

MARINE STEWARDSHIP COUNCIL

INDEPENDENT ADJUDICATION

IN THE MATTER OF

Echebatar Indian Ocean Skipjack Tuna Purse Seine Fishery

DECISION OF THE INDEPENDENT ADJUDICATOR

1. A hearing took place on 9 August 2018 during these proceedings. A written decision was issued to the parties, following the hearing on 10 August 2018. Paragraph 4 of that decision stated that the parties were notified the adjudication phase would commence immediately, pursuant to PD 2.5.5.
2. As a consequence, WWF and IPNLF were required to sign and file with the MSC a signed costs agreement, within a prescribed timescale. WWF duly did so. Shark Project were not required to do so.
3. On 16 August 2018, the independent paralegal wrote to Mr Purves of the IPNLF as follows (emphasis added):

As a reminder, the LA has now notified the parties of an adjudication in his decision dated 10 August 2018.

The attached costs agreement will therefore need to be signed and returned by 24 August 2018, 5pm BST (i.e. 10 days from 10 August 2018).

4. On 27 August 2018, Mr Purves returned to the MSC, by emailing Ms Cheung, the paralegal, the signed costs agreement, which he had signed and dated on 23 August 2018.

5. On 28 August 2018, I made a direction as follows:

Mr Purves - your email of 27 August 2018 is noted.

Given the terms of PD 2.9.8, can I invite a formal application from IPNLF by close of business on 31 August 2018 and a response from any party who opposes their application by close of business on 4 September 2018.

6. Relevant provisions of the FCR are as follows:

PD 2.9.4 Notwithstanding the provisions of PD2.6, an objection shall not proceed to adjudication unless, within 10 days after the date on which the independent adjudicator notifies the parties that the adjudication phase will commence, the objector(s) has either:

PD2.9.4.1 Signed a costs agreement with the MSC; or
PD2.9.4.2 Obtained a waiver from the independent adjudicator in accordance with PD 2.9.6.

PD 2.9.8 In the event that, 10 days after the date on which the independent adjudicator notified the parties that the adjudication phase will commence, any objector has not either signed a costs agreement with the MSC or obtained a waiver from the independent adjudicator in accordance with PD2.9.6, the objection in respect of that objector shall be considered to have been dismissed.

PD2.10.1.5 In exceptional circumstances, the independent adjudicator may consider and grant an extension to any of the time limits set out in these procedures.

7. A formal application was made on behalf of IPNLF on 31 August 2018. Two points were essentially developed. The first was that whilst there was a requirement to sign the cost agreement within 10 days of the notification of adjudication, there was no requirement to file the signed document with the MSC within the same timescale (or at all, presumably). Secondly,

an argument based upon what English lawyers would call “relief from sanctions” was developed.

8. The Fishery Client, Echebatar, filed and served submissions on 4 September 2018, noting there was nothing exceptional about the oversight on the part of Mr Purves and inviting me to dismiss the application.
9. The CAB, Acoura responded with detailed submissions on 31 August 2018. The covering letter appeared to take a broadly neutral approach, but attached a document entitled “further reasons” which argued strongly against IPNLF’s application. I need not set out all the points raised, but do note the following submission was made:

PD 2.10.1.5 is a power to extend time, exercisable only in exceptional circumstances. It is not a power to grant relief from sanction. Powers must be used for their proper purposes. The CR must be read as a whole, and consistently with the clear terms of PD2.9.8, and PD 2.9.8.2 which provides for only a limited form of relief for specific circumstances. For these reasons, PD 2.10.1.5 does not contain a power for the IA to grant relief from sanction.

10. Confusingly, however, the CAB goes on to explain why PD 2.10.1.5 should not be exercised. It was submitted:

The CAB cannot support that pressures of work are adequate to exercise the power in PD 2.10.1.5 in this context. Pressures of work impact everyone, most of the time. This is not exceptional, nor practicable. Rightly, it is not asserted that they are exceptional. PD 2.10.1.5 thus does not apply.

11. There were further exchanges on 5 September 2018 which I need not detail, but I have read.
12. I am prepared to grant IPNLF’s application for the following reasons.
13. First, I reject IPNLF’s submission that it was sufficient to sign the document on 23 August 2018 but not file it with the MSC. This is an absurd interpretation of a common sense provision. The language is clear when it states twice: “*signed a costs agreement with the MSC*”. If

the document is not returned to the MSC within the required period, how can there be an agreement with the MSC?

14. Secondly, I am not prepared to import into the adjudication process, even by analogy, the concept of “relief from sanctions”, the terms of the English Civil Procedure Rules and the case law which interprets and explains these matters. This is not formal litigation.
15. Thirdly, I am entirely persuaded that PD 2.10.1.5 applies. It applies to “any of the time limits set out in these procedures.” Within the procedures is the time limit in respect of the costs agreement. The CAB’s submissions that only the MSC can grant a variation to this time limit is wrong and seeks to limit the powers of the Independent Adjudicator and unduly burden the MSC, when it is wholly unnecessary. I therefore exercise the power contained in PD 2.10.1.5. I find exceptional reasons do exist. As the parties have pointed out, there is nothing exceptional about Mr Purves being busy on 24 August 2018 which has contributed to his oversight, however, it would be exceptional for an objector who has been involved in an objection for months, and who has already attended one hearing and invested significant time and energy in formulating objections, which I have accepted, to be barred from the objection process because of a delay of around one working day in filing the costs agreement. That would be demonstrably unfair, and therefore exceptional.
16. This relatively detailed decision and the amount of written work expended by two of the parties has been largely unnecessary and disproportionate. I repeat, once again, that the overly legalistic approach adopted is not consistent with the purpose of the MSC objection adjudication process.

John McKendrick QC
Independent Adjudicator
7 September 2018