IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO M-32 OF 2000

IN THE MATTER OF D Y C FISHING LIMITED

VS

MINISTER OF AGRICULTURE

Summons to set aside exparte Order made 2000 March 31.

Heard:- 2000/03 31, 2000/05/31; 2000/06/01; 2000/06/05; 2000/06/06.

Mr. L. Robinson and with him Miss N. Foster and Ms. J. Crawford instructed by Director of State Proceedings for the Applicant.

Mrs. P. Benka-Coker, Q. C., and C. Piper instructed by Piper and Samuda for the Respondent D. Y. C. Fishing Limited.

ELLIS, J.

The Respondent D. Y. C. Fishing Limited applied for an Order that the Minister of Agriculture be made available for cross examination on his affidavit.

Mrs. Benka-Coker, Q. C. argued that the application should be granted because the Minister's Affidavit conflicted with that of Frank Cox. Also she argued that the stay was not the inhibitive factor in the Minister not being able to implement the statutory requirements.

Mr. Robinson submitted that the Minister's affidavit is not in answer to that of Frank Cox of March 2000. The Minister's affidavit, he argued, grounds the application to set aside the paragraph 3 of the Order dated 2000/5/31.

Moreover, the affidavit does not deal with the substantive Order.

Reference was made by Mr. Robinson to the case of **O'REILEY V MACKMAN [1983] A. C. 237** and paragraph 8-010 at page 151 of Judicial Review: Law and Procedure by Richard Gordon Q. C. In O'Reiley vs McMan Lord Diplock in general did say that cross examination on affidavit should be allowed when the justice of the particular case so requires.

But in my opinion justice must have a peg in which to hang; it does not

dwell invacuo.

I am not convinced that the cross examination of the Minister would be of any relevance to the application to lift the stay referred to.
In my discretion I therefore refused the application to have the Minister present for cross examination. In so doing I find support in a passage in the above cited text book at page 151 paragraph 9-010. It is, "Notwithstanding the generality of this statement (**Lord Diplock's Statement)** there have been indications (both pre and post **O'Reiley v Mackman)** that the Court will be slow to permit cross examination under **Order 53."** And see also **R V Janner [1983] 1W.L.R. 873. and George v Secretary of State for the Environment [1979] Local Government Rep. 689.**

This is an amended Summons to set aside an Order made on the 2000 March 31. The Summons was amended pursuant to leave granted by me on 2000 May 31 .

In that Order leave was granted to apply for Orders of Prohibition, Mandamus and Declarations. At paragraph 3 of the Order all actions and

proceedings of the Minister of Agriculture and all or any Division of The Ministry of Agriculture in respect of the issuing of quotas under the **Fishing Industries Act 1975**, and the **Fishing Industry (Conservation of Conch) (Genus Strombus) Regulations, 2000** are stayed until the hearing for Prohibition Mandamus and Declarations.

Four grounds were put forward and argued for the setting aside of the Order:

They are:-

(1) On a proper construction of **section 564C (11)** (a) of **The Judicial Review Rules 1998** there were no existing proceedings connected with the application upon which a stay could take effect, consequently the Court had no jurisdiction to make the Order.

(2) The impugned regulations must be presumed to be valid until they have been declared invalid by a court of competent jurisdiction. It was therefore in appropriate for the Court to make an Order which had the effect of conferring rights in the applicant/respondent in contraventionof the regulations.

(3) The learned Judge by granting paragraph 3 of the said Order, erred in law, as the intended effect of the said Order is to grant injunctive relief against the Crown in contravention of **section 16 of The Crown Proceedings Act** and no jurisdiction is conferred by the provisions of the **Judicial Review Rules 1998** to grant injunctions against the Crown.

(4) The effect of paragraph 3 of the Order is to preclude the issuing of quotas under the **Fishing Industry (Conservation) of Conch (Genus Strombus) Regulations 2000** resulting in irreparable damage to the national economy and the livelihood of thousands of persons employed in the Conch Industry.

Mr. Robinson in his argument on ground 1 referred to **The Court of Appeal Judgment of 1999 July 01 in Natural Resources Conservation Authority vs Seafood and Ting International Limited and D. Y. C Fishing Limited.**

The Court of Appeal in that case held that the Minister of Agriculture had no power under any statute or any authority otherwise to assume the right to issue permits or to regulate quotas relevant to the harvesting of Conch. That disability in the Minister was sought to be remedied by Regulations made on

2000 March 20, and 2000 May 09. It was declared that the harvesting of Conchs would be started on 2000 April 01 subsequent on the promulgation of legislation.

