JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 81/2002

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

BETWEEN **DYC FISHING LIMITED** **APPELLANT**

AND **THE MINISTER OF AGRICULTURE**
AQUACULTURE JAMAICA LIMITED **RESPONDENT(S)**

Christopher Dunkley and MarinO Sakhno instructed by Cowan, Dunkley and Cowan for the appellant D.Y.C. Fishing Ltd.

Ingrid Mangatal Actg. Deputy Solicitor-General and Michael Deans Asst. Crown Counsel instructed by the Director of State Proceedings for the Ministry of Agriculture.

Garth McBean and Lara Dayes instructed by Dunn Cox for Aquaculture Jamaica Ltd.

Joy Crawford watching proceedings on behalf of the Ministry of Agriculture.

8, 9, 10, 11, 14, 15, 17, 18, October 2002 and March 6, 2003

DOWNER, J.A.

This is an appeal from the order of Anderson J. sitting in the Judicial Review Court, dismissing the prayer of D.Y.C. Fishing Limited (the appellant), seeking leave to apply for Prohibition, Mandamus and several Declaratory orders.

This is the first such appeal under The Judicature (Civil Procedure Code) (Amendment) (Judicial Review) Rules, 1998, published in the Jamaica Gazette

Supplement Proclamations, Rules and Regulations dated August 5, 1998 (the "Rules").

The application was made pursuant to Rule 564C(1) which reads:

> "564C-(1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this section.
>
> (2) An application for leave shall be made *ex parte* to a judge by filing -
>
> (a) a notice – containing a statement of
>
> (i) the name and description of the applicant,
>
> (ii) the relief sought and the grounds upon which it is sought,
>
> (iii) the name and address of the applicant's attorney (if any); and
>
> (b) an affidavit which verifies the facts relied on."

The reasoning in this case will be somewhat different from **Minister of Commerce and Technology v Cable and Wireless Jamaica Ltd.** Motion No. 18 of 1998 delivered 10th November 1998, which was the last case before the Court, on this issue, under the old rules.

In the light of the foregoing, it is necessary to set out the order of the learned judge below and to state the basis by which this Court has jurisdiction to entertain the appeal. Here is the order of the Court below at pp 151-152 of Vol. 1 of the Record:

> "**UPON THE APPPLICATION FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION, MANDAMUS and DECLARATIONS** dated the 5th day of June, 2002 coming up for hearing on this day and after hearing MR. CHRISTOPHER DUNKLEY and MS. MARINA SAKHNO, instructed by COWAN, DUNKLEY & COWAN for the Applicant, MS. INGRID MANGATAL and MR. MICHAEL DEANS instructed by the Director of State Proceedings for the Minister of Agriculture; MRS. JOY 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 IT IS HEREBY ORDERED THAT:-
>
> 1. Application for Leave to Apply for Orders of Prohibition, Mandamus and Declaration is dismissed;
>
> 2. Costs to the Respondent to be agreed or taxed."

The order was supported by a closely reasoned judgment which will be examined to ascertain if it can be supported.

The jurisdiction to hear the appeal

Rule 564J reads:

> "Appeal from judge's order
>
> 564J. No appeal shall lie from an order made under section 564C(3) on any application for leave which may be renewed under subsection (4) of that section."

This rule emphasizes that there is no appeal to this Court when Rule 564C(3) & (4) is applicable and there is an initial application for leave without a hearing.

Such an application has been described as a paper application.

It is now necessary to turn to Rule 564C(3) & (4) to examine the circumstances when no appeal to this Court is permitted pursuant to these rules. Rule 564C(3) reads:

> "(3) The judge may determine the application without requiring the attendance of the applicant, unless a hearing is requested in the notice of application, and need not sit in open court, and if the applicant does not appear, the Registrar shall serve a copy of the judge's order on the applicant
>
> (4) Where the application for leave is refused by the judge, or is granted on terms, the applicant may renew it by applying -
>
> (a) in any matter involving the liberty of the subject or in any criminal cause or matter, to a Full Court
>
> (b) in any other case, to a single judge sitting in open court or, if the Court so directs, to a Full Court."

It is clear that in the ex parte application before Anderson J. there was a hearing so there could be no renewal of this application to a judge sitting in open court or to a Full Court. This is so because Rule 564C (5) reads:

> "(5) No application for leave may be renewed in any matter not involving the liberty of the subject or in any non-criminal cause (3) of this section after a hearing."

The first Respondent was served and a hearing was requested. See Vol. 1 page 290 of the Record. The request for a hearing follows the regular

course. Here is how Lord Diplock states it in **O'Reilly v. Mackman** [1982] 3 W.L.R. 1096 at 1105-1106:

> "First, leave to apply for the order was required. The application for leave which was ex parte but could be, and in practice often was, adjourned in order to enable the proposed respondent to be represented, had to be supported by a statement setting out, inter alia, the grounds on which the relief was sought and by affidavits verifying the facts relied on: so that a knowingly false statement of fact would amount to the criminal offence of perjury. Such affidavit was also required to satisfy the requirement of uberrima fides, with the consequence that failure to make on oath a full and candid disclosure of material facts was of itself a ground for refusing the relief sought in the substantive application for which leave had been obtained on the strength of the affidavit. This was an important safeguard, which is preserved in the new Order 53 of 1977. 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."

Since there was a hearing before Anderson J. lasting some four days, Rule 564J precluding an appeal did not apply.

In the instant case there was a hearing, so Rule 564C(5) supra applies. There can be no application for renewal before either a single judge or the Full Court. However, there is an unrestricted right of appeal by virtue of Section 10 of the Judicature (Appellate Jurisdiction) Act which reads:

> "10. Subject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of

> the Supreme Court in all civil proceedings, and for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court shall subject as aforesaid have all the power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958."

It should be noted that this is the counterpart to Section 12 of the Bermuda Court of Appeal Act 1964, which will be mentioned later in the case of **Kemper.**

The policy behind the Rules is clear. There is a renewal of the application by way of appeal direct to this Court, whenever there is a hearing. If there is no hearing then there is a renewal of the application before a single judge in open Court or the Full Court.

The circumstance where there is no appeal pursuant to the above rules is not as restrictive as it appears. There is a provision in the 1962 Court of Appeal Rules dealing with ex parte appeals which will be addressed later. I have not found **Durity v.Judicial & Legal Service Commission and another** [1994] 47 W.I.R. 424 helpful in this context. On the other hand, **Kemper Reinsurance Co. v. Minister of Finance and others** (1998) 53 W.I.R. 109 is helpful. Lord Hoffmann said at page 119:

> "In principle, however, judicial review is quite different from an appeal. It is concerned with the legality rather than the merits of the decision, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than whether the decision was correct. In the case of a restriction on the right of appeal, the policy is to limit the

> number of times which a litigant may require the same question to be decided. The court is specifically given power to decide that a decision on a particular question should be final. There is obviously a strong case for saying that, in the absence of express contrary language, such a decision should itself be final. But judicial review seldom involves deciding a question which someone else has already decided. In many cases, the decision-maker will not have addressed his mind to the question at all. The application for leave may be the first time that the issue of the legality of the decision is raised and their lordships think that it is by no means obvious that a refusal of leave to challenge its legality should be final. The law reports reveal a number of important points of administrative law which have been decided ~~by the Court of Appeal~~ or House of Lords in cases in which leave was refused at ~~first~~ instance."

The provisions for an appeal from a refusal to grant leave to apply for the prerogative orders enunciated in the above passage is applicable to the Rules for Judicial Review, where, for a paper application an appeal is not permitted by these Rules, but a renewal of the application is permissible before a judge in open Court or the Full Court. On the other hand, to reiterate where there has been a hearing at the application stage an appeal is permitted by Section 10 of the Judicature (Appellate Jurisdiction) Act which governs appeals to this Court.

There is another method of invoking the jurisdiction of this Court if there had been no inter-partes hearing. Rule 22(3) of the Court of Appeal Rules, 1962 reads:

> "Where an ex parte application has been refused by the Court below, an application for a similar purpose

> may be made to the Court ex parte within seven days from the date of the refusal."

Here **Kemper Reinsurance Co.,** (supra) is again helpful in explaining Rule 22(3) which has its origin in RSC Order 59 rule 14(3). At pages 121-122 Lord Hoffmann said:

> "It would therefore seem to their lordships that in some of the cases which have been cited, the nature of a renewed application ex parte to the Court of Appeal under RSC Order 59, rule 14(3), may have been misunderstood. A similar provision has been in the Rules of the Supreme Court since the original Rules scheduled to the Judicature Act 1873, where it appeared as Order LV111, rule 10. It may well be, although neither counsel nor their lordships have undertaken any research into earlier history, that it derives from the practice of the 19th century Court of Appeal in Chancery. The Rules scheduled to the 1873 Act were largely based upon earlier practice. At any rate, the rule appears to their lordships to be entirely procedural. In the case of an appeal against the refusal of an application ex parte, it is plainly inappropriate to follow the ordinary procedure of giving notice of appeal to the other party. Order LVIII, rule 10, therefore provided for an appeal by way of renewal of the application to the Court of Appeal, but limited the period for such appeal to four (now seven) days after the refusal of an order in the court below. That such was the understanding of the contemporary chancery Bar appears from the following comment in Sir Arthur Underhill's *Manual of the Procedure of the Chancery Division* (1881):
>
> > 'Where an application to the High Court is ex parte, an appeal from its refusal is also ex parte, and in that case, it is made by motion without setting it down or entering it for hearing, but such appeal motion must be made within four days unless a judge of the court below, or of the Court of Appeals, extends the time'."

