

**IN THE DISTRICT COURT
AT WHANGAREI**

**CIV-2016-088-000234
[2017] NZDC 18737**

UNDER	THE MARITIME TRANSPORT ACT 1994
IN THE MATTER OF	AN APPEAL PURSUANT TO SECTION 424 MARITIME TRANSPORT ACT 1994 AGAINST A DECISION OF THE DIRECTOR TO REVOKE MARITIME DOCUMENTS PURSUANT TO SECTION 44 MARITIME TRANSPORT ACT 1994
BETWEEN	RICHARD JOHN PRENTICE Appellant
AND	DIRECTOR OF MARITIME NEW ZEALAND Respondent

Hearing: 30 and 31 May 2017, 3 August 2017

Appearances: Mr F Pilditch for the Appellant
Mr K Murray for the Respondent

Judgment: 7 September 2017

DECISION OF JUDGE G M HARRISON

[1] Mr Prentice appeals against a decision of the Director of Maritime New Zealand to revoke his New Zealand coastal master certificate, and his commercial launch master certificate, from 3 May 2016.

[2] That same day the Director also imposed conditions on Mr Prentice's second class diesel trawler engineer certificate, to the effect that he could not exercise the privileges of that document on any vessel which he owned or in which he had an ownership interest. The appeal is directed only to the revocation of the Maritime documents under s 44 of the Maritime Transport Act 1994 (the Act), and not to the

imposition of the conditions on the engineer certificate which are imposed under s 43 of the Act.

[3] At the time of the revocation Mr Prentice applied to the High Court for interim relief under s 8 of the Judicature Amendment Act 1972, to enable him to continue to operate his two oyster farms near Opua, Northland.

[4] On 12 May 2016 Venning J made the following orders:

- (a) The defendant's decision to revoke Mr Prentice's NZ Coastal Masters Certificate is suspended pending further order of the Court on the following conditions:
 - (i) Mr Prentice is to restrict the use of the certificate to the operation of *Oyster One* for the purpose of running his oyster farm operation;
 - (ii) *Oyster One* is to remain in survey;
 - (iii) Mr Prentice is to file and serve his substantive application for judicial review proceedings by 26 May 2016;
 - (iv) Mr Prentice is to file and serve any further affidavit in support of his application with that substantive proceeding;
 - (v) Mr Prentice is to diligently pursue the appeal and judicial review proceedings.
- (b) Leave is granted to the defendant to apply to have the interim orders set aside in the event other issues arise or if Mr Prentice does not diligently pursue the appeal and judicial review proceedings.

[5] During October 2016 it was discovered that Mr Prentice had qualified as a skipper of oyster farming vessels in accordance with the director's delegation of authority to the New Zealand Oyster Industry Association pursuant to Part 35 of the Maritime Rules.

[6] The director consequently accepted that Mr Prentice could act as a skipper of *Oyster One* under the authority of the certificate. As a consequence of that Mr Prentice discontinued his High Court proceedings on 16 November 2016. He continues to operate the oyster farms pursuant to the Industry Association certificate.

Background

[7] The following is taken from Mr Pilditch's closing submissions, which I did not understand to be contested. Mr Prentice is 60 years of age. He began his maritime career 44 years ago as a deck hand. In addition to farming throughout New Zealand and Australia, Mr Prentice obtained his commercial launch master certificate between 1985 and 1988, and then obtained his New Zealand coastal master certificate between 1995 and 1998.

[8] He worked in the fishing industry and between 1995 and 2001. He owned, and fished from, the vessel *Southern Maru*.

[9] He then travelled to Japan and purchased the *Seafort* which he sailed within the Pacific for six months, before returning to New Zealand, using that vessel to fish here.

[10] Prior to 2007 therefore Mr Prentice had accumulated nearly 17 years of experience in the operation of fishing vessels. For 15 of those years he held the launch master certificate and for 12 of those years he held the coastal master certificate. He skippered vessels in New Zealand's most dangerous waters, including off Puysegur Point, and crossing the Greymouth and Westport bars.

[11] In 2007 Mr Prentice acquired the *Mack Attack* and its associated business through a swap arrangement for his house in Christchurch. The *Mack Attack* was a high speed vessel transporting tourists from Paihia to offshore islands to view particularly what is known colloquially as the "hole in the rock".

[12] Having taken over the *Mack Attack* operation, existing personnel continued to operate it until 2009 when Mr Prentice took over its operation. Following this, in 2012, Mr Prentice commenced his oyster farming operations.

[13] The revocation of Mr Prentice's maritime documents has ended a lengthy career spanning a diverse range of maritime activities, with the exception of the oyster boat certificate. The revocation has resulted in Mr Prentice suffering

substantial losses said to be in the region of \$1,000,000, he having sold *Mack Attack* recently at a significant loss.

