IN THE MATTER OF

A MARINE LICENCE AT PORT ISAAC BAY, NORTH CORNWALL

MLA/2022/00180

LEGAL DOCUMENT

Introduction

1. I am asked to advise Save Port Isaac Bay Group in relation a 25-year marine licence that was granted in August 2023 by the Marine Management Organisation ("**MMO**") for a 100-hectare seaweed farm to be located at Port Isaac Bay, North Cornwall ("**the Site**"). I am asked to advise specifically in relation to the MMO's power in section 72 of the Marine and Coastal Access Act 2009 ("**the 2009 Act**").

Section 72 of the 2009 Act

2. Section 72 provides as follows:

> *(1) A licensing authority may by notice vary, suspend or revoke a licence granted by it if it appears to the authority that there has been a breach of any of its provisions.*
>
> *(2) A licensing authority may by notice vary, suspend or revoke a licence granted by it if it appears to the authority that—*
>
> *(a) in the course of the application for the licence, any person either supplied information to the authority that was false or misleading or failed to supply information, and*
>
> *(b) if the correct information had been supplied the authority would have, or it is likely that the authority would have, refused the application or granted the licence in different terms.*

(3) A licensing authority may by notice vary, suspend or revoke a licence granted by it if it appears to the authority that the licence ought to be varied, suspended or revoked—

(a) because of a change in circumstances relating to the environment or human health;

(b) because of increased scientific knowledge relating to either of those matters;

(c) in the interests of safety of navigation;

(d) for any other reason that appears to the authority to be relevant.

(4) A suspension under subsection (1), (2) or (3) is for such period as the authority specifies in the notice of suspension.

(5) A licensing authority may by further notice extend the period of a suspension.

(6) But a licence may not by virtue of this section be suspended for a period exceeding 18 months.

(7) On an application made by a licensee, the licensing authority which granted the licence—

(a) may transfer the licence from the licensee to another person, and

(b) if it does so, must vary the licence accordingly.

(8) A licence may not be transferred except in accordance with subsection (7).

3. Therefore, in accordance with section 72(2) and (3), the MMO can vary, suspend or revoke a licence:

    - Where any person supplied information to the MMO during the course of the application that was false or misleading, or failed to supply information; and if the correct information had been supplied the MMO

would have or would likely have either refused the application or granted the licence in different terms (section 72(2)).

- Where there has been a change in circumstances relating to the environment or human health (section 72(3)(a)).
- Where there is increased scientific knowledge relating to the environment or human health (section 72(3)(b)).
- In the interests of safety of navigation (section 72(3)(c)).
- For any other reason that appears to the authority to be relevant (section 72(3)(d)).

4. Holgate J in *R (Tarian Hafren Severn Shield CYF) v Marine Management Organisation* [2022] EWHC 683 (Admin) considered section 72 of the 2009 Act and relevantly held that the following legal principles applied:

    - The power in section 72 can be exercised by the MMO acting of its own motion. There is no need for there to be an application made by a licensee. (See paragraph 79 of *Tarian Hafren Severn Shield*).
    - The wording of section 72(3)(c) clearly allows for a "*reconsideration*" of the impact of a licensed activity. (See paragraph 127 of *Tarian Hafren Severn Shield*).
    - The wording in section 72(3)(d), namely "*for any other reason that appears to the authority to be relevant*", gives the MMO a "*very broad discretion*" to vary, suspend or revoke a licence. In using these words, Parliament did not consider it appropriate to set down an exhaustive list of matters. Given the widely ranging circumstances in which the regulatory regime applies, it is wholly unsurprising that Parliament did not seek to envisage all the situations or factors which might arise. This allows the MMO to vary, suspend or revoke a licence based on any other relevant matters too. (See paragraphs 122 -125 of *Tarian Hafren Severn Shield*).

- The flexibility in section 72(3)(d) is in line with the statutory general objective in section 2 of the 2009 Act. Under section 2(1) the MMO has a duty to exercise its functions so that the carrying out of activities in the MMO's area is managed and regulated, inter alia, taking into account "*all relevant facts and matters*". These relevant facts and matters include scientific evidence, whether available to, or reasonably obtainable by, the MMO; other evidence relating to the social, economic or environmental elements of sustainable development; and other matters the MMO may consider appropriate (section 2(3)). By section 2(2) the MMO is also empowered to take "*any action which it considers necessary or expedient for the purpose of furthering any social, economic or environmental purpose*". (See paragraph 122 of *Tarian Hafren Severn Shield*).