Then in explaining how this rule was applied to the Crown Office list Lord Hoffmann said at page 122-123:

> "There is evidence of a similar understanding about the former practice in the Crown Office list. In 1938, the new RSC Order LIX provided in rule 3 (5) that a refusal of leave to apply for judicial review by the Divisional Court, either in its original jurisdiction or on appeal from a judge in chambers, should 'be final'. In 1947 the rule was amended to provide that only a decision on appeal should be final. Since then, unsuccessful applicants to the Divisional Court have been free to apply to the Court of Appeal, although the language of the rule ('shall be final') does not decide the question of whether such applications are original or by way of appeal. But J O Griffits's Guide to the Practice of the Crown Office (1947), published just before 1947 ~~amendment~~, said (at page 324) that under the pre-1938 procedure of applying for a rule *nisi*, an applicant had a right of appeal to the Court of Appeal from the refusal of the Divisional Court to make an order nisi. The author noted that a similar right had been excluded by the 1938 Order LIX but added:
>
> > 'Should this right be again restored by any future amendment of Order 59 the following practice as to appealing would, no doubt, be revived.
> >
> > Where an ex-parte application had been refused by the Divisional Court, an application for a similar purpose could be made to the Court of Appeal ex parte within four days from the date of such refusal, or within such enlarged time as the Divisional Court or the Court of Appeal may allow'.
>
> Their lordships therefore consider that a renewed application to the Court of Appeal under RSC Order 59, rule 14(3), is a true appeal with a procedure adapted to its ex-parte nature."

R. (on the application of Burkett and another) v. Hammersmith and Fulham London Borough Council [2002] 3 All E.R. 97 approved **Kemper Reinsurance Co.** Further, the stance taken by Lord Steyn, concerning the relationship between Section 31(6) of the Supreme Court Act (the substantive law,) and the Rules of Court at page 103, (the procedural rules), is instructive. There is a similar constitutional relationship between Section 1(9) of the Constitution which provides for Judicial Review and Section 20(2) which provides for a 'fair hearing within a reasonable time' and the provisions in the Rules applicable in this case which must be in conformity with above constitutional provisions.

The proceedings before Anderson, J.

In invoking the jurisdiction of the Judicial Review Court the appellant based its application on a comprehensive affidavit of some fifty-four (54) paragraphs at pages 324 of Volume 2 of the Record. Due to the unusual course of this case on appeal it is not proposed to summarise the contents of this or any of the many other affidavits from both sides. All that is necessary, is to highlight certain features to demonstrate whether the appellant has a good arguable case, in its application for Prohibition, Mandamus, and Declaratory orders.

To demonstrate the nature of the investigative work by the appellant and others in the industry and to appreciate the nature of the appellant's

grievances it is pertinent to cite just one letter at page 191 of Volume 2 of the Record to the Competent Authority:

"May 2, 2001

Dr. Headley Edwards
Chief Inspector
Veterinary Services Division
Competent Authority
193 Old Hope Road
Kingston 6, Jamaica

The Marine Products
Core Group
P.O. Box 504
Kingston 10
Jamaica W.I.
Tel/Fax 876 706-1993

Dear Sir;

Re: Inspection of Newport Fish and Meats under the Aquaculture, Inland and Marine Products and By-Products Act 1999 and Regulations 2000, located at Myers Wharf Kingston

It has come to the attention of the undersigned that your office continues to **ill advise** the above captioned company on the requirements for licensing under the Aquaculture, Inland and Marine Products and By-Products Act 1999, and the Regulations 2000, (AQUACULTURE Act and Regulations).

This facility is in direct contravention of Regulation 13(4) (c) as it is on premises used as a lumber yard, lumber offloading wharf and a tile manufacturing factory. This Regulation states inter alia:-

> "The Competent Authority shall not license any place as a processing establishment that is on premises on which there is also a dwelling house or a facility that is not used for processing or handling prescribed products"

(emphasis added) thereby **prohibiting** the licensing of this facility.

In addition this facility is subject to copious amounts of unpleasant odors and dust from the lumber yard, lumber offloading wharf and tile manufacturing factory

and also from the three (3) large feed mills (Jamaica Livestock, Nutramix and Newport Mills) which are in close proximity, further offending Regulation 17(1) (a).

We are of the unanimous view that Regulations 17 (1) (a) and 13 (4) (c) are very clear and **prohibit** the licensing of any facility at the said Myers Wharf locations as a processing establishment under the Aquaculture Act.

As you are aware, there has recently been a settlement of the long outstanding suit with your Ministry, that was centered around the strict implementation and enforcement of the Aquaculture Act, and other Laws. The Minister of Agriculture has further assured us that **no concession** will be given to any person that does not comply.

We feel strongly, that your actions, although accommodating, threaten to erode and diminish the considerable efforts made by the Minister of Agriculture, Hon. Roger Clarke, the Director of the Veterinary Services Division Dr. George Grant, Mr. Andre Kong the Director of Fisheries and ourselves among others to reach an amicable working relationship out of this settlement and to elevate this country's Sanitary and Phytosanitary Standards to being among the best in the world.

Further, it is our collective opinion that your continued support and encouragement of these activities is a total disregard of your statutory obligations pursuant to Section 5(1)(a)(i) of the Aquaculture Act.

We therefore implore you to exercise powers contained in Section 5 (1)(vi) of the Aquaculture Act, by immediately informing the management of Newport Fish and Meats that the Aquaculture Act **prohibits** the licensing of that facility as a processing establishment.

We shall be keenly monitoring this very disturbing situation, and further inform you that we are prepared to take any and all necessary action to

ensure that the strict terms of the Aquaculture Act and regulations are observed and that the agreement signed by the Minister of Agriculture is strictly complied with.

In the mean time we shall copy this letter to the members of the Veterinary Committee under the Aquaculture Act, the Minister of Agriculture, the Permanent Secretary in the Ministry of Agriculture and also to the Director of Public Prosecutions requesting him to immediately conduct an investigation into these allegations.

Yours truly,

Sgd.	Sgd.
DYC Fishing Ltd.	Seafood & Ting International Ltd.
Sgd.	Sgd.
Ton Ric Enterprises Ltd	Seafood Incorporated Ltd.

c.c.	Hon. Roger Clarke	Minister of Agriculture
	Mr. Arron Parke	Permanent Secretary, Ministry of Agriculture
	Dr. R. Harrison	Chief Technical Director
	Dr. George Grant	Director Veterinary Services Ministry of Agriculture
	Mr. G. Andre Kong	Director of Fisheries, Ministry of Agriculture
	Mr. L. Peters	Director of Veterinary Public Health Ministry Ministry of Health
	Dr. Omar Thomas	Director of the Bureau of Standards
	Mr. E. Oniss	Senior Legal Officer, Office of the Attorney General
	Mr.Kent Pantry	Director of Public Prosecutions."

Did the appellant in law have a sufficient interest?

The first issue to be addressed must be a consideration of Rule 564C(8) which reads:

> "(8) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

In the case **of R.V. Department of Transport and another Ex parte Presvac Engineering Ltd. (1992) 4 Admin. 1 L.R. 121 the Times July 110, 1991**, the Court of Appeal decided that Presvac had locus standi to apply for judicial review. This was in relation to the grant by the Department of a certificate to a competitor company of Presvac certifying that valves manufactured by that company were acceptable for the purpose of the Merchant Shipping Regulations 1984.

It is necessary to say a word about the affidavits and the Record in this case. Volume 1 contains 357 pages of affidavit evidence and exhibits. Volume 2 contains 574 pages of affidavit evidence and exhibits. Some of the exhibits pertain to other cases but have a bearing on the Regulatory functions of the Ministry. One important affidavit in this respect comes from Dr. Wintorph Marsden at Pages 439 and 453 of Volume 11 of the Record. These volumes were a formidable challenge. Further, these volumes relate to two different proceedings although they cover the same subject matter. This appeal (SCCA 81 of 2002) relates to Suit M.069 of 2002 which was the Judicial Review proceedings before Anderson J. Suit No. CL 026 of 2002 pertains to the proceeding for an interlocutory injunction before Wesley James J. which was concluded thus at Volume 1 page 284:

> "IN CHAMBERS
> BEFORE THE HON. MR. JUSTICE W. JAMES

THE 7th DAY OF MAY 2002

UPON **the Summons for interlocutory injunction coming on for hearing this day and after hearing Mr. Christopher Dunkley and Miss Marina Sakhno, instructed by Messrs. Cowan, Dunkley & Cowan for the Plaintiff, and Miss Ingrid Mangatal and Miss Stacian Bennett, instructed by the Director of State Proceedings for the Defendants.**

THE MINISTER OF AGRICULTURE and/or his representative,officers, servants and/or agents within the Ministry of Agriculture HEREBY GIVE AN UNDERTAKING TO THIS HONOURABLE COURT not to issue or renew any licenses under the Aquaculture, Inland And Marine Products and By-Products Act, 1999 for a period of **twenty-one (21) days** from the 9th day of May, 2002.

AND THE COURT HEREBY MAKE NO ORDER ON THE SAID summons except that the costs thereof be costs in the cause."

The proceedings with respect to the interlocutory injunction were based on the Statement of Claim at page 308 of Volume 1 of the Record. Surprisingly, this Statement of Claim is based solely in contract. It might well be that additionally or alternatively there ought to be a claim in tort pursuant to the Crown Proceedings Act. A breach of statutory duty or more importantly misfeasance in public office, which is now the dominant tort, in administrative law might well be appropriate. See **Bourgoin SA v. Minister of Agriculture Fisheries & Food** [1985] 3 All E.R. 585 and **Three Rivers D.C. v. Bank of England No. 3** [2000] 3 All E.R. 1.

