

2/11/02

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M. 146 OF 2002

IN THE MATTER of an application by D.Y.C. FISHING LIMITED for leave to apply for Orders of Certiorari, 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.

AND

IN THE MATTER of the Aquaculture, Inland and Marine Products and By-Products (Inspection, Licensing and Export) Act, Inspection and Certification of Fishery Facilities (Prescribed Forms) Regulations, 2002.

REGINA vs. THE MINISTER OF AGRICULTURE, Ex-parte D.Y.C. Fishing Limited

Applications for Release from Undertakings and for Imposition of Injunctions.

Mr. Christopher Dunkley and Mrs. Marino Sakhno instructed by Cowan Dunkley, Cowan for the Applicant.

Lord Anthony Gifford, Mr. Walter Scott and Miss Stacy Mitchell, instructed by Chancellor & Co. for B.& D. Trawling Limited.

Miss. Annaliesa Lindsay and Mr. Michael Deans instructed by the Director of State Proceedings for The Minister of Agriculture.

Miss Joy Crawford watching proceedings on behalf of the Minister of Agriculture.

**Heard: 5<sup>th</sup> and 8<sup>th</sup> August, 2003**

**Brooks, J.**

Two applications were argued simultaneously by Counsel in this matter. The first was an application by B & D Trawling (hereinafter called "B& D") to be released from an undertaking given on its behalf to this Court on the 13<sup>th</sup> day of February 2003.

The undertaking was in these terms:-

"The Third Party B& D Trawling Ltd., through its Attorney-at-Law, undertakes not to apply for Export Health Certificates until the trial and determination of this action in respect of Queen Conch (*Strombus Gigas*)."

Although there was no prior notice given, Counsel for the Minister of Agriculture, with some prompting from the Court, made an application

allied to that mentioned above, seeking to be released from the following undertaking:-

“The Competent Authority undertakes through its Attorney –at  
– Law not to issue Export Health Certificates, in respect of  
Queen Conch (*Strombus Gigas*) to B & D Trawling Limited  
until the trial and determination of this action”

That undertaking was given on the same occasion as that on which B&D gave its undertaking.

The second application before the Court is one made by DYC Fishing Limited (hereinafter called “DYC”). It was made in conjunction with its objection to B&D and the Minister being released from their respective undertakings. DYC asks that if the Court is minded to grant the abovementioned applications of B&D and the Minister, then an injunction ought to be issued in the following terms:-

“1. The Minister of Agriculture through the Competent Authority under the Aquaculture Act be restrained until the hearing of the Judicial Review herein from issuing any new Export Health Certificates to B&D Trawling Limited of 1 Port Royal Street in the City and Parish of Kingston until the said B& D Trawling

Limited accounts for and delivers up to the said  
Competent Authority five containers of conch under  
the following cancelled Export Health Certificates:-

...(the certificates are thereafter particularized)

2. The Minister of Agriculture through the Competent Authority under the Aquaculture Act be restrained until the hearing of the Judicial Review herein or until further order of the Court from issuing any Export Health Certificates in relation to all conch harvested by MV Rajmilour between the period May 16<sup>th</sup>, 2003 and May 21<sup>st</sup>, 2003 and delivered to the B&D Trawling Limited dock on May 21<sup>st</sup>, 2003.”

The application concerning the MV Rajmilour will not be considered as there is no proof of service of the application on the master or owner of that vessel, nor has either made any representation to the court in connection with the application. As indicated above, neither was present or represented during the hearing of these present applications.

Lord Gifford made the first submissions in respect of the matter. He referred principally to the affidavit of Rodrick Francis, sworn to on the 13<sup>th</sup> May 2003. Mr. Francis is the Managing Director of B&D.

Lord Gifford's submissions may be summarized as follows:-

- a. DYC and B&D are competitors in the conch industry in which, it seems, there are very few licensed participants.
- b. The subject undertaking was given by B&D on the assumption that there would be an early hearing of the Judicial Review requested by DYC (hereinafter referred to as "this action").
- c. The complaints raised by DYC, in this action, as they concern B&D, have been resolved, namely;
  - i. DYC has complained that B&D has failed to account for 3 containers of conch exported to the French Antilles. This is so despite the fact that the Veterinary Services Division ("the VSD") has cancelled the Export Health Certificate issued in respect of the batches of conch in those containers and has directed B&D to have the product returned to Jamaica.

Lord Gifford submits that this issue is two years old and the conch involved was paid for by B&D's customer Beaver Street Fisheries Inc. ("BSF").

Regardless of who is right in this situation, says Lord Gifford, the right of B&D to apply in the future for Export Health Certificates, should be unaffected.

