

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 122/2010**

**APPLICATION NO 186/2010**

<b>BETWEEN</b>	<b>DYC FISHING LIMITED</b>	<b>APPLICANT</b>
<b>AND</b>	<b>THE MINISTER OF AGRICULTURE</b>	<b>RESPONDENT</b>
<b>AND</b>	<b>B &amp; D TRAWLING LIMITED/ RODERICK FRANCIS</b>	<b>INTERESTED PARTY</b>

**Christopher Dunkley instructed by Phillipson Partners for the applicant**

**Lackston Robinson instructed by Director of State Proceedings for the respondent**

**Abraham Dabdoub instructed by Dabdoub Dabdoub & Co for the interested party**

**11 and 12 November 2010**

**IN CHAMBERS**

**MORRISON JA**

[1] This is an application by the applicant for the following orders:

- "1. That the verification of Catch Certificates by the Fisheries Division of the Ministry of Agriculture and the grant and issuance of Export Health Certificates by the Veterinary Services Division of the Ministry of Agriculture in relation to any fishery products landed by the MV Rajmilour and or the MV Brice be stayed until the hearing of this appeal or further **Order**.

Or alternatively

That the Honourable Minister of Agriculture through the Fisheries Division and the Veterinary Services Division is hereby restrained by **Injunction** from verifying any catch certificates or granting and issuing any Export Health Certificates in relation to any fishery products landed by the MV Rajmilour and or the MV Brice be stayed until the hearing of this Appeal or further **Order**.

2. Such further relief as this Honourable Court of Appeal deems just.
3. Costs to be costs in the Appeal."

[2] In this judgment, I will refer to the applicant as 'DYC', to the respondent as 'the Minister' and to the interested party as 'B & D'.

[3] DYC appeals to this court (by leave of the judge below) from an order made by Brooks J on 7 October 2010 refusing its application for similar (though not identical) relief to that which it now seeks, pending the hearing and disposal of DYC's application for judicial review of the decision of the Minister on 20 June 2008 to allow an appeal by B & D from a refusal by the Licensing Authority under the Fishing Industry Act 1976 ('the Licensing Authority') to grant a license to B & D to fish for conch for the 2008 fishing season. As a result of the appeal having been allowed by the Minister, a provisional licence to fish was duly issued to B & D on 24 June 2008 (to expire on 31 August 2008). The substantive application for judicial review is now fixed for hearing in the Supreme Court in the week of 20 June 2011.

[4] The matter has a complicated history, which I will nevertheless attempt to state briefly, insofar as it is relevant to the application that is now before me. On 29 September 2008, Daye J granted leave to DYC to apply for judicial review of the Minister's decision referred to in the previous paragraph and on 13 October 2008 DYC filed a fixed date claim form for judicial

review accordingly. On 7 October 2008, the Minister filed an application to set aside Daye J's order granting leave and the hearing of this application was completed before Marsh J on 5 January 2009, when judgment was reserved. On 16 July 2010, Marsh J eventually made an order refusing the application to set aside the grant of leave to apply for judicial review.

[5] On 19 August 2010, DYC filed an application for court orders in the following terms:

"a) The verification of Catch Certificates by the Fisheries Division of the Ministry of Agriculture and the grant and issuance of Export Health Certificates by the Veterinary Services Division of the Ministry of Agriculture in relation to any fishery products landed by the MV Rajmilour and MV Brice for this 2010 Conch fishing season be stayed until the hearing of this Judicial Review;

Or alternatively

b) the Honourable Minister of Agriculture through the Fisheries Division and the Veterinary Services Division is hereby restrained by Injunction from verifying any Catch Certificates or granting and issuing any Export Health Certificates, in relation to any fishery products landed by the MV Rajmilour and MV Brice for this 2010 Conch fishing season until the hearing of this Judicial Review."

[6] This application was heard by Brooks J on 7 October 2010, when the learned judge took the view that there was no evidential basis for the grant of the stay sought by DYC: "There is nothing before the Court to demonstrate that it would not be acting in vain were it to order a stay, and this Court does not act in vain". The application was accordingly refused and the judge very sensibly used this opportunity to make case management orders for the hearing of the substantive application for judicial review, including an order for standard disclosure by each party by 30 November 2010 and an order fixing the hearing of the application for 20 June 2011, before a judge alone in open court.

[7] On 21 October 2010, DYC filed its appeal from Brooks J's order on the following grounds:

