leading to a final decision which is not being appealed (*Haines v Australian Broadcasting Corp* (1995) 43 NSWLR 404 per Hunt CJ at 414).
38. In the present case, any assertion that there was any statutory obligation to investigate would constitute a direct challenge to the determination by Master Newnes in the proceedings for prerogative relief.
39. No appeal was taken from the decision of Master Newnes. The Plaintiff is therefore bound by the findings that there was an inquiry made and such inquiry was not conducted pursuant to any statutory duty or legal obligation or established practice.
40. Further, if there was any obligation to conduct an investigation or an obligation to amend the Management Plan in the way asserted, that is a matter that should have been raised in the proceedings before Master Newnes.

Conclusion

41. The fundamental failure to disclose any cause of action, the failure to seek leave, and the failure to raise matters that should have been raised before Master Newnes, results in a claim devoid of merit and incurable by amendment. The action should be struck out.

DATED the 25th day of November 2009


for TIMOTHY SHARP
STATE SOLICITOR FOR WESTERN AUSTRALIA
SOLICITOR FOR THE FIRST AND SECOND DEFENDANTS

TO: The Plaintiff's solicitors
Leask and Co
26 Cliff Street
FREMANTLE WA 6160

² The question of whether an issue estoppel can arise is arguable, but before any argument could be made it would be necessary to know what the Plaintiff is asserting in this particular case, so for the present purposes it is speculative.

LIST OF AUTHORITIES

Legislation:

- * 1. *Limitation Act 1935 (WA)*
- 2. *Limitation Act 2005 (WA)*
- * 3. *Fish Resources Management Act 1994 (WA)*
- * 4. *Rules of the Supreme Court (WA) Order 20*
- * 5. *Parliamentary Privileges Act 1891 (WA)*

Cases

- * 6. *Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd and ors* [2006] WASC 161; 33 WAR 1, [2], [19].
- 7. *Lowmond Pty Ltd v Town of Fremantle and Anor* [2007] WASC 67
- * 8. *Barclay Mowlem Construction Ltd v Dampier Port Authority* [2006] WASC 281, [4] and [7]
- 9. *Bruce Oldhams Press Ltd* [1936] 1 KB 697
- 10. *Hart-Roach v Public Trustee* unreported; WASC, Library No 980044; 11 February 1998
- 11. *Kimberley Downs Pty Ltd v Western Australia* (WASC), Staples M, Library No 6414, 25 August 1986
- 12. *Cargill v Bower* (1878) 10 Ch D 502
- * 13. *Paxton v Jon Ford, Minister for Fisheries and Peter Rogers* [2006] WASC 194 at [40]
- 14. *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633
- 15. *Ron Hodgson (Trading) Pty Ltd v Belvedere Motors (Hurstville) Pty Ltd* [1971] 1 NSWLR 472
- 16. *Moullin v Westralian Farmers Co-op Ltd* WASC, White M, Library No 8455, 31 August 1990
- * 17. *Mees v Roads Corporation* [2003] FCA 306; 28 FCR 418 at [76], [80], [81] and [85]-[86]
- * 18. *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, at 333-334, 337.
- 19. *Coe v Commonwealth* (1979) 24 ALR 118
- * 20. *Alcoa of Australia v SEC(WA)* (1995) 17 WAR 112, 114 and 129
- 21. *SEC(WA) v Alcoa of Australia Ltd* (1995) 17 WAR 131
- 22. *Australian National Airlines Commission v Newman* (1987) 162 CLR 466
- * 23. *Commissioner of Main Roads v Highway Construction Pty Ltd* [2001] WASCA 158
- 24. *Minister for Community Welfare v Bennett* (Unreported, WASC, Library

No. 5060, 2 September 1983) Burt CJ

25. *Reichel v Magrath* (1889) 14 App Cas 666

26. *Haines v Australian Broadcasting Corp* (1995) 43 NSWLR 404

*Denotes legislation/cases from which passages may be read.

IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV 2076 OF 2007

B E T W E E N:

MARK ASHLEY PAXTON

Plaintiff

- and -

JON FORD, MINISTER FOR FISHERIES

First Defendant

- and -

PETER ROGERS

Second Defendant

**APPLICATION TO CASE MANAGEMENT REGISTRAR
ORDER 29A RULE 12; FORM 18A**

Date of Document:

27 October 2009

Filed on behalf of:

First and Second Defendants

Date of Filing:

27 October 2009

Prepared by:

TIMOTHY SHARP

STATE SOLICITOR FOR WESTERN AUSTRALIA

TELEPHONE: 9264 1888

141 ST GEORGES TERRACE

REF: SSO 4301/07

PERTH WA 6000

SOLICITOR FOR THE

FIRST AND SECOND DEFENDANTS

The Defendants applies to a Case Management Registrar for the following orders:

1. The Plaintiff's Writ and Statement of Claim be struck out in their entirety on the ground that the action is an abuse of process in failing to comply with section 47A of the *Limitation Act 1935* – O20r19(1)(d).

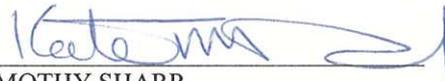
2. Pursuant to Order 20 Rule 19(1) of the *Rules of Supreme Court* the Statement of Claim be struck out in its entirety and the action against the First and Second Defendants be dismissed, on the grounds that:
 - a. The Statement of Claim reveals no reasonable cause of action against the First and Second Defendants (O20r19(1)(a));
 - b. The Statement of Claim contains matters which are frivolous and vexatious (O20r19(1)(b));
 - c. The Statement of Claim may prejudice, embarrass or delay the fair trial of the action (O20r19(1)(c));
 - d. The Statement of Claim is otherwise an abuse of process of the Court (O20r19(1)(d)).
3. Further and in the alternative, paragraphs 4 to 17 (inclusive), 21, 26, 29, 30, 33 and the Prayer for Relief be struck out on the grounds referred to in paragraph 2 above.
4. Further and in the alternative, the Plaintiff's Writ and Statement of Claim be struck out in their entirety on the ground that the action is an abuse of process in seeking to raise matters which this Court has already determined in earlier proceedings – O20r19(1)(d).
5. There be judgement for the First and Second Defendants with costs.

The Grounds for this Application are:

- contained in the document entitled "Particulars of Grounds of Application to Strike Out Statement of Claim in Support of Summons dated 27 October 2009: Order 20r19(3)(b)" attached as Annexure A.

A copy of the Memorandum referred to in Order 59 Rule 9(1) is attached as Annexure B to this application.

DATED the 27 day of October 2009



for TIMOTHY SHARP
STATE SOLICITOR FOR WESTERN AUSTRALIA
SOLICITOR FOR THE FIRST AND SECOND DEFENDANTS

TO: The Plaintiff's solicitors
Leask & Co
26 Cliff Street
FREMANTLE WA 6160

IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV 2076 OF 2007

B E T W E E N:

MARK ASHLEY PAXTON

Plaintiff

- and -

MINISTER FOR FISHERIES

First Defendant

- and -

PETER ROGERS

Second Defendant

**SUMMONS BY DEFENDANTS TO STRIKE OUT THE STATEMENT OF
CLAIM DATED 15 SEPTEMBER 2009 PURSUANT TO ORDER 20 r19 AND
ORDER OF REGISTRAR DIXON DATED 29 SEPTEMBER 2009**

Date of Document: 27 October 2009

Filed on behalf of: First and Second Defendants

Date of Filing: 27 October 2009

Prepared by:

TIMOTHY SHARP

STATE SOLICITOR FOR WESTERN AUSTRALIA TELEPHONE: 9264 1888

141 ST GEORGES TERRACE

REF: SSO 4301/07

PERTH WA 6000

SOLICITOR FOR THE

FIRST AND SECOND DEFENDANTS

LET ALL PARTIES concerned attend before a Master in Chambers on the day

of at the hour of on the hearing of an application by the First and Second

Defendants for orders that:

1. The Plaintiff's Writ and Statement of Claim be struck out in its entirety on the ground that the action is an abuse of process in failing to comply with section 47A of the *Limitation Act 1935* – O20r19(1)(d).
2. Pursuant to Order 20 Rule 19(1) of the *Rules of Supreme Court* the Statement of Claim be struck out in its entirety and the action against the First and Second Defendants be dismissed, on the grounds that:
 - a. The Statement of Claim reveals no reasonable cause of action against the First and Second Defendants (O20r19(1)(a));
 - b. The Statement of Claim contains matters which are frivolous and vexatious (O20r19(1)(b));
 - c. The Statement of Claim may prejudice, embarrass or delay the fair trial of the action (O20r19(1)(c));
 - d. The Statement of Claim is otherwise an abuse of process of the Court (O20r19(1)(d)).
3. Further and in the alternative, paragraphs 4 to 17 (inclusive), 21, 26, 29, 30, 33 and the Prayer for Relief be struck out on the grounds referred to in paragraph 2 above.
4. Further and in the alternative, the Plaintiff's Writ and Statement of Claim be struck out in its entirety on the ground that the action is an abuse of process in seeking to raise matters which the court has already determined in earlier proceedings – O20r19(1)(d).
5. There be judgement for the First and Second Defendants with costs.

The Particulars of the Grounds for this application are set out in the document entitled "Particulars of Grounds of Application to Strike out Statement of Claim in Support of Summons dated 27 October 2009 Order 20r19(3)(b)".

A copy of the Memorandum referred to in Order 59 rule 9 is attached to this application.

DATED the 27 day of October 2009

for TIMOTHY SHARP
STATE SOLICITOR FOR WESTERN AUSTRALIA
SOLICITOR FOR THE FIRST AND SECOND DEFENDANTS

TO: The Plaintiff's solicitors
Leask & Co
26 Cliff Street
FREMANTLE WA 6160

IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIF 2076 OF 2007

B E T W E E N:

MARK ASHLEY PAXTON

Plaintiff

- and -

MINISTER FOR FISHERIES

First Defendant

- and -

PETER ROGERS

Second Defendant

**PARTICULARS OF GROUNDS OF APPLICATION TO STRIKE OUT
STATEMENT OF CLAIM IN SUPPORT OF SUMMONS
DATED 27 OCTOBER 2009
ORDER 20 RULE 19(3)(b)**

Date of Document:

27 October 2009

Filed on behalf of:

First and Second Defendants

Date of Filing:

27 October 2009

Prepared by:

TIMOTHY SHARP

STATE SOLICITOR FOR WESTERN AUSTRALIA TELEPHONE: 9264 1888

141 ST GEORGES TERRACE

REF: SSO 4301/07

PERTH WA 6000

SOLICITOR FOR THE

FIRST AND SECOND DEFENDANTS

-
1. The Writ and Statement of Claim should be struck out in their entirety on the ground the action is an abuse of process in that there is a complete bar to legal proceedings as, contrary to section 47A of the *Limitation Act 1935*, the Plaintiff failed to:

- (a) commence an action before the expiration of one year from the date on which any purported cause of action accrued; or
- (b) obtain the First or Second Defendants' consent in writing to the bringing of the action against them; or
- (c) apply to the Court for leave to bring an action before the expiration of six years from the date on which the cause of action accrued; O20r19(1)(d); Affidavit of Michael Andrew Cuomo sworn

2. The Statement of Claim discloses no reasonable cause of action, is frivolous, embarrassing, likely to delay the fair trial of the action and is an abuse of process in that:

- (a) the Writ alleges negligence on the part of the First and Second Defendants;
- (b) the Statement of Claim presumes failures to take certain actions (paragraph 33), when no duty is pleaded that the First and/or Second Defendants were legally obliged to take those actions – O20r19(1)(a)(b)(c);
- (c) even if a duty were pleaded the facts pleaded if proved could not support the same – O20r19(1)(a)(b)(c);
- (d) the only duty pleaded in the Statement of Claim (at paragraph 15) is irrelevant to the failures alleged at paragraph 33 – O20r19(1)(a),(b),(c);
- (e) there are no material facts pleaded to support the alleged "failures"- O20r19(1)(b)(c);
- (f) the loss and damage claimed at paragraph 33 does not follow from the alleged "failures" - O20r19(1)(b), (c).

3. In the alternative, the following paragraphs of the Statement of Claim should be struck out:

Paragraphs 4 to 17

- (1) The paragraphs raise wholly irrelevant matter which may prejudice, embarrass or delay the fair trial of the action – O20r19(1)(c).
- (2) Any claim based on the events pleaded at paragraphs 4 to 17 are time-barred and an abuse of process – O20r19(1)(d).

Paragraph 26

The pleading is evidence rather than material fact if what is sought to be pleaded is a failure to investigate – O20r8 and O20r19(1)(c).

Paragraph 30

The terms "amendment", "assurance" and "statement" are not defined or referable to particular events and the pleading is therefore unclear and is prejudicial, embarrassing and likely to delay the fair trial of the action O20r19(1)(c).

Paragraphs 21 and 29

Refers to comments that are inadmissible and may not be relied on by the Plaintiff as to do so would contravene section 1 of the *Parliamentary Privileges Act 1891 (WA)* –O20r19(1)(c).

Paragraph 33

The paragraph fails to disclose a cause of action, is frivolous, prejudicial, embarrassing and likely to delay the fair trial of the action in that:

- (a) it refers to consequences arising from a failure to investigate, when no such failure is pleaded in the Statement of Claim –O20r19(1)(a), (b), (c);

- (b) in any event pleads no material facts in support of any failure to investigate, even if the fact of such a failure was pleaded – O20r19(1)(a);
- (c) is irrelevant when no duty to conduct an investigation or amend the Management Plan in a particular way is pleaded – O20r19(1)(a)(c);
- (d) by referring to paragraph 23 confines the claim to fishing in the 2005 season, but then claims losses for subsequent seasons without any material facts to support the same; O20r19(1)(a) (b) and (c).

Prayer for Relief

No reasonable cause of action is disclosed entitling the Plaintiff to damages and judgement – O20r19(1)(a).

- 4. In any event, the Writ and Statement of Claim are an abuse of process in that the Plaintiff is attempting to re-litigate issues already determined by the Court in *Paxton v Jon Ford & Minister for Fisheries* [2006] WASC 194 – O20r19(1)(d).

for TIMOTHY SHARP
STATE SOLICITOR FOR WESTERN AUSTRALIA
SOLICITOR FOR THE FIRST AND SECOND DEFENDANTS

TO: The Plaintiff's solicitors
Leask & Co
26 Cliff Street
FREMANTLE WA 6160

IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV 2076 OF 2007

B E T W E E N:

MARK ASHLEY PAXTON

Plaintiff

- and -

JON FORD, MINISTER FOR FISHERIES

First Defendant

- and -

PETER ROGERS

Second Defendant

**ORDER 59 RULE 9(1)
MEMORANDUM OF CONFERRAL
RE: DEFENDANT'S CHAMBER SUMMONS DATED 27 OCTOBER 2009**

Date of Document:	27 October 2009
Filed on behalf of:	First and Second Defendants
Date of Filing:	27 October 2009
Prepared by:	
TIMOTHY SHARP	TELEPHONE: 9264 1888
STATE SOLICITOR FOR WESTERN AUSTRALIA	REF: SSO 4301/07
141 ST GEORGES TERRACE	
PERTH WA 6000	
SOLICITOR FOR THE	
FIRST AND SECOND DEFENDANTS	

Conferral

1. The solicitor for the First and Second Defendants confirm that there has been conferral with the Plaintiff's solicitors to try and resolve the matters giving rise to the Summons dated 27 October 2009 in support of which the Memorandum is filed.
2. On 25 August 2009 the parties appeared before Master Sanderson in chambers in respect of the Plaintiff's application to have the action removed from the

Inactive Cases List. In support of that application a draft Statement of Claim dated 30 June 2009 ("the Draft") was filed. Master Sanderson removed the matter from the Inactive Cases List but gave the Plaintiff 21 days in which to file a Statement of Claim so that any perceived defects in the Draft, might be addressed in order to avoid a strike out application.

