

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 23/2005

MOTION NO. 14/05

**BEFORE: THE HON MR JUSTICE P. HARRISON, J.A.
THE HON MR JUSTICE PANTON, J.A.
THE HON MRS JUSTICE McCALLA, J.A. (Ag.)**

BETWEEN: D.Y.C. FISHING LIMITED	APPELLANT
AND MINISTER OF AGRICULTURE	RESPONDENT
AND AQUACULTURE JAMAICA LTD.	1ST INTERVENER
AND B & D TRAWLING LTD	2ND INTERVENER
AND WADWALD KNIGHT	3RD INTERVENER

**R.N.A. Henriques, Q.C., Christopher Dunkley and Marina Sakhno
instructed by Cowan Dunkley & Cowan, for the appellant**

**Lord Anthony Gifford, Q.C. and Walter Scott instructed by
Chancellor & Co. for the applicant/2nd intervener**

**Mrs. Nicole Foster-Pusey & Miss Annaliesa Lindsay instructed
by the Director of State Proceedings for the respondent**

April 20, 21, 22, & May 25, 2005

HARRISON, J.A:

This is an application to this Court to review its order made on March 18 2005, granting an injunction restraining both the second intervener B & D Trawling Ltd ("B&D") from applying for health certificates and the Competent Authority of the Ministry of Agriculture ("the Competent Authority") from granting such certificates to B&D for

the export of conch meat prior to the determination of the appeal herein.

The Court had then granted liberty to the parties to apply for such review in the event that new evidence became available.

This new evidence was placed before this Court by means of affidavits and numerous faxed photocopies of documents from sources outside the Island.

These are interlocutory civil proceedings.

Rule 30.5(3) of the Civil Procedure Rules, provides for the reception of photocopies of documents exhibited to affidavits. The Rule reads:

"(3) Clearly legible photocopies of original documents may be exhibited provided that the originals are made available for inspection by the other parties before the hearing and by the court at the hearing."

This Court repeatedly, during this hearing, commented on the absence of the originals. All parties at this hearing utilized photocopies without the production of the originals.

These being civil proceedings and there being no objection raised to the reception in evidence of the photocopies of the originals by any party herein, this Court regarded the parties as consenting. No allegation of fraud was made.

The product in question, namely, frozen conch meat, of the species, *strombus gigas*, processed, but not by European Union standards, was shipped from Jamaica by B&D in 2001, in three containers:

KNLU 471 5997 (966 cases) on October 10 2001
KNLU 471 8363 (966 cases) on November 13, 2001
both to Martinique and
KNLU 477 1594 (818 cases) to Guadeloupe

The Competent Authority on December 4 2001, cancelled the issued health certificates for the said product and ordered that B&D return the said cancelled certificates as also the product. The European Union was advised of the cancellation and the authorities in the French islands of Martinique and Guadeloupe were also advised and instructed to return the products in question.

B&D Trawling was also ordered by the Competent Authority to return the said containers to Jamaica and it undertook to do so.

Containers KNLU 4715997 and 4718363, with 912 and 966 cases respectively, were re-consigned to B&D on March 29 2002, and loaded and shipped on board PONL Trinidad, at Fort de France, Martinique, destined for Kingston, Jamaica, via Port of Spain, Trinidad. The bills of lading from the shipper in Martinique named B&D as the consignee. The ownership of the cargo was effectively residing in B&D.

Container KNLU 477 1594 with 818 cases was re-consigned to the "Veterinary Services Division, Ministry of Agriculture, Hope Gardens, Kingston 6, Jamaica," on April 10 2002, from Guadeloupe.

In Trinidad the said containers were off-loaded.

Invoices from a company, Logos Distributors Ltd. of 1A Stanmore Court, Port of Spain, Trinidad, exhibited to the affidavit of Roderick "Bunny" Francis dated April 26 2005, reveal that the frozen conch in,

- (1) container No. 4771 was transferred to container No. SVDU 4771155
- (2) container No. 4718363 was transferred to container No. TRIU 8457818 and
- (3) container No. 4716997 was transferred to container No. TRIU 8462761

Exhibited also to the affidavit of one Carlos Navarro dated April 7 2005, was a fax sheet headed "Beaver Street Fisheries Inc. of Jacksonville, Florida", dated April 18 2002, from one Carlos Sanchez and "Attn: Roderick Francis". Carlos Navarro is the owner and director of Logos Distributors which sometimes "make arrangements for shipment of seafood through our ports in Trinidad to several destinations", on behalf of Beaver Street Fisheries Inc.

This exhibit describes the shipper as "Logos Distributors Ltd." the consignee as "Pescados Mexicanos SA. ... Progreso, Yucatan" and the port as "Port Progreso, Yucatan, Mexico."

The Navarro affidavit also exhibited:

- (1) Bill of Lading designating "Logos Distributors" as shippers and "Pescados Mexicanos, Progreso" as consignees; vessel "Poni Houston" and the port of discharge as "Vera Cruz Mexico" and
- (2) Cargo manifest.

Both documents, show the cargo as the said containers of frozen conch, albeit with gross weight of 21,470 lbs each, which differs from the weight when first shipped from Jamaica.

Exhibited also to the said affidavit of Carlos Navarro and which he said he received from Pescados Mexicanos S.A. de CV were:

- (1) Sanitary permit to import dated May 14 2002, issued to Pescados, Mexicanos S.A. De C V in respect of "Frozen white conch - 53,925 kg, monetary value \$142,639.35". This permit was issued by the Yucatan State Government, Department of Health Regulation, Goods and Services, Foreign Trade, and signed by Dr. Jorge Carlos Rios Cavinn Patron, Director.

