

CITATION: *Perry v Simlesa & Armytage & Reidy* [2002] NTMC 031

PARTIES: RUSSELL LAWRENCE PERRY

v

MARKO SIMLESA

&

LUCAS STEVEN ARMYTAGE

&

KODE ROBERT REIDY

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION:

FILE NO(s): 20102600, 20102599, 20015481

DELIVERED ON: 12 August 2002

DELIVERED AT: Darwin

HEARING DATE(s): 23 January 2002, 24 January 2002, 31 July 2002

DECISION OF: R J Wallace

CATCHWORDS:

FISH AND FISHERIES – STATUTORY INTERPRETATION – FISHERIES ACT (NT) – FISHERIES REGULATIONS (NT) – BARRAMUNDI FISHERY MANAGEMENT PLAN – “river” – “river mouth” – “creek” – “coast” – “coastline”

REPRESENTATION:

Counsel:

Complainant: Mr I Rowbottam

Defendants: Ms V Farmer

Solicitors:

Complainant: Office of the DPP

Defendant: Withnall , Maley & Co.

Judgment category classification: A

Judgment ID number: [2002] NTMC 031

Number of paragraphs: 28

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No.s 20102600
20102599
20105481

BETWEEN:

RUSSELL LAWRENCE PERRY
Complainant

AND:

MARKO SIMLESA

AND

LUCAS STEVEN ARMYTAGE

AND

KODE ROBERT REIDY

Defendants

REASONS FOR DECISION

(Delivered 12 August 2002)

Mr Wallace SM:

1. Each of the three Defendants was charged with two offences contrary to Clause 8 (1) (a) of the Barramundi Fishery Management Plan (“the BFMP”) The *Fisheries Act* (“the Act”) provides, in Part III, for the formulation and promulgation of management plans, and the BFMP is one such plan. On 23/11/89, the Minister for Primary Industry and Fisheries made a declaration of managed fishery pursuant to s 22(b) of the Act, published in the NT Government Gazette No. 948 on 6/12/89 (a copy of which became Ex 24 in the proceedings before me). A later Minister of the same Department approved the BFMP, pursuant to s 25 (3) of the Act. It came into operation on 1 February 1998. Clause 8 of the BFMP reads, in relevant part :

“8. FISHERY AREA

- (1) Subject to this Part, a barramundi licensee must not fish under a barramundi licence –
 - (a) landwards of the coast or a river mouth;...”

Section 27 of the Act provides

“27. MANAGEMENT PLANS ENFORCEABLE AS REGULATIONS

- (1) Every provision of an operative management plan shall have the force and effect of a regulation in force under this Act.
- (2) In the event of an inconsistency between a provision of an operative management plan and the Regulations or a notice given under section 28 the provision of the plan shall prevail to the extent of the inconsistency.
- (3) Where a word or phrase used in a fishery management plan or a notice under section 28 is not defined by this Act or the plan but is defined by the Regulations, it shall have the meaning it has under the Regulations in relation to the management plan or the notice, as the case may be.”

2. The offences charged are alleged in the Complaints to have been committed on the 13 August 2000 at Perakary (otherwise Perakery) Creek on Bathurst Island. At that date the Defendant Marko Simlesa was the holder of Barramundi License issued pursuant to the Act. He had become the holder of a Barramundi Fishery Licence No. A7 of 95. Section 14 of the Act requires, in a case where a corporation owns such a licence, that a natural person be nominated to be a “nominated person”. Pirate Enterprises Pty Ltd, the holder of the licence, had nominated a Mr Peter Ince who fulfilled that role for some time. However a temporary transfer of the nominated person was effected by appropriate documentation lodged in June 2000. Mr Simlesa was the transferee, for the period 1 July 2000 to 30 June 2001. Section 14 (8) of the Act provides relevantly;

“(8) A nominated person is...deemed to be holder of the license or permit, as the case may be, for the purpose of this Act and each instrument of an administrative or legislative character made under it.”

3. The defendants Lucas Steven Armytage (“Mr Armytage”) and Kode Robert Reidy (“Mr Reidy”) were “assistants” within the meaning of the Act., “assistant” being defined in s 4 relevantly;

“in relation to a licence or permit, means a person notified by the licensee or permit holder in writing to the Director as an assistant in relation to the licence or permit...”