3. On 26 August 2009 the Plaintiff's solicitors wrote to the Defendants' solicitors requesting comments in relation to the perceived defects in the Draft so that these might be addressed before the date the Statement of Claim was due to be filed. A copy of that letter is attached and marked "A".
4. The Defendants' solicitors outlined the principle objections to the Draft in a letter dated 4 September 2009, a copy of which is attached and marked "B".
5. On 15 September 2009 the Plaintiff's solicitors filed and served a Statement of Claim in this action, which was in exactly the same form as the Draft, under cover of a letter advising they had unable to obtain instructions. A copy of the letter is attached and marked "C".
6. On 22 September 2009 the Defendants' solicitors wrote to the Plaintiff's solicitors advising that in the absence of any indication that the Plaintiff's solicitors would obtain instructions to apply to amend the Statement of Claim filed, the Defendants would apply to strike it out. A copy of the letter is attached and marked "D".
7. On 29 September 2009 the parties appeared before Registrar Dixon at an Order 29A Case Management Conference. Registrar Dixon made an order the Plaintiff file and served any Amended Statement of Claim by 13 October 2009,

failing which the Defendants have until 27 October 2009 to apply to strike out the Statement of Claim.

8. No Statement of Claim was received by 13 October 2009 and on 15 October 2009 the Defendant's solicitors wrote to the Plaintiff's solicitors and asked if the Plaintiff intended to proceed with the Statement of Claim filed on 15 September 2009. No response to that letter has been received. A copy of the letter dated 15 October 2009 is attached and marked "E".
9. A copy of the Summons to Strike Out the Plaintiff's Statement of Claim and the Particulars of the application was faxed to the Plaintiff's solicitors on 22 October 2009 asking if any of the issues could be conceded or agreed upon. A copy of the letter is attached and marked with the letter "F". No response was received.
10. On 27 October 2009 the Defendant's solicitors left a telephone message for the Plaintiff's solicitor, to call regarding the matter and a facsimile was sent outlining the proposed programming orders. The Plaintiff's solicitor's telephoned to agree with the proposed programming of the application.

Matters in Dispute

11. All the matters giving rise to the Summons dated 27 October 2009 still remain in dispute.

Hearing

12. The parties have agreed to the following programme for the hearing of the application. Subject to the direction of the Court, the application should be listed for hearing as follows:

- a. Special appointment;
- b. Standard programming orders;
- c. The time required for oral argument is 2 ½ hours;
- d. Unavailable dates: Mondays and Fridays,
11, 17, 18, 19, 25, 26 November 2009,
8, 9, 15, 22-31 December 2009,
4-8, 11 to 21 January 2010.

DATED the 27th day of October 2009



for TIMOTHY SHARP
STATE SOLICITOR FOR WESTERN AUSTRALIA
SOLICITOR FOR THE FIRST AND SECOND DEFENDANTS

TO: The Plaintiff's solicitors
Leask & Co
26 Cliff Street
FREMANTLE WA 6160

FACSIMILE FROM:

LEASK & CO.BARRISTERS & SOLICITORS
ABN 11 113 988 13426 CLIFF STREET FREMANTLE WESTERN AUSTRALIA 6160
PO BOX 1161 FREMANTLE WESTERN AUSTRALIA 6959TELEPHONE (08) 9430 6688
FACSIMILE (08) 9430 4044
E-MAIL: law@leask.com.au

PLEASE NOTE: This facsimile message contains information that is **CONFIDENTIAL** and which may be subject to **LEGAL PRIVILEGE**. If you are not the intended recipient, you must not peruse, use, disseminate, distribute or copy this message. If you have received this message in error, please notify us immediately by facsimile or telephone and return the original message by mail. Thank you.

FROM : David Leask
OUR REF : 1134/DL:gw
No.OFPAGES : 1
DATE : 26 August 2009
TO : STATE SOLICITOR'S OFFICE
ATTENTION : Eric Heenan
YOUR REF : 4301/07
FACSIMILE No. : 9264 1670

COPY

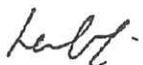
Dear Sirs

PAXTON v MINISTER FOR FISHERIES & Anor
SUPREME COURT ACTION CIV 2076 of 2007

We refer to the orders made by Master Sanderson in chambers on 25 August 2009.

May we respectfully request your comments in relation to the perceived defects in the draft statement of claim so that we might address these before 15 September 2009.

Yours faithfully


LEASK & CO

SSO Ref: 4301-07
Enquiries: Kate McDonald
Telephone: 92641655
Direct Fax: 9264 1670
Email: k.mcdonald@sso.wa.gov.au

Date: 4 September 2009

COPY

Leask & Co
Barristers and Solicitors
PO Box 1161
FREMANTLE WA 6160

By facsimile: 9430 4044

Dear Sir

PAXTON V MINISTER FOR FISHERIES & ANOR
SUPREME COURT ACTION CIV 2076 OF 2007

I refer to your facsimile of 26 August 2009 wherein you request comments on behalf of the Defendants "in relation to the perceived defects in the Draft Statement of Claim".

The fundamental (and in the Defendants' view fatal) defect is that your client still has not complied with section 47A of the *Limitation Act 1935*. This was first brought to your attention by letter dated 28 December 2007. No leave has ever been granted to issue these proceedings.

Ultimately it is of course for the plaintiff to plead his own case. Nevertheless, the Draft Statement of Claim dated 30 June 2009 ("the Draft") is, in our opinion, defective and would, in its current form be liable to be struck out. Given that your client has obtained leave to file and serve a Statement of Claim my comments below are confined to the Draft, not to any subsequent document that may be filed and served.

As to the Draft its defect is it fails to disclose any reasonable cause of action.

By way of general comment:

1. The Plaintiff seeks damages, loss of profit and loss of opportunity to apply for a licence without pleading any legal basis for such a claim. It is pleaded in paragraph 33 of the Draft that these losses arose by virtue of the Defendants' failure to conduct the investigation referred to in the Draft. However, it is not pleaded anywhere in the Draft that there was any obligation, statutory or otherwise, to conduct such an investigation. The source of any obligation remains speculative. It is an abuse and frivolous to proceed as pleaded.

2. Even if an obligation to conduct an investigation was established, I note that paragraph 26 of the Draft, inconsistently with what is pleaded in paragraph 33, pleads and proceeds on the basis that an investigation was in fact conducted. Paragraph 26 of the Draft refers to the fact that the Plaintiff was advised by the Defendant that the investigation was finalised, the outcome was that the Plaintiff's claim was dismissed, a detailed response would be provided in the near future, the exemption would not be renewed and First Defendant viewed the matter of the Plaintiff's lost right to fish in the Fishery as concluded. Paragraph 33 pleads a failure to conduct an investigation. It is not pleaded that any such investigation was inadequate. These paragraphs are clearly inconsistent and as pleaded are frivolous.
3. The only duty alleged is pleaded in paragraph 15 of the Draft. However, that alleges that there was a duty not to transfer the entitlement or deal with the entitlement without first notifying the Plaintiff. Nowhere is it pleaded that this duty was breached. Even if it was to be pleaded, obviously attempting to establish any cause of action rising from these facts would be statute-barred, since it is pleaded that these events occurred in May 1991 and proceedings were not commenced until October 1997.
4. Likewise it is not pleaded in paragraph 33 of the Draft or at all what legal obligation was breached by the making of the 2005 amendments (which I have assumed are the matters referred to in paragraph 27 of the Draft) so as to give the Plaintiff a right to damages.
5. The failure to identify a cause of action also means that it is not possible for the Defendants to determine when time begins to run for the purposes of any possible limitation period. This failure is embarrassing and prejudicial.
6. It is pleaded in paragraph 33 that the Plaintiff was prevented from operating within the Fishery consistent with the statements referred to in paragraph 23 of the Draft. However, the statements in paragraph 23 effectively state that the First Defendant offered to extend the Exemption to allow it to remain in force for the 2005 fishery season until the Department finalised its investigation into the issues. It appears from the pleadings that the Plaintiff was in fact entitled to continue fishing during the 2005 season in which case he was not prevented from operating in the Fishery in a manner consistent with the statements in paragraph 23, contrary to what is pleaded at paragraph 33. Further, if the statements in paragraph 23 only entitled an exemption for the 2005 season, on what basis is a loss of profit for the subsequent seasons claimed? Again these paragraphs are inconsistent and as pleaded are frivolous.
7. The sequence of events in paragraphs 27 to 32 is entirely confusing. The terms "amendment", "assurance" and "statement" are not referable to particular events. On one hand, it seems that the Plaintiff is complaining about the amendments made on 11 November 2005 (paragraph 27 and 32), yet paragraph 30 suggests that such amendments breached an assurance that no licence would be made available to or could be applied for by the Plaintiff. It is not clear what assurance is being referred to as the only assurances pleaded appear to refer to the very opposite (paragraph 28 and 29). In any event, again it is not at all clear what

cause of action is relied upon. These paragraphs are prejudicial, embarrassing and an abuse.

In addition to the failure to identify and plead a cause of action and the other defects mentioned above, there are numerous other problems with the Draft that render it embarrassing and liable to be struck out. I do not, however, intend to attempt a detailed critique of these issues when the cause of action is yet to be identified. In light of these comments, it is likely that I would receive instructions to apply to strike out the Draft, (should it be filed in its current form as the Statement of Claim) in its entirety and seek the costs of the same.

Finally, you should not proceed upon the assumption that even if you amended the Draft in light of the above or otherwise, the Defendants would not seek to strike out any filed Statement of Claim. My clients reserve their rights to make any such application following the filing of any Statement of Claim in the future.

Yours sincerely

KATE McDONALD
SENIOR ASSISTANT STATE COUNSEL

LEASK & CO.
BARRISTERS & SOLICITORS
ABN 11 113 988 134

26 CLIFF STREET FREMANTLE WESTERN AUSTRALIA 61
PO BOX 1161 FREMANTLE WESTERN AUSTRALIA 69
TELEPHONE (08) 9430 6688
FACSIMILE (08) 9430 4044
EMAIL law@leask.com.au

State Solicitor's Office
141 St George's Terrace
PERTH WA 6000
Attention: Kate McDonald

Our Ref: 1334\DL:gw
Your Ref: 4301/07

15 September 2009

Dear Sirs

PAXTON v MINISTER FOR FISHERIES & PETER ROGERS
SUPREME COURT ACTION CIV 2076 of 2007

COPY

We enclose by way of service the Plaintiff's Statement of Claim which has been filed at Court today.

The Statement of Claim does not address the issues raised in your letter dated 4 September 2009 as we have not been able to discuss those issues with the Plaintiff, who is working in the northwest of the State. We will endeavour to do so before the Status Conference listed for 29 September 2009.

Yours faithfully

herbl
LEASK & CO

Encl

SSO Ref: 4301-07 Your Ref: 1334/DL
Enquiries: Kate McDonald
Telephone: 9264 1655
Direct Fax: 9264 1670
Email: k.mcdonald@sso.wa.gov.au

Date: 22 September 2009

Leask & Co
Barristers and Solicitors
PO Box 1161
FREMANTLE WA 6160

COPY

By Facsimile: 9430 4044

Dear Sir

**PAXTON V MINISTER FOR FISHERIES & ANOR
SUPREME COURT ACTION CIV 2076 OF 2007**

I refer to your letter dated 15 September 2009 enclosing by way of service the Plaintiff's Statement of Claim. I note that it is effectively the same as the Draft Statement of Claim dated 30 June 2009.

On 26 August 2009 you requested our comments on the perceived defects of that Draft, so that you might address them before 15 September 2009. The Draft was the subject of extensive comments contained in my letter of 4 September 2009. As I stated in that letter the Draft was, in our opinion, defective and liable to be struck out for a number of reasons, including failing to disclose a reasonable cause of action, as well as being time-barred in the absence of your client obtaining any leave to proceed notwithstanding non-compliance with section 47A of the *Limitation Act 1935*.

In your letter of 15 September 2009, you state that you will endeavour to address the issues raised in my letter prior to the next Status Conference on 29 September 2009. As the Plaintiff does not have leave to file any further draft and there is no clear indication that you will be able to obtain instructions to amend the Statement of Claim, my client has no option other than to apply to strike out the Statement of Claim filed.

An application will be filed within the time permitted by the Rules. As it appears that it is likely that the Statement of Claim may ultimately need to be amended or substituted, whether by virtue of your client's instructions or the Defendants' application to strike it out, it seems premature to file a defence. As such, I would ask that you consent to our request for an extension of time in which to file and serve a defence until a date to be fixed following the determination of the Defendants' application to strike-out the Statement of Claim.

I would be grateful if you could advise of your consent or otherwise by close of business tomorrow, so that should I need to take instructions from my client I can do so, taking into account the public holiday on Monday.

Yours faithfully



KATE McDONALD
SENIOR ASSISTANT STATE COUNSEL

"E"

SSO Ref: 4301-07 Your Ref: 1334/DL
Enquiries: Kate McDonald
Telephone: 9264 1655
Direct Fax: 9264 1670
Email: k.mcdonald@sso.wa.gov.au

Date: 15 October 2009

Leask & Co
Barristers and Solicitors
PO Box 1161
FREMANTLE WA 6160

COPY

By Facsimile: 9430 4044

Dear Sir

**PAXTON V MINISTER FOR FISHERIES & ANOR
SUPREME COURT ACTION CIV 2076 OF 2007**

I note the deadline to file and serve an Amended Statement of Claim has passed.

Please advise by close of business today if the Plaintiff intends to proceed with the Statement of Claim dated 15 September 2009 already filed.

I have instructions to make a strike out application and this letter will be used in support of any application for costs thrown away, in the event of any subsequent application to file and serve an Amended Statement of Claim.

Yours faithfully



**KATE McDONALD
SENIOR ASSISTANT STATE COUNSEL**

"F"

SSO Ref: 4301-07 Your Ref: 1334/DL
Enquiries: Kate McDonald
Telephone: 9264 1655
Direct Fax: 9264 1670
Email: k.mcdonald@sso.wa.gov.au

Date: 22 October 2009

Leask & Co
Barristers and Solicitors
PO Box 1161
FREMANTLE WA 6959

COPY

By Facsimile: 9430 4044

Dear Sir

PAXTON V MINISTER FOR FISHERIES & PETER ROGERS

I refer to the above matter.

As indicated in my letter dated 15 October 2009 I have instructions to apply to strike out the Plaintiff's Statement of Claim.

For the purposes of conferral pursuant to Order 59 rule 9 of the Rules of the Supreme Court I have attached a draft application. Please advise if there are any issues that can be conceded or agreed upon, so that I can advise the Court which issues remain in dispute.

The Affidavit referred to in paragraph 1 of the Particulars in support of the non-compliance with section 47A of the *Limitation Act 1935* has not yet been sworn, but will depose to those matters referred to in that paragraph.

I am obliged pursuant to the Order of Registrar Dixon to file the application by 27 October 2009 and therefore I would be grateful for your early response.

Yours sincerely

MD

Kate McDonald
SENIOR ASSISTANT STATE COUNSEL

Enc

IN THE SUPREME COURT OF WESTERN AUSTRALIA

NO. 2076 of 2007

BETWEEN:

MARK ASHLEY PAXTON

Plaintiff

- and -

JON FORD, MINISTER FOR FISHERIES

First Defendant

- and -

PETER ROGERS

Second Defendant

**AFFIDAVIT OF MICHAEL ANDREW CUOMO
SWORN ON THE 27th DAY OF OCTOBER 2009**

Date of Document : 27 October 2009

Filed on behalf of : First and Second Defendants

Date of Filing : 27 October 2009

Prepared by :
TIMOTHY SHARP
STATE SOLICITOR FOR THE
STATE OF WESTERN AUSTRALIA
SOLICITOR FOR THE FIRST AND
SECOND DEFENDANTS

TELEPHONE : 9264 1888
REF : SSO 4301/07

INDEX

	<u>Page</u>
1. Affidavit of MICHAEL ANDREW CUOMO	2-4

Mark Ashley Paxton

AFFIDAVIT OF MICHAEL ANDREW CUOMO

I, MICHAEL ANDREW CUOMO, care of Department of Fisheries, 168 St Georges Terrace Perth in the State of Western Australia, Legal Officer, MAKE OATH AND SAY as follows:

1. I am employed as a Legal Officer in the Department of Fisheries. I am authorised to swear this affidavit on behalf of the Defendants in this action. This affidavit is sworn in support of the application made by the First and Second Defendant dated 27 October 2009 to strike out the Writ and Statement of Claim in this action.