- ii. DYC has complained that B&D has failed to account to the VSD for two containers of conch for which Export Health Certificates were also cancelled.

Lord Gifford has pointed to paragraph 20 (ii) of Mr. Francis' abovementioned affidavit in support of his submission that the issue is one which arose in 2001, that it was investigated by the VSD in 2002 and the contaminated batches of conch in those containers dumped on May 9, 2003. Again, Lord Gifford says, this has been satisfactorily resolved.

He therefore asserts that these issues should no longer concern the Court, nor indeed, hamstring B&D and the VSD from respectively applying for and granting new Export Health Certificates for conch harvested this year and in the future.

- iii. DYC has complained that the VSD has issued a licence to B&D to process conch despite the fact that (as DYC asserts) the plant used by B&D for the process is in breach of the Regulations under the Act. Lord Gifford contends that DYC's assertions are incorrect and points to assertions by Mr. Francis (supported by photographs) that B&D's facility is in fact in compliance with the Regulations. Certificates from the Ministry of Health and the Bureau of Standards are also prayed in aid of Mr. Francis' assertion.
- d. B&D has harvested and processed conch for a portion of the period during which it was bound by its undertaking. These actions were subject to the inspections required by the Regulations (see paragraph 14 of the affidavit of Rodrick Francis sworn to on 4<sup>th</sup> August 2003 and filed on the 5<sup>th</sup> August). The conch must be processed within 21 days of the close of the conch season, reported Lord Gifford. The season, he says, ended on 31<sup>st</sup> July, 2003. This fact, submitted Lord Gifford, made these

applications urgent, as without a removal of the undertaking, the conch would be wasted. The waste would result from the fact that:

- i. B&D would be unable to export the conch;
- ii. There is no local market for the product.

The waste would have the following consequences:

- i. B&D would suffer losses quantified in millions of dollars,
  - ii. The employment of 270 workers would be jeopardized.
- e. From the point of view of the balance of convenience, when one balances the factors itemized in d. above, against the fact that DYC would suffer no prejudice to its economic interests, if the injunction were not granted, then no injunction ought to be granted.
- f. The court should not allow itself to be used as a vehicle to favour one competitor over another, when there is a Competent Authority, established by statute and directed by regulations, to secure the protection of the industry.



Miss Lindsay, on behalf of the Minister supported the submissions by Lord Gifford. She emphasized the role of the VSD in ensuring compliance with the regulations established under the Aquaculture, Inland and Marine Products and By-Products (Inspection, Licensing and Export) Act, 1999 (hereinafter referred to as “the Act”). Interestingly, Miss Lindsay submits that this action has led to the Ministry, through the VSD, being more vigilant in carrying out its duties under the Act.

She pointed to the Affidavit of Dr. George Grant, the Director of the VSD, sworn to on 21<sup>st</sup> March 2003, and filed in Suit M069/2002 (which suit I am informed was consolidated with this action). That affidavit, submits Miss Lindsay, shows that the VSD has been testing; it has been insisting on compliance and it is enforcing a “zero tolerance” approach in respect of sanitation. These steps, she says, demonstrate the attitude “of strict compliance to the regulations by the Competent Authority”. (The VSD is the Competent Authority established under the provisions of the Act.)

Miss Lindsay, was at pains to point out that the undertakings given did not affect the matter of the licences issued and further that the release from the undertaking would “not guarantee that B&D would be given an Export Health Certificate.”

Mr. Dunkley, in opposing the applications for the release from the undertakings and supporting the application for the imposition of the injunctions, was the only attorney to have complied with an order by Beswick J. made on 10<sup>th</sup> June, 2003, that skeleton arguments ought to have been submitted. This fact is deemed significant considering the nature of B&D's application and the new regime established by the Civil Procedure Rules. The court did not enforce any consequences of the omission because of the urgency of the matter and ~~because~~ of the explanation given by Lord Gifford.

I hope I do no violence to Mr. Dunkley's extensive and careful arguments by summarizing them as follows:

1. The VSD has not been proactive in ensuring compliance with the regulations under the Act and it is only this action which has caused the VSD to be taking any positive steps in that regard (albeit reactive in nature).
2. There were clear breaches of the Regulations in respect of the harvesting and processing of the batches of the conch in the three containers sent to the French Antilles and a further two retained by B&D. Despite these breaches, Export Health Certificates were issued in respect of all these batches. The certificates were subsequently cancelled but no proper accounting has been made concerning the recovery and disposal of the affected product.

“Until the whereabouts (of those batches) have been identified, the risk exists that there will be intermingling (with recently harvested and processed conch).