Procedure on appeal

[14] Section 425 of the Act prescribes the procedure to be followed on appeal. In summary:

- (i) Appeals are brought by way of originating application not more than 28 days after the date on which the appellant is notified of the decision appealed against, or within such further period as this Court may allow. This appeal was commenced in time.
- (ii) Appeals are by way of rehearing.
- (iii) Appeals made are determined in accordance with the District Courts Act 2016 and the District Courts Rules 2014.
- (iv) The District Court may hear all evidence tendered and representations made by or on behalf of any party to the appeal, whether or not that evidence would be otherwise admissible.
- (v) This Court may either:
 - (a) confirm, reverse, or modify the decision appealed against, and make such orders and give such directions to the Director as may be necessary to give effect to the Court's decision; or
 - (b) refer the matter back to the Director with directions to reconsider the whole or any specified part of the matter.

The Director's decision continues in force pending the determination of the appeal: s 426(1).

[15] Counsel did not disagree on the correct approach to be followed. Earlier decisions¹ were to the effect that while the Court would always treat with respect a decision of specialist bodies, the onus of proof rested with the Director of Maritime Safety to show on the balance of probabilities that the appellant's certificate should have been revoked.

[16] Since those decisions, however, the decision of the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*² has been delivered. It held that the extent of consideration the Appeal Court gave to the decision appealed from was a matter for its judgment; no deference was required beyond the customary caution appropriate when the Tribunal had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses.

[17] At [13] the Chief Justice, delivering the decision of the Court, said:

The procedure prescribed for appeals by s 27 does not provide for full de novo rehearing of evidence. While "further material" can be brought forward under subs (8) either "in the manner prescribed or by special leave of the Court", it is clearly envisaged that there will be rehearing on the record. That is usual, and is for example the manner of appeals under s 76 of the District Courts Act 1947. The appeal court must be persuaded that the decision is wrong, but in reaching that view no "deference" is required beyond the "customary" caution appropriate when seeing the witnesses provides an advantage because credibility is important. ...

[18] In this case, of course, there has been no prior hearing in the sense that competing interests gave evidence before a decision maker. In this Court, while appeals are to be by way of rehearing, that is not conducted on the record of proceedings before the decision maker, as would be the case of an appeal before a decision of a lower court. The appeal in this case involved a complete rehearing of the evidence including the submission of affidavits, briefs of evidence and cross-examination of witnesses.

¹ *Sinclair v Director of Maritime Safety* [1999] DCR 282; *Kerr v Director of Land Transport Safety* (HC Wellington, AP 276/97, 6 November 1998, Doogue and Durie JJ).

² *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103 (CA).

[19] In *Kacem v Bashir*³ the Supreme Court distinguished between an appeal from a discretion and a general appeal, and the relevance of that distinction to the *Austin Nichols* principle. At [32] Tipping J, delivering also the reasons of Blanchard and McGrath JJ, said:

But, for present purposes, the important point arising from *Austin Nichols* is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the Appellate Court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter:

- (1) error of law or principle;
- (2) taking account of irrelevant considerations;
- (3) failing to take account of relevant considerations;
- (4) the decision is plainly wrong.

The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves a factual evaluation and a value judgment does not of itself mean the decision is discretionary. ...

Appointment of review panel

[20] Under an historic Safe Ship Management (SSM) system the owner of a ship was issued an SSM certificate. Seafort Holdings Limited was a company of which Mr Prentice had control. It owned the vessel *Mack Attack*.

[21] The issue of an SSM certificate required there to be a designated “fit and proper person” who exercised control over the privileges of that maritime document.

[22] Individuals other than Mr Prentice had been the designated fit and proper persons exercising control over the operation of the *Mack Attack*, and on 12 November 2014 Mr Prentice requested a fit and proper person assessment.

[23] On 18 October 2014 Mr Prentice was operating the *Mack Attack* as skipper when a passenger, Ms Russell, suffered a serious injury to her back, as a result of

³ *Kacem v Bashir* [2011] 2 NZLR 1.

jolting to the vessel when striking waves at speed. Various safety measures had been installed on the vessel in the form of sprung seating, and seatbelts which I shall refer to later in this decision, but which were ineffective in preventing the injury.

[24] As a consequence, on 24 December 2014 a delegate of the Director imposed the condition that the *Mack Attack* could not be skippered by Mr Prentice.

[25] As at 9 February 2015 two fit and proper person assessments were being undertaken in respect of Mr Prentice. The first was with regard to the operation of the *Mack Attack*, and the second was with regard to his seafarer certificates.

[26] On 19 February 2015 Mr Prentice's application was withdrawn and a Megan Alexinas applied successfully to be the fit and proper person for the purposes of the *Mack Attack*. That meant that the assessment with regard to Mr Prentice's seafarer certificates remained on foot.

[27] The condition imposed on 24 December 2014, preventing the operation of the *Mack Attack* if Mr Prentice was skipper, was based upon six incidents to which I will refer later.

[28] A report to the Director of 3 June 2015 from the review panel also included an account of its appointment as follows:

- 17 Mr Prentice has an extensive compliance history over a number of years. Due to that extended history, it was determined that a fulsome review should be undertaken of all potentially relevant matters. As an administrative exercise, a draft chronology was completed with regard to all historical incidents that in some way appeared connected to Mr Prentice or to the operation of *Mack Attack*.
- 18 However Maritime New Zealand's records of some of these events were very limited, and in some circumstances, it was unclear whether Mr Prentice had any connection with some of the incidents and matters contained in that original chronology.
- 19 It was determined that the best way forward would be to have an internal panel of Maritime NZ staff who could consider which incidents and information were indeed relevant, and who could actually undertake the reassessment process, with a view to making a recommendation to the director, or the appropriate delegate.