2. The contents of this affidavit are sworn on the basis of my own knowledge and on the basis of the documents and files held at the Department of Fisheries. All facts and matters deposed to which are within my own knowledge are true. Insofar as the affidavit refers to matters which are not within my personal knowledge, they are true to the best of my knowledge, information and belief.

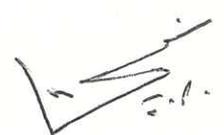
3. I took over the day to day conduct of this file in December 2007 and it has been my responsibility to co-ordinate instructions from the Department and the Defendants to the State Solicitor's Office and Riskcover, the insurer.

4. I have perused the files in relation to this matter held by the Department of Fisheries from February 2004 until the time the action was commenced on 24 October 2007. The files held by the Department in relation to this matter are



voluminous. I have been unable to find any notice in writing from the Plaintiff of his proposed action against the Defendants for negligence in failing to conduct or cause to be conducted any or any proper enquiry into the Plaintiff's complaints as set out in his letter dated 18 February 2004, or for negligence in failing to amend the relevant Management Plan to allow for the grant to the Plaintiff of a managed Fishery Licence, prior to him commencing the action by Writ dated 24 October 2007.

5. I have spoken to the Second Defendant and to the Acting Principal Policy Advisor at the Minister for Fisheries Office, who also held that position when the First Defendant was the Minister and I am informed that neither of the Defendants recall having received any notice in terms of that stated above at paragraph 4.
6. If there is a cause of action as alleged by the Plaintiff and on the assumption based on the Plaintiff's Statement of Claim it began to run from either 21 or 25 October 2005 or 11 November 2005, no action was commenced within a year of these dates.
7. To the best of my knowledge and belief neither of the Defendants nor any person on their behalf has consented in writing to the bringing of the action against them.
8. The Department or Defendants have not been served with any application for leave to commence proceedings pursuant to section 47A of the *Limitation*

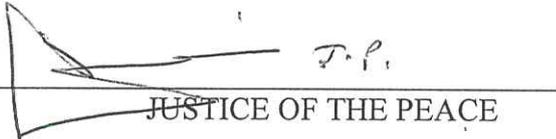


Act 1935 and to the best of my knowledge and belief no such order has been made.

SWORN by the said)
MICHAEL ANDREW CUOMO)
at Perth in the said State)
this 27th day)
of October 2009)



BEFORE ME: _____



J.P.
JUSTICE OF THE PEACE

B. J. WALLIS
JUSTICE OF THE PEACE
WESTERN AUSTRALIA

A

IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV 2076 OF 2007

B E T W E E N:

MARK ASHLEY PAXTON

Plaintiff

- and -

JON FORD, MINISTER FOR FISHERIES

First Defendant

- and -

PETER ROGERS

Second Defendant

**PARTICULARS OF GROUNDS OF APPLICATION TO STRIKE OUT
STATEMENT OF CLAIM IN SUPPORT OF SUMMONS
DATED 27 OCTOBER 2009:
ORDER 20 RULE 19(3)(b)**

Date of Document:	27 October 2009
Filed on behalf of:	First and Second Defendants
Date of Filing:	27 October 2009
Prepared by:	
TIMOTHY SHARP	
STATE SOLICITOR FOR WESTERN AUSTRALIA	TELEPHONE: 9264 1888
141 ST GEORGES TERRACE	REF: SSO 4301/07
PERTH WA 6000	
SOLICITOR FOR THE	
FIRST AND SECOND DEFENDANTS	

1. The Writ and Statement of Claim should be struck out in their entirety on the ground the action is an abuse of process in that there is a complete bar to legal proceedings as, contrary to section 47A of the *Limitation Act 1935*, the Plaintiff failed to:

- (a) commence an action before the expiration of one year from the date on which any purported cause of action accrued; or
- (b) obtain the First or Second Defendants' consent in writing to the bringing of the action against them; or
- (c) apply to the Court for leave to bring an action before the expiration of six years from the date on which any purported cause of action accrued; O20r19(1)(d); Affidavit of Michael Andrew Cuomo sworn 27 October 2009.

2. The Statement of Claim discloses no reasonable cause of action, is frivolous, embarrassing, likely to delay the fair trial of the action and is an abuse of process in that:

- (a) the Writ alleges negligence on the part of the First and Second Defendants;
- (b) the Statement of Claim presumes failures to take certain actions (paragraph 33), when no duty is pleaded that the First and/or Second Defendants were legally obliged to take those actions – O20r19(1)(a)(b)(c);
- (c) even if a duty were pleaded the facts pleaded if proved could not support the same – O20r19(1)(a)(b)(c);
- (d) the only duty pleaded in the Statement of Claim (at paragraph 15) is irrelevant to the failures alleged at paragraph 33 – O20r19(1)(a),(b),(c);
- (e) there are no material facts pleaded to support the alleged "failures"- O20r19(1)(b)(c);
- (f) the loss and damage claimed at paragraph 33 does not follow from the alleged "failures" - O20r19(1)(b), (c).

3. In the alternative, the following paragraphs of the Statement of Claim should be struck out:

Paragraphs 4 to 17

- (1) The paragraphs raise wholly irrelevant matter which may prejudice, embarrass or delay the fair trial of the action – O20r19(1)(c).
- (2) Any claim based on the events pleaded at paragraphs 4 to 17 are time-barred and an abuse of process – O20r19(1)(d).

Paragraph 26

The pleading is evidence rather than material fact if what is sought to be pleaded is a failure to investigate – O20r8 and O20r19(1)(c).

Paragraph 30

The terms "amendment", "assurance" and "statement" are not defined or referable to particular events and the pleading is therefore unclear and is prejudicial, embarrassing and likely to delay the fair trial of the action O20r19(1)(c).

Paragraphs 21 and 29

Refers to comments that are inadmissible and may not be relied on by the Plaintiff as to do so would contravene section 1 of the *Parliamentary Privileges Act 1891 (WA)* –O20r19(1)(c).

Paragraph 33

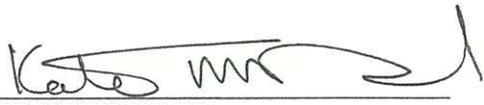
The paragraph fails to disclose a cause of action, is frivolous, prejudicial, embarrassing and likely to delay the fair trial of the action in that:

- (a) it refers to consequences arising from a failure to investigate, when no such failure is pleaded in the Statement of Claim – O20r19(1)(a), (b), (c);
- (b) in any event pleads no material facts in support of any failure to investigate, even if such a failure was pleaded – O20r19(1)(a);
- (c) is irrelevant when no duty to conduct an investigation or amend the Management Plan in a particular way is pleaded – O20r19(1)(a)(c);
- (d) by referring to paragraph 23 confines the claim to fishing in the 2005 season, but then claims losses for subsequent seasons without any material facts to support the same; O20r19(1)(a) (b) and (c).

Prayer for Relief

No reasonable cause of action is disclosed entitling the Plaintiff to damages and judgement – O20r19(1)(a).

- 4. In any event, the Writ and Statement of Claim are an abuse of process in that the Plaintiff is attempting to re-litigate issues already determined by the Court in *Paxton v Jon Ford & Minister for Fisheries* [2006] WASC 194 – O20r19(1)(d).


for TIMOTHY SHARP
STATE SOLICITOR FOR WESTERN AUSTRALIA
SOLICITOR FOR THE FIRST AND SECOND DEFENDANTS

TO: The Plaintiff's solicitors
Leask & Co
26 Cliff Street
FREMANTLE WA 6160



IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV/2076/2007

BETWEEN:

Mark Ashley PAXTON

Plaintiff

- and -

MINISTER FOR FISHERIES

First Defendant

Peter ROGERS

Second Defendant

**ORDER 29A CASE MANAGEMENT DIRECTIONS
STATUS CONFERENCE No.2
REGISTRAR DIXON
DATE: 29 September 2009**

IT IS ORDERED THAT:

1. The plaintiff file and serve any amended statement of claim by 13 October 2009, failing which the defendants have until 27 October 2009 to apply to strike out the statement of claim.
2. The time for the defendants to file and serve a defence shall not run pending the making of an order for the filing and serving of a defence.
3. The Status Conference be adjourned sine die.
4. The costs of today be in the cause, fixed at \$375.00.

BY THE COURT

REGISTRAR

IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV 2076 of 2009

B E T W E E N :

MARK ASHLEY PAXTON

Plaintiff

-and-

JON FORD, MINISTER FOR FISHERIES

First Defendant

-and-

PETER ROGERS

Second Defendant

STATEMENT OF CLAIM

Filed pursuant to the Order of Master Sanderson made 25 August 2009

Date of Document : 15 September 2009

Filed on behalf of : Plaintiff

Date of Filing : 15 September 2009

Prepared by :

Leask & Co
26 Cliff Street
Fremantle
WA 6160

Telephone: (08) 9430 6688
Fax: (08) 9430 4044
Reference: 1334/DL
David Leask

-
1. The Plaintiff:
 - (a) is and was at all material times a commercial fisherman;
 - (b) on 19 November 1986, was granted a Limited Entry Fishing Licence authorising the Plaintiff to operate in the Abrolhos Islands & Mid West Trawl Limited Entry Fishery ("the Fishery") which Limited Entry Fishing Licence ("the LEFL") was identified and known as "LEFL 1921", and is, together with the associated unit entitlement ("the unit"), together hereinafter referred to as "the fishing right"; and
 - (c) has fished in the Fishery from December 1981.

 2. The Second Defendant was at all material times the Chief Executive Officer of the Fisheries Department of Western Australia ("the Department").

3. The Fishery was:
 - (a) from 15 March 1986 - 29 May 1990, regulated by the *Abrolhos Islands Limited Entry Otter Trawl Fishery Notice* (“the 1986 Notice”);
 - (b) from 30 March 1990 until 24 May 1993, the Fishery was regulated by the *Abrolhos Islands & Mid West Trawl Limited Entry Fishery Notice*, 1990 (“the 1990 Notice”); and
 - (c) from 25 May 1993 and thereafter, the Fishery has been regulated by the *Abrolhos Islands & Mid West Trawl Limited Entry Fishery Notice*, 1993 (“the 1993 Notice”).
4. In order to lawfully participate in a Limited Entry Fishery, such as the Fishery, it is necessary either to hold what was known as a Limited Entry fishing Licence (“LEFL”) and is now known as a Managed Fishery Licence (“MFL”) relating to that Fishery, or to hold an Exemption issued under section 7 of the *Fish Resources Management Act*, 1994 (“the Act”), exempting the holder from the requirement to hold a Managed Fishery Licence.
5. On 23 August 1988, the fishing right was transferred from the Plaintiff to Mandare Holdings Pty Ltd (“the Mandare transfer”).
6. On 4 April 1990, at the Plaintiff’s request and direction, Mandare applied to transfer the fishing right to JF & KA Fay and Blenkinsop Nominees Pty Ltd (“Fay & Blenkinsop”) (“the application to transfer”), which application was granted, and by virtue of which the unit attached to the vessel LFBG 249 (“FV *Panama*”).
7. As at 4 April 1990, Fay & Blenkinsop were the holders of a MFL in the Fishery (LEFL 1890) which authorised the vessel FV “*Victorious*” to operate in the Fishery.
8. In April 1990, at a meeting held at the Fisheries Department’s Perth office between the Plaintiff and Peter Millington (“Millington”), who was then responsible for the management of the Fishery:

- (a) the Plaintiff requested that he be permitted to fish the unit, notwithstanding that the Fay & Blenkinsop transfer had not been registered;
 - (b) Millington granted the Plaintiff's request on the basis that the Plaintiff was, and was recognised by the Department to be, the beneficial owner of the fishing right.
9. Contemporaneously with the application to transfer, Fay & Blenkinsop applied to replace the FV "*Victorious*" as the vessel authorised by LEFL 1890 to operate in the Fishery, with the FV "*Panama*" which application was approved by the Second Defendant.
10. On 15 May 1990, pursuant to the application to transfer, the fishing right was transferred from Mandare to Fay & Blenkinsop ("the F&B transfer") as a result of which:
 - (a) LEFL 1890 and the fishing right were amalgamated into a single authorisation;
 - (b) LEFL 1890 continued in existence as a single amalgamated authorisation and authorised a single vessel to use two trawl nets in the Fishery;
 - (c) the LEFL 1921 was cancelled on 20 July 1990; and
 - (d) LEFL 1890 became, or was known as, a "twin rig" licence and entitled the licensee to lawfully operate two trawl nets.
11. The Plaintiff remained the beneficial owner of the fishing right following and notwithstanding:
 - (a) the Mandare transfer; and
 - (b) the F&B transfer.
12. On 3 May 1991, the gear units associated with LEFL 1890 were transferred to LEFLs of third parties, as a result of which LEFL 1890 was cancelled as all gear unit entitlements associated with that LEFL had been transferred to other LEFLs, thereby depriving the Plaintiff of the opportunity to have the fishing right transferred as he, as beneficial owner of the fishing right, may have directed.

13. At all material times, the First Defendant and the Second Defendant and each of them, knew that the Plaintiff was the beneficial owner of the unit as at April 1990 and at all material times thereafter.

PARTICULARS OF KNOWLEDGE

- (a) The Department, through Millington, agreed to convene and attend a meeting with the Plaintiff to discuss a request by the Plaintiff to transfer Fay and Blenkinsop from Mandare to Faye & Blenkinsop;
- (b) The Plaintiff attended the meeting with Millington and Alex Cechner (“Cechner”) of the Department at the Department’s offices in early April 1990, in which meeting the Plaintiff:
- (i) explained to Millington and Cechner that, notwithstanding that the fishing right was registered in the name of Mandare, he retained beneficial ownership of the fishing right;
- (ii) stated that he wished to transfer the fishing right from Mandare to Fay and Blenkinsop so that he could fish the fishing right with his vessel, the FV “*Panama*”, in conjunction with various other authorisations which were owned by Fay and Blenkinsop; and
- (c) stated that he wished to commence fishing the fishing right in conjunction with the other authorisation prior to the registration of the transfer, if the transfer had not been registered prior to the commencement of the 1990 fishery season; and
- (d) the Department, in the person of Millington, agreed to the Plaintiff’s requests.
14. The third party transfer was applied for and registered without the knowledge or consent of the Plaintiff.
15. The Department owed the Plaintiff a duty of care in respect of the fishing right:
- (a) not to transfer the unit from Fay and Blenkinsop without first notifying the Plaintiff of any application to transfer; and
- (b) to notify the Plaintiff of any application to transfer or otherwise deal with the unit.