Clause 6 of the BFMP reads;

“APPLICATION

- (1) This Division applies to a barramundi licensee and to a person assisting a barramundi licensee.
- (2) Where an act or omission of a person assisting a barramundi licensee would constitute an offence against this Division if it were the act or omission of licensee, the person may be charged with and convicted of the offence as if the person were a barramundi licensee and, for that purpose, a reference to a barramundi licensee doing an act or being prohibited from doing an act in this Division, including under a barramundi licence, includes such a person”.

4. The evidence of Stephen Francis Wilmore (the transcript has him as Steven – which might be right – Frances – which cannot be - Willmont – which I think is wrong) senior licensing officer with the Fisheries Department, established that Mr Armytage and Mr Reidy were assistants, two out of five names notified to the Director in that capacity under licence A7 of 95. Mr Wilmore also provided the evidence to establish Mr Simlesa’s status as at 13 August 2000.

PERAKARY CREEK

5. Bathurst Island has something the shape of a trefoil, with leaves pointing west, east and (the largest) north. Gordon Bay is a sweeping, almost

symmetrical bight indented into the north coast of the western leaf. In its southernmost part, the curve of the bight flattens out somewhat and runs virtually east west. At what seems to be the southernmost point, every depiction of the bay shows a broad meandering stream emerging to the sea after a last lazy right hand turn. This broad stream is Perakary Creek. A few hundred metres to the east of it, a narrower stream meanders to meet the sea at much the same latitude. Four or five kilometres to the west, a third, and likewise narrower stream meets the sea a fraction further north. All three of these streams wind their way through a single area consisting of mangrove swamps and saltflats.

6. There is in evidence a number of depictions of the area. Ex 6 is an A3 sized chart seized by police on 14 August 2000 from the “Jolly Roger”, a fishing vessel that seems to have been the “mother ship” used by the Defendants on 13 August 2000. (They used a dinghy, or dinghies, at the hands-on stage of their work.) Ex 6 is a photocopy of a chart on a scale of 1: 100,000. I suspect that the photocopying process has reduced the scale still further, closer to 1:300,000. That chart gives the broadest picture: it depicts four fifths of Bathurst Island, including the entire western leaf, and it gives an idea of the proportions of the whole of Gordon Bay. Exhibits 25 and 26 were produced by Mr Brocklehurst and Mr Bartholemew Edmeades, “resource survey mappers” from the NT Dept of Infrastructure, Planning and Environment. Ex 25 is a photographic representation of the southernmost part of the shore of Gordon Bay, and Ex 26 a map on the same scale (1:20,000), and delineating the types of coastal vegetation in the area; beach; mangrove, coastal vine thicket on sand ridges; paperbark forest and swamp; eucalypt forest and sand flat. Ex 16 is a composite aerial photograph depicting Gordon Bay and its southern shore westward from about the point where the eastern narrow stream meets the sea. It is on a scale of 1:25,000, and has placed upon it 3 red points. One represents the position of the Australian Customs Vessel “Roebuck Bay”, which brought investigating

police to the area on 29 August 2000, and waited there while police went ashore in Zodiac – type dinghies. The other two red points, numbered 4 & 5, purport to represent two places on Perakary Creek, where nets were observed on 13 August to have been set. Each Defendant is charged in respect of each of those nets – hence the two charges.

7. Those two red points appear again in Ex 15, an aerial photo on a scale of 1:5000, showing Perakary Creek's last kilometre or two, and a narrow slice of open sea. Ex A is another copy of the same photograph, variously marked in a red ball point pen. Ex 21 is a small map of most of Gordon Bay, on a scale of 1:59,172. (I would not be surprised if Ex 21 is a blown-up sized detail of the original which was photocopied and reduced to form the chart Ex 6.) Blue ballpoint pen lines on Ex 21 detail show the course taken by the police dinghies on 29 August 2000. Ex 11 is a set of six photographs taken by Senior Constable Cook when overflying the area where Perakary Creek meets the sea on 31 August 2000. They are on no particular scale.
8. In addition to these still images I have also seen three videos which are topographically informative. Ex 10.1 is a VHS copy of a super 8 video tape made in the course of that overflight on 30 August 2000. Ex 8.1 is a VHS copy of Super 8 videos made by police in the course of their expedition to Perakary Creek on 29 August 2000. The cinematographer seems to have had it in mind to illustrate the locale as completely as he possibly could. The result is very informative (and very, very tedious). Ex 2 is a VHS copy of a Super 8 video tape made buy a group of amateur fishermen, in particular by Mr Tony Pearce, on 13 August 2000. The group discovered the two nets in the creek (and also saw three other nets nearer the sea). They recorded what they saw, intending to report the matter to the police, as indeed they did. Ex 2 is perhaps less complete as topographical guide than Ex 8.1, but it is still pretty good, because Mr Pearce and his companions were doing their thoughtful best fully and intelligibly to record the defendants taking in the

nets, and driving downstream in a dinghy almost sinking under the mass of fish piled not only to, but also higher than the gunwales.