[29] The review panel consisted of three Maritime NZ staff, including two staff with a maritime background. These were Lou Christensen (Manager Personnel Certification); Martin Harper (Specialist Investigator, Intelligence and Planning); and Ceilhe Halpin (Technical Adviser, Domestic Operations). The reassessment was completed by way of a desktop review of relevant information held by Maritime NZ about Mr Prentice who was not asked to provide any information. Nor was further information sought from any other source outside Maritime NZ.

[30] That this approach was adopted is unsurprising. An email of 19 July 2013 from Deane Ingram, the Regional Compliance Manager (Northern) for Maritime NZ to Mark Thompson of SMS Technical, arose out of an incident whereby Mr Thompson had served a detention notice on "*Streaker*" which was being used at the oyster farm. The crew wished to know if the *Mack Attack* could be used to take them to the farm, which Mr Thompson approved but advised that "no farm gears nor oysters are to be carried as the vessel is a passenger vessel only". This appeared to overlook completely that carrying that equipment or product would not have been for value or reward, as the company would have been carrying its own employees and equipment and product.

[31] Mr Ingram's email to Mr Thompson read as follows:

Please continue to apply the rules rigidly to Mr Prentice's operation. He has a history of non compliance and we therefore need to encourage him to comply fully using all the tools in the compliance intervention model.

[32] That of course was almost two years before the appointment of the review committee, and was not one of the six incidents on which the condition was imposed preventing Mr Prentice from skippering *Mack Attack*.

[33] The review committee divided its report into the consideration of four behavioural patterns:

- Pattern 1 was described as "general observance of good seamanship, including navigation and "col regs";

- Pattern 2 related to Mr Prentice's behaviour as skipper of a high speed vessel;
- Pattern 3 related to maintaining the state of his vessel; and
- Pattern 4 related to offence history.

[34] The review committee concluded:

- 56 In addition to what the patterns of behaviour indicate to us about how Mr Prentice will likely behave in the future, we also specifically note the lack of influence that different compliance responses have had on Mr Prentice's behaviour. This confirms our views that his likely future behaviour will mirror his previous behaviour.

And:

- 63 As stated above, the review panel considers that Mr Prentice continues to behave in a manner that shows poor judgment and a disregard for both maritime safety and the potential or actual consequences of his actions on others. We consider that Mr Prentice's behaviour will likely continue in the future and this would result in an unacceptable safety risk.

[35] In their recommendation the review panel said:

- 66 We have considered whether the compliance response should be directed solely to Mr Prentice's operation of high speed vessels, like *Mack Attack*. We note that, in his capacity as company director, Mr Prentice does operate another vessel for oyster farming: *Oyster One*. That vessel is owned and operated by Seafort Holdings Limited. However, based on the information available to us, we understand that Mr Prentice does not personally skipper the vessel.
- 67 However, the issues raised in this report concern his overall disregard for both maritime safety and the potential or actual consequences of his actions on others. We consider that this is the same, regardless of the nature of the maritime operation.

[36] The review panel recommended that the Director consider that Mr Prentice was not a fit and proper person with regard to the maritime documents that he holds and to consider taking action under s 44 of the Act which empowers the Director to revoke those documents.

[37] The report was reviewed by Sharyn Forsyth who came to the conclusion that action should only be taken with regard to the two navigational certificates but that it was unnecessary to revoke his marine engineering certificate.

[38] The Director disagreed. He accepted the report recommendations.

[39] On 7 July 2015 Mr Prentice was notified of a proposed adverse decision as recommended by the review panel. Mr Prentice responded on 15 September 2015 providing his responses to the criticisms made of him. In particular, he attached the comments of the Northland Regional Council, Regional Harbour Master, Mr Jim Lyle, contained in an email of 13 August 2015. The harbour master said this:

As a submission from the Harbour Master's department, I can attest to the fact that I have had quite a few dealings with *Mackattack* over the years, which involved generally the speed of the vessel close to the other vessel or the shore. However it should be noted we also received complaints about the other commercial vessels for similar reasons. When followed up with Mr Prentice his response was always to try to resolve the issue, and I have held a number of meetings with Mr Prentice and some of his skippers to provide a safe passage plan and improve operational safety. Over the last few years there has been a marked drop off in complaints regarding *Mackattack*, and I can say that this company's safety performance has improved markedly in the last two seasons.

[40] He went on to describe an event involving the *Mack Attack* coming within 200 metres of a naval vessel at speed while diving activities were being carried out. This is one of the six incidents relied on by the review panel. Mr Lyle's predecessor had commenced a prosecution in respect of this incident but after investigating it Mr Lyle concluded there was no evidence to support it and the prosecution was abandoned.

[41] He went on to say:

With regard to Mr Prentice's oyster farm marine operations, I have no record of any navigation or safety issues being raised with this office. My recommendation at this time with Mr Prentice's marine operations would be ongoing careful monitoring for compliance with maintenance and safety procedures via the MOSS audits for a period to ensure that safety improvements are continuing to be implemented, in preference to any punitive action that may be being considered that would affect his ability to operate.