It is arguable that the Bank of England lost its regulatory functions with respect to the Banking system as a result of failure to regulate a merchant bank- (Barrings) and a retail Bank, (Bank of Credit and Commerce International). The Ministry of Agriculture settled the issue of damages in its case with **Bourgoin.**

During the submissions, I wondered aloud as to why damages were not sought in view of Rule 564G which reads:

> "564G-(1) On application for judicial review the Court may, subject to subsection (2) hereof award damages to the applicant if –
>
> (a) he has included in the statement in support of his application for leave under section 564C a claim for damages arising from any matter to which the application relates, and
>
> (b) the Court is satisfied that, if the claim has been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.
>
> (2) Section 170 shall apply to a statement relating to a claim for damages as it applies to a pleading."

Rule 564I-(5) is also appropriate. It reads:

> "(5) Where the relief sought is a declaration, an injunction or damages and the Court considers that it should be granted on a application for judicial review but might have been granted if it had been sought in an action begun by writ by the applicant at the time of making his application, the Court may, instead of refusing the application, order the proceedings to continue as if they had been begun by writ, and section 528, shall apply as if, in the case of an application made by motion, it had been made by summons."

Then there is the specific Rule 564B which speaks of Joinder thus:

> "Joinder of claims for relief
>
> On an application for judicial review any relief mentioned in sections 564A(1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter."

So this course of including a claim for damages might still be open to the appellant in the Judicial Review Court. If such course is taken, it would be prudent to join the Attorney-General as a party pursuant to the Crown Proceedings Act. Moreover, it should be noted the Rules are procedural. So they cannot alter the substantive law as for example limitation period for torts or contract pursuant to the Crown Proceedings Act. So any application for amendment should take this fact into account and grant the extension of time if necessary to accommodate the amendment, if it is sought. Reference will be made to the above rules later in this judgment.

Both sets of claims that were dealing with Judicial Review and the interlocutory injunction were before Anderson J. and compared grounds 8, 9, and 10 of Notice and Grounds of Appeal under the caption ... GROUNDS FOR THESE FURTHER ORDERS. They read at page 149 of Volume 1 of the Record:

> "(8). That the hearing of this Appeal would of necessity entail full consideration of all the circumstances which have lead (sic) to the Applicant/Appellant's application to move for

leave for Prohibition and Mandamus and Declaration under Judicial Review.

(9) That a full consideration of all the material being relied on between the parties would place this Honourable Court of Appeal in as good a position as the Lower Court to evaluate and to give effect to the reliefs being sought by the Applicant/Appellant under Judicial review.

(10) That in all the circumstances the hearing before the full Court of Appeal of the Judicial Review of the acts and omissions of the Respondent and his Ministry's various divisions and servants or agents would bring an end to voluminous litigation between the parties."

This was a laudable aim and this Court supported that stance. There were good precedents for such a course, the most notable being **Inland Revenue Comrs v. National Federation of Self-Employed and Small Business Ltd.** [1981] 2 All ER 94. At page 96, the preliminary point there was whether there was sufficient interest. In the instant case the preliminary point was that the time for making the application under the Rules had passed. The same principles apply to both preliminary points. Lord Wilberforce said at page 96 of the above case:

> "I think that it is unfortunate that this course has been taken. There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application; then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In these it will be

> necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and the breach of those said to have been committed. In other words, the question of sufficient interest cannot, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule requires sufficient interest in the matter to which the application relates. This, in the present case, necessarily involves the whole question of the duties of the Inland Revenue and the breaches of failure of those duties of which the federation complains."

Lord Diplock expressed similar views at page 100. Lord Frazer put it thus at page 106:

> "But the question whether the federation has a sufficient interest to make the application at all is a separate, and logically prior, question which has to be answered affirmatively before any question on the merits arises. Refusal of the application on its merits therefore implies that the prior question has been answered affirmatively. I recognize that in some cases, perhaps in many, it may be impracticable to decide whether an applicant has a sufficient interest or not, without having evidence from both parties as to the matter to which the application relates, and that, in such cases, the court before whom the matter comes in the first instance cannot refuse leave to the applicant at the ex parte stage, under r 3(5). The court which grants leave at that stage will do so on the footing that it makes a provisional finding of sufficient interest, subject to revisal later on, and it is therefore not necessarily to be criticized merely because the final decision is that the applicant did not have sufficient interest. But where, after seeing the evidence of both parties, the proper conclusion is that the applicant did not have a sufficient interest to make the application, the decision ought to be made on that ground. The present appeal is, in my view, such a case and I would therefore dismiss the appeal on that ground. When it is also shown, as in this

> case, that the application would fail on its merit, it is desirable for that to be stated by the court which first considers the matter in order to avoid unnecessary appeals on the preliminary point."

Lord Scarman at page 109 said:

> "As others of your Lordships have already commented, the decision to take locus standi as a preliminary issue was a mistake and has led to unfortunate results. The matter to which the application relates, namely the legality of the policy decision taken by the Revenue to refrain from collecting tax from the Fleet Street casuals, was never considered by the Divisional Court and was dealt with by concession in the Court of Appeal. Yet there were available at both hearings very full affidavits from which the circumstances in which the policy decisions, which is challenged, was taken, and the Revenue's explanation, clearly emerge."

Then Lord Roskill stated at page 114:

> "My Lords when the matter came before the Divisional Court inter partes it was apparently agreed that the question whether or not the federation had a 'sufficient interest' to bring these proceedings at all should be dealt with as a preliminary point (see the judgment of Lord Widgery CJ ([1980] 2 All E.R. 378, [1980] STC 261)). When the federation appealed to the Court of Appeal that preliminary point was the only issue before that court as it had been before the Divisional Court. Moreover, in their printed case, the Revenue averred that this was the only issue to be determined by your Lordships' House, the Revenue contending that, as a matter of law, the federation had no 'sufficient interest'.
>
> My Lords, your Lordships' House has often protested about the taking of short cuts in legal proceedings, most recently in **Allen v Gulf Oil Refining Ltd.** [1981] 1 All E.R. 353, [1981] 2 W.L.R. 188. The number of cases in which it is legitimate to take such short cuts is small and in my opinion the

> present was not such a case. Indeed, many of the difficulties which were canvassed at length in arguments before your Lordships' House would have been avoided had this particular short cut not been taken. With profound respect to the Divisional Court, this course was especially inappropriate where the grant or refusal of the remedy sought by way of judicial review is, in the ultimate analysis, discretionary, and the exercise of that discretion and the determination of the sufficiency or otherwise of the applicant's interest will depend not on one single factor (it is not simply a point of law to be determined in the abstract or on assumed facts) but on the due appraisal of many different factors revealed by the evidence produced by the parties, few if any of which will be able to be wholly isolated from the others."

Such a course, ~~of hearing the~~ preliminary point and the merit together, was followed in a different context in **R v Industrial Injuries Commissioner ex parte Amalgamated Engineering Union** [1966] 1 All E.R. 97. This course was also recognized in Practice Direction [1982] 3 All E.R. 800. It all depends on the circumstances. In **R(on the application of Burkett and another)** (supra), the issue of which time period was applicable was heard by the House of Lords and the matter remitted to the Supreme Court for a hearing on the merits. As to how the issue of time was dealt with in **Caswell and another v. Dairy Produce Quota Tribunal for England and Wales** [1990] 2 All E.R. 434, Lord Goff refers to a neat solution at p.437 thus:

> "It was not until May 1987 that they first became aware of the remedy of judicial review, as the result of an article in the Farming Press. A local solicitor was then consulted. He frankly admitted that he knew nothing about judicial review, but promptly referred the appellants to their present solicitors. Within a week they submitted an application for legal

> aid; it was not however until 5 October 1987, after considerable correspondence that legal aid was granted to the appellants. Within two days the appellant attended a conference with counsel, who forthwith settled the necessary documents for an application for leave to apply for judicial review, which were engrossed on 15 October 1987. The respondent to the application, the tribunal, was notified on 19 October. On 21 October Mann J granted the appellants leave to apply, observing however that they would have to deal with the matter of delay at the hearing.
>
> The application came on for hearing before Popplewell J on 23 November 1988. After a hearing lasting half a day he dealt with the substantive issue in an extempore judgment in which, after reviewing the relevant regulations, he concluded that the tribunal had erred in law in making an award based on the limited number of cows which the appellants would have on Pantdwfn farm at the end of March 1985, without regard to the future. There has been no appeal from that decision. Popplewell J then heard argument on the question of delay. On 25 November he delivered a second judgment in which he held that by reason of the delay which had occurred no order of mandamus or certiorari should be made, and that the relief granted should be limited to a declaration giving effect to his interpretation of the regulations and stating that the tribunal had erred in law. The appellants then appealed against the judge's refusal of substantive relief. On 26 May 1989 the Court of Appeal dismissed their appeal, the sole judgment being delivered by Lloyd LJ. with whom Kerr and Butler-Sloss LJJ agreed. The appellants now appeal to their Lordships' House with leave of the Court of Appeal."

Surprisingly, more than half-way through the submissions of the appellant, there was a joint submission from Ms. Ingrid Mangatal and Mr. Christopher Dunkley, that in this case the better course would be to decide the

preliminary point and remit the case to the Supreme Court if the appellant succeeded. This seemed odd, for in response to the Court, Mr. Christopher Dunkley submitted that he could prove his case from the affidavits and exhibits of the respondent Ministry. Despite that, he stated that he had further affidavits which he wished to adduce. The following letters were among those exhibited at page 48 Volume 1 of the Record:

> "11 June 2001
>
> Honourable Minister Roger Clarke
> Ministry of Agriculture
> Hope Gardens
> Kingston 6
>
> Dear Minister Clarke
>
> Pursuant to your request resulting from complaints by interested parties and concerns of the probity of the process of inspection, the Veterinary Committee has conducted an on-site investigation of each and every facility previously inspected by the Competent Authority.
>
> The Veterinary Committee has found the following:
>
> 1) All facilities inspected by the Competent Authority, excluding two (2), have satisfied the basic minimum requirements according to the Aquaculture Act and its Regulations.
>
> 2) Although they have satisfied the basic requirements according to the Act and its Regulations, there are one or two minor deficiencies which we have found and have asked the operators to have them rectified.
>
> 3) Of the two facilities which have not satisfied the basic requirements, one can be brought

into certification mode during the current season. The certification granted to this facility would be put on hold pending the corrections. The other facility which was outrightly rejected, was in an advance stage of construction. The facilities with which the Committee did not find favour, are not the ones for which there were any previously reported controversy.