16. The Department at all material times maintained an informal system of recognising beneficial interests in authorisations.
17. The Plaintiff has at all material times, since the third party transfer, continued to claim that the third party transfer was unlawful.
18. On 23 July 2003, Kim Chance, the then Minister for Agriculture, Forestry and Fisheries, met with the Plaintiff at Dumas House, West Perth (“the Dumas House meeting”), following an invitation by the Minister for the Plaintiff to discuss the circumstances and issues arising from the transfer and the cancellation. The issues raised by the Plaintiff included:
 - (a) whether or not the Plaintiff was, as at the date of the transfer, the beneficial owner of the fishing right;
 - (b) whether, as at the date of the transfer, the Department recognised the Plaintiff as the beneficial owner of the fishing right;
 - (c) whether or not the Department owed the Plaintiff a duty of care to safeguard the Plaintiff’s beneficial interest in the fishing right and if so whether that duty had been discharged;
 - (d) the inadequacies of the Department’s informal register of beneficial interests to safeguard the Plaintiff’s interest in the fishing right;
 - (e) why the Plaintiff was not notified of a transfer of the entitlements of which he was beneficial owner to any third party;
 - (f) whether or not the licensing system had been used by Faye and Blenkinsop to commit a fraud in relation to the transfer;
 - (g) the significance of the prosecution of Mace & Hoskins to the Plaintiff’s case with particular reference to:
 - (i) the adequacy of the licencing system to protect the beneficial owners of fishing rights;
 - (ii) the licensing system having been used to commit fraud on the beneficial owner of a fishing right; and
 - (iii) the distinction between the “considered” and the “beneficial” owner of a fishing right;
 - (h) the acts or defaults of the Department in relation to its knowledge of the matters referred to in paragraph 17(a)-(d) above;

- (i) Peter Rogers failure to
 - (i) clarify to all interested parties, when requested to do so, the legal and beneficial interests of those parties in the fishing right;
 - (ii) advise Fay and Blenkinsop and their legal advisors that their claimed ownership of the fishing right could not be based, as they contended, on the written contract whereby the Plaintiff had agreed to purchase various licences owned by Fay and Blenkinsop.

("the Issues").

19. At the conclusion of the Dumas House meeting, the Minister verbally stated to the Plaintiff that, if he was satisfied that the Plaintiff had made good his concerns in respect of the Issues, he would consider amending the Management Plan for the Fishery to make provision for the grant to the Plaintiff of a Managed Fishery Licence for the Fishery to replace the fishing right (hereinafter referred to as "a licence").
20. By his letter dated 13 August 2003 to the Plaintiff's solicitor, the Minister confirmed the statement referred to in paragraph 18 above.
21. On 19 August 2004, the Honourable Bruce Donaldson responded to the question put to him in the Legislative Council:

"Given the circumstances surrounding the cancelled fishing licence of Mr Mark Paxton to operate in the Abrolhos Islands and Mid West Trawl Fishery for scallops, and with your granting an Exemption for Mr Mark Paxton to fish until December 2004 in this fishery;

(1) Will you consider granting a further one year's Exemption to December 2005 to Mr Paxton, so this issue can be finally brought to resolution?"

with the answer:

"I thank the Honourable Member for some notice of this question.

(a) Yes, on submission of an application for Exemption from Mr Paxton."
22. By his letter dated 22 December 2003, the Minister *inter alia*:
 - (a) (i) confirmed that he was continuing to consider the Issues;

- (ii) if appropriate, he would amend the 1993 Management Plan to provide the Plaintiff with the opportunity to apply for the grant of a new licence; and
 - (iii) he would grant the Plaintiff an Exemption to enable the Plaintiff to legally operate in the Fishery in the 2004 season without being the holder of a MFL;
 - (b) stated:
 - (i) *“I have given further consideration to the matters you have raised and to advice from the Executive Director of Fisheries and I have formed the view that until the departmental investigation into your claims has been concluded, you should be subject to the same requirements as persons who hold a Managed Fishery Licence (MFL) to operate in the fishery.”*; and
 - (ii) *“You will be notified of the outcomes of the departmental investigation into the matters you have raised with me in due course.”*
23. On 24 November 2004, the Minister wrote to the Plaintiff offering to extend the Exemption to allow it to remain in force for the 2005 fishery season, on the basis that the Minister, on granting the Exemption, intended that it remain in force until the Department finalised an investigation into the Issues. The Plaintiff accepted the said offer and the Exemption was accordingly extended by Variation to Exemption Administrative No 545, dated 18 December 2004.
24. On 9 March 2005, the Minister wrote to the Plaintiff stating *inter alia* that:
- (a) the Plaintiff should, whilst operating in the Fishery, be subject to the same requirements as persons who hold a MFL to operate in the Fishery until the Department’s investigation into the Issues had been concluded;
 - (b) the Plaintiff would be notified of the outcomes of the Departmental investigation into the matters he had raised, in due course.
25. By his letter dated 25 October 2005, the Second Defendant advised the Plaintiff that any claim the Plaintiff may have had against the Director of Fisheries in

connection with the third party transfer was statute barred and there were no remedies available to the Plaintiff at law.

26. By his letter dated 21 October 2005, the First Defendant advised the Plaintiff *inter alia* that:
- (a) the Department had finalised its investigation following receipt of advice from the Office of the State Solicitor;
 - (b) the outcome of the investigation was that the Plaintiff's claim was dismissed;
 - (c) the Plaintiff would receive the Executive Director's detailed response to the Plaintiff's letter of February 2004 "*in the near future*";
 - (d) in light of the outcome of the investigation, the Exemption would not be renewed or extended further; and
 - (e) the First Defendant viewed the matter of the Plaintiff's claim of a lost right to fish in the Fishery as concluded.
27. On or about 11 November 2005, the 1993 Management Plan was amended, the effects of the amendments relevantly being that:
- (a) no application for the grant of a licence could be made after 15 November 2005; and
 - (b) the maximum head rope length of net pulled officially was 336.26m; and
 - (c) a person must not fish in the Fishery by means of a try net or otter trawl net, unless fishing under the authority of a licence that authorises the use of not less than one (1) gear unit.
28. On 16 November 2005, the First Defendant advised the Plaintiff that he had amended the 1993 Management Plan to create a seventeenth (17th) licence so as to allow for the issue to the Plaintiff of a MFL.

PARTICULARS

The advice was given verbally by the First Defendant to the Plaintiff in a meeting at Parliament House, Perth, Western Australia, on 16 November 2005, when the First Defendant said to the Plaintiff: "*I have made amendments to the management plan – I have created a seventeenth licence*"

29. On 29 November 2005, whilst responding to a question from the said Bruce Donaldson as to why the Management Plan for the Fishery had been amended, the First Defendant made a statement in the West Australian Parliament that there was a vacant licence in the Management Plan for the Fishery.
30. The amendment was in breach of the assurance and the statement in that:
- (a) no further MFL was made available by the amendment, whether to the Plaintiff or otherwise; and
 - (b) the effect of the amendment was to preclude any further application for a MFL in the Fishery being made.
31. Contrary to the statements referred to in para. 28
- (a) there was no 17th licence created;
 - (b) the criteria for the grant of a licence had not been amended, other than to require that the application be made on or before 15 November 2005;
 - (c) the Exemption was not capable of being fished in its own right as a result of the amendment prohibiting by means of a try net or otter trawl net only.
32. The effect of the addition of clause 10(8) was to prevent the Plaintiff from fishing the Exemption by means of a try net only, it being impossible for the holder of a licence to fish by means of a try net only as a result of clause 13(4).
33. By reason of:
- (a) the failure of the Defendants to conduct the investigation; and
 - (b) the 2005 amendments,
- the Plaintiff has been prevented from operating within the Fishery consistent with the statements referred to in para 23, as a result of which the Plaintiff has suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE

- A. Loss of profit for the 2006, 2007, 2008 seasons and continuing, full particulars of which will be delivered prior to trial.
- B. Loss of opportunity to apply for and, if considered appropriate, be granted, a licence.

AND THE PLAINTIFFS CLAIM against the First and Second Defendants:

1. Damages to be assessed,
2. Interest pursuant to section 32, *Supreme Court Act*, 1935, at such rate and for such time and on such sum as the Court should deem appropriate.
3. Costs.

Dated 15 September 2009



David Leask
Plaintiff's Counsel

To: The Defendants
And to: Their solicitors
State Solicitors Office
141 St George's Terrace
PERTH WA 6000
Ref: 4301-07



IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV/2076/2007

BETWEEN:

Mark Ashley PAXTON

Plaintiff

Leask & Co

and

MINISTER FOR FISHERIES

First Defendant

State Solicitor's Office

Peter ROGERS

Second Defendant

State Solicitor's Office

NOTICE OF RELISTING OF STATUS CONFERENCE

All parties are advised that the Summons to Attend Status Conference dated 14 January 2008 has been re-listed for hearing as follows:-

Place of Hearing : Mediation Room 4, 15th Floor, 111 St George's Terrace AXA Building
Date of Hearing : Tuesday, 29 September, 2009
Time of Hearing : 10:20AM

At the re-listing of the Status Conference the parties must be in a position to address the matters raised in Order 29A rule 6(5).

All parties are required to attend, unless otherwise ordered.

Dated 26 August 2009

S.C.S DIXON

CASE MANAGEMENT REGISTRAR

TO:
Leask & Co
26 Cliff Street
FREMANTLE WA 6160

State Solicitor's Office
Level 14, Westralia Square
141 St George's Terrace
PERTH WA 6000
REF: SSO 4301/07

BETWEEN:

MARK ASHLEY PAXTON

Plaintiff

-and-

JON FORD, MINISTER FOR FISHERIES

First Defendant

-and-

PETER ROGERS

Second Defendant

**SUPPLEMENTARY AFFIDAVIT OF MARK ASHLEY PAXTON
SWORN 19 August 2009
IN SUPPORT OF AN APPLICATION FOR REMOVAL OF CASE FROM
INACTIVE CASES LIST PURSUANT TO RSC O29A r20(2)
AND ANNEXURES "MAP-1" to "MAP-8"**

Date of Document : August 2009

Filed on behalf of : Plaintiff

Date of Filing : August 2009

Prepared by :

Mark Ashley Paxton
20 Livingstone Street
Fremantle
WA 6160

Telephone: (08) 9336 1364

INDEX

No	Document	Page No
1.	Affidavit of Mark Ashley Paxton, sworn August 2009	1 - 5
2.	Annexure "MAP-1", draft Statement of Claim	6 - 15
3.	Annexure "MAP-2", letter, Plaintiff to State Solicitor's Office, 30/06/2009	16
4.	Annexure "MAP-3", letter, State Solicitor's Office to Plaintiff, 28/07/2009	17
5.	Annexure "MAP-4", letter, Kim Chance, MLC, Minister for Agriculture, Forestry & Fisheries, to Plaintiff, undated	18 - 21



H. T. Collins J.P. 6183
H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

No	Document	Page No
6.	Annexure "MAP-5", copies of extracts from Hansard, dates various	22 – 27
7.	Annexure "MAP-6", letter, Plaintiff to The Rt Hon Norman Moore, 30/01/09	28 – 31
8.	Annexure "MAP-7", letter, Hon Norman Moore, MLC, Minister for Fisheries to Plaintiff, 27/02/09	32 – 34
9.	Schedule of contacts made by Plaintiff between 30/01/08 – 27/02/2009	35 - 38

I, **MARK ASHLEY PAXTON**, of 20 Livingstone Street Beaconsfield, in the state of Western Australia, Fisherman, being duly sworn **MAKE OATH AND SAY** as follows:

1. I am the Plaintiff in this action. I make this affidavit in support of my application to have this action removed from the inactive cases list.
2. ~~I have at all material times, until 1 July 2009, been a commercial fisherman. I am currently employed as an Able Seaman based in Dampier.~~
3. Between 4 and 14 August 2009 I attended a two-week STCW95 course conducted in Henderson, which is a compulsory training requirement. This course required my fulltime attendance in addition to which I had to do home study each evening. I was therefore only able to start work on this affidavit on 15 August 2009.
4. I confirm that I am seeking to file and serve my Statement of Claim, a draft of which is annexed as "MAP-1" ("the Statement of Claim") and to obtain any necessary leave from the Court for that purpose.
5. On 30 June 2009, I wrote to the Defendants' solicitors providing a copy of the Statement of Claim and asking whether the State Solicitor would consent to the matter coming out of the Inactive Cases List on the basis that I filed and served the Statement of Claim within seven (7) days. I attach as "MAP-2" a true copy of the said letter. I did not receive a reply to that letter, although I did receive a



H. T. Collins JP 6183
H. T. COLLINS J.P. 6183
 Justice of the Peace
 WESTERN AUSTRALIA

letter from the State Solicitor's Office dated 28 July 2009, a true copy of which I annexe as "MAP-3".

6. I understood from my attendance at the status conference in this matter on 29 January 2008 that I had to file and serve a Statement of Claim. I have been the Plaintiff in a previous action where I was required to serve a Statement of Claim and I recall that the Statement of Claim, which was prepared by my solicitor, was a long and complex document.
 7. I attempted to prepare a Statement of Claim in these proceedings which was comprehensive and, as a result of my lack of legal training, and the fact that I have been attempting to prepare the Statement of Claim while conducting my commercial fishing operation, I have also had to seek advice from David Leask, a solicitor who has previously acted for me. I have been unable to progress this action due partly to Mr Leask's availability and also my not having been able to obtain the information as advised by Mr Leask.
-
8. Now that I have completed the Statement of Claim, I am very keen to progress the matter as quickly as possible. I am unaware that the Defendants or either of them have suffered any prejudice as a result of the delay in finalising the Statement of Claim.
 9. In late 2003, I was told by the then Minister of Fisheries, Rt Hon Kim Chance (by his undated letter a copy of which is part of annexure "MAP-4") that there was to be an enquiry into the issues I had raised the surrounding circumstances in which I lost the beneficial ownership of my licence (and in particular the involvement of the Fisheries Department) and that I would have an exemption until that enquiry was concluded. The other copy letters in "MAP-4" also refer to the enquiry and the exemption.
 10. I annexe as "MAP-5" copies of extracts from Hansard recording answers to questions put in relation to this matter. The answer given by Rt Hon Ljilianna Ravlich on 18 June 2008 confirms that there had been an investigation.



H. T. Collins JP 6183

H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

11. On 25 May 2008, I contacted Rt Hon Christian Porter, the then Shadow Attorney General, through his representative, Peter Phillips, in relation to the supposed enquiry, and to the apparently false statements made in Parliament.
12. Mr Porter was unable to assist me in relation to the investigation and the statements, although no explanation was given to me as to why this was.
13. On 9 December 2008, I had a meeting with Rt Hon Norman Moore's representative, Trevor Whittington, who told me that "*the whole matter is going to be handed over to the Attorney General's Department*". However, when I later contacted the Attorney General's Department they told me that they were unaware of the matter, and on 15 December 2008 Peter Phillips told me that he had made enquiries with the Attorney General's Department and had been advised that they had not received a request to investigate the matter.
14. Following the meeting referred to in paragraph 13, I wrote to Rt Hon Norman Moore by letter dated 30 January 2009, a copy of which I annexe as "MAP-6", in reply to which I received his letter dated 27 February 2009, a true copy of which is annexed as "MAP-7".
15. After the current Liberal government had been elected, I repeated my request to Rt Hon Norman Moore, through his representatives, Trevor Whittington and Mark Pegano, to provide me with information as to the nature, scope and outcome of the alleged investigation. Although the request was not expressly refused, I never received any of the information I had requested.
16. In addition to the enquiries referred to above, I have contacted the various persons and bodies as set out on the schedule annexed hereto as "MAP-8".
17. In spite of the extensive attempts I have made as referred to above to try to find out who conducted the enquiry, its terms of reference, and its findings I have received no information whatsoever in relation to those matters.



H. T. Collins J.P. 6183



H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

18. As a result of being unable to obtain any information about the alleged enquiry, it became apparent to me that I had to complete my Statement of Claim on the basis of what little information that I already had, and then I therefore proceeded to prepare the Statement of Claim, with the assistance of Mr Leask, in its current form.