[42] The Director was unmoved by the Harbour Master's assessment and Mr Prentice's responses. He did request further information which Mr Prentice supplied. These responses were referred to the review panel who essentially repeated their earlier recommendation with the exception that conditions could be imposed on the diesel trawler engineer certificate which could otherwise be retained. This led on 3 May 2016 to the Director's decision to cancel the two navigational certificates and impose conditions on the diesel trawler engineer certificate.

[43] I pause to observe that s 443 of the Act permits the Director to delegate any of his functions and powers to employees of the Authority, as for the review panel. No issue was taken at the hearing with the legality of that delegation and I have proceeded on the basis that it was valid.

Assessment of issues on appeal

[44] The review panel's recommendation was based upon the four patterns of behaviour I have already referred to. The only member of the panel to give evidence was Mr Halpin who was cross-examined at some length by Mr Pilditch.

[45] In his closing submission Mr Murray for the Director submitted:

The appellant's sustained attack on the first review panel report is completely misconceived. It was only the start of the natural justice process. If there were any errors or omissions in it then the appellant had a full opportunity to repair them. He had a statutory obligation to ensure that he provided all information that he wanted the director to take account of.

[46] I do not agree that the "sustained attack" on the review panel report was misconceived.

[47] When cross-examined, the Director, Mr Keith Manch, accepted that as the Director and decision maker it was important for him to be independent in his judgment of the matters that affected Mr Prentice's maritime documents. He accepted that he had to be objective, maintain an open mind, to make decisions fairly, and to be consistent with the principles of natural justice. He was then asked:

Q But judging from your answer a moment ago the weight of your decision rested primarily on the description of events and conclusions

made in the panel report, that's where you place the weight in your decision?

A That's what I spent most of my time referring to, yes.

Q Rather than the source material contained in, for example, Appendix 5?

A Yes.⁴

[48] Quite clearly then, the Director relied, in making his decision, upon the panel's report, and not the source material, and so, if it could be demonstrated that recommendations of the panel were flawed, particularly by taking into account irrelevant or incorrect material, or by failing to take into account relevant material, the Director's decision must necessarily also be flawed.

The first pattern of behaviour

Pattern 1: Incident 1

[49] In answer to general questions, Mr Halpin accepted that paragraph 17 of the review panel report of 30 June 2015 recorded that:

Mr Prentice has an extensive compliance history over a number of years.⁵

[50] He was questioned about the chronology at Appendix 3 of the report, which acknowledged that Maritime NZ's records of some of the events were very limited, and in some circumstances it was unclear whether Mr Prentice had any connection with some of the incidents and matters contained in that original chronology.

[51] Mr Halpin also acknowledged that the only information that the panel accessed was information on Maritime NZ files. The panel did not seek any information from Mr Prentice. Only that he was asked for his response to the proposed decision. Mr Halpin acknowledged that the entire report was completed before any input was received from Mr Prentice and that he was not consulted on what could be relevant or irrelevant.⁶ He was asked:

⁴ Notes of Evidence p 159.

⁵ Notes of Evidence p 37.

⁶ Notes of Evidence p 40.

Q So not only did Mr Prentice not have any input into what was relevant and irrelevant, are you saying that the panel itself was only provided selective information to base its assessment on?

A Yes.

[52] Mr Halpin conceded that the chronology, or timeline in Appendix 3, commenced by recording a conviction entered against Mr Prentice in 1999 but that the timeline did not address any periods prior to the year 2000 in which Mr Prentice may have operated vessels without convictions or any other compliance issues arising. Mr Halpin accepted that the first piece of information contained in the timeline is a negative piece of information, and in fact the only information in the timeline is negative.⁷ Mr Halpin agreed that the report could have been more complete into Mr Prentice's previous experience.

[53] Mr Halpin then agreed that under the heading Summary of Fit and Proper Person Reassessment, paras 41-47 of the report were the nutshell conclusions the panel reached, and that those conclusions were based upon appendices to the report and Appendix 4 in particular. This commenced with behaviour pattern 1. This related to general observance of good seamanship including navigation and "col regs".

[54] Incident 1 related to excessive speed near an unnamed diving vessel on 9 January 2010. Mr Halpin conceded essentially that there was no evidence to support this incident. He accepted that it was based upon a report from a Mr Harper drawing conclusions from the Harbour Master's information, but its records could not be located. He accepted that:

All we have about this so called event is a single paragraph in a letter saying something about what the Harbour Master said.⁸

⁷ Notes of Evidence p 48.

⁸ Notes of Evidence p 55.

Pattern 1: Incident 2

[55] This was alleged to be excessive speed near HMNZS *Manawanui* (diving vessel) on 4 May 2010. This incident was based on the assumption that Mr Prentice took the *Mack Attack* too close to a vessel from which divers were operating. Mr Prentice's position was that he took his passengers close to the *Manawanui* to give them a view and was unaware that diving was in progress. The Harbour Master issued an infringement notice for this incident but it was later withdrawn. Maritime NZ was not clear as to why the infringement was withdrawn. The answer to this lay in an email from the Regional Harbour Master, Mr Lyle, to Mr Prentice of 13 August 2015, which was attached as Appendix 1 to Mr Prentice's letter of 15 September 2015 in response to the notice of intention to revoke.