4) We have also recognized that the requirements as far as other regulatory agencies are concerned, such as the Bureau of Standards, need to be addressed by all the facilities.

We wish to state that, had we enforced the requirements of all other regulatory agencies, none of the facilities we visited could have been considered for certification immediately.

We look forward to your further guidance and direction in this matter.

Yours sincerely
Members, Veterinary Committee"

It is arguable that the Veterinary Committee should have informed the Minister as to what steps they had taken in accordance with the Act and the Regulations. The guidance they sought from the Minister was ordained in the law. They should have sought the assistance of the legal adviser to the Ministry and if necessary the Law Officers of the Crown.

Then at page 75 of Volume 1 of the Record the following letter appears:

"December 4, 2001

Mr. Sydney Francis
Managing Director
TonRock Enterprises Ltd
Yallahs P.O.
St. Thomas

RE; MEETING WITH PRINCIPALS OF B & D TRAWLINGS LTD AND TONROCK ENTERPRISES LTD TO DEAL WITH CONTROVERSIAL EXPORT OF FISHERY PRODUCTS CONCH EUROPEAN UNION (EU)

With respect to the above-captioned subject as you may recall the major agreement by B & D as represented by Bunny Francis and Mrs. Pat Francis at this particular meeting were as follows:

- B & D Trawlings Ltd to undertake voluntary withdrawal of the products exported illegally in the form of two (2) containers of conch. This action would take immediate effect and should include removal from the distributive trade and their return to Jamaica.

- Failure to achieve the above objective of voluntary removal of products from the distributive trade in Martinique would necessitate the Competent Authority taking the necessary steps to see to their removal and immediate return to Jamaica.

I am hoping that you will confirm the above.

Yours truly

GEORGE H. GRANT,DVM, MPH
DIRECTOR,
VETERINARY SERVICES DIVISION."

Further, there is a letter on pages 81-82 of Volume 1 of the Record:

"December 4, 2001

Mr. B. Francis
Managing Director
B & D Trawlings Ltd
1 Port Royal Street
Kingston

Dear Mr. Francis:

RE: HEALTH CERTIFICATES ISSUED B & D TRAWLINGS LTD FOR EXPORT OF FISHERY PRODUCTS (CONCH)

With respect to the above-captioned subject please be advised that the four (4) health certificates issued to your company are being cancelled with immediate effect. These certificates should be returned to the Veterinary Services (**VSD)** as soon as possible.

The certificates in question are:

(i) VSDJ-TRE 009-LS03;01,C502:01-02
(ii) VSDJ-TRE 009-LS04:01,LS05:01-06,CS02:01-04,CS)3:01-02,C02:03-04
(iii) VSDJ-TRE 009-LS04:01-05,CS02:02-03
(iv) VSDJ-TRE 009-6.10.01-2152,8.10.01-3252,10.01-2352,11.10,:01-2352, 2-19552.102,2-195527.91

This cancellation is based on the current controversy surrounding the issuing and use of these particular certificates.

I would be grateful for your prompt-co-operation.

Yours truly

GEORGE H. GRANT, DVM, MPH
DIRECTOR
VETERINARY SERVICES DIVISION
GG/lg
c.c. Dr. Wintorph Marsden-Veterinary Officer-Veterinary Services Division."

Then there is this letter at pages 84-85 of Volume 1 of the Record:

"MINISTRY OF AGRICULTURE
VETERINARY SERVICES DIVISION
HOPE GARDENS
KINGSTON 6
JAMAICA

December 4, 2001

Mr. Luigi Brusa
Head Delegation of the European
Commission to Jamaica
8 Olivier Road
P.O. Box 463
Kingston 8

ATTENTION; MS. POLO

RE; NOTICE OF ILLEGAL EXPORT OF FISHERY PRODUCTS (conch) TO THE EUROPEAN UNION (EU) FROM JAMAICA

With respect to the above-mentioned subject the Jamaican Competent Authority, the Veterinary Services Division (VSD) is advising that two (2) containers with conch products shipped by B and D Trawling Limited of 1 Port Royal Street, Kingston and consigned to Rene Lanere , SA, Martinique have left Jamaica illegally based on document misrepresentation to the Competent Authority. That is, based on a trace back and audit query it was found that the products in question were not processed in an European Union-approved facility as is required by the relevant local regulations and the European directives.

In this regard, the Veterinary Services Division (VSD) is requesting through your good office that immediate steps be taken by the Competent Authority in Martinique to withdraw and hold these consignments so that they may not enter the distributive trade in Martinique. Furthermore, we are requesting that the said consignments be confiscated and immediately be returned to Jamaica to further facilitate the enquiry which is now in progress and also to prevent their placement on the European market since we are no longer able to guarantee their integrity.

For ease of reference the identification of the two(2) containers in question is as follows:

(i) Container # KNLU –471599-7

(ii) Container # KNLU –471836-3

Please see pertinent documents attached for further details

I would be grateful for your immediate action and response to this urgent request.

Yours truly.

GEORGE H. GRANT, DVM,MPH
DIRECTOR,
VETERINARY SERVICES DIVISION

GG/lg

Enc.

c.c. Mr.Jack Delisser- Deputy Director Customs
Mr. Mark Waters- Deputy Diretor-RPD
The Executive Director, NEPA
Mr. Sydney Francis, managing Director-Tonrick Enterprises Ltd."

These are examples of documents emanating from the Ministry which the appellant bases its contention that it has a strong arguable case at the initial stage. The appellant contends that these documents will also be powerful aids at the hearing on the merits.

Mr. Dunkley also proposed at the hearing below to seek an order for discovery. Further,he was entitled to do this by virtue of Rule 564H-(1): Application for discovery, interrogatories, cross-examination etc.

> "564H-(1) Unless the Court otherwise directs, any interlocutory application in proceedings on an application for judicial review may be made to any judge, notwithstanding that the application for judicial review has been made by motion and is to be heard by a Full Court.

> In this subsection "interlocutory application" includes an application for an order under sections 273 to 292 and 406 or for an order dismissing the proceedings by consent of the parties
>
> (3) This rule is without prejudice to any statutory provision or rule of law restricting the making of an order against the Crown."

Ms. Mangatal then stated that there were additional affidavits which she would wish to rely on at a hearing of the merits if there was one, and that she would also have to reply to the proposed new affidavits Mr. Dunkley wished to adduce. Both counsel contended that to hear the merits in this Court would take a month or more.

Despite the new emphasis on case management by the Judiciary, this Court was reluctant to insist on the original course to hear the whole case on the merits although the Registrar had scheduled the case to continue on November 4. Only time will tell whether the original course or the new accepted proposal served the interests of justice better.

One point that can be made with certainty is this. Once the appellant intends to resort to interlocutory proceedings for discovery of documents the Supreme Court is better able to deal with it. Moreover, that Court has the appropriate number of judges while at present, because of the limited number of judges and the increasing number of cases, we are not able to dispose of them with the promptitude to which we were accustomed in times past.

Is the appellant able to claim damages in these proceedings?

There was also in the Notice and Grounds of Appeal the request for the following order:

> '5. That this matter be consolidated with D.Y.C. Fishing Ltd. v. The Minister of Agriculture and the Attorney General, Suit No. C.L.D.0026 of 2002."

To my mind if the provisions of Rule 564G relating to a claim for damages and to the claim for judicial review pursuant to Rule 564C were followed there is no need to seek consolidation. These rules provide for consolidation. The matter is in counsel's hands. What the Court would do in the face of a proper plea would be to decide the issue on the prerogative orders and the declarations and if these were found to be in favour of the appellant then there would be a direction to try the issue of damages. This is the course the new Rules ordain and it ought to be followed. The claim for an interlocutory injunction, made in the proceedings assumed the existence of a Statement of Claim. (See page 284 Volume 1 of the Record). The averments in the Statement of Claim ought to have been made in the application for judicial review pursuant to Rule 564B (supra).

What was the evidence adduced to establish sufficient interest?

Here is how the appellant stated its sufficient interest at pages 3-10 of Volume 2 of the Record:

> "3. That the Plaintiff's principals have been operating in the fishing industry for the past twelve (12) years, first as an unincorporated

business and as of July 2nd, 1996 as a limited liability company duly registered under the laws of Jamaica.

4. That the Plaintiff's principal business is that of fishers, processors and exporters of conch, fish and lobsters. Among the countries to which it exports are the European Union (hereinafter referred to as **"the EU")** member states of France, Holland and the French Dominions of Martinique and Guadeloupe.

5. That in July of 1997, the EU banned Jamaica from exporting marine gastropods (Queen Conch) to its member states and their Dominions, for Jamaica's failure to comply with *inter alia* EU Directives 91/492/EEC, 91/493/EEC ~~and 92/48/EEC~~.

These Directives lay down the requirements for the harvesting, handling, transportation, processing and export of fishery products, generally and specifically the risky category to which various marine gastropods such as conch belong. I exhibit hereto marked "FC 1" copies of EU Directives 91/492/EEC, 91/493/EEC and 92/48/EEC."

Then the affidavit continues thus:

"6. That within my extensive knowledge and experience in the industry, I say that any processor that operates without making the aforesaid costly but necessary upgrades, would have lower production costs, thus enjoying an unfair advantage in the market place, whilst at the same time creating a public health risk which would necessarily damage the goodwill for the product coming out of the Jamaican market regardless of the source and place acceptability thereof to the EU in jeopardy.

