

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN MISCELLANEOUS
SUIT NO: M 069 OF 2002

IN THE MATTER of Applications by
D.Y.C. FISHING LIMITED for leave to
apply For Orders of Prohibition,
Mandamus and Declarations

AND

IN THE MATTER of the 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, DYC FISHING LIMITED**

Heard on June 25, 26 and July 2 and 3, 2002.

Mr. C Dunkley and Ms. M. Sakhno, instructed by Cowan, Dunkley, Cowan for the Applicant; Ms. I. Mangatal and Mr. Deans instructed by the Director of State Proceedings for the Minister of Agriculture; Mrs. Crawford of the Ministry of Agriculture (watching proceedings on behalf of the Ministry); Mr. Garth McBean and Ms. Lara Stewart instructed by Dunn Cox on behalf of Aquaculture Jamaica Limited, Intervenor.

ANDERSON: J

This is an application by the Applicant, DYC Fishing Limited ("DYC"), for leave to apply for the Prerogative Writs of Prohibition and Mandamus and for certain Declarations. Specifically, DYC seeks relief in the terms set out in their Notice of Application, in the following terms:

2. The reliefs sought are:

received by the Competent Authority between April 1st, 2001 and May 25th, 2001, which at the time limited for the filing of applications did not meet the prerequisites of Regulations 13(4) and 6 of the Regulations, were unlawfully accepted by the Competent Authority.

- (b) An order prohibiting the Competent Authority from considering any applications for licenses under the Aquaculture Act unless they are in strict compliance with all the prerequisites thereunder.
- (c) A Declaration that all applications for licenses to operate processing establishments and all applications for licences to operate freezer vessels under the Aquaculture Act, received by the Competent Authority between April 1st 2001 and May 25th 2001, which were incomplete to the extent that they failed to include statements from qualified refrigeration engineers pursuant to Regulation 15(4), were unlawfully accepted by the Competent Authority.
- (d) An order compelling the Ministry of Agriculture to gazette the Inspection Audit Form.
- (e) A Declaration that all applications for licenses to operate processing establishments and all applications for licenses to operate carrier vessels, factory vessels or freezer vessels under the Aquaculture Act, received by the Competent Authority between April 1st, 2001 and May 25th, 2001 which were incomplete to the extent that they contained any deficiencies as recorded in their respective Inspection Audit Form, were unlawfully accepted by the Competent Authority.
- (f) A Declaration that all licenses to operate processing establishments and all licenses to operate carrier vessels, factory vessels or freezer vessels under the Aquaculture Act, granted by the Competent Authority between April 1st, 2001 and May 25th, 2001, which were not properly recommended by the Veterinary Committee, were so granted unlawfully.
- (g) A Declaration that a valid Health Certificate issued pursuant to the provisions of the Public Health (Food Handling) Regulations, 1998 is the only acceptable proof of compliance therewith for the purposes of Regulation 13(4)(a).
- (h) A Declaration that the term 'premises' for the purposes of Regulation 13(4)(c) must be construed as referring to any premises of the same legal description.
- (i) An order prohibiting the Competent Authority from licensing any processing establishment without the required statement from a qualified Refrigeration Engineer.
- (j) An order prohibiting the Competent Authority from granting licenses to operate processing establishments and to operate carrier vessels, factory vessels or freezer vessels under the

Aquaculture Act without proper recommendations by the Veterinary Committee.