HTC
SWORN by the said **MARK**)
ASHLEY PAXTON at Fremantle)
in the State of Western Australia)
on the *19TH* day of August 2009)
Before me :-)



H. T. Collins J.P. 6183
Justice of the Peace *HARRY THOMAS COLLINS*

H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV of 2009

BETWEEN:

MARK ASHLEY PAXTON

Plaintiff

-and-

JON FORD, MINISTER FOR FISHERIES

First Defendant

-and-

PETER ROGERS

Second Defendant

DRAFT STATEMENT OF CLAIM

Date of Document : June 2009

Filed on behalf of : Plaintiff

Date of Filing : June 2009

Prepared by :
Mark Ashley Paxton
20 Livingstone Street
Fremantle
WA 6160

Telephone: (08) 9336 1364

1. The Plaintiff:
 - (a) is and was at all material times a commercial fisherman;
 - (b) on 19 November 1986, was granted a Limited Entry Fishing Licence authorising the Plaintiff to operate in the Abrolhos Islands & Mid West Trawl Limited Entry Fishery ("the Fishery") which Limited Entry Fishing Licence ("the LEFL") was identified and known as "LEFL 1921", and is, together with the associated unit entitlement ("the unit"), together hereinafter referred to as "the fishing right"; and
 - (c) has fished in the Fishery from December 1981.

2. The Second Defendant was at all material times the Chief Executive Officer of the Fisheries Department of Western Australia ("the Department").

H. T. Collins 30.6.09
H. T. COLLINS J.P. 6183
 Justice of the Peace
 WESTERN AUSTRALIA

3. The Fishery was:
- (a) from 15 March 1986 - 29 May 1990, regulated by the *Abrolhos Islands Limited Entry Otter Trawl Fishery Notice* ("the 1986 Notice");
 - (b) from 30 March 1990 until 24 May 1993, the Fishery was regulated by the *Abrolhos Islands & Mid West Trawl Limited Entry Fishery Notice, 1990* ("the 1990 Notice"); and
 - (c) from 25 May 1993 and thereafter, the Fishery has been regulated by the *Abrolhos Islands & Mid West Trawl Limited Entry Fishery Notice, 1993* ("the 1993 Notice").
4. In order to lawfully participate in a Limited Entry Fishery, such as the Fishery, it is necessary either to hold what was known as a Limited Entry fishing Licence ("LEFL) and is now known as a Managed Fishery Licence ("MFL") relating to that Fishery, or to hold an Exemption issued under section 7 of the *Fish Resources Management Act, 1994* ("the Act"), exempting the holder from the requirement to hold a Managed Fishery Licence.
-
5. On 23 August 1988, the fishing right was transferred from the Plaintiff to Mandare Holdings Pty Ltd ("the Mandare transfer").
6. On 4 April 1990, at the Plaintiff's request and direction, Mandare applied to transfer the fishing right to JF & KA Fay and Blenkinsop Nominees Pty Ltd ("Fay & Blenkinsop") ("the application to transfer"), which application was granted, and by virtue of which the unit attached to the vessel LFBG 249 ("FV "Panama").
7. As at 4 April 1990, Fay & Blenkinsop were the holders of a MFL in the Fishery (LEFL 1890) which authorised the vessel FV "Victorious" to operate in the Fishery.
8. In April 1990, at a meeting held at the Fisheries Department's Perth office between the Plaintiff and Peter Millington ("Millington"), who was then responsible for the management of the Fishery:

H. T. Collins J.P. 6183

H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

- (a) the Plaintiff requested that he be permitted to fish the unit, notwithstanding that the Fay & Blenkinsop transfer had not been registered;
- (b) Millington granted the Plaintiff's request on the basis that the Plaintiff was, and was recognised by the Department to be, the beneficial owner of the fishing right.
9. Contemporaneously with the application to transfer, Fay & Blenkinsop applied to replace the FV "Victorious" as the vessel authorised by LEFL 1890 to operate in the Fishery, with the FV "Panama" which application was approved by the Second Defendant.
10. On 15 May 1990, pursuant to the application to transfer, the fishing right was transferred from Mandare to Fay & Blenkinsop ("the F&B transfer") as a result of which:
- (a) LEFL 1890 and the fishing right were amalgamated into a single authorisation;
- (b) LEFL 1890 continued in existence as a single amalgamated authorisation and authorised a single vessel to use two trawl nets in the Fishery;
- (c) the LEFL 1921 was cancelled on 20 July 1990; and
- (d) LEFL 1890 became, or was known as, a "twin rig" licence and entitled the licensee to lawfully operate two trawl nets.
11. The Plaintiff remained the beneficial owner of the fishing right following and notwithstanding:
- (a) the Mandare transfer; and
- (b) the F&B transfer.
12. On 3 May 1991, the gear units associated with LEFL 1890 were transferred to LEFLs of third parties, as a result of which LEFL 1890 was cancelled as all gear unit entitlements associated with that LEFL had been transferred to other LEFLs, thereby depriving the Plaintiff of the opportunity to have the fishing right transferred as he, as beneficial owner of the fishing right, may have directed.


H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

13. At all material times, the First Defendant and the Second Defendant and each of them, knew that the Plaintiff was the beneficial owner of the unit as at April 1990 and at all material times thereafter.

PARTICULARS OF KNOWLEDGE

- (a) The Department, through Millington, agreed to convene and attend a meeting with the Plaintiff to discuss a request by the Plaintiff to transfer Fay and Blenkinsop from Mandare to Faye & Blenkinsop;
- (b) The Plaintiff attended the meeting with Millington and Alex Cechner ("Cechner") of the Department at the Department's offices in early April 1990, in which meeting the Plaintiff:
- (i) explained to Millington and Cechner that, notwithstanding that the fishing right was registered in the name of Mandare, he retained beneficial ownership of the fishing right;
- (ii) stated that he wished to transfer the fishing right from Mandare to Fay and Blenkinsop so that he could fish the fishing right with his vessel, the FV "Panama", in conjunction with various other authorisations which were owned by Fay and Blenkinsop; and
- (c) stated that he wished to commence fishing the fishing right in conjunction with the other authorisation prior to the registration of the transfer, if the transfer had not been registered prior to the commencement of the 1990 fishery season; and
- (d) the Department, in the person of Millington, agreed to the Plaintiff's requests.
14. The third party transfer was applied for and registered without the knowledge or consent of the Plaintiff.
15. The Department owed the Plaintiff a duty of care in respect of the fishing right:
- (a) not to transfer the unit from Fay and Blenkinsop without first notifying the Plaintiff of any application to transfer; and
- (b) to notify the Plaintiff of any application to transfer or otherwise deal with the unit.

H. T. Collins 26/11

H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

16. The Department at all material times maintained an informal system of recognising beneficial interests in authorisations.
17. The Plaintiff has at all material times, since the third party transfer, continued to claim that the third party transfer was unlawful.
18. On 23 July 2003, Kim Chance, the then Minister for Agriculture, Forestry and Fisheries, met with the Plaintiff at Dumas House, West Perth ("the Dumas House meeting"), following an invitation by the Minister for the Plaintiff to discuss the circumstances and issues arising from the transfer and the cancellation. The issues raised by the Plaintiff included:
- (a) whether or not the Plaintiff was, as at the date of the transfer, the beneficial owner of the fishing right;
 - (b) whether, as at the date of the transfer, the Department recognised the Plaintiff as the beneficial owner of the fishing right;
 - (c) whether or not the Department owed the Plaintiff a duty of care to safeguard the Plaintiff's beneficial interest in the fishing right and if so whether that duty had been discharged;
 - (d) the inadequacies of the Department's informal register of beneficial interests to safeguard the Plaintiff's interest in the fishing right;
 - (e) why the Plaintiff was not notified of a transfer of the entitlements of which he was beneficial owner to any third party;
 - (f) whether or not the licensing system had been used by Faye and Blenkinsop to commit a fraud in relation to the transfer;
 - (g) the significance of the prosecution of Mace & Hoskins to the Plaintiff's case with particular reference to:
 - (i) the adequacy of the licencing system to protect the beneficial owners of fishing rights;
 - (ii) the licensing system having been used to commit fraud on the beneficial owner of a fishing right; and
 - (iii) the distinction between the "considered" and the "beneficial" owner of a fishing right;
 - (h) the acts or defaults of the Department in relation to its knowledge of the matters referred to in paragraph 17(a)-(d) above;

H. T. Collins J.P. 6183

H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

- (i) Peter Rogers failure to
- (i) clarify to all interested parties, when requested to do so, the legal and beneficial interests of those parties in the fishing right;
 - (ii) advise Fay and Blenkinsop and their legal advisors that their claimed ownership of the fishing right could not be based, as they contended, on the written contract whereby the Plaintiff had agreed to purchase various licences owned by Fay and Blenkinsop.

("the Issues").

19. At the conclusion of the Dumas House meeting, the Minister verbally stated to the Plaintiff that, if he was satisfied that the Plaintiff had made good his concerns in respect of the Issues, he would consider amending the Management Plan for the Fishery to make provision for the grant to the Plaintiff of a Managed Fishery Licence for the Fishery to replace the fishing right (hereinafter referred to as "a licence").

20. By his letter dated 13 August 2003 to the Plaintiff's solicitor, the Minister confirmed the statement referred to in paragraph 18 above.

21. On 19 August 2004, the Honourable Bruce Donaldson responded to the question put to him in the Legislative Council:

"Given the circumstances surrounding the cancelled fishing licence of Mr Mark Paxton to operate in the Abrolhos Islands and Mid West Trawl Fishery for scallops, and with your granting an Exemption for Mr Mark Paxton to fish until December 2004 in this fishery;

(1) Will you consider granting a further one year's Exemption to December 2005 to Mr Paxton, so this issue can be finally brought to resolution?"

with the answer:

"I thank the Honourable Member for some notice of this question.

(a) Yes, on submission of an application for Exemption from Mr Paxton."

22. By his letter dated 22 December 2003, the Minister *inter alia*:

(a) (i) confirmed that he was continuing to consider the Issues;

H. T. Collins J.P. 6183
H. T. COLLINS J.P. 6183
 Justice of the Peace
 WESTERN AUSTRALIA

- (ii) if appropriate, he would amend the 1993 Management Plan to provide the Plaintiff with the opportunity to apply for the grant of a new licence; and
 - (iii) he would grant the Plaintiff an Exemption to enable the Plaintiff to legally operate in the Fishery in the 2004 season without being the holder of a MFL;
- (b) stated:
- (i) *"I have given further consideration to the matters you have raised and to advice from the Executive Director of Fisheries and I have formed the view that until the departmental investigation into your claims has been concluded, you should be subject to the same requirements as persons who hold a Managed Fishery Licence (MFL) to operate in the fishery."*; and
 - (ii) *"You will be notified of the outcomes of the departmental investigation into the matters you have raised with me in due course."*

23. On 24 November 2004, the Minister wrote to the Plaintiff offering to extend the Exemption to allow it to remain in force for the 2005 fishery season, on the basis that the Minister, on granting the Exemption, intended that it remain in force until the Department finalised an investigation into the Issues. The Plaintiff accepted the said offer and the Exemption was accordingly extended by Variation to Exemption Administrative No 545, dated 18 December 2004.
24. On 9 March 2005, the Minister wrote to the Plaintiff stating *inter alia* that:
- (a) the Plaintiff should, whilst operating in the Fishery, be subject to the same requirements as persons who hold a MFL to operate in the Fishery until the Department's investigation into the Issues had been concluded;
 - (b) the Plaintiff would be notified of the outcomes of the Departmental investigation into the matters he had raised, in due course.
25. By his letter dated 25 October 2005, the Second Defendant advised the Plaintiff that any claim the Plaintiff may have had against the Director of Fisheries in

H. T. Collins J.P. 6183
H. T. COLLINS J.P. 6183
 Justice of the Peace
 WESTERN AUSTRALIA

connection with the third party transfer was statute barred and there were no remedies available to the Plaintiff at law.

26. By his letter dated 21 October 2005, the First Defendant advised the Plaintiff *inter alia* that:
- (a) the Department had finalised its investigation following receipt of advice from the Office of the State Solicitor;
 - (b) the outcome of the investigation was that the Plaintiff's claim was dismissed;
 - (c) the Plaintiff would receive the Executive Director's detailed response to the Plaintiff's letter of February 2004 "*in the near future*";
 - (d) in light of the outcome of the investigation, the Exemption would not be renewed or extended further; and
 - (e) the First Defendant viewed the matter of the Plaintiff's claim of a lost right to fish in the Fishery as concluded.
-
27. On or about 11 November 2005, the 1993 Management Plan was amended, the effects of the amendments relevantly being that:
- (a) no application for the grant of a licence could be made after 15 November 2005; and
 - (b) the maximum head rope length of net pulled officially was 336.26m; and
 - (c) a person must not fish in the Fishery by means of a try net or otter trawl net, unless fishing under the authority of a licence that authorises the use of not less than one (1) gear unit.
28. On 16 November 2005, the First Defendant advised the Plaintiff that he had amended the 1993 Management Plan to create a seventeenth (17th) licence so as to allow for the issue to the Plaintiff of a MFL.

PARTICULARS

The advice was given verbally by the First Defendant to the Plaintiff in a meeting at Parliament House, Perth, Western Australia, on 16 November 2005, when the First Defendant said to the Plaintiff: "*I have made amendments to the management plan – I have created a seventeenth licence*"

H. T. Collins J.P. 6183

H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

29. On 29 November 2005, whilst responding to a question from the said Bruce Donaldson as to why the Management Plan for the Fishery had been amended, the First Defendant made a statement in the West Australian Parliament that there was a vacant licence in the Management Plan for the Fishery.
30. The amendment was in breach of the assurance and the statement in that:
- (a) no further MFL was made available by the amendment, whether to the Plaintiff or otherwise; and
 - (b) the effect of the amendment was to preclude any further application for a MFL in the Fishery being made.
31. Contrary to the statements referred to in para. 28
- (a) there was no 17th licence created;
 - (b) the criteria for the grant of a licence had not been amended, other than to require that the application be made on or before 15 November 2005;
 - (c) the Exemption was not capable of being fished in its own right as a result of the amendment prohibiting by means of a try net or otter trawl net only.
-
32. The effect of the addition of clause 10(8) was to prevent the Plaintiff from fishing the Exemption by means of a try net only, it being impossible for the holder of a licence to fish by means of a try net only as a result of clause 13(4).
33. By reason of:
- (a) the failure of the Defendants to conduct the investigation; and
 - (b) the 2005 amendments,
- the Plaintiff has been prevented from operating within the Fishery consistent with the statements referred to in para 23, as a result of which the Plaintiff has suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE

- A. Loss of profit for the 2006, 2007, 2008 seasons and continuing, full particulars of which will be delivered prior to trial.
- B. Loss of opportunity to apply for and, if considered appropriate, be granted, a licence.

H. T. Collins 30.6.18
H. T. COLLINS J.P. 6183
 Justice of the Peace
 WESTERN AUSTRALIA

AND THE PLAINTIFFS CLAIM against the First and Second Defendants:

1. Damages to be assessed,
2. Interest pursuant to section 32, *Supreme Court Act*, 1935, at such rate and for such time and on such sum as the Court should deem appropriate.
3. Costs.

Dated June 2009

MARK ASHLEY PAXTON

H. T. Collins J.P. 6183

H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

"MAP-2"

20 Livingstone Street
Beaconsfield
WA 6162

State Solicitor's Office
GPO Box B83
Perth
WA 6838

Your ref: SSO 4301/07

30 June 2009

Dear Sir

**PAXTON v MINISTER FOR FISHERIES & PETER ROGERS
SUPREME COURT ACTION CIV 2076 of 2007**

I intend to proceed in this matter by filing and serving a statement of claim, as per the attached draft.

Would you please confirm whether your clients are prepared to consent to this matter coming out of the Inactive Cases List on the basis that I file and serve a statement of claim within seven (7) days.

Yours faithfully

MARK PAXTON


H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

"MAP-3"



STATE SOLICITOR'S OFFICE

Westralia Square
141 St Georges Terrace
Perth, Western Australia 6000

GPO Box B83 Perth W.A. 6838
Telephone (08) 9264 1888
Fax (08) 9264 1440
DX 175

SSO Ref: 4301/07
Enquiries: Kate McDonald
Telephone: 9264 1888
Direct Fax: 9264 1670

Date: 28 July 2009

Mr Mark Paxton
20 Livingstone Street
BEACONSFIELD WA 6162

Dear Mr Paxton

PAXTON V MINISTER FOR FISHERIES & PETER ROGERS SUPREME COURT ACTION CIV 2076 OF 2007

I refer to your application to have the above action removed from the Inactive Cases List on 4 August 2009.