9. These pictures, moving and still are worth many thousands of words. In any event, words were not lacking in the evidence. Mr Pearce, and his companion Mr Anthony Reiter were careful, thoughtful, well-spoken witnesses. I am satisfied beyond reasonable doubt that, on 29 August 2000, Mr Reiter and Mr Pearce accurately identified the two places where they had seen the nets on 13 August.
10. I am satisfied beyond reasonable doubt that the geographical coordinates of those two places were accurately established by the police on 29 August, competently using GPS equipment, and I am satisfied beyond reasonable doubt that those coordinates have been accurately transposed onto the various maps eg. Ex 15, Ex 16. I am not sure whether the margin of error of those coordinates should be expressed in metres or tens of metres, but a comparison of the photos and maps with the videos satisfies me that, in the event, the error cannot be more than 20 metres or so. The two nets were set, respectively about 800 metres and 1500 metres, up the course of Perakary Creek, measured from the open sea.
11. Clause 8 (1) (a) of the BFMP, it will be recalled, prohibits fishing “...landwards of the coast or river mouth...”The Defendants are charged, in particular, with having fished landwards of a river mouth. “River mouth” is defined in Clause 4 of the BFMP to include (relevantly) :

“the body of water delineated –

... (b) ... by an imaginary line, contiguous with the shape of the adjoining coast, bay or inlet, across a river...”

12. “River” in term is defined also in Clause 4 and :

“river” includes a creek, stream, tidal arm, billabong, lake or other body of water, whether fresh or brackish, that, seasonally or consistently, flows directly or indirectly into the sea, and, for this

purpose, a tributary, branch, anabranch, channel or division of a river, or a river flowing into a river, is to be taken to form part of and be one river;

13. “Coast” is not defined in the BFMP, or the Act. The regulations do regulations do, however contain a definition of “coastline” in Reg 3:

“"coastline" means-

- (a) except in relation to the mouth of a river, an imaginary line drawn along the coast at the Highest Astronomical Tide; or
- (b) in relation to the mouth of a river, an imaginary line, contiguous with the adjacent coastline, drawn across the mouth of the river;”

THE COASTLINE: AN EXCURSION

14. Section 27(3) of the Act, it will be recalled, provides that where a word or phrase used in a management plan is not defined in that plan or the Act, but is defined in the Regulations, then that definition applies to the word or phrase in the plan. Accordingly, if the BFMP in clause 8, or in its definition of “river mouth” had referred to “coastline”, the Regulations’ definition of “coastline” would have come into play. As it happens the BFMP nowhere uses the word “coastline”: clause 8 and the definition of “river mouth” employ the word “coast”. Schedule 3(d), just to be different, speaks of the “shore”.
15. Mr Rowbottam, counsel for the complainant, mounted an argument that rode over any distinction between the words “coast” and “coastline”. His argument went as follows. The definition of “coastline” in Regulation 3(3) provides two means of establishing a line. The case being one concerning the mouth of a river, Reg 3 (a) can be disregarded. We proceed by the means established by Reg 3 (b) which in turn refers us to the Commonwealth *Seas and Submerged Lands Act 1973*.

16. A schedule to that Act was declared by Proclamation of His Excellency the Governor-General on 4 February 1983, and published in the Commonwealth Of Australia Gazette No S 29 on 9 February 1983 (Ex 22). That Schedule provides formulae for the drawing of a baseline, being the line defining the inner limit of Australia's territorial sea. One set of formulae relates to "bays", the idea being that the baseline skips across from headland to headland of any indentation in the coastline that is a "bay" Not every indentation is: it is a matter of size and shape. Paragraph 2 of the Schedule provides:

"(2) For the purposes of this Schedule-

- (a) subject to paragraphs (b) and (c), an indentation is a bay if the distance between the lowwater marks of the natural entrance points of the indentation does not exceed 24 miles;
- (b) an indentation having one mouth is not a bay if the area of the indentation is less than that of the semi-circle whose diameter is a line drawn across the mouth of the indentation;
- (c) an indentation which, because of the presence of islands, has more than one mouth is not a bay if the area of the indentation is less than that of the semi-circle drawn on a line as long as the sum total of the lengths of the lines across the different mouths;
- (d) the area of an indentation is that lying between the lowwater mark around the shore of the indentation and a line joining the lowwater marks of its natural entrance points, islands within the indentation being included as if they were part of the water areas of the indentation.