7. That between July of 1997 and April 1999, the Plaintiff itself expended US$1,012,474.00

in order to upgrade its facilities and assist Jamaica in an effort to meet the requirements of the said EU Directives. Between May 1999 and June 2001, the Plaintiff expended additional sums totaling US$677,526.00 in improving a landing site and fishing vessels, also in order to comply with the EU Directives and the by then enacted Aquaculture, Inland and Marine Products and By-products Act, 1999 (hereinafter referred to as **"the Aquaculture Act")** and Regulations 2000, made thereunder (hereinafter referred to as **"the Regulations").**

8. That notwithstanding the aforesaid enactments, the industry proceeded to operate without any or any significant changes, as the ~~statutory bodies~~ thereunder did very little in terms of compliance and enforcement.

9. That on March 31st 2000, the Plaintiff applied for and obtained leave from this Honourable Court to apply for orders of Prohibition, Mandamus and Declarations, in Suit # M32-2000. The Plaintiff further obtained a interlocutory stay of all proceedings by the various divisions of the Ministry of Agriculture in relation to this allocation of conch quotas. I exhibit hereto marked "FC-2" copies of the said Order On Ex Parte Summons for Leave to Apply for Order of Prohibition, Mandamus and Declaration of Justice Courtenay Orr and Notice of Application for Leave to Apply for Order of Prohibition, Mandamus and Declarations.

10. That after a year and a half of protracted litigation, standoffs and negotiations with the Defendant, by Settlement Agreement of April 11th, 2001 (hereinafter referred to as (**"the Agreement"),** the Honourable Minister of Agriculture (hereinafter referred to as the **Honourable Minister),** on behalf of all relevant Divisions of the Ministry of Agriculture,

> agreed *inter alia* to strictly enforce all the provisions of the Aquaculture Act and the Regulations. I exhibit hereto marked "FC-3" copy of the said Settlement Agreement without the attached appendix."

Paragraph 8 contains the gist of the appellant's case and I would make one comment on paragraph 10. The Minister of Agriculture must obey the statutes and regulations. If he does not, mandamus may compel him to do so. There is no need to attempt to secure such obedience by contract. Moreover, the Act and Regulations empowers certain officers in the Ministry to regulate the Aquaculture industry. Mandamus can compel them to perform their public duties. Additionally, if they knowingly fail to carry out their public duties they may be liable in tort as I have previously explained. In such proceedings the Attorney-General would be joined pursuant to the Crown Proceedings Act.

The standing of Aquaculture Jamaica Ltd.

There is a Statement of Claim at page 308 of Volume 1 of the Record which relies heavily on the Settlement Agreement dated 11th April, 2001. The Act is dated March 26, 1999. However, the vital Regulations were not made until May 9, 2000. They were published in the Jamaica Gazette Supplement Proclamations Rules and Regulations on the above date. Once those Regulations are in force we are in the area of public law and it has yet to be explained to me why there was any need for the vaunted Settlement Agreement.

At this stage reference must be made to Rule 564(I) to explain the stance of Aquaculture Jamaica Ltd as a party. It reads:

> "5641-(1) On the hearing of any motion or summons under section 564E, any person who desires to be heard in opposition to the motion or summons, and appears to the Court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with notice of the motion or the summons."

Perhaps Rule 564E-(2) should be referred to in this context:

> "(2) In any other cause or matter, the application shall be made by originating motion to a judge sitting in open court unless the Court directed that it shall be made –
>
> (a) by originating summons to a judge in chambers; or
>
> (b) by originating motion to a Full Court.
>
> Any direction under sub-paragraph (a) shall be without prejudice to the judge's powers under section 528."

Reference has been made to Rules 564I and 564E-(2) because there seems to be a misunderstanding in the Court below as to the basis on which Aquaculture Jamaica Ltd. became a party in these proceedings. The application was made pursuant to Section 100 of the Judicature (Civil Procedure Code) Law which deals with intervenors in ordinary civil proceedings as represented by the Statement of Claim at page 308 of Volume 1 of the Record. Rule 564I-(1) is the rule which enables Aquaculture Jamaica Ltd. to be a party in Judicial Review proceedings.

The evidential basis for being made a party in Judicial Review proceedings was provided by Robert Levy, who in his affidavit established that Aquaculture Jamaica Ltd. was a proper party to the proceedings. Here is how it was stated in his affidavit at pages 331-333 Volume 1 of the Record:

> "1. That I have my true place of abode and postal address at 4 Lanark Drive in the Parish of St. Andrew and I am a Director of Jamaica Broilers Group Limited and duly authorized to swear to this Affidavit on its behalf.
>
> 2. That Aquaculture Jamaica Limited, is a company duly incorporated under the Laws of Jamaica and is a subsidiary of Jamaica Broilers Group Limited, a public company
>
> 3. That Aquaculture Jamaica Limited is primarily engaged in the business of fish at Barton Isle, St. Elizabeth and at sundry fish farms in the parishes of Clarendon and St. Catherine and is an exporter of tilapia fish. Aquaculture employs 200 persons itself and through contractual arrangements generates employment for an additional 100 persons directly.
>
> 4. That Aquaculture Jamaica Limited is the holder of a licence granted under the Aquaculture Inland Marine Products and By-Products (Inspection Licensing and Export Act) 1999 and the Aquaculture Inland Marine Products & By-Products (Inspection Licensing and Export) Regulations 2000 made thereunder. Under that licence Aquaculture is allowed to engage in the processing and export of aquaculture products. That Aquaculture licence expired on or about the 24th day of May, 2002 and it has applied for the renewal of the existing licence but has been advised by the Ministry of Agriculture that since it gave an undertaking to the Supreme Court on the 13th of June 2002 in this suit, that it would not issue any further licences under the aforesaid Act

until the 2nd July, 2002 when the matter comes on for hearing. Exhibited hereto is a copy of the said Licence marked "RL1" for identification.

5. I am advised and do verily believe that as a consequence of the said undertaking the Ministry of Agriculture's Veterinary Division ceased issuing health certificates for the export of fish licensed under the aforesaid Act."

Then the affidavit continues thus:

"6.That Aquaculture Jamaica Limited has shipments of fish as follows on the following dates:-

Atlantic Bay	Wednesday, June 19	1,100 Kilos
Pithers, Brussels	Friday, June 21	1,200 Kilos
Tampa	Saturday, June 22	4,500 Kilos
UK	Sunday, June 23	2,300 Kilos
UK & Brussels	Monday, June 24	1,500 Kilos

10,600

7. That the abovementioned shipment to Tampa Bay represents a sample shipment from which Aquaculture anticipates a firm order of 4,500 kilos a week.

8. That the average price per kilo of tilapia exported is US$3.00 pr J$145.50 and it would mean that Aquaculture stands to lose approximately J$1,542,300.00 from these shipments. That the aforesaid shipments represents just a small quantity of the fish exported by Aquaculture.

9. That the export of farm raised fish is built upon the basis of a guaranteed supply of fish as

distinct from fish harvested from the oceans and a failure to deliver the fish could result in a complete loss of business with these customers.

10. That if this situation is allowed to continue indefinitely, it could mean that Aquaculture and its holding company could suffer irreparable economic loss and the livelihood of over 300 persons would be directly affected.

11. That I do therefore pray that this Honourable Court will grant the relief sought herein as a matter of extreme urgency."

It is clear from the foregoing that Aquaculture Jamaica Limited made out a case to be a party to these proceedings. What is omitted from the Record is the Order of the Court pursuant to the application. As the company is a proper party pursuant to Rule 564I-(1) the omission is not a serious issue.

The respondent's case

As regards the affidavit on behalf of the Minister of Agriculture the initial affidavit filed for the application of the interlocutory injunction was that of Headley George Edwards the acting Director, Veterinary Services, at pages 168-171 of Volume 1 of the Record. In it he concentrated on the lucrative earnings of the industry, the number of people employed, some 20,000 and the need for those who harvest, process and export aquaculture products to comply with the Aquaculture Act and the regulations made thereunder.

What is absent from the affidavit is an answer to the charge that the relevant regulations were being breached without any action by the Ministry

which is the Regulatory Agency. Paragraphs 12, 13 and 14 indicate the nature of the response.

> "12. That the Plaintiff and the First Defendant entered into a Settlement Agreement on April 11, 2001 wherein trade in Conch resumed and the industry benefited from a conch season from June to September 2001.
>
> 13. That the Veterinary Services Division/Ministry of Agriculture's inability to issue or renew any licences under the Aquaculture Act will effectively cripple exports of fish and fish products and result in severe hardship and inconvenience for the members of the Industry, including the artisanal Fishermen who will not be able to earn a living as no one will be able to harvest, process or export any aquaculture product, including conch, lobster and tilapia.
>
> 14. That most licences issued under the Aquaculture Act, including that of Jamaica Aquaculture Limited, expired on or about May 24, 2002 and a failure to renew these licenses will result in the closure of the entire export sector of the fishing industry. The lobster season is scheduled to reopen on July 1, 2002. There are no close seasons for the rearing of, trade in and export of tilipia."

In concluding paragraph 20 reads:

> "20. That restraining the Veterinary Services Division/Ministry of Agriculture from issuing or Renewing any licences under the said Aquaculture Act will have a deleterious effect, not only on the livelihood of those involved in the fishing industry, but also significantly impede the operations of the Ministry of Agriculture/Veterinary Services Division and have an adverse effect on the national economy as the industry generates approximately US$26 Million in valuable foreign exchange annually."