- (k) An Order of mandamus compelling the Minister of Agriculture and/or his representatives, officers, servants and/or agents within the Competent Authority and/or the Veterinary Committee to conduct inspections de novo in accordance with the Act and the Regulations of all of the current licensees' processing establishments and/or vessels prior to the renewal of any existing licenses or grant of any new licenses under the said Act and to prepare and submit a report thereof to the said Minister and submit said report to this Honourable Court.
- (l) An order prohibiting the Minister of agriculture and/or his representatives, officers, servants and/or agents within the Competent Authority from renewing any of the licenses under S. 15 of the Aquaculture Act, issued by the Competent Authority between April 1st, 2001 and May 25th 2001
- (m) An order compelling the said Competent Authority to treat applications to renew the said licenses issued by the Competent Authority between April 1st, 2001 and May 25th 2001 as applications de novo.
- (n) An order prohibiting the Competent Authority from renewing existing licenses or granting new licenses under the Aquaculture Act without a proper prior determination of the respective capacities of all the processing establishments or vessels that use freezers.
- (o) An order compelling the Competent Authority conduct a proper determination of the respect capacities of all the processing establishments or vessels that use freezers prior to renewal of existing licenses or grant of new licenses under the Aquaculture Act.
- (p) A Declaration that all processing establishments must have sufficient capacity with regard to:-
 - i) Freezers;
 - ii) Cold stores for the storage of raw material (Prescribed Products);
 - iii) Cold stores for the storage of finished goods (Prescribed Products) while batch(s) are being analyzed and awaiting certification for export;
 - iv) Cold stores for the storage of goods (Prescribed Products) isolated when a batch has failed inspection;
 - v) Ice making capacity if ice not source from ice manufacturer approval by the Competent Authority.
- (q) A Declaration that the Official Register established in October of 2001 and kept at the offices of the Competent Authority is incomplete, erroneous and thus is unlawfully maintained by the Competent Authority.

- (r) An Order of mandamus compelling the Minister of Agriculture and/or his representatives, officers, servants, and/or agents within the Competent Authority to make available copies of the official Register to the public upon request.
- (s) A declaration that it is unlawful **not to** make available to the prospective applicants or operators of processing establishments or vessels:-
 - i) all results of all inspections carried out on application for license;
 - ii) all results of daily inspections;
 - iii) all results of all analysis of batches of Prescribed Products
- (t) An Order mandamus compelling the Minister of Agriculture and/or his representatives, officers, servants and/or agents within the Competent Authority to make available to the prospective applicants or operators of processing establishments or vessels:-
 - i) all results of all inspections carried out on application for license;
 - ii) all results of daily inspections;
 - iii) all results of all analysis of batches of Prescribed Products

carried out under the Aquaculture Act and the Regulations.
- (u) A Declaration that all facilities and vessels, which were added to the new EU List published on December 21, 2001, upon the recommendations of the Competent Authority without having undergone a prior 90 days compulsory monitoring and testing and without having received a prior recommendation from the Veterinary Committee, were so added to the new EU list unlawfully.
- (v) A Declaration that all licenses to operate carrier vessels, factory vessels or freezer vessels, granted pursuant to the Aquaculture Act, by the Competent Authority between April 1st 2001 and May 25th, 2001, which did not at the time of their grant have valid Certificates of Sea Worthiness from the Maritime Authority of Jamaica, were so granted unlawfully.
- (w) An order prohibiting the competent Authority from granting licenses to operate carrier vessels, factory vessels or freezer vessels pursuant to the Aquaculture Act to the vessels which at the time of application have no valid Certificates of Sea Worthiness from the Maritime Authority of Jamaica.
- (x) An Order of mandamus compelling the Minister of Agriculture to direct the Veterinary Committee to conduct a review and make recommendations to the Competent Authority in respect of all new applications for licenses and applications for renewals under the Aquaculture Act in accordance with the law.

- (y) An Order of mandamus compelling the Minister of Agriculture to direct the Veterinary Committee to conduct a review and make recommendations to the Competent Authority in respect of all new applications and or requests for inclusion on the EU list as of April 11th, 2001 in accordance with the Aquaculture Act, the Regulations and EU Directives.
- (z) An Order of mandamus compelling the Minister of Agriculture and/or his representatives, officers, servants and/or agents within the Competent Authority to review all the existing licenses to operate processing establishments and to operate carrier vessels, factory vessels or freezer vessels, and renew only those licenses which are in compliance with all the requirements of the Aquaculture Act and the Regulations.
- (aa) An Order of mandamus compelling the Minister of Agriculture to appoint as an inspector, an Independent auditor with the expertise in food safety to review all HACCP Plans and make recommendations in respect thereof to the competent Authority prior to issuing of any new licenses or renewal of any existing licenses, as the case may be.
- (bb) A Declaration that all licenses granted by the Competent Authority between April 1st, 2001 and May 25th, 2001 under the Aquaculture Act, to the applicants who failed to pay, at the prescribed time, being:-
 - i) In respect of applications for licensing – on application
 - ii) In respect of inspections for licensing – in advance;
 - iii) In respect of grant of licenses – upon grant or official notification of grant of licenses;