5. Section 72 of the 2009 Act confers a power on the MMO. The courts have also laid down several legal principles generally in relation to powers conferred by Parliament in an Act:

    - Where Parliament confers a power, the exercise of that power or performance of that duty must promote the policy and objects of the Act (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997).

    - Even where statute creates a discretionary power, a failure to exercise the power will be unlawful if it is contrary to the policy and objects of the Act: *M v Scottish Ministers* [2012] UKSC 58 at [47].

    - A power which is expressed to be performed according to what a body "*considers appropriate*" is not unfettered, but is to be exercised in accordance with the statutory purpose, or Parliament's intention, having regard inter alia to matters particularised in the statute: *R (Palestine Solidarity Campaign Ltd and another) v Secretary of State for Housing Communities and Local Government* [2020] 1 WLR 1774 at §23; *R v Tower Hamlets LBC ex parte Chetnik Developments Ltd [1998] 1 AC 858* at 873G.

    - There can be, inherent within a statutory power, an ongoing concomitant duty to consider, in good faith, whether to exercise a power (*R v Secretary*

of State for the Home Department Ex p. Fire Brigades Union [1995] 2 AC 513 at p.575 – 577).

6. Accordingly, the MMO must consider, in good faith, whether to exercise the power to vary, suspend or revoke a licence under section 72 of the 2009 Act. In doing so, the MMO must promote the policy and objects of the 2009 Act, and a failure to exercise the power will be unlawful if it is contrary to the policy and objects of the Act. In addition, the very broad discretion in section 72(3)(d) to vary, suspend or revoke for any other reason "*that appears to the authority [i.e. the MMO] to be relevant*" is not unfettered, but is to be exercised in accordance with the statutory purpose in the 2009 Act.

7. The policy and objects of the 2009 Act as a whole is clear from the general objective in section 2 of the 2009 Act, which states that the MMO must contribute to the achievement of sustainable development and must take any action which it considers necessary or expedient for the purpose of furthering any social, economic or environmental purposes.

8. The statutory purposes specifically of the marine licencing provisions in the 2009 Act are made clear from section 69 of the 2009 Act, which states that when deciding whether to grant a licence the MMO must have regard to the following considerations:

   (a) the need to protect the environment,

   (b) the need to protect human health,

   (c) the need to prevent interference with legitimate uses of the sea, and such other matters as the authority thinks relevant.

<u>The marine licence at Port Isaac Bay</u>

9. The Submission document on behalf of the Save Port Isaac Bay Group, and accompanying expert evidence, sets out a number of matters relevant to the revocation of the marine licence granted at Port Isaac Bay. These matters are relevant to the MMO's power to revoke under section 72(2), i.e. where the applicant supplied information to the MMO during the course of the application

that was false or misleading, or failed to supply information; and if the correct information had been supplied the MMO would have or would likely have either refused the application or granted the licence in different terms; and section 72(3)(a)-(d), i.e. there has been a change in circumstances or increase in scientific knowledge relating to the environment or human health, or revocation is in the interests of safety of navigation, or is justified for any other relevant reason.

10. As set out above, there is a very broad discretion and flexibility within section 72(3)(d). There does not necessarily need to be a change in circumstances since the grant of the licence in order to justify revocation of a licence; rather section 72 does allow a fresh reconsideration of the impacts of the licenced activity in light of evidence now available.

11. As also set out above, the MMO must promote the policy and objects/statutory purpose of the 2009 Act when considering whether there are relevant reasons to revoke, and whether to exercise the power to revoke. The policy and objects of the 2009 Act, which must be promoted in the exercise of the section 72 power, are the contribution to the achievement of sustainable development, which includes the MMO taking any necessary or expedient action for the purpose of furthering any social, economic or environmental purposes (see section 2 of the 2009 Act); and the need to protect the environment, the need to protect human health, and the need to prevent interference with legitimate uses of the sea and other relevant matters (see section 69 of the 2009 Act).

12. Primarily, the Submission document, and accompanying expert evidence, sets out that there is a "*high, if not inevitable*" chance that the infrastructure in the seaweed farm will fail due to the significant local wave climate at the Site and the inappropriate design approach. I note that a main part of this evidence is a draft report from Aquamoor. I have only seen a draft version of this report and I am instructed that the author has recently been taken ill. My analysis is based on the draft conclusions in this report being confirmed. Therefore, my analysis is caveated on this basis.