The applicant **D.Y. C. Fishing Limited** challenges the vires of the regulations of 2000 March 20 made under the Fishing Industry Act. It does so by seeking to prohibit the making of the Regulations (**see paragraph 2 of the Notice to Apply for Leave).** Mr. Robinson made reference to **paragraphs 21, 24, 28, 45 and 56 of Frank Cox's affidavit and paragraph 1 of the grounds of relief** to emphasize his contention that the vires of the Regulations are being challenged. It was his submission that **S.564C 11(a) of the Judicature (Civil Procedure Code) Amendment) (Judicial Review) Rules, 1998** was the section under which paragraph 3 of the Order of Orr, J. was made. The Court is only empowered to make an order to stay thereunder in circumstances where there are proceedings, in Court or before a tribunal connected, with the application.

The case of **Minister of Foreign Trade vs Vehicles and Supplies (1991) 39 W.I. R. (J.C.P.C.) 270** was cited and relied upon in support of the submission.

Ground 2

The submission here is that subsiduary legislation must be presumed to be valid unless and until it has been declared invalid by the court. It is therefore inappropriate for a Court to make an order based on the invalidity of the subsiduary legislation before that invalidity has been determined. If the Regulations made under the Fishing Industry Act are valid the Minister cannot be prevented from acting thereunder for the issuance of quotas.

Since the applicant D.Y.C. Fishing Limited argued that the Regulations were ultra vires the Court must have granted the stay on the ground that the regulations were ultra vires. If the stay was not granted on that ground then there was no basis for a stay of the Minister's executive action under the Regulations.

As to the presumption of the validity of subsidiary legislation Mr. Robinson cited the case of **Reg. v Transport Secretary Exp. Factortame Limited (1990) 2 AC 85 and the dicta of L.J.J. Reid, Morris of Borth-y - Gest and Diplock at page 141 letters C - F.**

Ground 3

The contention here is that the effect of the Order by Orr J. is to grant an injunction against the Crown. Such a grant is in violation of S.16 of The Crown Proceedings Act. The Rules as to Judicial Review of August 5, 1998 have not changed the substantive law in **S. 16 of The Crown Proceedings Act.**

They could not do so since those rules deal with procedure only. (**see Judicature (Rules of Court) Act S. 14).**

Ground 4

If a stay is granted an application for leave to apply for Judicial Review and the grant will affect 3rd parties, the Court should apply the normal

principles relating to the grant of interlocutory injunctions.

The Judge did not consider the effect of his stay upon 3rd parties and how the stay would affect the national economy. If he had done so the balance of convenience would have favoured a refusal of the stay.

On this ground, the following were cited **R v Inspectorate of Pollution 1994 1W.L.R. 570 at 573 D.** and a passage from the text **Judicial Review Law and Practice by Richard Gordon Q.C. at pp 154-155.** Mrs Benka-Coker, Q.C. for D.Y.C. Fishing Limited submitted that there are no new material before this tribunal which were not before Orr J. The judge is presumed to know the law and no circumstance has been raised to show otherwise.

The Court's discretion to set aside the stay is properly exercisable on the new facts introduced in the Minister's affidavit. She therefore submitted that those new facts must be looked at in the light of the two (2) affidavits of

Frank Cox. She argued that material facts as used in Minister of Foreign Affairs' case did not contemplate law as new material. New material had to be the introduction of new evidence which had not been placed before the Court which granted leave.

Mrs. Benka-Coker's further arguments and submissions may be distilled to say:-

(i) the stay at para 3 of the Order of 2000 March 31 should not be lifted. It should not be lifted because a stay in the nature of injunctive relief may be granted in cases of Judicial Review.

(ii) **Section 16 of The Crown Proceedings Act** does not provide immunities for officers of the Crown in proceedings for Judicial Review.

(iii) The Crown Proceedings Act has no relevance to these proceedings.

(iv) The grant of leave to go for Judicial Review has not been challenged only that paragraph which stays executive action.

(v) Reliance was placed inter alia on the cases of **R. v Secretary of State for Education and Science, ex parte Avon County Council (1991) 1All E.R. 282. and M v Home Office (1993)3All E.R 537.**

I did not agree with those submissions.

In the light of the Minister of Foreign Trade vs Vehicles and Supplies , law as well as facts can be new material to found reason for setting aside an ex parte Order.

I do not hold that in this jurisdiction, injunctive relief or Orders which have that effect can be granted against the Crown. Section 16 of The Crown Proceedings Act prevents any such order. I am not pursuaded that mere Rules of Court, which our Judicial Review Rules are, can supercede the substantive law contained in S. 16 of The Crown Proceedings Act.

The English decisions cited are of no avail since they turned on the Section 31 of the 1981 Supreme Court Act and the English obligation to The European Community.

I therefore concluded as I did and made the Order lifting the stay granted under paragraph 3 of the Order made 2000 March 31.