[56] In that email Mr Lyle said:

A previous incident some years ago involving the Navy dive boat and *Mack Attack* has been mentioned. My recollection of the event was that the *Mack Attack* came within 200 m of the Navy vessel at speed, which was carrying out diving activity. My predecessor started a prosecution just before leaving the Council. I dealt with the incident following his departure, and one of the key factors that came out was that there was no wind on the day, and the Navy were using a normal cloth A flag, which would have likely have (sic) been lying limp at the time of the occurrence. This did line up with your testimony. In light of this evidence NRC dropped the prosecution with Mr Prentice agreeing to carry out various safety initiatives.

[57] This information was before the Director when he made his final decision but was plainly not taken into account as this incident was not removed from consideration of pattern 1.

Pattern 1, Incident 3

[58] This was described as a close quarters incident with *Bay Belle* on 15 January 2011. This was an incident in which *Mack Attack* was required under the Maritime rules to give way to the *Bay Belle*. The latter was forced to go astern and Mr Prentice and Seafort Holdings Limited were prosecuted for this incident. Mr Halpin refused to acknowledge that this was the first non compliance incident.

Pattern 1, Incident 4

[59] This incident relates to a lack of recording of routes taken on 24 April 2011. The incident was described as an individual in a kayak witnessed a vessel matching *Mack Attack*'s description passing through the Okahu passage on this date. The vessel was moving very fast through the area which is popular with snorkelers, swimmers and kayakers. When questioned, Mr Prentice replied that he was not sure he had been through there on that day because his vessel's route was not logged anywhere. The report notes that there is no evidence that corroborates Mr Prentice was operating *Mack Attack* and that the incident occurred in this way "and so the review panel has placed no weight on the matters referred to". Despite this, the panel members were critical of Mr Prentice for not keeping a log of the movements of *Mack Attack*, which is not a legal requirement. His failure to do so was described as a poor standard of seamanship.

Pattern 1: Incident 5

[60] This was a close quarters incident with *Okiato* on 31 August 2012. This incident involved the passenger/vehicular ferry *Okiato* operated by Fullers at Opua. Fullers were of course a competitor of Mr Prentice. The incident was similar to the *Bay Belle* incident where the *Mack Attack* failed to give way requiring evasive action to be taken. There was no impact. Mr Prentice was prosecuted for this incident to which he pleaded guilty.

Pattern 1: Incident 6

[61] This was described as a close quarters incident with diving vessel 007 of 30 April 2014. This involved the *Mack Attack* approaching the 007 at the "hole in the rock" which was apparently overseeing a dive inside the "hole in the rock". The evidence was that the *Mack Attack* approached very slowly with no evidence of any actual threat to divers. Indeed, it was accepted that Mr Prentice had disengaged the engine so the propellers were not working. Furthermore, Mr Prentice claimed that he attempted to contact the 007 on DHF but there was no response. No relevant enforcement action was taken in respect of that incident.

[62] To conclude on Pattern 1, Mr Pilditch put to Mr Halpin that all of the incidents concerned took place when the *Mack Attack* was involved. Mr Halpin accepted that was so and that there was no evidence of these types of incidents in respect of any of Mr Prentice's oyster boats, nor the vessel *Seafort*, nor the *Southern Maru*.

The second pattern of behaviour

Behaviour as skipper of a high-speed vessel

[63] Maritime NZ produced a report dated 27 June 2009 on high-speed passenger boats operating from Paihia. The report was prepared following a lower back compression fracture to a passenger on the vessel *Excitor*. Maritime NZ was aware of seven other accidents that had resulted in lower back compression injuries on board the two high-speed vessels that had been operating out of Paihia since 1999.

Pattern 2: Incident 1

[64] The first incident involving the *Mack Attack* occurred on 15 April 2010 when the vessel was operated by skipper Brendan Gates. Two passengers received lower back injuries.

[65] Despite Mr Prentice not being involved at all at paragraph 44 of the review panel report, the panel stated:

We consider that he should have – in some way and in some capacity – been involved in trying to learn from the accident, especially as he was aware of Maritime NZ's safety investigation report referred to above. There was no prosecution of Mr Gates.

Pattern 2: Incident 2

[66] This incident occurred on 21 December 2010 which involved a serious back injury to a Mrs Cooke. She was sitting at the front of the craft (as she had insisted on doing), had a known pre-existing spinal condition, and was not wearing a seatbelt. I should note that as I understand it the *Mack Attack* was fitted with sprung seating with seatbelts for individual seats as preventatives to back injuries.

[67] Seafort Holdings Limited was prosecuted by Maritime NZ under the Health and Safety in Employment Act 1992. There were two charges: one of failing to take all practicable steps as an employer to ensure that no act or omission of an employee of the company caused harm to any person; and, secondly, of failing to notify the secretary of the relevant authority of the incident. The company was fined on both charges.