The risk exists even if the VSD carries out its functions properly in respect of recently harvested and processed conch.

Significant emphasis was placed by Mr. Dunkley on the fact that BSF wrote to the VSD indicating that the product was said to have been exported from the French Antilles by BSF’s customers and were consigned to B&D in Jamaica. Despite this assertion, which was confirmed by a document by the Direction des Services Vétérinaires in Martinique (that the product was “shipped back to Jamaica”), Mr. Francis, in paragraph 4 of his affidavit sworn to on 10<sup>th</sup> February 2003, deponed that he was “not aware of the products which were shipped to the French Antilles ever re-entering the Jamaican market.”

The result of this situation says Mr. Dunkley, is that the VSD does not know what has happened to those batches of conch and the risk of intermingling is real. The export of uncertified product can cause the ruin of the industry and DYC.

3. There is evidence of continuing breaches of the Regulations by B&D even during the subsistence of this action and movement of product to B&D’s plant from the MV Rajmilow, facilitates a misrepresentation of the catch of the latter.
4. The principles set out in the American Cyanamid case ([1975] 1 All E.R. 504) are satisfied by the facts of the case. “The balance of convenience” namely the protection of the public health of consumers, is in favour of granting the injunction.

The protection of consumers and the viability of the industry have been acknowledged by the Court of Appeal in respect of these issues as being most pertinent to this action. This was in the case of *DYC Fishing Ltd. v. The Minister of Agriculture and Aquaculture Jamaica Ltd.* SCCA 81/2002 (delivered March 6, 2003) at pp 61 and 64)

5. The injunction should therefore be granted.

I have considered the submissions and the relevant affidavits and I am conscious that these are interlocutory applications. Bearing this in mind any orders made thereunder should not render redundant the eventual hearing by the Judicial Review Court. The Originating Summons is extensive in setting out the items of relief claimed, but their essence for these purposes may be set out as follows:

- “3. The Applicant seeks the following Declarations:-

...

- (c) That the granting and issuing of a licence to operate a processing establishment to Charles Scott of C&J Seafood Ltd., the renewal of a license to operate a processing establishment to B&D Trawling Ltd. and the grant and/or renewal of freezer vessel licenses to MV Rough Rider and

Loan (sic) Star and Rajmilour were contrary to the Aquaculture Act.

4. The applicant seeks an order of *certiorari*, quashing all licenses to operate a processing establishment and/or renewed to Charles Scott of C&J Seafood Ltd., and to B&D Trawling Ltd. and the grant and/or renewal of freezer vessel licenses to MV Rough Rider, MV Lone Star and MV Rajmilour.

5. That the Applicant will seek the following injunctions at the hearing of the motion for Judicial Review:

That the defendant Minister of Agriculture and/or his representatives, officers servants and/or agents within the Competent Authority and/or the Veterinary Committee be restrained by injunction from:

....

(b) Granting and issuing any Export Health Certificate to B&D Trawling Ltd., for any

products prescribed under the Aquaculture Act, unless and until the Competent Authority:

- (i) Carries out a comprehensive inspection and testing audit to the facilities of the said B&D Trawling Ltd., and all its vessels including MV Lone Star and MV Rough Rider, in order to satisfy itself that the facility and any equipment and vessels used by the said B&D Trawling Ltd. meet all the requirements of the Aquaculture Act;
- (ii) Ascertains whether the operations of the said B&D Trawling Ltd. are free from *Listeria* and other harmful micro-organisms.
- (iii) All the conch products for which the Export Health Certificate (sic) were cancelled and products with *Listeria*

and high specific plate count are accounted for and disposed of in accordance with the law;

- (iv) Duly licence de novo the said B&D Trawling Ltd. and its said vessels Rough Rider and Lone Star.

....

- (6) The Applicant seeks such damages as this Honourable Court deems just, as compensation to the Applicant for the injury, loss to and damage sustained by reason of the matters set forth in the Affidavit filed in support of this Application.

I am convinced by the submissions of Counsel, the Affidavit of Dr. George Grant sworn to on 21<sup>st</sup> March, 2003, and filed in Suit M069 of 2002, and indeed the abovementioned excerpts from the Originating Summons, that all parties accept the authority and the ability of the VSD to carry out the functions stipulated by the Regulations promulgated under the Act.

From Dr. Grant's affidavits mentioned above can be gleaned the manner in which the Regulations (or at least some) are actually enforced on a day-to-day basis.

I am satisfied that although the VSD does have that ability there are areas in which practical considerations prevent monitoring of every stage of the process of every harvester and processor in the industry.

