

Department of Conservation's actions concerning lease approval were unreasonable, causing stress and financial loss to complainant

Legislation	Ombudsmen Act 1975, Marine Farming Act 1982
Agency	Department of Conservation
Ombudsman	Sir John Robertson
Case number(s)	W29009
Date	1993

A marine farming company applied for lease under Marine Farming Act—farm already in existence when application made under new legislation—DOC rejected new lease on basis it interfered with public's usage—matter to go to Planning Tribunal—DOC then approved lease just before Tribunal hearing—complainants claimed the whole process unfair—Ombudsman investigated—DOC agrees to make ex gratia payment to complainants

The complainants were marine farmers who complained that they had been put to considerable and, in their view, unnecessary legal costs as a result of the actions of the Department of Conservation. The background was that the complainants had applied for a lease under the Marine Farming Act in April 1982. In November 1986 the survey plan had been approved and all conditions for the granting of the lease fulfilled. However, the lease was not executed by the Minister of Fisheries until July 1987.

In September 1989, by which time the marine farm had been 25 percent developed, the Minister of Fisheries wrote to the Minister of Conservation requesting concurrence to a number of marine farm leases, of which the complainants' was one. All these leases had been approved before 1 April 1987 when the Department of Conservation was created, but had not been executed until after that date. The concurrence of the Minister of Conservation was required following an amendment to the Marine Farming Act 1971 when the Conservation Act 1987 was enacted. Notwithstanding that the complainants' farm had been in existence for more than two years, the local Conservancy processed the request for concurrence as a new application and recommended to Head Office that concurrence should not be granted on the

basis that the 'proposed' lease would interfere unduly with the area's usage for recreational purposes and be contrary to the public interest.

At the same time as the concurrence issue was under consideration, the complainants were involved in an appeal against the proposed zoning of the area occupied by their farm as Marine 2 (Conservation), which would not permit farming. The proposal affected a number of other farms in the area and it was eventually agreed with the local Council that existing marine farms would be zoned to permit the operation within their own boundaries. However, in respect of the complainants' appeal, the Department served notice that it wished to be heard because of the outstanding issue of concurrence, and this necessitated a full hearing of the Planning Tribunal. As a consequence, the complainants were obliged to seek legal advice to ensure that their position was adequately represented before the Tribunal.

A few days before the hearing, and some two years after the request for concurrence had been made, the Minister of Conservation gave his concurrence to the lease. The Department had decided that natural justice demanded concurrence notwithstanding other considerations which would normally result in non-concurrence. In the light of this development, on the day of the hearing the Department withdrew from the case on the ground that concurrence had been granted to the lease.

The complainants considered that they were entitled to compensation from the Department for the considerable legal and other costs incurred as a result of its insistence on a full hearing of the Planning Tribunal and their complaint was directed at the Department's refusal to entertain their claim. On examination of all the facts, it became evident that had the request for concurrence been given due consideration when it first went to the Department, the decision to grant concurrence, which was eventually made after a two-year delay, should have been just as easily discernible and the complainants would have been spared the expense the Department caused them. The Department's decision to withdraw from the Planning Appeal hearing as soon as concurrence was granted confirmed that the concurrence issue was the only reason for the Department's involvement in the Planning consent.

On this basis it was concluded that the complainants had been put to unreasonable costs as a result of the Department's action in disputing the validity of the lease. The Department was invited to consider making an ex gratia payment to the complainants in recognition of the stress and costs incurred by the complainants as a result of its involvement in the planning appeal. It agreed to make the ex gratia payment.

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