17. Mr Rowbottam then moves on to Gordon Bay, the arm of the sea into which Perakary Creek debouches. (There are no Islands across the mouth of the Gordon Bay, so Paragraphs 2(a) and (b) govern the case.) He argues that the baseline, the coastline as defined, runs from headland to headland , from Munanampi Point in the east (the name can be read on Ex 21) to an unnamed

point on the west – Ex 16 suggests there might be a choice of two. Gordon Bay being a “bay”, the “coastline” would be miles north of the vegetation and sandbars shown in the photos and videos; miles north of anything that the eye and normal usage would consider to be the coast, or shore.

18. In my opinion Mr Rowbottam’s argument fails both on the facts and as a matter of law. First, on the facts, I am not persuaded that the Gordon Bay is a “bay” according to the criteria laid down in the Proclamation’s Schedule. I think I can be certain notwithstanding my doubts about the exact scale of the map Ex 6 (the only map that shows the whole of Gordon Bay), that the headlands, the “natural entrance points” are a lot less than 24 miles apart. (Cross-referencing the various maps, I find them to be of the close order of 12 kms apart). So Paragraph 2(a) of the Schedule is satisfied. But I am not satisfied in respect of the evidence as it bears on the requirement of Paragraph 2 (b). There is no expert evidence as to the area of Gordon Bay, nor as to the exact measure of the length of the line drawn across the mouth of the indentation. I can only use the evidence of my eyes, which suggest that Gordon Bay – a nearly symmetrical indentation, as I mentioned earlier, is shallower than the requisite semi-circle. That being so, I am not satisfied by the evidence that Gordon Bay is a “bay”.
19. Even if it were, in my judgment the baseline thus established would have no relevance to the lines pertaining to the BFMP. I am of the view that the draftsman’s use of “coast” (and “shore”) on the one hand, and, “coastline” on the other, is deliberate and purposeful. The employment of the word “coastline” in the Regulations is consistently in contexts concerned with waters *seaward* of the “coastline”(see Regs 78, 83, 89, 96, 100, 104,114, 135, 136, 141U.) The sundry Regulations thus govern the areas of the sea from their greatest landward extent – The Highest Astronomical Tide- out to sea to various distances, chosen in respect of the several fisheries.

20. Clause 8 (1) (a) of the BFMP is concerned with regulating areas landward of “the coast or a river mouth ”, a purpose dictating a diametrically different outlook from the purpose advanced in the Regulations that employ the word “coastline”. Its meaning and its calculation are irrelevant to the BFMP, and Mr Rowbottam’s argument, depending as it does on Regulation 3 (3), fails also as a matter of law.

“THE COAST OR A RIVER MOUTH”

I return, therefore, to the definitions of “river” and “river mouth” in Clause 4 of the BFMP. The history of the definition of “river” is not without interest. Under the old *Fish and Fisheries Act 1979* (repealed by the Act when it came into force in 1988) there were no management plans. The barramundi fishery was governed by the Regulations. The scheme of things can be gleaned from the judgment of Gallop J in *Mitchell v Noble* (unreported SCC No. 1096 of 1980, 14/8/81) . At page 5 of that judgment His Honour set out the then Regulations’ definition of “river” as at 30/5/80, the date when Mr Noble was found netting in the Victoria River - legally, as it turned out. Regulation 3 defined the word as follows:

“‘river’ includes creek, stream, billabong, lake and any other water course or body of water that flows, directly or indirectly into the sea, whether seasonally or consistently throughout the year.”