As you have not adequately explained the reason for the significant delay in preparing a Statement of Claim which in turn fails to disclose a cause of action, the Defendants will be opposing your application.

Yours faithfully

KATE McDONALD
SENIOR ASSISTANT STATE COUNSEL

H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA 181952R1

"MAP-4"

MINISTER FOR AGRICULTURE, FORESTRY AND FISHERIES;
THE MIDWEST, WHEATBELT AND GREAT SOUTHERN
LEADER OF THE GOVERNMENT IN THE LEGISLATIVE COUNCIL



Ref: 811/03

Mr M Paxton
2 Mardie St
BEACONSFIELD WA 6162

Dear Mr Paxton

I have considered the matter of your application for an exemption dated 5 November 2003. Whilst I understand your on-going anguish over the matter of the cancellation of what you regard as "your" licence in the Abrolhos Islands and Mid-West Trawl Fishery, I do not consider that an exemption is the appropriate legislative instrument to use for the purposes of granting a licence.

I am continuing to consider the matters raised regarding the cancelled licence and, if appropriate, I will amend the *Abrolhos Islands and Mid-West Trawl Fishery Management Plan 1993* to provide you with the opportunity to apply for the grant of a new licence. However, my decision as to whether or not to take this course of action is awaiting further input from current licence holders in the fishery.

Nevertheless, given the circumstances which surround your claim, I have determined that I will grant you an Exemption which will permit you to legally operate in the Abrolhos Islands and Mid-West Trawl Fishery in the 2004 season without being the holder of a Managed Fishery Licence (MFL). However, for the Exemption to be functional, it will be necessary for one or more MFL holders to request suspension of one or more gear units and for the functionality of these gear units to "transferred" to your Exemption.

To give effect to this functionality it will be necessary for the Executive Director of Fisheries to provide you with a written authority as to the amount of headrope which may be exercised under the authority of the Exemption. Furthermore, should there be any change in status of any gear units which are suspended by an MFL holder, the Executive Director will provide further written advice regarding the amount of headrope which may be exercised. Note also, that all normal operational requirements for the fishery which apply to a licence holder, master or an authorised boat will also apply to the fishing activities which you conduct under the authority of the Exemption.

Yours sincerely

A handwritten signature in black ink, appearing to read "Kim Chance".

Kim Chance MLC
MINISTER FOR AGRICULTURE, FORESTRY AND FISHERIES

H. T. COLLINS J.P. 6183
61.

Enc: Exemption instrument (Administrative No. 545)

H. T. COLLINS J.P. 6183
Justice of the Peace



MINISTER FOR AGRICULTURE, FORESTRY AND FISHERIES;
THE MIDWEST, WHEATBELT AND GREAT SOUTHERN
LEADER OF THE GOVERNMENT IN THE LEGISLATIVE COUNCIL



Ref: 8-23459

Mr M Paxton
2 Mardie Street
BEACONSFIELD WA 6162

Dear Mr Paxton

I write in regard to the matter of access to fish in the Abrolhos Island and Midwest Trawl Managed Fishery (AIMWTMF) during the 2005 season.

I have become aware that the exemption granted to you to enable you to fish in the AIMWTMF during the 2004 season is in force (subject to the conditions contained therein) until 31 December 2004. In granting you that exemption, it was my intention that it remain in force while the Department finalised an investigation into the claims you have raised regarding the cancellation of an AIMWTMF licence.

I am advised that the Departmental investigation will not be finalised until possibly early 2005. Based on that position, I am prepared to vary your existing exemption to remain in force for 2005 to continue the opportunity for you to access the AIMWTMF, subject to the conditions of the exemption.

In regard to the conditions by which you may access the AIMWTMF under the authority of the exemption, my position remains such that I am prepared to exempt you from the requirement to hold a managed fishery licence, however, you must acquire the use of the necessary gear entitlement to operate within the fishery.

Notwithstanding my offer to vary your existing exemption, you may still have your recent application for exemption formally considered by forwarding the application fee of \$1900.00 to the Department of Fisheries.

Please advise me (in writing) by 26 November if you are agreeable to me varying your existing exemption as outlined in this letter.

Yours sincerely

Kim Chance MLC
MINISTER FOR AGRICULTURE, FORESTRY AND FISHERIES

H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

22 NOV 2004

MINISTER FOR AGRICULTURE, FORESTRY AND FISHERIES;
THE MIDWEST, WHEATBELT AND GREAT SOUTHERN
LEADER OF THE GOVERNMENT IN THE LEGISLATIVE COUNCIL



Ref: 8-24636

Mr M Paxton
2 Mardie Street
BEACONSFIELD WA 6162

Dear Mr Paxton

Thank you for your facsimile of 6 January in regard to the conditions under which you may operate within the Abrolhos Island and Mid West Trawl Managed Fishery (the Fishery) during 2005.

I have given further consideration to the matters you have raised and to advice from the Executive Director of Fisheries and I have formed the view that until the Departmental investigation into your claims has been concluded, you should be subject to the same requirements as persons who hold a Managed Fishery Licence (MFL) to operate in the Fishery.

Consequently, I have varied your current Exemption to remove the requirement for another licensee to suspend gear entitlement as well as the requirement for you to hold gear entitlement before using a try net and to conform to specific try net otter board dimensions. The signed Instrument is included with this correspondence and should be carried on your vessel at all times and produced to an Officer of the Department when required.

Subject to final approval by the Executive Director, I am advised that the main 2005 Abrolhos trawl season is scheduled to begin on or about 28 April 2005 and the main fishing area will close when an agreed catch rate threshold has been reached. You will be formally notified by the Department of 2005 fishing arrangements in due course.

I must also inform you of the agreement, following some initial conflict over trawl-rock lobster fleet interaction, that has been reached between the rock lobster and trawl sectors in regard to traditional trawl areas and sensitive rock lobster fishing areas within the waters of the Fishery. Resolution of these matters has also become a condition of the recent Department of Environment and Heritage (DEH) ESD approval for the Fishery, which is necessary for the ongoing export of Abrolhos scallops.

H. T. Collins J.P.

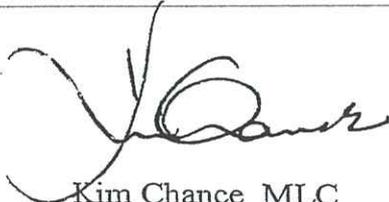
H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

Trawl licensees have developed a map of traditionally trawled areas within the Fishery and trawling activity will be confined to these areas for 2005. A trawl Code of Practice has also been developed to establish agreed protocols that skippers will follow to reduce interaction with rock lobster gear and focus trawling activity within traditional trawl areas and to areas that have been identified as containing sufficient scallops. In addition, there may also be some rock lobster sensitive areas identified where trawling will not take place.

The Department will provide you with all the information detailing the agreed trawl areas and operating guidelines. It is important that you abide by all the agreed protocols developed between the rock lobster and trawl sectors. Failure to do so will increase conflict with the rock lobster industry, jeopardise ongoing DEH export approval for the Fishery and would leave me no option but to support revoking your authority to operate in the Fishery.

You will notified of the outcomes of the Departmental investigation into the matters you have raised with me in due course. In respect of your comments regarding your recent Application for Exemption, I understand that the Executive Director is not of a mind to waive all or part of the associated application fee and does not have the power to defer payment of the application fee. In addition, I would not support you operating in the Fishery with gear units additional to that already in existence in the Fishery and I understand that the Department will be returning the application to you in due course.

Yours sincerely



Kim Chance MLC
MINISTER FOR AGRICULTURE, FORESTRY AND FISHERIES

Att 09 MAR 2005



H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

Tuesday, 4 March 2008

LEGISLATIVE COUNCIL

Questions without notice (of which some notice is given).

Hon Anthony Fels to the Minister for Fisheries:

I refer to question 934 in reference to the Abrolhos Island and Mid West Trawl Fishery Management Plan and I ask-

1. In 2005 you stated in the Legislative Council that there was one vacant licence on the plan. Will you confirm that there was a vacant licence at that time and if not why not?

H. T. Collins J.P.

H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

HANSARD 11/03/08

ABROLHOS ISLANDS AND MID-WEST TRAWL FISHERY

123. Hon ANTHONY FELS to the Minister for Fisheries:

I refer the minister to question without notice 934 in reference to the Abrolhos Islands and mid-west trawl fishery management plan. On 29 November 2005, the minister stated in the Legislative Council that there was one vacant licence on the plan. Will he confirm that there was a vacant licence at that time; and, if not, why not?

Hon JON FORD replied:

I thank Hon Anthony Fels for some notice of the question. The answer to the question is yes.

H. T. Collins J.P. 6183

H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

I have a further question. How has the 50 minutes that the Leader of the House referred to become government time or government business when in fact the hour was consumed by a motion moved by the opposition, as is normal during private members' time; will the Leader of the House tell me how that became government business?

HTE
JMM

Hon KIM CHANCE replied:

In the 54 minutes the house dealt with the Treasurer's Advance Authorisation Bill 2008—that is government business.

ABROLHOS ISLANDS AND MID-WEST TRAWL FISHERY

309. Hon ANTHONY FELS to the Minister for Fisheries:

I refer to question without notice 123.

- (1) Has anyone applied for the vacant licence for the Abrolhos and mid-west trawl fishery management plan?
- (2) Will the minister table documents to prove that there is a vacant licence?
- (3) Can Mr Mark Paxton apply for the vacant licence; and, if not, why not?

HTE
JMM

Hon JON FORD replied:

I thank the member for some notice of this question.

- (1)-(3) Following introduction of the cut-off date of 15 November 2005 for applications for licences in the Abrolhos Islands and mid-west trawl management plan, there is no longer the provision for the grant of any additional licence for the fishery.

TOWN OF CLAREMONT — ANNUAL FINANCIAL REPORT 2007

310. Hon GEORGE CASH to the Minister for Local Government:

- (1) Was the Town of Claremont's annual financial report for the financial year ended 30 June 2007 submitted to the council auditor by 30 September 2007?
- (2) Did the Town of Claremont seek an extension of time from the minister to submit the report?
- (3) If yes to (2), was the extension granted?
- (4) Was the annual financial report sent by the chief executive officer to the department within 30 days after the receipt of the auditor's report; and, if not, why not?

HTE
JMM

<039> B/2

Hon LJILJANNA RAVLICH replied:

I thank the member for some notice of this question.

- (1) No.
- (2) Yes.
- (3) No.
- (4) Yes.

Point of Order

Hon KIM CHANCE: Is it correct, Mr President, that we must deal with additional answers within the half hour?

The PRESIDENT: I will provide some clarification on the operation of the temporary order.

On Wednesdays, we move to consideration of committee reports in committee. It has been the custom and practice of the house that that period is not abridged, whether we have had sessional orders or temporary orders—whatever the description of the order may be. However, it is different on other days because, on other days, questions on notice do not impact on the time afforded to members carrying out their private business. They impact on orders of the day, which is government business. The standing orders provide for the Leader of the House to terminate question time in accord with the wording of the standing orders, when the Leader of the House stands, seeks my attention and asks that the business of the house be resumed. Having said that, as I pointed out yesterday, it is the custom and practice of the house that, as a matter of courtesy to the house and whoever is in the chair, the Leader of the House, irrespective of what is said in the temporary order or sessional order—though it may be on a Wednesday, as is the case with this temporary order—will stand and move in the way he did yesterday. Before such an event occurs, I note that the Leader of the Opposition has a question.

HTE
JMM

MR MARK PAXTON — FISHING LICENCE

527. Hon NORMAN MOORE to the Minister for Fisheries:

I refer to the complaints by Mr Mark Paxton concerning his claims over the loss of his fishing licence, and ask —

- (1) Did the Department of Fisheries complete its investigations into Mr Paxton's claims; and, if not, why not?
- (2) When was the investigation and report completed?
- (3) If the department has completed its investigation, will the minister table the report; and, if not, why not?

Hon JON FORD replied:

I thank the Leader of the Opposition for some notice of the question.

- (1)-(3) Mr Paxton has made numerous claims and complaints over a number of years. If the honourable member provides specific details of the claim in question, I will be pleased to provide an answer. I do not mean to be churlish about it, but it is a lot of information. Furthermore, if the honourable member wishes, I would be happy to arrange an unrestricted personal briefing by Department of Fisheries staff regarding Mr Paxton and all those issues.

House: Legislative Council- QUESTIONS WITHOUT NOTICE
 Date: Wednesday, 18 June 2008
 Member: Moore, Hon Norman; Ravlich, Hon Ljiljanna
 Subject: MR MARK PAXTON - FISHING LICENCE
 Page: 4002c - 4003a / 1



PDF of this document.

MR MARK PAXTON — FISHING LICENCE

615. Hon NORMAN MOORE to the Minister for Fisheries:

I refer the minister, who I gather is paired again, to his answer to question without notice 527 concerning Mr Mark Paxton's grievance.

- (1) Is the minister aware that the previous minister wrote to Mr Paxton on 22 November 2004 and stated that Mr Paxton was granted an exemption to fish while the department finalised an investigation into claims raised by Mr Paxton concerning the cancellation of an Abrolhos Islands and mid-west trawl managed fishery licence?
- (2) Was such an investigation undertaken; and, if not, why not?
- (3) If the departmental investigation was undertaken, will the minister table a copy of the report of the investigation; and, if not, why not?
- (4) If the minister refuses to table the report, will the minister outline the findings of the investigation?

Hon LJILJANNA RAVLICH replied:

On behalf of the minister for Fisheries, I thank the member for some notice of this question.

(1)-(2) Yes.

(3) No. Mr Paxton has initiated several unsuccessful legal proceedings in relation to this matter. A Supreme Court proceeding by Mr Paxton against the former CEO of the department and me remains ongoing. On legal advice, I will not be releasing documents relating to this matter that potentially involve waiver of legal professional privilege.

(4) Mr Paxton applied to transfer limited entry fishery licence 1921 to another party and the licence was subsequently cancelled. The outcome of the investigation was that Mr Paxton's claim was dismissed—in particular, his claim to a lost right to fish in the fishery. I add by way of additional information that Mr Paxton initiated Supreme Court proceedings against subsequent licence holders. Mr Paxton's legal proceedings were struck out.

H. T. Collins 56.61

H. T. COLLINS J.P. 6183
 Justice of the Peace
 WESTERN AUSTRALIA

9422 3001 (FX) MAP-6
The Rt Hon Norman Moore
Level 4
London House
216 St George's Terrace
Perth WA 6000

20 Livingstone Street
Beaconsfield
WA 6162
08 9336 1364

30 January 2009

Dear Sir

I write to:

1. place on record the Department of Fisheries' dealings with me in relation to my ongoing claim to a fishing right, and
2. to apply for an exemption.

On 6 October 2008 I requested a meeting with you as Minister of Fisheries I then forwarded a comprehensive outline of my situation to you on 16 October 2008, which included:

1. References to the then Minister, Kim Chance's assurances that I could fish on exemption until this matter is resolved (that is, by a concluded Fisheries Department investigation into the matters I had raised with Kim Chance). It should be noted that Kim Chance accepted all relevant facts/evidence, ie:

- ~~I was the beneficial owner of my fishing right;~~
- Fred Blenkinsop was not the beneficial owner of my fishing right;
- The Fisheries Department's licensing system was inadequate to safeguard and maintain beneficial ownership; and
- Fred Blenkinsop's actions amounted to alleged fraud.

Kim Chance stated that *"If appropriate, I will make amendments to allow you to apply for a licence"*.