[68] At [24] of the decision District Court Judge Gittos stated:

The defendants have co-operated with the investigation, they have a good record in the industry over the three years they have run this vessel and have not previously been before the Court. It must, however, be said that this accident did occur against a background of similar problems with spinal injuries that had involved both operators of these sorts of trips in the Bay of Islands, previously, and had been the subject of a quite in depth investigation by the department. So that background was known to this operator and should have served as a spur to ensure that their statutory responsibility of notification was promptly complied with.

[69] The report on this issue was negative to Mr Prentice, although there was nothing in the sentencing remarks of Judge Gittos to support that. There was some doubt that Mr Prentice was aware at all that Mrs Cooke had a pre-existing back condition, and there was some evidence that she had declined to fix her seatbelt.

[70] Following this incident, Maritime NZ gave notice to Seafort Holdings Ltd prohibiting the use of *Mack Attack* until a recognised surveyor from the Safe Ship Management Company confirmed to the Director that the vessel remained fit for purpose. In a report completed in March 2011 by Maritime NZ, the executive summary at page 4 noted:

SML has undertaken research on the subject of seating and injury and has assessed the seating as fit for purpose, there has been no collaborated testing carried out on the seats fitted to the vessel by any agency. With conditions experienced on the day, the seating fitted to *Mack Attack*, with the seatbelt arrangement being securely fitted, we experienced no adverse effect to back or spine.

They said further:

From the physical inspection there does not appear to be any safety or pollution-related deficiencies to prevent the lifting of the prohibition notice.

From this report it is recommended that the prohibition notice be lifted a new SSM certificate is issued.

[71] Finally, on this incident, it was conceded that there was no criticism of the speed of the vessel or its handling at the time of the incident.

Pattern 2: Incident 3

[72] This related to a back injury to a Ms Russell on 18 October 2014.

[73] This matter is currently the subject of a prosecution by Maritime NZ which is yet to be determined.

[74] Despite this, the panel was critical of the seat that the injured lady was sitting in. As the matter is the subject of a prosecution it is not appropriate for me to comment further.

[75] Mr Halpin acknowledged in cross examination that he had no criticism of how Mr Prentice managed the boat on that occasion.

[76] I accept the submission of Mr Pilditch with regard to “Pattern 2” where he said:

“Pattern 2” disclosed one incident for which the appellant accepted the fault of not ensuring that a passenger wore the seatbelt provided, (although only the company was prosecuted) and one further incident where the passenger had been briefed on risks, did not exhibit or disclose known risks, (overweight or back injury – including age-related conditions), and was wearing a seatbelt at the time of the incident.

It is troubling that this can be characterised as the “pattern” from which poor judgment, ignorance, and irresponsibility can be inferred, particularly when the material included in the *Mack Attack* report represented significant advances in the identification of at risk passengers ...

The third pattern of behaviour

Pattern 3: Maintenance

[77] I do not regard this pattern of any particular significance in deciding whether Mr Prentice is a fit and proper person. Mr Murray did not address this issue in his

submissions. Four incidents were raised which all relate to the *Mack Attack* and Mr Prentice's role as a director of Seafort Holdings Ltd.

Pattern 3: Incident 1

[78] The first incident related to the vessel running out of fuel. It was not skippered on that occasion by Mr Prentice, but by a Mr Hoggard and I do not see how that has any relevance whatsoever to the issue.

[79] The next incident, although described as incident 1, related to flooding through a steering rod seal which occurred on 5 October 2008. I note that the vessel operated for another seven years and it does not seem that this malfunction had any relevant effect.

Pattern 3: Incident 2

[80] Incident 2 is alleged to have occurred on 22 February 2010 which resulted from anonymous calls to Maritime NZ. The vessel was detained and surveyed and corrective action required included replacing the steering arms, bushes and seals. This work was undertaken.

Pattern 3: Incident 3

[81] Incident 3 related to leaking steering rod seals resulting in flooding and allegedly occurred on 11 January 2011. Mr Prentice engaged professionals to design and manufacture replacement parts to rectify the problem. He estimated he had spent around \$80,000 on repairs and maintenance for the 2014-2015 year.

[82] In this regard, I refer to a letter of 7 February 2012 from Steve Mabbett Limited – ship surveyors to Maritime NZ – in which Mr Steve Mabbett as managing director referred to his working relationship with Mr Prentice over the previous 16 months and stated:

Over this period we have observed Richard in his capacity as managing director of the company and also in his day to day, hands on operation of the business in support of his operations manager. We have found consistently,

that he has demonstrated a very positive attitude towards maintaining a safe operation and compliance with all aspects of safe ship management as required by Maritime NZ. He has been very co-operative, proactive and reasonable to deal with at all times. His communication with us has been excellent and his approach to the safe ship management system implemented is very positive. We would also note that during the period the vessel was detained in January 2011, Richard was very supportive of, and endorsed, all measures that were adopted to increase the safety of the operation. Despite the stress of this situation, Richard's conduct was always professional.

[83] Mr Pilditch's submission in this regard was as follows:

Maintenance issues arose, but it is the insinuation that the appellant was cavalier and indifferent to these maintenance issues that is rejected, because it is unsupported by the evidence.

[84] For the reasons stated I agree with that submission and note again Mr Pilditch's comment that these concerns relate only to the *Mack Attack*.

