

NMLJ

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN MISCELLANEOUS – APPLICATION FOR JUDICIAL REVIEW
SUIT NOS. M – 069/2002 AND M – 146/2002

IN THE MATTER of application by
D.Y.C FISHING LIMITED for Orders of
Prohibition, Mandamus and Declarations.

AND

IN THE MATTER of Aquaculture,
Inland and Marine Products and
By-Products (Inspection Licensing and
Export) Act, 1999.

AND

IN THE MATTER of the Aquaculture
Inland and Marine Products and
By-Products (Inspection, Licensing and
Export) Regulations, 2000.

Regina v. The Minister of Agriculture

Ex-parte D.Y.C Fishing Ltd.

BETWEEN	DYC FISHING LTD.	CLAIMANT
AND	THE MINISTER OF AGRICULTURE	DEFENDANT
AND	B & D TRAWLING LIMITED	2ND INTERVENER
AND	WADWALD KNIGHT	3RD INTERVENER (Not Participating)

**Christopher Dunkley and Marina Sakhno Instructed by Cowan, Dunkley & Cowan
for the Claimant.**

Miss Nicole Foster-Pusey, Miss A. Lindsay and Michael Deans Instructed by Director of State Proceedings for the Respondent

Lord Anthony Gifford Q.C., Walter Scott and Miss Karen Stanley Instructed by Chancellor & Co. for the 2ND Intervener

**Heard: 17TH, 18TH, 19TH, 20TH May 2004.
15TH, 24TH, 26TH, 27TH, 30TH August, 2004.
1ST, March 2005.**

REID J,

The reliefs sought by way of Judicial Review together with the grounds in support in the amended notice dated 5TH July 2002, consists of almost twenty-five (25) pages as the summary hereunder shows. At a Case Management Conference before Hibbert J., on April 23, 24 and 25 of 2003, some issues were resolved and no longer require adjudication.

Abbreviated, the reliefs sought are:

- (a) A declaration that all application for licenses to operate processing establishments and carrier vessels received by the Competent Authority (C.A.) between 1ST April and 15TH May 2001 which did not then meet the requirement of Regulations 6 and 13 (4) were unlawfully accepted.
- (b) An Order to prohibit the CA from considering applications for licenses not in strict compliance with the provisions of the Aquaculture Act (the Act)
- (e) A declaration that all applications for licenses received during the impugned period (above) were incomplete as to deficiencies in the Inspection Audit Form and hence, unlawfully accepted.

- (f) A declaration that all licenses granted by the CA in the impugned period and which were not properly recommended by the Veterinary Committee (VC) were granted unlawfully.
- (h) A declaration that the term 'premises' in Regulation 13(4)(c) must be constructed as referring to any premises of the same legal description.
- (j) An Order to prohibit the CA from granting licenses for processing establishments and carrier, factory and freezer vessels without proper recommendation by the VC.
- (k) An order of Mandamus for inspection *de novo* in accordance with the Act and Regulations prior to renewals or new grants and for a report to the Minister of Agriculture and to the Court in turn.
- (l) An order prohibiting renewals of licenses under Section 15 of the Act, and which were issued by the CA during the impugned period (above).
- (m) An order to compel the CA to treat as applications *de novo*, those for renewal, which were issued during the impugned period (above).
- (n) An Order to prohibit renewals of existing licenses without a proper determination of the capacity of processing establishments of freezer vessels.

An order to compel proper determination of the capacities as at (n) above prior to renewal of existing licenses.

- (o) A declaration that all processing establishments must have sufficient capacities
qua
- (i) freezers
 - (ii) cold stores for raw materials (prescribed products)
 - (iii) cold stores of finished goods (awaiting certificates during batch analysis)
 - (iv) isolated storage for failed inspection
 - (v) ice-making capacity
- (q) A declaration that the Official Register at the offices of the CA is incomplete, erroneous and hence unlawfully maintained.
- (r) Mandamus for copies of the Official Register to be made available to the public on request.
- (s) A Declaration that is unlawful not to make available to prospective applicants or operators of processing establishments or vessels all results of
- (i) inspections re application for licenses
 - (ii) daily inspections results
 - (iii) batch analyses results
- (t) Mandamus to make available to operators or prospective applicants data as at (s) above.
- (u) A declaration that facilities and vessels not having undergone the 90-day compulsory monitoring but added to the new EU list of 21ST December 2001, without the VC's recommendation to the CA were unlawfully so added.
- (x) Mandamus for the VC to conduct a review and make recommendation to the CA for all licenses, renewals and new, under the Act.

- (y) Mandamus for the VC to conduct a review of new applications for requests for EU List inclusion as of April 11, 2001.
- (z) Mandamus for the VC to review all existing licenses to operate vessels and to renew only those in strict compliance with the Act and Regulations.
- (aa) Mandamus for the appointment of an independent auditor with expertise in food safety to review all HACCP Plans (Regulation 93) for inspection and recommendation prior to new or renewed issue of licenses.
- (ff) Mandamus for implementation for sampling analysis by the CA in accordance with regulations on CODEX standards.
- (gg) A declaration that post harvest handling outside of a licensed facility is unlawful
- (hh) A declaration that standards prescribed in the Act and Regulations are to be construed as minimum standards for licensing.
- (ii) A declaration that transportation of prescribed products without maintaining the proper *in transit* temperatures is unlawful.