2. Requested Outcomes - the Exemption being reinstated; and
A properly instituted enquiry with agreed terms of reference,

On 4 November 2008 I requested that you supply, at our meeting, details of the departmental investigation that resulted in my right to fish (Exemption 545) being cancelled. That request asked for

"copies of:

- (a) *the terms of reference;*
- (b) *the material considered;*
- (c) *the findings; and*
- (d) *the final report,*

of or by the Fisheries Department's investigation"

On 9 December 2008 a meeting did take place, however it was not with you, but with Trevor Whittington, when I asked:

1. *"Has the Department held an investigation?"* to which Mr Whittington raised his eyebrows and made no comment; and
2. *"Have you seen the results of the investigation?"* - again, Mr Whittington's response was to raise his eyebrows and make no comment.

H. T. Collins J.P. 6183

H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

I took to that meeting, thinking it was necessary, evidence of my claim and a request for an exemption, all of which Mr. Whittington declined to accept or consider.

The only outcome of the meeting was Mr Whittington's statement "*The Minister is passing the whole thing to the Attorney General*", however the Attorney General's department have told me that they have made enquiries of your department in relation to the supposed referral of the matter to the Attorney General and that your department have no intention of making any such referral.

Following the meeting of 9 December 2008, I made a written request to Mark Pagano on 12 December 2008 in which I again requested details of the investigation, minutes of the meeting and clarification of your intentions and response to my request for an exemption. I have had no reply to that request.

I have yet to receive an explanation as to how the Department can suggest that the investigation into the matters I have raised has been completed, given that the outcome of the supposed enquiry:

- (a) failed to address the major issue of the Department's failure of duty of care, a matter for the Supreme Court, whilst the Department has the legislative power through FRMA 155(2) to have the Supreme Court "*consider and determine any case stated*";
- (b) failed to address the beneficial ownership of my fishing right, having written evidence of Fred Blenkinsop's four (4) varying claims to beneficial ownership that claim to be, but are not, substantiated by any document, contract, remuneration or Fisheries Department records and are refuted by his two partners in Fraud Squad statements. NB: Fraud Squad also did not accept his claim to beneficial ownership (see below (d)(2));
- (c) failed to address any of the "*matters*" and "*circumstances surrounding*", agreed upon as the terms of reference for the enquiry by myself and Kim Chance, instead having two "*outcomes*":
 - (i) the State Solicitor statement that the Limitations Act does not allow me to sue the Fisheries Department; and
 - (ii) they had no legislative framework to protect my beneficial ownership.

two matters of record already known to myself and Kim Chance - not the above-mentioned and agreed upon terms of reference. NB: I have a legal opinion that Point (ii) constitutes a failure of duty of care;

- (d) failed to seek any advice or clarification from the DPP and ignores:
 - (1) District Court Geraldton 101996, in which the "*considered*", but not "*beneficial*", owner of a fishing right was jailed for four (4) years on seven (7) counts of fraud, establishing:
 - (i) that a licence is something capable of being stolen;
 - (ii) beneficial ownership can be established; and
 - (iii) that the licensing system failed to safeguard and maintain beneficial ownership.

Three facts that Peter Rogers told the SCPA in October 1999 could not be established;

H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

- (2) the letter from Samantha Tough, Legal Officer of the Fraud Squad to me in which she stated "My assessment of this matter is that there is probably a *prima facie* case of stealing".
- (e) failed to seek advice from the Major Crimes Squad as to my allegations of Peter Rogers's and Peter Millington's possible fraudulent actions, as set out in evidence to Kim Chance in relation to:
- (i) Peter Rogers's original response to the situation, including letters to Fred Blenkinsop's lawyers, in relation to licence ownership; and
- (ii) misleading statements to the SCPA, the DPP, the Ombudsman and to several lawyers.

Mr Moore, please do not lose sight of the fact that this fishing right would not exist if I had not been one of a small number of Geraldton fishermen who started and developed this industry.

I first started fishing in the Abrolhos Islands in 1981 as a crew hand, when there were only four (4) boats. I realized the potential, bought a 32' boat and converted it to a trawler. I put in five (5) years of very hard work prior to licensing, labouring under the assumption that I would be licensed (licences issued 1986) and be able to develop a career fishing for scallops. That has been denied to me by a Fisheries Department that has:

- Created a licensing system that "*considered*", in 1991, someone else to be the owner of my licence whilst "*recognizing*" in writing that I was the beneficial owner but created no legislative system to protect my beneficial ownership;
- Realised my right to fish was lost due to an act of fraud, yet ignored FRMA 143(C);
- Misled Parliament, the SCPA, the DPP and the Ombudsman, and frustrated all efforts to have this matter investigated by the SAT, Supreme Court (certiorari, re enquiry) and a ministerial assured enquiry.

Please do not:

- (a) use the excuse of my suing Jon Ford and Peter Rogers for negligence, in the Supreme Court, to ignore my request for an exemption. It is my understanding that those are separate issues and that the action does not absolve you of the responsibility to assess my application for an exemption; or
- (b) refer me to the SCPA or CCC, as I believe those courses of action would only be appropriate if you as the present Minister of Fisheries, are unwilling to take any action to access my exemption application, after satisfying yourself of the validity of the enquiry/investigation.

I have not included the exemption application fee as the application fee was paid in 2003 when exemption was originally approved. What I am requesting is a variation to the previously approved exemption to allow me to fish the 2009 Abrolhos Islands scallop season with 1 x 4 fathom unit.

The original exemption was approved on the basis that Kim Chance accepted that:

- (a) I was beneficial owner of one (1) unit;


H. T. COLLINS J.P. 6183
 Justice of the Peace
 WESTERN AUSTRALIA

- (b) Fay & Blenkinsop Nominees Pty Ltd committed what amounts to a fraudulent act;
- (c) the Fisheries Department had an informal system of register of beneficial ownership that failed to protect my interest;
- (d) the Fisheries Department recognised Mark Paxton as beneficial owner, as evidenced by Peter Millington's letter of April 1993 confirming recognition,

and that these "matters" and "circumstances" would be investigated by Kim Chance, and, if appropriate, Kim Chance would make amendments to allow for the grant of a licence.

I am requesting you to waive the fee as this matter should have been resolved many, many years ago.

Considering the information provided in this letter and in my letter of 4 November 2008 to your office, including a letter dated 10 October 2007 to Jon Ford, outlining facts not taken into account and the reasons that the enquiry/investigation into the relevant and agreed upon parameters has not been held, I believe you are now in a position, and, with my application for an exemption, have a responsibility to validate this enquiry.

Having had no reply to my letters of 4 November 2008 and 12 December 2008, and having had no meeting with you, as requested in my letter of 6 October 2008, if I have no reply with ten (10) days to my exemption request, I will assume you have accepted the Fisheries Department's investigation as refuting the above facts already accepted by Kim Chance;

If you suspect that there has been any misconduct by the Fisheries Department, you have a "duty to notify" the CCC in writing, as imposed by section 28, Corruption & Crime Commission Act, 2003.

Yours faithfully



Mark Paxton
20 Livingstone Street
Beaconsfield 6162
0417 817 523
08 9336 1364

Encl

cc by fax: Premier Colin Barnett	9322 1213
Hon Barry House	9757 9599
Hon Brendon Grylls	9123 7001



H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

MA-7



MINISTER FOR MINES
AND PETROLEUM;
FISHERIES;
ELECTORAL AFFAIRS;
LEADER OF THE
GOVERNMENT IN THE
LEGISLATIVE COUNCIL

Ref: 26-00148

Mr Mark Paxton
20 Livingstone Street
BEACONSFIELD WA 6162

Dear Mr Paxton

REQUEST FOR MEETING AND APPLICATION TO VARY EXPIRED EXEMPTION

I refer to your email of 6 October 2008, and facsimiles of 16 October 2008 and 4 November 2008 requesting a meeting with me, and your facsimile of 3 February 2009 attaching an application to vary expired Exemption 545.

I understand the matters you raise in your facsimiles have been well ventilated over the years, and have been the subject of a number of unsuccessful proceedings in the Supreme Court and the State Administrative Tribunal.

Further, you have commenced new Supreme Court proceedings against my predecessor, the Hon Jon Ford MLC, and the former Executive Director of Fisheries, Mr Peter Rogers (action number CIV 2076 of 2007). While these proceedings remain on foot, it would be inappropriate for me to meet with you to discuss the claims and allegations made in your facsimiles.

I note that in your 16 October 2008 facsimile you claim to have "*remained beneficial owner of the MFL whilst the same was on Fay and Blenkinsop's wetline licence and attached to vessel LFBG 249*" (par 1.(g)). If your claim to beneficial ownership of the MFL is valid, then you would be able to enforce that right in the Courts. If you are unable to enforce your claim then it would appear that you do not have the "beneficial interest" that you claim to have.

I understand that you met with my Chief of Staff, Mr Trevor Whittington, on 9 December 2008. I have been apprised of the matters you raised at the meeting. In the circumstances, I am unable to see how the meeting you propose with me can be of assistance to you.

A handwritten signature in black ink, appearing to read "H. T. Collins J.P. 6183".

H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

With respect to your undated application to vary Exemption 545, which expired in 2005, I cannot vary an Exemption that has ceased to exist. I assume you wish to apply for a further Exemption. In accordance with section 7(4)(c) of the *Fish Resources Management Act 1994*, an application for an Exemption *must* be accompanied by the prescribed fee (\$2,060.00). I am unable to consider your application for an Exemption until the prescribed fee is paid.

Yours sincerely



**HON NORMAN MOORE MLC
MINISTER FOR FISHERIES**

27 FEB 2009

H. T. Collins s/6183

H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA



Premier of Western Australia

Our Ref: 200900814

Mr M Paxton
20 Livingstone Street
BEACONSFIELD WA 6162

Dear Mr Paxton

Thank you for the copy of your letter to the Hon Norman Moore, Minister for Fisheries, and your telephone call to this office regarding your claim to a fishing right and dealings with the Department of Fisheries.

~~The detailed information provided in your correspondence has been noted, and the points you raised will be appropriately considered.~~

Yours sincerely

Colin Barnett MLA
PREMIER

26 FEB 2009

H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

PAXTON v MINISTER FOR FISHERIES

Date	Contact	Method	Comment
30/01/08	Liberal Party, Alex Tenby:	Telephone	He will show questions to Troy Buswell
20/02/08	WAFIC	Telephone	
22/02/08	Anthony Fels	Facsimile	J Ford amendments
25/02/08	Gary Snook	Telephone	
26/02/08	Norman Moor	Telephone	
29/02/08	Anthony Fels:	Telephone	He will talk to J Ford
04/03/08	Anthony Fels	Facsimile	Hansard: 934 - Parliament
	Grant Woodhams	Telephone	Jon Ford – vacant licence
	Mike McMullen (K. Chance)	Telephone	
05/03/08	Anthony Fels	Facsimile	
11/03/08	PARLIAMENT		Hansard – Questions, J Ford answer
13/03/09	Anthony Fels:	Telephone	Hansard - Answer 123 - He confirmed questions raised in Parliament on 04/03. The answer was “Yes” there was a vacant licence
14/03/08	Shane O’Donohue, Fisheries Dept Mike McMullen Rita Saffiotti, Alan Carpenter	Telephone Telephone Telephone	Please confirm “vacant licence”
17/03/08	Shane O’Donohue Rita Saffiotti Jon Ford Mike McMullen	Facsimile Letter Telephone Telephone Telephone	K Chance to M Paxton re amendments – “issues have been considered”.
20/03/08		Letter	Reply from Fisheries Dept
01/04/08	Tony Papisilas, N Moore Anthony Fels	Telephone Telephone	Vacant licence
03/04/08	Anthony Fels		Hansard : 309 - questions to J Ford re vacant licence & answers
16/04/08	Tony Papisilas	Telephone	Questions for Jon Ford
29/05/08	Norman Moore		Hansard : Questions 527 & 531 re enquiry/investigation
04/06/08	Tony Papisilas	Telephone	Questions for Jon Ford

H. T. Collins 7/6/03

H. T. COLLINS J.P. 6183
Justice of the Peace
WESTERN AUSTRALIA

Date	Contact	Method	Comment
17/02/09	Norman Moore Colin Barnett	Fax received Telephone	
23/02/09	Norman Moore, Barry House Fisheries Dept: M Cuomo, M McMullen	Telephone Telephone	
26/02/09		Letter	Response from Colin Barnett re N Moore
27/02/09		Letter	To M Paxton from N Moore ignoring all questions from 30/01

H. T. Collins J.P. 6183

H. T. COLLINS J.P. 6183
 Justice of the Peace
 1534-090819
 WESTERN AUSTRALIA

B E T W E E N :

MARK ASHLEY PAXTON

Plaintiff

-and-

JON FORD, MINISTER FOR FISHERIES

First Defendant

-and-

PETER ROGERS

Second Defendant

PLAINTIFF'S NOTICE OF APPOINTMENT OF SOLICITOR

Date of Document : 18 August 2009

Filed on behalf of : Plaintiff

Date of Filing : 18 August 2009

Prepared by :
LEASK & CO.
Barristers & Solicitors
26 Cliff Street
FREMANTLE WA 6160

Telephone: (08) 9430 6688
Reference: 1334/DL

Mr D Leask

TAKE NOTICE that the Plaintiff **MARK ASHLEY PAXTON** who has hitherto appeared in person has appointed **LEASK & CO** of 26 Cliff Street, Fremantle WA 6160 as his solicitors in the above mentioned action **AND FURTHER TAKE NOTICE** that the address for service of the Plaintiff is now care of **LEASK & CO** of 26 Cliff Street, Fremantle, WA 6160

DATED the 18 day of August 2009.


Solicitors for the Plaintiff

TO : The Defendants

AND TO : The Defendants' Solicitors
State Solicitor's Office
GPO Box B83
Perth
WA 6838
Ref: SSO 4301/07

IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV 207⁶ of 2007

BETWEEN:

MARK ASHLEY PAXTON

Plaintiff

-and-

JON FORD, MINISTER FOR FISHERIES

First Defendant

-and-

PETER ROGERS

Second Defendant

AFFIDAVIT OF MARK ASHLEY PAXTON IN SUPPORT OF AN
APPLICATION FOR REMOVAL OF CASE FROM INACTIVE CASES LIST
PURSUANT TO RSC O29A r20(2)

Date of Document : July 2009

Filed on behalf of : Plaintiff

Date of Filing : July 2009

Prepared by :

Mark Ashley Paxton
20 Livingstone Street
Fremantle
WA 6160

Telephone: (08) 9336 1364

INDEX

No	Document	Page No
1.	Affidavit of Mark Ashley Paxton, sworn July 2009	1 - 2
2.	Annexure "MAP-11" Draft Statement of Claim	3 - 12

I, **MARK ASHLEY PAXTON**, of 20 Livingstone Street Beaconsfield, in the state of Western Australia, Fisherman, being duly sworn **MAKE OATH AND SAY** as follows:

1. I am the Plaintiff in this action. I make this affidavit in support of my application to have the case removed from the Inactive Cases List.

Mark

*Ronald TP #529
Ronald Noel Manoy*

- 2. I have only recently been able to finalise my Statement of Claim, a draft of which is annexed hereto as "MAP-1".

- 3. I seek to have the case removed from the Inactive Cases List on condition that I file and serve my Statement of Claim, in the form of the said Draft Statement of Claim, within seven (7) days of the case being removed from the Inactive Cases List.