The fourth pattern of behaviour

Pattern 4: Offence history

[85] This history refers to six offences, three of which have already been considered under previous behaviour patterns. These are the injury to Mrs Cooke, and the convictions relating to the *Bay Belle* and *Okiato* incidents. The panel stated that it did not "double count" these incidents. If that is so, it is difficult to understand why they were included at all in this alleged behaviour pattern.

[86] Of the other offences, the first occurred in May 2000, some 15 years prior to the report which related to an incident on the *Southern Maru* where a deck hand lost an eye from fishing equipment.

[87] The next offences occurred in January 2003 and August 2007 and concerned Fisheries Act paperwork. Indeed, in respect of the January 2003 incident Mr Prentice was convicted but later discharged, presumably without conviction. The last conviction was in October 2009 for a minor assault, its only relevance being seemingly that it occurred on a boat.

[88] Of these offences the only one that could possibly be said to give rise to a safety issue was the conviction in 2000, some 15 years prior to the panel report.

[89] Against that history, in November 2014 Maritime NZ carried out an audit of Seafort Holdings Ltd and its compliance with relevant rules. In the report dated 12 January 2015, the following is stated under the heading "Overview":

Since the auditor first visited the vessel in October 2011 there have been a number of visits and numerous deficiencies have been raised over this time with both the vessel and the operating system. It is pleasing to note that the overall standard has improved over this time, although some issues have come up again and again, in particular maintenance related items.

[90] In the conclusion to the report, the following appears:

1. The operator is to be commended for the level of openness and candour shown to the auditors.
2. The auditors were impressed with the generally high standard of the deemed MTOP; unfortunately this was marred by less than consistent execution as indicated by actual performance, in the areas of environmental outcomes and maintenance as indicated in particular.

No issues as to safety were raised.

[91] This report was available to the panel. It referred to it in paragraph 5 of Appendix 1, at p 14. It noted:

The results were satisfactory.

[92] No other reference is made to that report. It is therefore difficult to reconcile the conclusions of the report with the conclusions of the panel in respect of Pattern 4 where it concludes that the prosecutions do not improve Mr Prentice's behaviour to any noticeable extent. I simply observe that the audit report was completed after the dates of all of the convictions referred to.

[93] The panel report was forwarded to Mr Prentice on 7 July 2015. He responded on 15 September 2015 with a 25 page submission addressing the four patterns of behaviour and their respective incidents, with appropriate appendices.

[94] The panel reviewed this response which was received and considered by the Director on 29 April 2016. The panel essentially rejected all of the responses and recommended that the Director declare Mr Prentice not to be a fit and proper person with regard to his commercial launch master and New Zealand coastal masters certificates, and that conditions should be imposed on his diesel trawler engineer certificate with which the Director agreed and acted accordingly as evidenced by his decision of 3 May 2016.

Assessment of the Director's decision

[95] It was put to Mr Halpin in cross examination that the panel had made a number of errors in omitting relevant material from the report. It is unrealistic to catalogue them but he was asked:

Q So the picture that's beginning to emerge in that is that Mr Prentice is being judged on material that has not been made available to him through your panel report in the appendix?

A There does appear to have been some errors in the information not being included, yes.⁹

[96] When the Director was cross examined the following exchanges occurred:

Q From a natural justice perspective I (sic) would have been important to you as a decision maker to ensure that Mr Prentice was provided with all of the information on which the decision was going to be based?

A Yes.¹⁰

Q As far as the source material is concerned, the primary material, the evidence, you accept the proposition that the panel reference material that wasn't included in the four bundles that we have?

A Yes.

Q Because that's been the content of a lot of the questions and answers over the last couple of days?

A Yes.

Q So do you accept that as far as ensuring Mr Prentice was provided with and properly informed of all the matters on which the panel

⁹ Notes of Evidence, page 120.

¹⁰ Notes of Evidence, page 160.

premised its report that that obligation to him was not met in this case?

A Well again, I'd say there's material in the report that was part of what was relied on and I think you're suggesting that there wasn't the evidence that sat behind it and I agree with that, yes.

Q Yes, yeah, you accept that?

A Yes.

Q Yes and do you accept that it's unfair to Mr Prentice if he doesn't have the same source material that the panel relied on?

A To the extent that he doesn't have the source material, yes. If the material is in the report though, he has – he has knowledge of what is relied on.

Q Well he has a version of the events in the report prepared by the panel –

A Yes.

Q But not the evidence on which that panel observation, comment or opinion is made?

A Yes.

Q Now what I'm suggesting to you is that if he doesn't have all of the evidence that the panel had, that was unfair to him. Do you agree with that?

A Again I agree with it to the extent that he didn't have the evidence, yes.

Q Well yes, well you appreciate from a natural justice perspective the intention is to ensure that the person whose documents are in issue has the opportunity –

A Yes.

Q - to comment on the evidence and bring matters to the Director's attention, to your attention?

A Yep.

Q That arise from that?

A Yes.

Q And he wasn't able to do that in some instances with this report?

A Not with evidence, no.

Q Because he wasn't provided with all of the evidence, assuming it – it exists?

A He wasn't provided with all the evidence.

Q Yes.

A Yes.