13. The new evidence produced shows that the Site is directly exposed to westerly swells, which is the typical direction of the largest waves. The evidence shows that wave heights at the Site currently regularly exceed 6 metres, and peak wave heights in the range of 15 metres cannot be discounted. The 6-metre wave threshold is important as this has been used by the MMO to identify which sites are suitable and unsuitable for seaweed aquaculture due to the risk of long line aquaculture infrastructure failing in such exposed coastal conditions.

14. In the present case, the evidence indicates that the design of the approved seaweed farm is not fit for purpose given this wave climate. On this basis, there would be a material risk to safety of life at sea. If moorings fail, and/or if all or parts of the infrastructure fail, there would thus be clear and obvious risks to the environment, human health and other legitimate users of the sea.

15. According to the new evidence, the application documents for the seaweed farm documents did not include a *"detailed study of the local wave climate"* and only included datasets from locations which are not comparable to the Site. This indicates that the statements in the application documents which said that there is only low risk of infrastructure failing and that such a risk would result in no impact, and which were subsequently relied upon by the MMO, may have been inaccurate and/or unevidenced and should not have been relied upon.

16. In light of this, the MMO must consider whether to exercise their power to vary, suspend or revoke the licence under section 72(2) or 72(3)(a)-(d), reconsidering the impacts of the licence in light of the current evidence. In particular, the MMO must consider using their powers because the correct information was not provided to the MMO at the time of the application; and/or on the basis of the scientific evidence now available; and/or in the interests of safety of navigation; and/or in the interests of risk to the environment, human health and other users of the sea (which clearly amount to other relevant reasons).

17. The MMO must exercise the section 72 power in accordance with the policy and objects of the 2009 Act, and a failure to exercise the power will be unlawful if it is contrary to the policy and objects of the Act. It is clearly contrary to the policy and

objects of the 2009 Act to continue to permit a licence if the activity will result in a "*high, if not inevitable*" chance of the infrastructure of the seaweed farm failing, thus causing material risks to the environment, human health and other users of the sea and failing to contribute to sustainable development. The power in section 72 is plainly intended to address situations such as this.

18. The Submission document also sets out that there were a number of deficiencies in the notice and consultation exercises for the application, contrary to the requirements of sections 68 and 69 of the 2009 Act. As stated in the Submission document, the public notice was not in place for the required length of time, the notice was not published in a manner best calculated to bring the application to the attention of any persons likely to be interested in it, and there were several inaccuracies/omissions in the stakeholder engagement log provided in the application documentation. The MMO placed reliance on what they incorrectly thought was "*extensive local engagement*". These deficiencies in the notice and consultation surrounding the application are now clear, together with complaints now from those interested persons who were unfairly not given notice or consulted properly at the time.

19. On this basis, the MMO must consider whether to exercise their power to vary, suspend or revoke the licence under section 72(2) or 72(3)(a)-(d). In particular, due to the correct information not having been provided to the MMO at the time of the application; and/or on the basis of other relevant reasons, including the lack of fairness in the process and the MMO's failure to take into account objections which would have been made apparent to the MMO had the correct procedure been followed and the right information been provided to the MMO at the time. It is contrary to the statutory purpose of the 2009 Act to permit a licence to continue where there were material failings in the notice and consultation process, such that the MMO was not aware of the extent of public objection and the substantive issues that these objections would otherwise have raised.

20. The Submission document also raises numerous other issues which are relevant to the exercise of the section 72 power, including the impact of the seaweed farm on the seascape and protected landscape, cumulative impact and effect on

habitats, and considerations of deliverability of the development. Again, these are all matters that should be taken into account by the MMO in considering whether to exercise their power to vary, suspend or revoke the licence under section 72.

Conclusion

21. On the basis of the above, the MMO must consider whether to exercise their power to vary, suspend or revoke the licence under section 72(2) or 72(3)(a)-(d) of the 2009 Act, reconsidering the impacts of the licence. This is so in particular due to the high risk of infrastructure failing,[1] the lack of notice and consultation, and other relevant reasons. A failure by the MMO to exercise the section 72 power will be unlawful if it is contrary to the policy and objects of the Act.

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Landmark Chambers

22 July 2024

[1] As referenced above, a main part of the evidence now produced is a draft report from Aquamoor. I have only seen a draft version of this report and I am instructed that the author has recently been taken ill. My analysis is based on the draft conclusions in this report being confirmed. Therefore, my analysis is caveated on this basis.