- "1. Leave to proceed to Judicial Review herein was granted by the Honourable Justice Daye on September 29<sup>th</sup>, 2008.
2. On October 7<sup>th</sup>, 2010 Claim # HCV 04444/2008, was heard by the Honourable Mr. Justice Brooks wherein case management Orders were made. His Lordship also heard contemporaneously an application for a stay of the Respondent Minister's actions or Injunction which application was heard and refused. Leave to appeal was granted;
3. On hearing the Applicant/Claimant's complaint and application for a stay or Injunction, the Learned Judge in Chambers having just made case management orders was seized of the fact that no affidavit from the Respondent Minister in response to the application at issue was filed or before the Court;
4. The Learned Judge in Chambers erred in that having enquired whether subsequent to the first hearing date of August 25<sup>th</sup>, 2010 there were further instances/breaches of the law, placed the sole burden on the Applicant/Claimant to put evidence before the Court in circumstances where details of the administrative process complained of are in the sole custody of the Respondent and his Ministry;
5. The first opportunity for the Applicant/Claimant or the Court to be aware of the evidence of which the Learned Judge enquired, would be when the Respondent Minister complies with standard disclosure ordered by November 30<sup>th</sup>, 2010 in compliance with case management Orders, by which time irreparable harm may have been done to the Seafood Industry and consequently the Applicant/Claimant's interest;
6. The Learned Judge in Chambers, in refusing the Applicant/Claimant's Application therefore wrongly exercised his discretion by otherwise failing to order an affidavit in answer;
7. That this untenable state of affairs has been brought to the attention of the relevant authorities on several occasions without response;
8. There is a clear and imminent danger that the Respondent Minister and his Ministry may be in breach of the law and that without a

response from them and no stay of their actions in place, product may be exported from Jamaica in contravention of the law and to the Country's detriment."

[8] Before me yesterday, Mr Christopher Dunkley, who has appeared for DYC at every stage of these proceedings, in answer to my question, stated that he did not dissent from the learned judge's assessment of the evidential position (see para. [6] above). However, Mr Dunkley contended strongly that, in the absence of an affidavit or any material from the Minister setting out the facts, the judge had exercised his discretion wrongly, given that the first opportunity that DYC will have to be aware of the true position (in other words to fill the evidential gap) will be when the Minister complies with the order for standard disclosure on or before 30 November 2010. By this time, irreparable harm may have been done to the seafood industry and to DYC's interests. There was therefore, Mr Dunkley submitted, a "clear and imminent danger" that the Minister may be in breach of the law and that without any response from the Minister or a stay of B & D's actions in place, product may be exported from Jamaica in contravention of the law and to the country's detriment. Mr Dunkley referred me to the case of ***R v Ashworth Special Hospital Authority*** [2003] 1 WLR 127, to make the point that the court does have the power to make an anticipatory order in the appropriate circumstances. He also referred to the obligation on the Crown in public law matters to have regard to the "duty of candour".

[9] For the Minister, Mr Robinson very helpfully took me through a brief history of this litigation and pointed out that the application for a stay that was now being made bore "absolutely no relationship" to the original application for judicial review, in respect of which

leave was granted in 2008 and which has yet to be heard. He therefore submitted that the court had no jurisdiction to entertain this application, as DYC was in fact applying for a stay/injunction without there being any substantive proceedings to ground it.

[10] For D & B, Mr Dabdoub made a similar point, submitting that DYC's current application did not relate to and was not grounded in either a cause of action or a claim. In any event, Mr Dabdoub pointed out, the conch season had already ended on (31 August 2010) and there was therefore no scope for a stay or an injunction in these circumstances.

[11] The application for a stay before Brooks J was made on the basis of rule 56.4 (9) of the Civil Procedure Rules, which provides as follows:

"Where the application is for an order (or writ) of prohibition or certiorari, the judge must direct whether or not the grant of leave operates as a stay of the proceedings."

[12] The learned judge took the view, in my respectful opinion correctly, that although that the wording of rule 56.4 (9) appears to limit the court's power to grant a stay to the hearing of the application for leave itself, the court nevertheless had ample power under section 49 (h) of the Judicature (Supreme Court) Act to grant an injunction whenever it appeared to the court to be just and convenient to do so.

[13] In ***Watersports Enterprises Ltd v Jamaica Grande*** (SCCA No 10/2008, judgment delivered 4 February 2009), Harrison JA stated that a stay pending appeal should not be

granted “unless the applicant can show that the appeal has some prospect of success”, and this is the test which has consistently been applied in this court in these matters.

[14] On a comparison of the basis upon which Daye J granted leave to NYC to apply for judicial review of the Minister’s decision made on 20 June 2008 and the application for court orders upon which Brooks J made his ruling on 7 October 2010, it seems to me that Mr Robinson’s contention, that the application that was before Brooks J (and indeed the application that is now before me) bears absolutely no relationship to the original grounds upon which leave to apply for judicial review was granted, is irrefutable. It is clear that the original application for (and the grant of) leave to apply for judicial review has to do with the Minister’s upholding of B & D’s appeal for a licence and quota allocation for the 2008 conch season, while the application for a stay which Brooks J had before him was concerned with matters arising out of the 2010 conch season. To that extent, those applications were equally clearly, as Mr Dabdoub submitted, not grounded in any substantive claim.

[15] In addition to this, it appears to me that in the light of Mr Dunkley’s very proper concession that Brooks J’s statement that there was no evidential basis in the material before him to support the grant of a stay was correct, NYC is going to be hard put to persuade this court that the judge’s exercise of his undoubted discretion should be disturbed, given the court’s traditional reluctance to disturb such an exercise, save in special circumstances (*Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191).

[16] I therefore think that NYC’s application for a stay in this case must fail at the threshold, it not having been shown that this appeal has some prospects of success. The

application must accordingly be refused, with costs to the respondent and the interested party, to be taxed if not agreed.