Q So in terms of that intention of achieving fairness, natural justice I'm putting to you that wasn't achieved here for the very reason of the issues that we've just addressed?

A And again I – I think my answer was that there was references in the report to material the primary evidence may not have been provided in the way you're describing it.

Q Do you accept that the fair thing to do would have been to have provided all of the evidence?

A I think it would've been better to have done that, yes for sure.

[97] Furthermore, on this theme the following exchange occurred with Mr Halpin during cross examination:

Q But having been through the process with me over the last day or so, do you not agree as I believe we have agreed that the panel report failed to contain positive information about Mr Prentice that was available to it?

A I agree that it wasn't represented as it could have been or perhaps should have been and I can see that I have learnt from this process.

Q Right. And so his concern that the panel failed to consider positive aspects of his marine history and behaviour appears to have been justified, would you agree with that?

A Yes, or at least it has not been properly represented in the report to the Director.¹¹

[98] And further:

Q Really, Mr Halpin what I'm putting to you is that both of the initial and the second panel report, the panel took the most pejorative and damning view of Mr Prentice that it could. What do you say to that?

A No I don't believe that is true.

Q It failed to reference information available to it that was positive about Mr Prentice?

A That is – that is true yes.

¹¹ Notes of Evidence page 141.

Q It made claims about Mr Prentice which don't appear to be supported on the documentation that we have?

A Based on the exercise we have gone through yes that is true it did appear to.¹²

[99] Based on the foregoing the panel report on which the Director's decision was based cannot stand. It was prepared with a negative attitude towards Mr Prentice despite evidence from Steve Mabbett Limited and Mr Jim Lyle, the Harbour Master, and the audit report of January 2015, to the contrary. The report omitted material favourable to Mr Prentice and was accordingly unfair and lacked objectivity.

[100] Furthermore all of Maritime NZ concerns related to the operation of *Mack Attack*. The report and the Director's decision endeavoured to extend perceived shortcomings in the operation of *Mack Attack* to Mr Prentice's entire seamanship when the evidence to support that was sparse if not non-existent.

[101] My decision has been arrived at according to the principles stated in the *Austin, Nichols* decision. As the Chief Justice said at [16]:

Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ.

[102] The Director's decision was that Mr Prentice was no longer considered to be a fit and proper person to hold the cancelled certificates. He concluded that his action was necessary "in the interests of marine safety."

[103] I do not accept that conclusion.

[104] There were clearly incidents of concern with regard to the operation of *Mack Attack* and, in particular, the injury to Mrs Cooke in October 2014 which appears to have been the critical incident leading to the restrictions imposed on the operation of *Mack Attack* which ultimately caused the failure of the business and the losses suffered by Mr Prentice.

¹² Notes of Evidence page 145.

[105] Section 50 of the Act specifies criteria for the assessment of a fit and proper person. The first criterion is the person's compliance history with transport safety regulatory requirements. There have been some minor breaches by Mr Prentice in that regard and I do not refer here to the injuries suffered by passengers on the *Mack Attack*. That was a phenomenon associated with other high speed passenger vessels as well and while obviously serious do not fall within transport safety regulatory requirements.

[106] The next criterion is the person's related experience within the transport industry. Mr Prentice has worked within the industry for of the order of 40 years in various roles. His current pursuit is the oyster farming activity and he is obviously properly experienced to continue with that.

[107] The next criterion is his knowledge of the application maritime regulatory requirements. Certainly, the comments of the Harbour Master and the audit report confirm his necessary awareness of those requirements.

[108] I have already referred to Mr Prentice's convictions for any transport safety offences which in my view are minor and in the case of the *Bay Belle* and *Okiato* incidents may have been provoked by commercial competitors.

[109] The phrase "fit and proper person" was explained by Lord Bingham in *R v Crown Court at Warrington XP RBNB* (an unlimited company)¹³ as follows:

This is a portmanteau expression, widely used in many contexts. It does not lend itself to semantic exegesis or paraphrase and takes its colour from the context in which it is used. It is an expression directed to ensuring that an applicant for permission to do something has the personal qualities and professional qualifications reasonably required of a person doing whatever it is that the applicant seeks permission to do.

[110] I am satisfied that Mr Prentice has those qualities and qualifications reasonably required of him to exercise the privileges that flow from his certificates.


[111] The decision of the Director of 3 May 2016 is quashed. Mr Prentice's commercial launch master certificate is reinstated. His New Zealand coastal master

¹³ *R v Crown Court at Warrington XP RBNB* (an unlimited company) [2002] 1 WLR 1954.

certificate is also reinstated, but is subject to a condition that it does not authorise him to operate a high speed passenger vessel without receiving a separate approval to do so.

[112] The conditions imposed on Mr Prentice's second class diesel trawler engineer certificate were not a subject of this appeal. I can discern no reason for the imposition of those conditions, but make no order in that regard. Leave is reserved for memoranda to be filed in respect of the condition I have imposed on the New Zealand coastal master certificate should that prove to be necessary, or generally on the reinstatement of the two certificates.

[113] The appeal is allowed accordingly. I see no reason why costs assessed on a 2B basis should not follow. I invite the parties to agree in that regard but, failing agreement, I will receive memoranda.



G M Harrison
District Court Judge