The Appellant's case

In response was the Appellant's reply in an affidavit of eighty-six paragraphs. Paragraph 11 at pages 188-189 of Volume 1 of the Record indicates the basis of the appellant's case for leave to apply for the relevant orders:

> "11. In reply to paragraph 16, I crave leave to refer to letter of November 2nd, 2000, exhibited at 'FC-8' of my Affidavit-A, at page 109 and say that by this letter, Dr. Grant admits that, he **did find** evidence of operations contrary to the Aquaculture Act at 44 Norbrook Acres Dr., Kingston 8. However to date, no action whatsoever has been taken against this illegal operator, who admitted operating a processing establishment at this address, in contravention of Sections 21 and 24 of Part VII, "Offences and Penalties" of the Aquaculture Act. I also crave leave to refer to letter of November 2nd, 2000 exhibited and marked "FC-30", at page 313, of my Affidavit-A, where Dr. Grant admitted finding Mr. Knight making an illegal shipment. The Competent Authority completely failed to address this illegal activity and instead:-
>
> a) Issued an Export Health Certificate under the Aquaculture Act to Mr. Knight, though he possessed no licence to export;
>
> b) Certified said illegal Product not having inspected it during processing as required by the Regulations;
>
> c) Certified the said illegal Product for export despite the fact that it was processed in Mr. Knight's unlicensed facility, as he possessed no license to operate a processing establishment;
>
> d) Took no action whatsoever against Mr. Knight as it is mandated to do under the Aquaculture Act.

> I verily believe that similar treatment was accorded to other unlicensed operators whereas the Plaintiff was required to comply strictly with all the relevant laws."

So it is necessary to cite paragraph 16 of Dr. Grant's affidavit at page 482 of Volume 2 which reads:

> "16. That every allegation of illegal operations made by the Plaintiff was investigated by the VSD and found not to be substantiated. I refer to exhibit **"FC8"** of the Affidavit of Frank Samuel Cox and, in particular, my response to him dated November 2, 2000 at Page 108. That, unless and until, persons are found operating a "processing establishment factory... freezer... or carrier vessel or any other facility or installation for the purpose of harvesting, handling or processing for export, any aquaculture, inland or marine product or its by-product" there is nothing that the VSD or the police can do without the requisite evidence."

It is also necessary to cite Dr. Grant's comments on 44 Norbrook Acres Drive, Kingston 8 in his letter of November 2, 2002 at page 109 Volume 2 of the Record. It reads:

> "(4) **44 NORBROOK ACRES DRIVE, KINGSTON 8**
>
> Investigation by the VSD indicated that the address mentioned is apparently a residence. The person spoken to, one Mr. Ainsley Folks, the apparent owner of premises informed the inspector that some processing of fishery products (Lobster) tails takes place for both export and local consumption. It should be noted that this particular facility is not known to the VSD."

As regards the issue of Mr. Knight it is appropriate to set out the correspondence at pp 311-313 at Volume 2 of the Record:

> "**FAX** DATE: 26 OCT 00
>
> FROM: FRANK S. COX
> TO: VDS- MINISTRY OF AGRICULTURE
> ATTENTION: DR. G. GRANT
>
> NO. OF PAGES INCLUDING THIS: 1 – RE ILLEGAL SHIPMENT
>
> DEAR DR.
>
> WE HAVE BEEN INFORMED BY MR. OSMOND HARRY, GENERAL MANAGER AIR CANADA, THAT THE AIRLINE HAS IN ITS POSSESSION A CONSIGNMENT OF LOBSTER TAILS DESTINED FOR TORONTO CANADA.
>
> WE ARE TOLD THAT IN TRUTH AND IN FACT YOUR OFFICE HAS NOT ISSUED A LEGAL EXPORT HEALTH CERTIFICATE FOR THIS SHIPMENT AND NEITHER DOES THE EXPORTER HAVE A LICENCE TO OPERATE A PROCESSING ESTABLISHMENT.
>
> MR. HARRY ALSO SAYS THAT HE HAS NO INFORMATION FROM YOUR OFFICE AS TO WHAT THE REGULATIONS ARE AND WHAT THE AIRLINE IS SUPPOSE TO LOOK FOR PRIOR TO ACCEPTING THESE SHIPMENTS.
>
> WE EMPLORE YOU TO INTERVENE IN THIS MATTER AND TAKE ACTION AS REQUIRED BY LAW.
>
> AWAITING YOUR URGENT ACTION.
>
> SIGN
> FRANK S. COX
> DIRECTOR DYC FISHING LTD."

Then the next letter is at p. 312. It reads:

> "November 1, 2000
>
> Dr. G. Grant
> Director of Veterinary Services

Ministry of Agriculture
Hope Gardens
Kingston 5

Dear Dr.

Thank you for your explanation and response to our letter of 26th October 2000.

We are however compelled to write to you again in reference to the same shipment by Knight Commerce and Trading.

On examination of your Official Register of Approved facilities for the Production/Processing of Fish products this company does not appear. We understand however that an Export Health Certificate under the Aquaculture, Inland and Marine Products and By-products Act and Regulations was issued for this shipment signed by Inspector Marsden.

Our understanding of the procedures laid out by your office is that the processing and export of fishery products must be done from an approved facility. Then how did this company get a certificate when they have not presented a facility nor a HACCP plan for your approval neither have they paid the required fees for licensing? This is creating some confusion with ourselves and the Director of Customs at the Norman Manley Airport, Mr. Cassey. Please clarify.

We await your usual prompt response.

Sincerely

Frank S. Cox
Director: DYC Fishing Ltd."

Dr. Grant's reply is as follows:

"November 2, 2000

Mr. Frank Cox
DYC Fishing Limited

23 Brentford Road
Kingston 5

Dear Mr. Cox

RE: CONSIGNMENT OF LOBSTER TAILS DESTINED FOR CANADA ALLEGED IN THE POSSESSION OF ONE MR. OSMOND HARRY, GENERAL MANAGER OF AIR CANADA

This is in response to your correspondence dated October 26, 2000 on the above-captioned subject.

Dr. Headley Edwards from the Veterinary Services has already addressed the situation you have raised by furnishing the necessary information concerning the matter to both Air Canada and the Customs office.

It ~~should be noted that international airlines,~~ as well as, the relevant port authorities and customs have all been routinely informed about the protocols and procedures relating to all animal products entering and leaving the country through personal contacts and by way of formal relevant literature.

Yours truly

GEORGE H. GRANT, DVM, MPH.
Director, Veterinary Services Division."

Here are paragraphs from Dr. Grant's affidavit at pp. 483-486 of Volume 2 of the Record which suggest that the Respondent exercised a discretion while the appellant contends that the provisions of the Act and regulations are mandatory:

> "16. That every allegation of illegal operations made by the Plaintiff was investigated by the VSD and found not to be substantiated. I refer to exhibit **"FC8"** of the Affidavit of Frank Samuel Cox and, in particular, my response to him dated November 2, 2000 at page 108. That, unless and until, persons are found operating a *"processing establishment, factory...freezer...or*

carrier vessel or any other facility or installation for the purpose of harvesting, handling or processing for export, any aquaculture, inland or marine product or its by-product" there is nothing that the VSD or the police can do without the requisite evidence.

...

"36 That, in response to Paragraph 29(b) of the Affidavit of Frank Samuel Cox, I state that in any instance where fees were not paid on time the VSD, in its discretion, gave the operators time to pay in light of the fact that there had been a protracted period of inactivity in the conch industry due to the suits filed by the Plaintiff and injunctions it obtained against the Minister and the Natural Resources Conservation Authority and that many persons consequently had severe cash flow problems.

...

45. That, as already stated, the VSD, as Competent Authority, exercised its discretion in relation to the collection of its fees and the Plaintiff, as already stated, did not pay its fees on time although it tried to appear that it had done so in one instance when it left a 'pre-dated' cheque under the door of our offices at a time when they were closed and the actual date on the cheque had passed and no one would have been available to issue a receipt. That the receipt was issued at the very earliest opportunity upon the cheque being found and I exhibit herewith marked with the letters **"GHG4"** for identity copies of the correspondence between the Plaintiff and my erstwhile office in that regard.

46. The licences issued pursuant to Section 12 of the Aquaculture Act are a "Licence to operate a Processing Establishment" and a "Licence to operate a Carrier Vessel, factory Vessel or Freezer Vessel" respectively."

It was the contention of the appellant that the provisions of Section 12 of the Act impose mandatory rather than discretionary duties on the competent authority.

How did Anderson, J. decide on the issues?

The learned judge stated the issue to be determined thus at page 158 of Volume 1 of the Record:

> "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)."

It is clear that the learned judge was adverting to the merits of the case, namely as to the exercise of the discretion to grant the reliefs sought pursuant to the Act and the Regulations made thereunder. However, because he focused on the preliminary point, he did not pay sufficient attention to allegations of the Appellant that the Respondent was failing to carry out its regulatory functions pursuant to the Aquaculture Act and its Regulations. Nor did he come to a direct decision on the merits of the case although there was ample material for him to do so. The affidavits and numerous documents

emanating from the Ministry of Agriculture in the Record were also before Anderson J. in the Court below.

So he turned to the issue which gave him most cause for concern thus:

> "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."

Although the issue of the preliminary point was a main concern of the learned judge, it is clear that the merits of the case had to be considered especially since there is a discretion to extend time. For the proper exercise of such a discretion it was appropriate to consider the whole case in the light of the authorities previously cited. Here is how the learned judge recounted the matter at page 159 of Volume 1 of the Record:

> "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."

If this formulation was correct how could proceedings instituted on 5th June 2002, be out of time with regard to a prayer for prohibition? Moreover, by necessary implication, the Prohibition would not only cover renewals but new applications which were likely throughout the year. Also, once a licence is issued there are Export Health Certificates, daily inspections, certification of products for export, certificates that there be compliance with certain E.U. directives etc. to be completed by the Ministry. These continuing requirements will be referred to again to explain how they are connected with the law. Perhaps it should be noted the Notice of application for leave to apply for Judicial Review takes up some sixteen pages of the Record in Volume 2. This demonstrates the need for a careful analysis and assessment of these claims if justice is to be done to the Appellant's claim.