Judicial Review being a discretionary remedy must take account of whether impugned activities were substantially unlawful or were in substance, lawful but exhibiting deficiencies in strict compliance with the Act and Regulations. To the extent that the reliefs seek statutory interpretations of the provisions a Court should selectively avoid mere academic exercises unless there are some points of public importance demanding a determination. Moreover, where orders would involve a day-to-day supervision of the activities, in this case, of the Competent Authority and by extension that of the Veterinary Committee in its role as advisor to the CA, the making of such orders would be superfluous.

Consideration must be had to orders which if granted would be detrimental to good administration having regard to events long past and the *status quo* on which the public in general, and in this case, the international community, would have relied.

The interval of two years between the grant of leave to proceed to Judicial Review and the commencement of this hearing (even without ascribing fault to the Claimant) must render certain issues, stale or otiose.

Since, however there is a difference in the interpretation as to who is a qualified engineer, a declaration is called for, notwithstanding the CA and the VC agreeing that an engineer's report would henceforth be required. Agreement on this, as well as other items, demonstrates the commitment to strict compliance with the provisions of the Act notwithstanding deficiencies that have been demonstrated.

As to relief 2 (i), instead of a prohibiting order, a declaration is hereby made that the licensing of a processing establishment requires the statement from a qualified refrigeration engineer. Such certification will provide proper determination of capacities and sufficiency of facilities postulated in reliefs 2(a), (2o) and 2(p) and determine the issue of requiring separate refrigeration, freezer and storage compartments as variations in configuration obtain.

Provision of Copies of daily inspection and batch reports

Notices:-2s, 2t

As to relief 2(s) it is hereby declared that the results of all inspections ought to be made available to prospective applicants or existing operators. This renders unnecessary an order in terms of relief 2(t)

Availabilities of copies of the Official Register and timelines of updates thereto

Notices:- 2(q), 2(r)

It is hereby declared that entries in the Official Register must be made contemporaneously with the events and copies should be made available upon payment of a reasonable fee for copying.

Compliance with the Public Health Food Handling Regulation 1998 as a prerequisite to licensing under Regulation 13 (4) – Aquaculture Regulation.

Although there was a consensus on this issue before Hibbert J., nevertheless, it is hereby declared that a valid health certificate should not only be proof of compliance but also must be displayed.

Application for Release from Undertaking

The Application by the CA & B&D to be released from the undertaking provisionally ordered by Brooks J., was by a further order in the Court of Appeal (P.T. Harrison J.A.,) made to abide the hearing of Judicial Review.

On behalf of the Claimant reiterating submissions on previous occasions it is urged that for such a Order to be made certain things should be fulfilled. The CA should *inter alia* contact Beaver Street Fisheries (BSF) to ascertain if the latter had in “defiance of the Order of the Competent Authority to return (the product) to Jamaica had so disposed of same” [and in what quantity]. The CA should also provide evidence in accordance with the Public Health Act of the destruction of consignment of 71,000 lbs of conch condemned on 22ND January 2003, in compliance with the provisions of the Public Health Act.

The Second Intervener, it was submitted, should provide evidence of its co-operation with the CA in relation to all five consignments of conch, as well as provide evidence which would support B&D’s contention that the conch had left Jamaica against the latter’s instructions.

The Court, it was further submitted, must give consideration as follows:

- a. Has B&D shown any new evidence, which could not reasonably have been available at the time it gave its undertaking.
- b. Is there now a new state of affairs that did not obtain at the time of the giving of the undertaking.

In none of the applications for discharge on prior occasions had an ostensible change in circumstances been demonstrated or had the merits of the application so appeared.

Effluxion of time, without more, could not constitute sufficient reason for the discharge.

It was urged in response on behalf of B&D that the five Export Health Certificates were cancelled because the product had been exported to the French Antilles and had to be removed from there. Although BSF had advised the CA that the shipments had been dispatched from that location to B&D in fact there had been no re-delivery to Jamaica

Moreover Mr. Francis in an Affidavit on the 21st May, 2004 offers further evidence as to the disposal of BSF of the products and the crediting of the proceeds of sale to B&D's account.

Perhaps with a little more industry this information might have been forthcoming and proffered at the last Application for Discharge before this review hearing.

Furthermore Mr. Grant for the CA had accepted that the products were disposed of outside Jamaica and the EU Territories.

While these considerations might not, as a matter of prudence, have put paid to the issue at an interlocutory hearing, in my view, propriety of reconsideration now that all the evidence is before this Court justifies closure to the issue of the conch unaccounted for.

Application of the Public Health (Food Handling) Regulations

1998 – disposal of condemned products

As to the conch destroyed by order of the Court, in my view is that it is not necessary to invoke the assistance of these Public Health regulations.

Regulation 18 (1) deals with the seizure and condemnation of food. It authorizes seizure and detention where an inspector (*inter alia*) suspects that food offered for sale to the public is unfit for human consumption and an examination to be conducted within 24 hours.

Subsection (4)

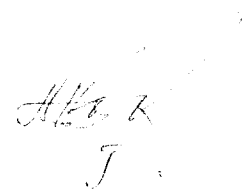
precludes access during detention by “.....any person other than a Medical Officer (Health) an Inspector or authorized person”

Subsection (5)

Provides no person shall dispose of condemned food except in accordance with instructions issued under paragraphs (2)(b)(ii)

The Provisions clearly refer to disposed of food offered for sale in the context of seizure and detention by Public Health Officials exclusively. They are irrelevant to prescribed products under the Aquaculture Regulations which if intended for export cannot be offered for sale to the public.

The significance of the credit given to the consignment, which was never returned, demonstrates that retrieval is now, for all practical purposes, impossible.

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