Dr. Grant acknowledges this in a few paragraphs of his extensive affidavit. Paragraphs 78, 93, 138, 139, 143 are but some examples of the obvious fact that there can be breaches of the system. That however is the system that Parliament has approved and the system with which all the participants should comply.

The critical issue to be decided to assist the Court in arriving at its decision is therefore, this; can and should the VSD as the Competent Authority be allowed to carry out its function as approved by Parliament in assessing applications for licences and Export Health Certificates under the Act and Regulations respectively”.

In considering this question I consider two further factors.

- (a) licenses are issued for the maximum period of one year.
- (b) there is a great deal of contention between the parties as to what are the facts in this action and the resolution of that contention would rest with the Judicial Review Court.



I am firmly of the view that the VSD should be allowed to exercise its authority pending the hearing by the Judicial Review Court.

But I do have a concern.

B&D seeks to be released from its undertaking given to this Court. This is an application that depends on the exercise of the court's discretion. It has however, in my view, not been completely candid with the court in respect of the conch exported to the French Antilles.

Paragraph 9 of Mr. Francis' affidavit sworn to on 13<sup>th</sup> May, 2003 is instructive of the attitude of B&D in this (in my view) important area

“9. As a result of the dispute and the seizure of the goods by the French authorities BSF had stopped payment to B&D. There was extensive communication between BSF and the French and Jamaican authorities with BSF lobbying for the release of the shipments to them. In due course the goods were released by the French Authorities and BSF by letter dated April 16, 2002 advised the Permanent Secretary in the Ministry of Agriculture that the shipments had been dispatched to B&D. That letter notwithstanding, BSF in July, 2002 paid B&D the outstanding balance in acknowledgement of receipt of the product. This final payment was a net sum from which BSF had deducted storage, testing and other costs incurred in the French Antilles. B&D

is therefore confident that BSF received the product and B&D therefore is in no position to either deliver up the conch to the local Competent Authority or to indicate what BSF ultimately did with the shipments. Exhibited hereto and marked 'RBF 7' are Bills numbered 200204 - 101 to 200204 - 103 showing deductions for expenses incurred in the French Antilles in relation to each of the three containers which sums were deducted by BSF."

In light of the evidence that the conch was shipped to Jamaica consigned to B&D, Mr. Francis' attitude, and, therefore by extension, that of B&D, could, at best, be regarded as casual. Far stronger terms could be used bearing in mind the demand made to B&D by the VSD that the conch should be returned to Jamaica. B&D, in my view, if it wishes to continue in the industry and receive Export Health Certificates in the future must demonstrate a respect for the spirit of the Regulations and the authority of the VSD.

I am satisfied that there has been some specific attention given by the VSD to the batches of conch in the two containers which remained in Jamaica, and therefore will not require any further accounting in respect of

those batches. This is without any prejudice to the VSD carrying out any further action in respect of any such product still in existence.

In order to reconcile my view concerning the ability of the VSD and my opinion of B&D's approach to the exported conch against the background of the risks of intermingling highlighted by Mr. Dunkley the order of the Court is as follows:

1. B&D Trawling Ltd is hereby released from its undertaking given to this Court on 13<sup>th</sup> February 2003.
2. The Competent Authority is hereby released from its undertaking given to this Court on the 13<sup>th</sup> February 2003.
3. B&D Trawling Ltd is hereby restrained by itself or through its servants or agents or otherwise from applying for any Export Health Certificate in respect of Queen Conch (*Strombus Gigas*) until the trial and final determination of this action, or further order of the Court unless it shall:

- (a) account, to the satisfaction of the Veterinary Services Division of the Ministry of Agriculture, for the whereabouts and/or disposal of conch shipped from Jamaica on or about 14<sup>th</sup> November 2001 in shipping containers numbered

- 1 KNLU – 471836/3
- 2 KNLU – 471599/7
- 3 POHU – 477159/4, and

(b) provide documentation in support of such whereabouts and/or disposal to the satisfaction of the said Veterinary Services Division.

4. There shall be liberty to apply to all parties.
5. The costs of these applications are to be borne by B&D Trawlers Ltd. and are to be taxed if not agreed.

The Attorney for DYC offered the usual undertaking as to damages in the event that an injunction was granted, but in light of the basis on which I have imposed the injunction I am of the view that such an undertaking is unnecessary, and indeed, inappropriate. It is also for that reason that I have ordered B&D to bear the costs of this application.

B&D's fate lies in its own hands.

In making this order I am of the view that I have not interfered with the issues to be determined by the Judicial Review Court as those issues mainly concern occurrences in the past. The application for declarations, certiorari, damages and injunctions may still be ordered by the Judicial Review Court if it is so minded.