Then the learned judge turned to the core of the Appellant's case thus at page 160 of Volume 1 of the Record:

> "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."

These passages are enough to demonstrate that the learned judge examined the affidavits the Aquaculture Act and the Regulations. It is necessary to cite one more passage which runs thus at page 161 of Volume 1 of the Record:

> "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 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 licenses: 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."

In the above passage it seems Anderson J. was almost persuaded as to the correctness of the Appellant's case. The problem as the learned judge saw it, was the preliminary point raised by the Respondent.

In this context the following passage from the speech of Lord Steyn in **R(Burkett)** (supra) at p. 109 is pertinent in relation to Prohibition:

> "Thus it is in principle possible to apply for judicial review in respect of a resolution to grant outline permission and for prohibition even in advance of it (see generally Wade & Forsyth Administrative Law (8th edn, 2000) p 600: Craig Administrative Law (4th edn. 1999) pp 724-725; Fordham Judicial Review handbook (3rd edn. 2001) pp.102-103 (para 4.8.2)). It is clear therefore that if Mrs. Burkett had acted in time, she could have challenged the resolution."

Also to reiterate what Lord Hoffmann said in **Kemper** (1998) 53 W.I.R. at 119:

> "But judicial review seldom involves deciding a question which some one has already decided. In many cases the decision maker will not have addressed his mind to the question at all."

In any event, Prohibition relates to continuing unlawful acts. This is an aspect that was insufficiently grasped in the Court below.

It is arguable that the learned judge accepted the Appellant's argument that the merits of the case ought to be decided, so in such circumstances since

the remedies sought are discretionary leave ought to have been granted. So why did he not grant it? Here are his reasons at page 162 of Volume 1 of the Record:

> "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."

This is probably why the learned judge erred. The gist of the Appellant's case is a request to prohibit the Ministry from continuing to issue licences where those seeking renewals were in breach of the Aquaculture Act and Regulations.

The following passage from Lord Goff in **Caswell v. Dairy Produce Quota Tribunal** at [1990] 2 All ER 435 at 439 is instructive as to how the instant case ought to have proceeded:

> "It follows that when an application for leave to apply is not made promptly and in any event within three months the court may refuse leave on grounds of delay unless it considers that there is good reason for extending the period; but, even if it considers that there is such good reason, it may still refuse leave (or, where leave has been granted, substantive relief) if in its opinion the granting of the relief sought would be likely to cause hardship or prejudice (as specified in s 31 (6)) or would be detrimental to good administration. I imagine that on an ex parte application for leave to apply before a single judge the question most likely to be considered by him, if there has been such delay, is whether there is good

> reason for extending the period under r 4(1). Questions of hardship or prejudice or detriment under 31 (6) are, I imagine, unlikely to arise on an ex parte application, when the necessary material would in all probability not be available to the judge. Such questions could arise on a contested application for leave to apply, as indeed they did in **Ex p. Jackson**; but even then, as in that case, it may be thought better to grant leave where there is considered to be good reasons to extend the period under r 4 (1), leaving questions arising under s 31(6) to be explored in depth on the hearing of the substantive application."

The following are the relevant passages from the learned judge's conclusion in the Court below at p.165:

> "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."

Then at page 166 the following passage concludes the judgment:

> "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 conclusions 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."

There are two observations which can be made with respect to the above paragraph. Firstly, it demonstrates a misunderstanding of the role of prohibition which is to preclude unlawful acts and future unlawful acts. For existing unlawful acts certiorari is available to quash the decision. Secondly, the finding in relation to good administration could only have been made on the basis that the merits of the case had been considered. Be it noted that unlawful acts could not amount to good administration.

Why the above reasons cannot be supported

The principal relief claimed was Prohibition. It concerned licences which came up for renewal on May 25, 2002. The application in the instant case (at page 290-306 of Volume 1 of the Record) was filed on 5th June 2002. So the application was in time in accordance with the rules which stipulate for 3 months. The economical course therefore on appeal was for the Appellant to

demonstrate the central breaches of the Act and its regulations and contend that the learned judge seemed to have accepted the Appellant's contention on the merits and show that his finding on the preliminary issue was wrong. This Court could then have dealt fully with the issue on the merits, granted the appropriate amendments if warranted, and granted the reliefs sought if established. There would also be a need for directions as to the issue of damages if the appropriate amendments were sought.

The Proceedings on Appeal

The first point to make is to reiterate that initially, the Appellant requested this Court in its prayer for further orders to review the judgment of the Court below. It was contended that the reasons were faulty. The reliefs prayed for would then be granted on the basis of its submissions. This course was permissible by virtue of Section 10 of the Judicature (Appellate Jurisdiction) Act and Rule 18(1) of the 1962 Court of Appeal rules which spells out the power thus:

> "In relation to an appeal the Court shall have all the powers and duties as to amendment and otherwise of the Supreme Court."

The second point is that subsequently more than half-way in the submissions of Mr. Dunkley for the Appellant, there was a joint submission that only the issue of leave ought to be decided by this Court, and if leave were granted, the matter should be remitted to the Judicial Review Court for a hearing on the merits. The third point is that this Court eventually accepted these submissions

and concluded at the end of the hearing, that leave ought to be granted and the matter remitted to the Judicial Review Court.

Against this background it is pertinent to cite the Order issued and give the reasons for it. The Order reads as follows:

> "(1) Appeal allowed
>
> (2) Order of the Court below set aside
>
> (3) Leave granted for appellant DYC Fishing Ltd. to apply for Judicial Review
>
> (4) Matter remitted to the Judicial Review Court to hear application for Prohibition, Mandamus and Declaratory Orders.
>
> (5) The agreed or taxed costs here [for four days] and below to be paid to the Appellant by the Ministry of Agriculture
>
> (6) Expedited hearing before the Judicial Review Court ordered
>
> (7) Reasons to be put in writing."

It is to be noted that we had asked the Appellant to prepare a chart with the breaches they alleged, and Ms. Sakhno who prepared it entitled it "Relief Chart" and gave three examples from it in her oral submissions. We will not advert to them in these reasons as it is now a matter which the Full Court or a single judge will have to determine, after hearing from both sides.

We would however wish to remind all parties of Lord Diplock's sage words in **Council of Civil Service Union and others v. Minister of the Civil Service** [1984] 3 All E.R. 937 at 949:

> "My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognized in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
>
> By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."

Since the challenge in the instant case is based on illegality, the issue of a discretion coupled with a duty in certain circumstances will also be a live issue. Reference will therefore have to be made to **Padfield v the Minister of Agriculture** [1968] 1 All E.R. 694.

Of the seven grounds of appeal filed it is convenient to refer to four in order to dispose of this appeal. They are as follows at page 141 of Volume 1 of the Record:

"(1) The Learned Judge erred in law and in fact in holding that the Applicant's application was either premature or out of time.

(2) The Learned Judge erred in law in failing to find that prohibitory relief in anticipation of unlawful acts by statutory authorities exists in law separate and apart from orders of certiorari.

(3) The Learned Judge erred in finding that the relevant grounds giving rise to the application for prohibitive relief sought by the Applicant/Appellant arose solely out of the grant of the relevant licenses in the year 2001.

(4) The Learned Judge further erred in law and in fact in failing to find that the determinant ground for Applicant's application for prohibitive relief was the expiration of the existing licences under the Aquaculture Act and the imminent prospect of renewal of the said licences by the Defendant/respondent, the relevant date for which was on or about May 25th, 2002."

These grounds must be considered against the background of Rule 564D which reads as follows:

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

(2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.

> (3) The preceding subsections are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

Judicial Review is similar to a constitutional remedy. It is a remedy of last resort. Here is how Lord Steyn put it in **R. (Burkett) v Hammersmith** (supra) at 110-111:

> "But it is a jump in legal logic to say that he must apply for such relief in respect of the resolution on pain of losing his right to judicial review of the actual grant of planning permission which does affect his rights. Such a view would also be in tension with the established principle that judicial review is a remedy of last resort."

The constitutional foundation for Judicial Review is stated in Section 1(9) of the Constitution which reads thus:

> "(9) No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law."

Then the provisions which govern time in the Supreme Court which adjudicates on Judicial Review at Section 20 (2) of the Constitution read:

> "(2) Any court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

This relation between Section 1(9) of Chapter 1 of the Constitution and Section 20(2) of Chapter III of the Constitution makes Judicial Review a Constitutional right linked to Fundamental Rights. Rule 564D-(1) which speaks to application for Judicial Review must conform to the broad and ample words of Section 20(2) of the Constitution especially with respect to time within which applications ought to be made. That time ought to be a "reasonable time."

Woolf L.J. as he then was, in referring to time within which proceeding ought to be brought pursuant to the unwritten Constitution of England states it thus in **R v Commissioner of Local Administration ex parte Croydon London Borough Council and another** [1989 1 All E.R. 1033 at 1046:

> "While I fully recognise the importance of applications for judicial review being made promptly, I would not criticize in any way Croydon's decision in this case. If Croydon had applied at the time the commissioner was embarking on his investigation, I have little doubt that they would have been faced with an argument that their application was premature. Certainly the application could at that stage have proved to be wholly unnecessary and at best would have merely resulted in the commissioner having the opportunity to decide whether to exercise his discretion under the proviso to s.26(6). It would then still have been necessary for a second application to be made to challenge the commissioner's findings of maladministration. Such a duplication of proceedings would not have been in anyone's interest.
>
> While in the public law field, it is essential that the courts should scrutinize with care any delay in making an application and a litigant who does delay in making an application is always at risk, the provisions of RSC Ord 53, r 4 and s 31(6) of the Supreme Court

> Act 1981 are not intended to be applied in a technical manner. As long as no prejudice is caused, which is my view of the position here, the courts will not rely on those provisions to deprive a litigant who has behaved sensibly and reasonably of relief to which he is otherwise entitled."