SWORN by the said MARK)
ASHLEY PAXTON at Fremantle)
in the State of Western Australia)
on the 14 day of July 2009)
Before me :-)

Ronald Noel Mundy

Ronald JP 6529

Justice of the Peace

M
14/7/09

MAP-1

IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV of 2009

BETWEEN:

MARK ASHLEY PAXTON

Plaintiff

-and-

JON FORD, MINISTER FOR FISHERIES

First Defendant

-and-

PETER ROGERS

Second Defendant

DRAFT STATEMENT OF CLAIM

Date of Document : June 2009

Filed on behalf of : Plaintiff

Date of Filing : June 2009

Prepared by :
Mark Ashley Paxton
20 Livingstone Street
Fremantle
WA 6160

Telephone: (08) 9336 1364

-
1. The Plaintiff:
 - (a) is and was at all material times a commercial fisherman;
 - (b) on 19 November 1986, was granted a Limited Entry Fishing Licence authorising the Plaintiff to operate in the Abrolhos Islands & Mid West Trawl Limited Entry Fishery ("the Fishery") which Limited Entry Fishing Licence ("the LEFL") was identified and known as "LEFL 1921", and is, together with the associated unit entitlement ("the unit"), together hereinafter referred to as "the fishing right"; and
 - (c) has fished in the Fishery from December 1981.

 2. The Second Defendant was at all material times the Chief Executive Officer of the Fisheries Department of Western Australia ("the Department").

- (a) the Plaintiff requested that he be permitted to fish the unit, notwithstanding that the Fay & Blenkinsop transfer had not been registered;
 - (b) Millington granted the Plaintiff's request on the basis that the Plaintiff was, and was recognised by the Department to be, the beneficial owner of the fishing right.
9. Contemporaneously with the application to transfer, Fay & Blenkinsop applied to replace the FV "*Victorious*" as the vessel authorised by LEFL 1890 to operate in the Fishery, with the FV "*Panama*" which application was approved by the Second Defendant.
10. On 15 May 1990, pursuant to the application to transfer, the fishing right was transferred from Mandare to Fay & Blenkinsop ("the F&B transfer") as a result of which:
 - (a) LEFL 1890 and the fishing right were amalgamated into a single authorisation;
 - (b) LEFL 1890 continued in existence as a single amalgamated authorisation and authorised a single vessel to use two trawl nets in the Fishery;
 - (c) the LEFL 1921 was cancelled on 20 July 1990; and
 - (d) LEFL 1890 became, or was known as, a "twin rig" licence and entitled the licensee to lawfully operate two trawl nets.
11. The Plaintiff remained the beneficial owner of the fishing right following and notwithstanding:
 - (a) the Mandare transfer; and
 - (b) the F&B transfer.
12. On 3 May 1991, the gear units associated with LEFL 1890 were transferred to LEFLs of third parties, as a result of which LEFL 1890 was cancelled as all gear unit entitlements associated with that LEFL had been transferred to other LEFLs, thereby depriving the Plaintiff of the opportunity to have the fishing right transferred as he, as beneficial owner of the fishing right, may have directed.

13. At all material times, the First Defendant and the Second Defendant and each of them, knew that the Plaintiff was the beneficial owner of the unit as at April 1990 and at all material times thereafter.

PARTICULARS OF KNOWLEDGE

- (a) The Department, through Millington, agreed to convene and attend a meeting with the Plaintiff to discuss a request by the Plaintiff to transfer Fay and Blenkinsop from Mandare to Faye & Blenkinsop;
- (b) The Plaintiff attended the meeting with Millington and Alex Cechner ("Cechner") of the Department at the Department's offices in early April 1990, in which meeting the Plaintiff:
- (i) explained to Millington and Cechner that, notwithstanding that the fishing right was registered in the name of Mandare, he retained beneficial ownership of the fishing right;
- (ii) stated that he wished to transfer the fishing right from Mandare to Fay and Blenkinsop so that he could fish the fishing right with his vessel, the FV "*Panama*", in conjunction with various other authorisations which were owned by Fay and Blenkinsop; and
- (c) stated that he wished to commence fishing the fishing right in conjunction with the other authorisation prior to the registration of the transfer, if the transfer had not been registered prior to the commencement of the 1990 fishery season; and
- (d) the Department, in the person of Millington, agreed to the Plaintiff's requests.
-
14. The third party transfer was applied for and registered without the knowledge or consent of the Plaintiff.
15. The Department owed the Plaintiff a duty of care in respect of the fishing right:
- (a) not to transfer the unit from Fay and Blenkinsop without first notifying the Plaintiff of any application to transfer; and
- (b) to notify the Plaintiff of any application to transfer or otherwise deal with the unit.

16. The Department at all material times maintained an informal system of recognising beneficial interests in authorisations.
17. The Plaintiff has at all material times, since the third party transfer, continued to claim that the third party transfer was unlawful.
18. On 23 July 2003, Kim Chance, the then Minister for Agriculture, Forestry and Fisheries, met with the Plaintiff at Dumas House, West Perth ("the Dumas House meeting"), following an invitation by the Minister for the Plaintiff to discuss the circumstances and issues arising from the transfer and the cancellation. The issues raised by the Plaintiff included:
 - (a) whether or not the Plaintiff was, as at the date of the transfer, the beneficial owner of the fishing right;
 - (b) whether, as at the date of the transfer, the Department recognised the Plaintiff as the beneficial owner of the fishing right;
 - (c) whether or not the Department owed the Plaintiff a duty of care to safeguard the Plaintiff's beneficial interest in the fishing right and if so whether that duty had been discharged;
 - (d) the inadequacies of the Department's informal register of beneficial interests to safeguard the Plaintiff's interest in the fishing right;
 - (e) why the Plaintiff was not notified of a transfer of the entitlements of which he was beneficial owner to any third party;
 - (f) whether or not the licensing system had been used by Faye and Blenkinsop to commit a fraud in relation to the transfer;
 - (g) the significance of the prosecution of Mace & Hoskins to the Plaintiff's case with particular reference to:
 - (i) the adequacy of the licencing system to protect the beneficial owners of fishing rights;
 - (ii) the licensing system having been used to commit fraud on the beneficial owner of a fishing right; and
 - (iii) the distinction between the "considered" and the "beneficial" owner of a fishing right;
 - (h) the acts or defaults of the Department in relation to its knowledge of the matters referred to in paragraph 17(a)-(d) above;

- (i) Peter Rogers failure to
 - (i) clarify to all interested parties, when requested to do so, the legal and beneficial interests of those parties in the fishing right;
 - (ii) advise Fay and Blenkinsop and their legal advisors that their claimed ownership of the fishing right could not be based, as they contended, on the written contract whereby the Plaintiff had agreed to purchase various licences owned by Fay and Blenkinsop.

("the Issues").

19. At the conclusion of the Dumas House meeting, the Minister verbally stated to the Plaintiff that, if he was satisfied that the Plaintiff had made good his concerns in respect of the Issues, he would consider amending the Management Plan for the Fishery to make provision for the grant to the Plaintiff of a Managed Fishery Licence for the Fishery to replace the fishing right (hereinafter referred to as "a licence").
20. By his letter dated 13 August 2003 to the Plaintiff's solicitor, the Minister confirmed the statement referred to in paragraph 18 above.
21. On 19 August 2004, the Honourable Bruce Donaldson responded to the question put to him in the Legislative Council:

"Given the circumstances surrounding the cancelled fishing licence of Mr Mark Paxton to operate in the Abrolhos Islands and Mid West Trawl Fishery for scallops, and with your granting an Exemption for Mr Mark Paxton to fish until December 2004 in this fishery:

(1) Will you consider granting a further one year's Exemption to December 2005 to Mr Paxton, so this issue can be finally brought to resolution?"

with the answer:

"I thank the Honourable Member for some notice of this question.

(a) Yes, on submission of an application for Exemption from Mr Paxton."
22. By his letter dated 22 December 2003, the Minister *inter alia*:
 - (a) (i) confirmed that he was continuing to consider the Issues:

- (ii) if appropriate, he would amend the 1993 Management Plan to provide the Plaintiff with the opportunity to apply for the grant of a new licence; and
 - (iii) he would grant the Plaintiff an Exemption to enable the Plaintiff to legally operate in the Fishery in the 2004 season without being the holder of a MFL;
 - (b) stated:
 - (i) *"I have given further consideration to the matters you have raised and to advice from the Executive Director of Fisheries and I have formed the view that until the departmental investigation into your claims has been concluded, you should be subject to the same requirements as persons who hold a Managed Fishery Licence (MFL) to operate in the fishery."*; and
 - (ii) *"You will be notified of the outcomes of the departmental investigation into the matters you have raised with me in due course."*
23. On 24 November 2004, the Minister wrote to the Plaintiff offering to extend the Exemption to allow it to remain in force for the 2005 fishery season, on the basis that the Minister, on granting the Exemption, intended that it remain in force until the Department finalised an investigation into the Issues. The Plaintiff accepted the said offer and the Exemption was accordingly extended by Variation to Exemption Administrative No 545, dated 18 December 2004.
24. On 9 March 2005, the Minister wrote to the Plaintiff stating *inter alia* that:
- (a) the Plaintiff should, whilst operating in the Fishery, be subject to the same requirements as persons who hold a MFL to operate in the Fishery until the Department's investigation into the Issues had been concluded;
 - (b) the Plaintiff would be notified of the outcomes of the Departmental investigation into the matters he had raised, in due course.
25. By his letter dated 25 October 2005, the Second Defendant advised the Plaintiff that any claim the Plaintiff may have had against the Director of Fisheries in

connection with the third party transfer was statute barred and there were no remedies available to the Plaintiff at law.

26. By his letter dated 21 October 2005, the First Defendant advised the Plaintiff *inter alia* that:
- (a) the Department had finalised its investigation following receipt of advice from the Office of the State Solicitor;
 - (b) the outcome of the investigation was that the Plaintiff's claim was dismissed;
 - (c) the Plaintiff would receive the Executive Director's detailed response to the Plaintiff's letter of February 2004 "*in the near future*";
 - (d) in light of the outcome of the investigation, the Exemption would not be renewed or extended further; and
 - (e) the First Defendant viewed the matter of the Plaintiff's claim of a lost right to fish in the Fishery as concluded.
27. On or about 11 November 2005, the 1993 Management Plan was amended, the effects of the amendments relevantly being that:
- (a) no application for the grant of a licence could be made after 15 November 2005; and
 - (b) the maximum head rope length of net pulled officially was 336.26m; and
 - (c) a person must not fish in the Fishery by means of a try net or otter trawl net, unless fishing under the authority of a licence that authorises the use of not less than one (1) gear unit.
-

28. On 16 November 2005, the First Defendant advised the Plaintiff that he had amended the 1993 Management Plan to create a seventeenth (17th) licence so as to allow for the issue to the Plaintiff of a MFL.

PARTICULARS

The advice was given verbally by the First Defendant to the Plaintiff in a meeting at Parliament House, Perth, Western Australia, on 16 November 2005, when the First Defendant said to the Plaintiff: "*I have made amendments to the management plan – I have created a seventeenth licence*"

29. On 29 November 2005, whilst responding to a question from the said Bruce Donaldson as to why the Management Plan for the Fishery had been amended, the First Defendant made a statement in the West Australian Parliament that there was a vacant licence in the Management Plan for the Fishery.
30. The amendment was in breach of the assurance and the statement in that:
- (a) no further MFL was made available by the amendment, whether to the Plaintiff or otherwise; and
 - (b) the effect of the amendment was to preclude any further application for a MFL in the Fishery being made.
31. Contrary to the statements referred to in para. 28
- (a) there was no 17th licence created;
 - (b) the criteria for the grant of a licence had not been amended, other than to require that the application be made on or before 15 November 2005;
 - (c) the Exemption was not capable of being fished in its own right as a result of the amendment prohibiting by means of a try net or otter trawl net only.
32. The effect of the addition of clause 10(8) was to prevent the Plaintiff from fishing the Exemption by means of a try net only, it being impossible for the holder of a licence to fish by means of a try net only as a result of clause 13(4).
33. By reason of:
- (a) the failure of the Defendants to conduct the investigation; and
 - (b) the 2005 amendments,
- the Plaintiff has been prevented from operating within the Fishery consistent with the statements referred to in para 23, as a result of which the Plaintiff has suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE

- A. Loss of profit for the 2006, 2007, 2008 seasons and continuing, full particulars of which will be delivered prior to trial.
- B. Loss of opportunity to apply for and, if considered appropriate, be granted, a licence.

AND THE PLAINTIFFS CLAIM against the First and Second Defendants:

1. Damages to be assessed.
2. Interest pursuant to section 32, *Supreme Court Act*, 1935, at such rate and for such time and on such sum as the Court should deem appropriate.
3. Costs.

Dated June 2009


MARK ASHLEY PAXTON

BETWEEN :

MARK ASHLEY PAXTON

Plaintiff

-and-

JON FORD, MINISTER FOR FISHERIES

First Defendant

-and-

PETER ROGERS

Second Defendant

ORDER 59 RULE 9(1) MEMORANDUM OF CONFERRAL

Date of Document : July 2009

Filed on behalf of : Plaintiff

Date of Filing : July 2009

Prepared by :
Mark Ashley Paxton
20 Livingstone Street
Beaconsfield
WA 6162

Telephone No: (08) 9336 1364

I refer to the Plaintiff's application to the Case Management Registrar for orders that:

1. The case be removed from the Inactive Cases List pursuant to RSC O29A r20(2).
2. The Plaintiff file and serve his Statement of Claim within seven (7) days of the case being removed from the Inactive Cases List.
3. The costs of this application be provided for.

and certify that:

1. **Conferral**

I wrote to the Defendants' solicitors on 30 June 2009 seeking their agreement to this action being removed from the Inactive Cases List if I filed and served a Statement of Claim. That agreement has not been forthcoming.

2. **Matters in dispute**

Whether this action shall be removed from the Inactive Cases List.

3. **Hearing**

20 minutes is required.

Signed


The Plaintiff

BETWEEN :

MARK ASHLEY PAXTON

Plaintiff

-and-

JON FORD, MINISTER FOR FISHERIES

First Defendant

-and-

PETER ROGERS

Second Defendant



PLAINTIFF CHAMBER SUMMONS

Date of Document : 10 July 2009

Filed on behalf of : Plaintiff

Date of Filing : 10 July 2009

Prepared by :
Mark Ashley Paxton
20 Livingstone Street
Fremantle
WA 6160

Telephone: (08) 9336 1364

LET ALL PARTIES concerned attend the Master in Chambers at the Supreme Court, Perth on *Tuesday* the *4* day of *August*, 2009 at the hour of *9:15* o'clock in the *fore* noon on the hearing of an application on the part of the Plaintiff, for Orders that:

1. The case be removed from the Inactive Cases List pursuant to RSC O29A r20(2).
2. The Plaintiff file and serve his Statement of Claim within seven (7) days of the case being removed from the Inactive Cases List.
3. The costs of this application be provided for.

DATED the day of July 2009



The Plaintiff

TO : The Defendants
State Solicitor's Office
Westralia Square
141 St George's Terrace
Perth WA 6000
Ref: SSO 4301/07

IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV 2076 of 2007

B E T W E E N :

MARK ASHLEY PAXTON

Plaintiff

-and-

JON FORD, MINISTER FOR FISHERIES

First Defendant

-and-

PETER ROGERS

Second Defendant

ORDER 59 RULE 9(1) MEMORANDUM OF CONFERRAL

Date of Document : July 2009

Filed on behalf of : Plaintiff

Date of Filing : July 2009

Prepared by :
Mark Ashley Paxton
20 Livingstone Street
Beaconsfield
WA 6162

Telephone No: (08) 9336 1364

I refer to the Plaintiff's application to the Case Management Registrar for orders that:

1. The case be removed from the Inactive Cases List pursuant to RSC O29A r20(2).
2. The Plaintiff file and serve his Statement of Claim within seven (7) days of the case being removed from the Inactive Cases List.
3. The costs of this application be provided for.

and certify that:

1. **Conferral**

I wrote to the Defendants' solicitors on 30 June 2009 seeking their agreement to this action being removed from the Inactive Cases List if I filed and served a Statement of Claim. That agreement has not been forthcoming.

2. **Matters in dispute**

Whether this action shall be removed from the Inactive Cases List.

3. **Hearing**

20 minutes is required.

Signed



The Plaintiff