The requisite application inspection and licensing fees, were so granted unlawfully.
- (cc) An order prohibiting the Competent Authority from receiving applications, conducting inspections and granting or renewing licenses without payment of the prescribed fees at prescribed times.
- (dd) An Order of mandamus compelling the Minister of Agriculture and/or his representatives, officers, servants and/or agents within the Competent Authority to issue Operating Certificates in accordance with the Act and the Regulations.
- (ee) A Declaration that products to which the Aquaculture Act applies ("Prescribed Products") harvested, handled or transported during the period between April 1st, 2001 and May 25th, 2002 by the vessels named LONE STAR, GERANIMO, CAPTAIN SHAWN, ROUGH RIDER, CAPTAIN FRANKLIN and CAPTAIN LAMAR, are "not fit for export", and that any Export Health Certificates issued in respect thereof were so issued unlawfully.
- (ff) An Order of mandamus compelling the Minister of Agriculture and/or his representatives, officers, servants and/or agents

within the Competent Authority to develop and implement sampling and analysis plans for Prescribed Products in accordance with the Regulations and Intention (CODEX) Standards.

- (gg) A Declaration that post-harvest handling carried out outside of a licensed vessel or a licensed processing establishment is unlawful.
- (hh) A Declaration that all the standards prescribed by the Act and the Regulations are to be construed, when it is so required, by the Honourable Minister and/or his representatives, officers, servants and/or agents within the several Divisions of the Ministry of Agriculture as providing the minimum standards for licensing thereunder of the processing establishments and vessels.
- (ii) A Declaration that transportation of Prescribed Product by air or any other means without maintaining at all times and throughout the Product, the proper temperatures being:-
 - i) -18 Celsius for frozen Products; and
 - ii) between 0 Celsius and 3 Celsius for fresh or chilled Products
 is unlawful.

Leaving aside the issue of the declarations which form the substantial part of the relief sought, it will be apparent that the Applicant seeks, at 2(b) of its application, to prohibit the Competent Authority, which has the Authority under the Aquaculture Inland and Marine Products and By-Products, (Inspection, Licensing and Export) Act 1999, (Hereinafter, "The Aquaculture Act" or "the Act") from "considering any applications for licences under the Aquaculture Act unless they are in strict compliance with all prerequisites thereunder. As will be apparent from the reliefs sought and set out above, there are several requests for leave to apply for Mandamus, and Prohibition sought is in terms of 2(b), (i), (j), (l), (n) and (w).

Ms. Mangatal for the DSP raised a preliminary point as to the timeliness of the application for leave to apply for judicial review. She submitted that the time for making application under "The Judicature (Civil Procedure Code) (Amendment) (Judicial Review) Rules, 1998" (the "new rules") had passed. She noted that section 564D (1) of the new rules provides as follows:-

"An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when the grounds for the application first arose unless the court considers there is good reason for extending the period within which the application shall be made".

She submitted that DYC was seeking to challenge the grant of licences which had been granted over one (1) year ago, and have such matters declared unlawful. To the extent that the grant of the licences was the ground upon which the application was founded, that ground had arisen more than three (3) months prior to the making of the application. The time limit referred to in the new rules, that is "promptly and in any event within three months from the date the grounds for the application first arose" applied to all reliefs sought by way of judicial review. That, in fact, once the three-month period had passed, there was by definition, "undue delay", and the application ought not to be entertained. The delay in applying for the remedies being sought was excessive given the nature of those remedies.