21. That definition is not so very different from the one presently contained in Clause 4 of the BFMP; for present purposes the most significant difference would seem to be the inclusion of “tidal arm” into the BFMP’s definition.
22. By regulations No.1 of 1983, the old definition was amended to read:

“river” includes a creek stream billabong, lake and any other water course or body of water that comprises or drains a permanent source of freshwater and flows, directly or indirectly into the sea, whether seasonally or consistently throughout the year, the lower sections of which may contain saltwater”

23. This definition is notably different from that in the BFMP, most particularly its requirement that a river drain a permanent source of freshwater. I think I must regard this 1983 definition as an act of regulatory deviance, and I might consider the omission of the “permanent source of freshwater”, together with the inclusion of the “tidal arm” in the BFMP’s definition as perhaps signifying that the draftsman of the BFMP was intending to include rather more of the waters near the margin of the sea. “River” there defined includes, it will be recalled, “... a creek...tidal arm...” The Shorter Oxford English Dictionary (3 ed 1973) offers the following for “creek”

- “1. A narrow recess or inlet in the coastline of the sea or the tidal estuary of a river; a small port or harbour; an inlet within the limits of a haven or port...
2. In U.S and British colonies a branch of a main river; a tributary river; a small stream or run 1674...” [meanings 3,4,and 5 are non-aqueous]

The Macquarie dictionary (3 ed 1997 has the SOED’s colonial usage first:

- “1. a small stream, as a branch of a river (originally of unexplored inlets, as def 2)
2. a narrow recess in the shore of the sea; a small inlet or bay...” [meaning 3 is non-aqueous]

24. If I were forced to decide which of these two meanings the word “creek” is intended to bear when used in the BFMP, I think I should choose the English, marine sense. I should make that choice notwithstanding “creek’s being an ordinary an ordinary Australian appellation of watercourses sometimes extremely unadjacent to the sea – Cooper’s Creek being perhaps the *ne plus ultra*. I should so choose for two reasons. First, that “river” does not include all inland waterways, only these which flow into the sea ; secondly because the language of the Act, Regulations and BFMP tends towards technical mariners’ usage from time to time, in which “creek” is reserved for arms of the sea, estuaries etc.

25. But I do not believe I am forced to make any such choice. In its context in the BFMP the word “creek” can comfortably accommodate both meanings. The draftsman’s idea is to comprehend all sorts of watercourses under the rubric of “river”, as long as they flow into the sea “seasonally or consistently” If Perakary Creek is not a “creek”, then I think it must be a “tidal arm”, or a “tidal arm” as well as a creek
26. Everything about the appearance of Perakary Creek in the charts, map, aerial photographs, photographs from land and from its waters, and the video tape footage suggests that it is a “creek”, a “tidal arm”: in short “a river”. It has a well marked, apparently steep -sided channel, such that net No. 4, the net about 800 metres from the open sea, was strung from mangroves trunks rooted at a higher level than the creek – higher by some metres from the creek bed – and covered the extent of the creek’s waters from bank to bank. As far as I can tell, the physical features were pretty much the same at net No. 5 (1500 m from the open sea): mangroves growing on a flattish area, and that area ending, suddenly delineated by the steep bank of Perakary Creek.
27. The presence of mangroves indicates unmistakably that those flattish areas are inundated by the tidal movements of the sea. Mr Edmeades’s opinion, which I accept, was that at the point where Perakary Creek meets the open sea, the mangrove type or types indicate that that land is inundated on every high tide not just the springs. I have no reason to believe that the situation was any different at the two points where nets No 4 and No 5 were located.
28. I can see no reason at all why this pattern of inundations should in any way affect the characterisation of Perakary Creek as a river, and, in particular, why it should affect in any way , the establishment, according to the BFMP’s definition of “river mouth” .In my judgment the “coast” is self-evidently the seaward edge of the mangroves, and the beach along that edge. In the course of the police’s visit to Perakary Creek on 29 August, Senior

Constable Cook stood on the western edge of the mouth of the Creek, and indicated with an outstretched arm where he thought “an imaginary line contiguous with the shape of the adjoining coast, bay or inlet” lay across the mouth. That line has been drawn on Ex A. In my judgment, senior Constable Cook was standing on, or near enough to, the coast, so the western end of his line an appropriate starting point to delineate the “river mouth”. However, in my view the “shape of the adjoining coast” would dictate a line heading almost due east from that starting point, not SE, or , ESE, as Cook’s line does, somewhat generously to the Defendants .Be that as it may, the river mouth is there or thereabouts. The nets were landwards of the river mouth, by approximately 800 metres, and 1500 metres respectively. “Fishing” according to the definition in s 4 of the Act includes the “...taking ...of fish...”, and in my view a separate “act” within the Meaning of S 2 of the Criminal Code, was entailed in clearing each net. For these reasons I found proved the two charges against each Defendant.

Dated this 12th day of August 2002.

R J WALLACE
STIPENDIARY MAGISTRATE