This permit required the presentation of the original certificate issued in Jamaica dated October 22, 2001 and the veterinary certificates Nos. 2002/02 (Martinique) and HA/01/02 (Guadeloupe) and

- (2) Customs Order in respect of the importation on May 13 2002, by Pescados Mexicanos S.A. De C V, Progreso, Yucatan, of 3 containers No. TRIU 8457819, TRIU 8452761 and SUDU 477115-5 sent by Logos Distributors Ltd., Port of Spain, Trinidad. Duty paid "\$446,586.10" on May 17 2002. Attached were copies of "commercial invoices, original of health permit subject to import No. 231001100442, 'certificates' from the Ministry of Agriculture Nos.

2002/01, 2002/02, HA/01/02, bill of lading of origin and shipping document ..."

This documentation reveals that the conch in question in the said three containers was probably wrongly received by Pescados Mexicanos in Yucatan, Mexico. This sale was in breach of the order made by the Competent Authority and the undertaking by B&D to return the conch to Jamaica.

There were clear irregularities in the nature of the documents and discrepancies between them. These documents were however, utilized to effect the importation of the said conch into Mexico.

The "health certificates" were no more than passes. No valid original health certificate from Jamaica could have been tendered to the Mexican authorities. They were cancelled by the Competent Authority in December 2001.

B&D In defiance of the Competent Authority since December 2001, refused to return the "four (4) health certificates issued to your company ... cancelled with immediate effect ..." despite being directed to do so, by the Veterinary Services Division of the Ministry of Agriculture by letter dated December 4 2001.

Roderick "Bunny" Francis, managing director of B&D in his affidavit dated January 11, 2002 as his reason for not returning the said certificates, said in paragraph 17:

"... it became unnecessary to return the certificates as they were cancelled."

The entire state of affairs does no credit to the Jamaican authorities concerned.

In all the particular circumstances of the case and the documentary evidence exhibited, the injunction should be discharged. The 2nd intervener may apply to the proper authorities in pursuance of its trade.

There should be no order as to costs.

PANTON, J.A.

1. I agree that this application by B and D Trawling Ltd. (hereinafter, B and D) should be granted, and that the order of March 18, 2005, ought to be varied to permit B and D to apply for health certificates. I also agree that there should be no order as to costs.
2. On February 10, 2005, Reid, J. ordered the release of B and D from an undertaking given not to apply for health certificates in respect of the export of conch from Jamaica. D.Y.C. Fishing Ltd. (hereinafter, DYC) applied to this Court for that order to be stayed pending the hearing of an appeal from the judgment of Reid J. On March 18, 2005, this Court granted the stay. However, B and D was given liberty to apply for a review of the order if B and D were to find itself in a position to provide evidence as to the proper disposition of the conch that had been improperly exported.

3. At the heart of the Court's order of March 18, 2005, was the fear of the conch finding its way back into Jamaica, and contaminating future exports of the product. Such an eventuality would clearly jeopardize the country's reputation in respect of the quality of the product exported.

4. B and D has now provided some evidence of what has happened to the conch. This evidence has resulted from the visit of B and D's managing director to Trinidad on April 4, 2005. There, he met with one Carlos Navarro, managing director of Logos Distributors Ltd., agent of Beaver Street Fisheries Inc., the latter being the original purchaser of the conch improperly exported by B and D.

5. Mr. Henriques submitted that no evidence has been forthcoming from Beaver Street Fisheries Inc., although that entity ought to be in a position to bring clarity to the proceedings. He also submitted that, having examined the documents, there is a big question mark as to the true situation.

6. In my opinion, Mr. Henriques' submissions are to be viewed amid the following considerations –

1. Beaver Street Fisheries Inc., is not subject to the jurisdiction of this Court, at this time;
2. there is no evidence that B and D has any controlling influence over Beaver Street Fisheries Inc.,
3. counsel for the respondent Minister of Agriculture is of the view that the documents appear to be genuine;
4. there is no allegation that the documents are fraudulent; and

5. the proceedings in this suit, prior to this point in time, seem to have been conducted on all sides on the basis of documents that are in a similar state to those used in this application.
7. In the light of the foregoing, I am of the view that the documents are not only admissible but, on the evidence available at this stage, they may also be relied on. These documents show that the product, which is the subject of this suit, was deposited in Mexico. There is, therefore, no longer a basis for the fear of contamination in Jamaica; nor is there any further need for the Court to prevent B and D from applying for health certificates for the purpose of exporting conch.

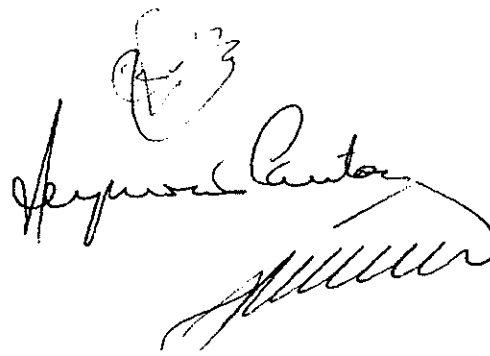
McCALLA, J.A. (Ag.)

I have had concerns about the state of documents exhibited in this matter having regard to the provisions of the Civil Procedure Rules 2002.

However, as there is no allegation of fraud, I am in agreement with the reasoning and conclusion of my brothers Harrison and Panton, JJA, that the injunction ought to be discharged.

ORDER

1. The injunction is discharged.
2. The 2nd intervener is at liberty to apply to the competent authority for health certificates.
3. No order as to costs.



Handwritten signature of Raymond Panton, with a circled '13' above it.