She further submitted that while the court had the power under 564D(1) to extend the time for making the instant applications, based upon the authorities, it is clear that it ought not to grant the extension when the grant would be detrimental to good public administration. An extension of time here would be "detrimental to good administration" as it would prejudice persons who were operating legitimately under the terms of licences previously issued to them. With respect to the application for Prohibition, it was clear that such application had to be based upon grounds which had arisen within the statutory period.

In a preliminary response, Mr. Dunkley for DYC pointed out that the primary relief sought was Prohibition, aimed at preventing the Competent Authority from renewing licences due for renewal on May 25, 2002. In his submission, these had been issued pursuant to a system which was "tainted". The issue of the

declarations sought, was only of assistance to the process, to the extent that they set out some of the bases upon which it is claimed that the licensing process is tainted. The *de facto* and *de jure* ground of the application is, therefore, not the initial issue of the licence, which was admittedly on May 24, 2001, over a year ago. Rather, the application is a challenge to the ability of the Minister of Agriculture through its agent, the Competent Authority, to issue renewals of the licences, due as of May 25, 2002.

The question of renewals is dealt with under section 15 of the Aquaculture Act. The terms under which the licences may be renewed are set out in the applicant's written submissions. These terms purportedly contemplate the continuing existence of certain conditions, as a pre-requisite to renewal. Thus, the Authority must be satisfied that the applicant "**is operating** in compliance with the provisions of the Aquaculture Act"; "that the equipment in the licensed establishment or licensed vessel **is being operated** in an efficient and hygienic manner"; "that there **has been no material change** in the circumstances which existed at the time the licence was granted, which would justify the application being treated as a new application". Indeed, Mr. Dunkley in the course of his submissions was at pains to emphasise the fact of the numerous and continuing breaches by licencees of obligations imposed upon them by the Act and the Regulations. I hope that I do not do violence to his submission in this regard if I say I understand the applicant's position to be that the continuing breaches of the Act and Regulations provide a powerful basis for prohibiting the Competent Authority from issuing the renewals of the licences.

The Applicant's written submissions cited to the court, the authority **O'Reilly v Mackman, [1982] 3 All E.R. 1124**, and the dictum of Lord Diplock to the effect that:-

The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to

the legal validity of a decision the authority has reached in purported exercise of decision making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision".

It was suggested that in the instant case, far from negating "good administration", the efforts to force compliance with the statutory provisions of the Act and Regulations, actually enhanced the efforts to have "good administration". The submissions conceded that "even where there is good reason for the delay, the court could refuse leave or where leave was granted, refuse substantive relief where the grant of relief is likely to cause hardship or prejudice or would be detrimental to good administration". It was submitted, however, that hardship ought not to be considered as a basis for the refusal of relief in the instant case, as this "would be inconsistent with the objects of the Aquaculture Act to which this application and any application for renewal relates". Further, that to refuse leave on the basis of prejudice would also "be inconsistent with the objects of the Aquaculture Act", and that such refusal would greatly prejudice the Applicant. Finally, in this regard, it was submitted that the grant of leave and the ability to proceed to seek the orders, would be consistent with the proper enforcement of the Act. Conversely, permitting the continuation of the "unlawful practices of the Inspectors, Competent Authority and Veterinary Committee" would amount to bad administration.

From these premises, Mr. Dunkley proceeds to argue that it would not be lawful to renew licences based upon "unlawful inspections, nor on statutory duties improperly carried out throughout the period. Reliance must only be placed on the conditions existing at the time of renewal". This is a proposition with which it would be impossible to disagree. It seems to me however, that even accepting this proposition as true, does not avail the Applicant in response to the preliminary objection. It is perhaps instructive to note that at 8 in the Applicant's written submissions on the preliminary objection, it is stated that "the grounds for

this application are therefore based upon the anticipated reliance by the Competent Authority (emphasis mine) while renewing the licences: a) on the existing conditions of prospective applicants for renewal processing establishments which are in violation of the Regulations; b) on the existing conditions for the prospective applicants for renewal which are in violation of the Regulations; c) on the existing conditions of the operators who are in violation of the Aquaculture Act; d) on the existing inspection process which is in violation of the Aquaculture Act and Regulations; e) on the existing licensing process which is violation of the Aquaculture Act and Regulations".

The submissions continue at 9, with the assertion that:- "These grounds **first arose** when it became apparent that the Competent Authority intended to renew the said licences relying on items above". Even if this submission is correct, it is not apparent from the written submissions or evidence presented so far, when this "intention to renew" first occurred. Assuming that the conditions that existed at the time of the initial grant justified that grant, then it would not be unreasonable to argue that, given the construct of the legislation, the intention to renew arose at the time of the grant, provided the licencees maintained the conditions which allowed for the grant in the first place. It is common ground that there could not be a judicial review challenge to the initial grant of the licences at this time. It is far too late. If that proposition is correct, then the applicant, to demonstrate that he is within time for the application, must show by presenting the appropriate evidence, when the "grounds", as referred to in 8 and 9 of the submissions, arose.

In addition, the Applicant urges the Court to find that there have been, in the words of section 15(1)(d), "material changes in the circumstances which existed at the time the licence was granted which would necessarily justify the application being treated as a new application". A list of such purported changes is thereafter given. Even if that were shown, it is not clear how this would assist the Applicant to answer the preliminary objection. There is no "act" of the public

authority within the period limited by the rules, which is the subject of the application for leave.

Ms. Mangatal for the Minister, submitted that the Applicant had failed to overcome the fact of his delay, (which based upon the authorities is "undue delay"), and that no good reason had been advanced for the court to exercise its discretion to extend the period for filing for leave to apply. In this regard, it seems to me that the Applicant's reliance upon existence of the Settlement Agreement as well as the efforts through correspondence to arrive at some negotiated resolution of the larger dispute as a basis for granting the extension of time, is not well founded. Mr. Dunkley in his submissions also suggested that the fact that there had been an attempt by another member of the industry, B & D Trawling Ltd., to apply for judicial review, and that the Applicant had sought to intervene in that case (which case did not eventually go ahead), was another reason for granting an extension of the time. The urging of the Applicant that these efforts to resolve the long-standing substantive dispute that culminated in the so-called Settlement Agreement, and the subsequent correspondence afterwards, provide a basis in law for such a discretionary extension is, in my view, unsupported by the authorities.

It was submitted by the Director of State Proceedings that **R v Stratford-on-Avon District Council and Another, Ex Parte Jackson [1985] 3 All E.R., 769**, is authority for the proposition that delay may be justified in certain circumstances, sufficient to make a grant of extension reasonable. In that case, the delay was occasioned by circumstances entirely outside the control of the applicant, the failure of the legal aid authorities to respond in a timely manner despite the applicant's best efforts to move expeditiously. However, where, as here, the delay is being justified upon the basis of the acts of the Applicant itself, it ought not to be allowed. I would hold that the Applicant's conduct, however well-intentioned, here is not sufficient in law, to make this situation parallel with the Stratford-on-Avon case.

In **Caswell and Another v Dairy Produce Quota Tribunal for England and Wales [1990] 2 All E.R. 434**, it was held that even where the court considered that there was good reason for extending the time within which to apply, it could still refuse leave or if leave was granted, it could subsequently refuse the substantive relief, on the ground that to grant it would be likely to cause hardship or prejudice or be detrimental to good administration. This derives from the fact that the remedy is a discretionary one. The Applicant's submissions to the contrary notwithstanding, I am of the view that these are real bars to the court's exercise of its discretion in favour of any extension of time.

I should also advert to **O'Reilly v Mackman [1982]** (see reference above) which was cited by the Applicant. That case, it seems to me, would be merely authority for the proposition that where a public law right may be pursued, it would be inappropriate for a remedy to be sought in private law, thereby denying public authorities of the protections afforded in public law under the judicial review process.

Both parties also referred to **R v Ministry of Agriculture Fisheries and Food and Another, ex parte Monsanto plc (Clayton Plant Protection Ltd., Intervening)**. In particular, reference was made to the section of the head note, and court's holding that neither interim relief nor judicial review proceedings were "intended for, or well suited to, inhibiting commercial activity, particularly over an indefinite, substantial period of time". I accept that this dictum is appropriate in the instant case. I should merely add that the submissions made on behalf of the Minister by the representatives of the Director of State Proceedings, were adopted by Ms. Stewart for the Intervenor, Aquaculture Jamaica, Ltd.

In his response, Mr. Dunkley sought to refer to sections of affidavits on the record, but I confess that I did not think they addressed the issue before the court which had to do with the issue of the timeliness of the application for leave. Nor

did the reference to the well-known Jamaican case of *Vehicles and Supplies v The Ministry of Foreign Affairs and Foreign Trade*, assist me further.

He also again referred to *Caswell*, distinguishing it, and suggested that the court had a discretion to extend the time and grant leave, unless it was detrimental to good administration. He urged the court to say that the issue of "good administration" had to be viewed on a balance of convenience. He submitted that the authorities pointed to the possible detrimental effects on the individual applicant. He sought to distinguish this case as one where all players in the industry were being affected since third parties who would not otherwise benefit, now benefit because of breaches of the law. He also returned to the *Stratford-on-Avon* case (see above), suggesting that the failure to apply for leave in time was through "no fault of the Applicant". He sought to find a parallel between the failure to get a legal aid certificate in that case, with the two years of litigation culminating in the Settlement Agreement in this one. Further, he suggested that it would have been inconsistent to have raised a challenge to the validity of the licences within three months after the signing of the Settlement Agreement, thereby shutting down the cinch industry for which great efforts had been made to have it up and running.

Having reviewed the submissions, I have come to the conclusion that I should uphold the preliminary point and hold that, to the extent that the Applicant relies as the basis or ground for application for leave, upon the fact of the lack of integrity of the licensing system and the issue of the licences in May 2001 under this system, that the Applicant is guilty of undue delay. That having determined that there has been undue delay, the burden for showing that time ought to be extended for filing the application for leave, is upon the Applicant. The Applicant has failed to discharge that burden.

I hold that the delay in filing for leave to apply is not justified by the existence of the Settlement Agreement and the subsequent exchange of correspondence.

Even if it were, I would be prepared to hold that to grant an extension of time would cause undue hardship, not only on the members of the conch industry, but on others whose operations fall under the Aquaculture Act. That such an extension would be prejudicial not only to others outside the conch industry, but even to smaller conch producers/exporters. For these purposes, I adopt the dictum of Ackner L.J. at page 774 of the Stratford-on-Avon case:

"The court therefore still retains a discretion to refuse to grant leave for the making of the application or the relief sought on the substantive application on the grounds of undue delay, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration".

But even if I am not correct in accepting the issue of the previous licences in May 2001, under a purportedly flawed system as not being the ground upon which the Applicant hangs his opposition to this preliminary point, I believe that there is an alternative basis upon which the holding may be made.

It will be recalled that at 8 in the Applicant's written submissions, the following was stated: - "The grounds for this application are therefore based upon the anticipated reliance by the Competent Authority while reviewing the licences for renewal. It seems to me that an application for leave to apply for judicial review is not appropriate in circumstances where the conduct which is being sought to be prevented, is still inchoate. If there were some action taken by the Competent Authority to indicate that that is what it had decided to do, and this could be shown, this may be quite different. But there is nothing in the submissions which inexorably or by necessary implication, would lead to the conclusion that any decision, when made, will be in breach of the statutory obligations imposed by the Act. In this case, the application would probably be premature. Nor am I to be understood to be making any pronouncement upon the rights of the Applicant later to apply for leave when there is an act of the Minister or Competent Authority which they seek to quash, or the effect of which they seek to prohibit.

Accordingly, my order is that this application for leave is out of time as the Applicant is guilty of undue delay; application for extension of time is refused on the basis that it would be contrary to good administration and prejudicial to other persons, including non-conch processing interests of the fishing industry, such as the Intervenor in this case.

Costs to the Respondent to be agreed or taxed.