Reference must be made to Section 13 of the Act which reads:

> "13. A licence granted pursuant to this Act shall not be transferable and shall be valid for such period, not exceeding twelve months as is specified therein."

As licences were issued on an annual basis and licences were coming for renewal the appellant was not out of time.

Then Section 5.-(1)(a)(i) of the Act reads: .

> "5.-(1) The functions of an inspector shall be –
>
> (a) to inspect processing establishments, factory vessels, freezer vessels or carrier vessels in order to-
>
> (i) ensure compliance with provisions of this Act or any regulations made hereunder or any condition subject to which a licence is granted."

So there are continuing regulatory functions after a licence is granted. Certainly prohibition can act on these continuing features if the requirements are not met. Then another continuing function for the inspector is provided for in Section 5 (1) (e) thus:

> "5(1)(e) to certify for export any such aquaculture, inland or marine product or its by-product."

Earlier the documentary and affidavit evidence was referred to which is capable of supporting the Appellant's claim that the Inspectorate failed to perform its duties under the Act and Regulations.

Section 19 provides for the revocation of licences. When we turn to the Regulation, the Inspectors are accorded powers under Rule 157 which are continuing. Rule 157 reads:

> "157. Where an inspector has inspected prescribed products, and he has reasonable grounds to believe that the prescribed products are not fit for export but fit for human consumption he shall –
>
> (a) cause the prescribed product to be handled, treated, stored or marked so to prevent deterioration; and
>
> (b) cancel, remove and deface any official export health marks that may have been applied thereto on the container or carton."

These provisions coupled with the affidavit evidence of the Appellant which alleges that the regulatory functions of the Ministry are not being performed demonstrate that the Appellant had an arguable case and was within the time limit laid down by the Judicial Review Regulations for continuing unlawful acts. Also to be taken into account is that the Appellant attempted to settle the issues in dispute by the Settlement Agreement even if such an Agreement was superfluous.

These are the reasons which this Court promised to put in writing at the conclusion of the hearing. They establish that the Appellant has raised important points as to how the Ministry of Agriculture exercises its regulatory

functions which it claims are prejudicial to its interest and Jamaica's international reputation with the particular reference to the area of public health.

Two of our principal export markets for Aquaculture products are the United States of America with a regulatory regime administered by the Food and Drug Administration. The other is the European Union which has an equally strict regime can be gleaned from these proceedings. Parliament has enacted a strict regulatory regime in the interest of consumers both within and outside the jurisdiction. Therefore the Appellant should have its day or it seems its month in Court to prove its case.

HARRISON, J.A.

I have read the judgments of my learned brothers Downer and Smith, J.J.A. I agree with their indepth reasoning in the matter to which I can make no useful addition. Because of the importance of this matter I make this brief comment.

Anderson, J. on July 3 2002, dismissed the application of the appellant for leave to apply for judicial review for the issuance of orders of prohibition, mandamus and declarations, on the ground that the appellant was out of time due to delay. The learned judge, in addition refused the appellant an extension of time in which to do so on the ground that it would be contrary to good administration and prejudicial to other persons.

The Aquaculture Act and the Regulations made thereunder are in existence for the express purpose of regulating, establishing and maintaining, local and international standards in relation to public health and hygiene practices in respect of the various aspects of operations involved and stipulating the standards for production, harvesting and export of products and by-products of the aquaculture and general fishing trade.

The export of aquaculture products to the European Union ("E.U."), one of our primary markets, is strictly regulated, in that directives from that body require that prospective exporters must comply with specific standards.

The appellant's complaint that there have been continuing breaches of the Act, the Regulations and the said directives of the E.U., is supported by a

chronicle of detailed transgressions by persons involved in the trade. These breaches, on the affidavit evidence before the learned judge, reveal clear instances of acquiescence on the part of the Competent Authority, the Veterinary Services within the Ministry of Agriculture.

Licences granted under the Act in May 2001, by the said Competent Authority are valid for a period "not exceeding twelve months": (Section 13). Renewal of such licences may be effected by the competent authority if:

> "(a) application for such renewal is made not later than thirty days before the date of expiry or within such, longer period as the competent authority may allow." (Section 15(1).

It was evident to the appellants that the Competent Authority demonstrated that it intended no change in its pattern of conduct of issuing export and other health certificates and licences in breach of the said Act, Regulations and directives.

The appellant's remedy therefore, in order to forestall such issuance, did lie in public law by way of judicial review.

Because the said breaches by the Competent Authority continued for the period of the currency of licences issued in May 2001, and the anticipated renewal of licences were to be considered in June 2002, the application of the appellant on June 5 2002, to prohibit the issuance of such certificates and licences was not filed out of time. The appellant had acted promptly and well "within three months ..." as required by section 564D(1) of the Judicature (Civil Procedure Code(Amendment)(Judicial Review)Rules, 1998.

The aquaculture trade, and in particular, fishery, is the livelihood of many Jamaicans. The harvesting and export of conch, a particular specie which is internationally accepted as found no where else in the world, in the quantities found in Jamaican waters, all need protection from extinction. These proceedings are the latest in an ongoing series of litigation between various participants in the trade.

It is difficult to appreciate why the parties involved and at various levels have consistently failed to regulate their affairs and to conform to the requirements of the statutory provisions in a principled way, without constant resort to legal proceedings. A mature approach is necessary. It may save a vital valuable national commodity from becoming another wasting asset.

I agree that this appeal must be allowed.

SMITH, J.A.:

This is an appeal from the order of Anderson, J. refusing an application by DYC Fishing Ltd. ("DYC") for leave to apply for Orders of Prohibition, Mandamus and Declarations.

I have had the privilege of reading in draft the reasons for judgment of Downer, J.A. In a wide ranging judgment, Downer, J.A. has expressed his views on certain issues. These will, in my opinion, provide great assistance and guidance to counsel on both sides and indeed to the trial judge. I venture to think that these views, if heeded, may well lead to the saving of time and costs.

Since this matter involves allegations of the maladministration and non-enforcement of a public Act, I feel constrained to make a brief contribution. I will confine myself to dealing only with the complaint that the learned trial judge erred in holding that the application for leave was out of time and in refusing to grant an extension of time.

THE BACKGROUND:

DYC is a company incorporated under the Laws of Jamaica. Its Managing Director is Mr. Frank Cox. It is engaged in the business of seafood processing and distribution. DYC exports its seafood products mainly to the European Union ("EU"). In 1991 the EU introduced Directives (91/482/EEC and 91/493/EEC) laying down the health conditions for production and sale of fishery products.

In 1997, Jamaica was banned from exporting conch to the EU and threatened with a similar ban on other fishery products unless these Directives were complied with.

As a result of the agitation of DYC, its overseas customers and other members of the Fishing Industry, a task force was set up by the Minister of Agriculture. The work and recommendation of this task force led to the promulgation of the Aquaculture, Inland and Marine Products and Bye-Products (Inspection Licensing and Export) Act 1999 (the "Aquaculture Act"). The Veterinary Services Division of the Ministry of Agriculture was designated the Competent Authority. ~~A Veterinary Service Committee~~ was established (s.8 of the Aquaculture Act). The Competent Authority and the Veterinary Committee were given the responsibility for the due administration of the Act.

In March, 2000 DYC brought an action against the Minister seeking Orders prohibiting the Minister and/or his agents or servants from issuing fishing or other licences for the harvesting of fish or other marine or aquatic products in contravention of the provisions of the Aquaculture Act. DYC also sought orders of mandamus to compel the Minister and the Competent Authority to implement and enforce policies and programmes to safeguard the public health of consumers of aquaculture, inland and marine products and their by-products and generally to comply with the provisions of the Aquaculture Act.

By a Settlement Agreement dated April 11, 2001 that litigation was brought to an end. This "Agreement" addressed the issues such as a fair and

lawful allocation system for conch quotas, the proper administration of the Aquaculture Act and the proper procedure to be followed in the granting of licences under the said Act.

In December, 2001, DYC complained to the Minister that the Competent Authority had breached the Settlement Agreement by not properly administering and enforcing the Aquaculture Act. Numerous instances of non-compliance were brought to the attention of the Competent Authority and although the Minister personally directed that the breaches be rectified, in most cases the breaches remained unabated. As a result, several containers of conch were shipped to the EU market by persons who should not have been authorised. Some of these products were later found to be contaminated with the deadly bacterium **Listera.**

DYC and other legitimate exporters, claimed they were in imminent danger of losing their EU market. Consequently, DYC on the 26th April, 2002, filed suit No.026 of 2002 against the Minister and the Attorney General for the breach of the Settlement Agreement. DYC sought and obtained an interim injunction for ten days restraining the Minister and the Competent Authority from issuing or renewing licences under the Aquaculture Act.

The Respondents intimated their intention to take a preliminary point that an injunction could not be granted against the Crown in civil proceedings by virtue of S.16 of the Crown Proceedings Act. In the face of this DYC on the 29th May, 2002 wholly discontinued its action against the Attorney General.

Shortly after, it became apparent to DYC that the Competent Authority intended to renew licences and issue export health certificates without the necessary compliance with the provisions of the Aquaculture Act and the Regulations made thereunder. On the 5th June, 2002, Notice of Application for leave to apply for Orders of Mandamus and Declarations was filed. This Notice was amended to include the Order of Prohibition.

The application for leave was heard by Anderson J, on the 25th and 26th June, 2002 and July 2 & 3, 2002. Anderson J dismissed the application for leave on the ground that it was out of time and refused to grant an extension on the basis that it would be contrary to good administration and prejudicial to other persons with interests in the fishing industry.

It is against this order that DYC has appealed to this Court.

Leave to apply for judicial review.

Section 564C of the Judicature (Civil Procedure Code) (Amendment) (Judicial Review) Rules 1998, the ("Rules"), provides:

> " (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this section.
>
> (2) An application for leave shall be made exparte to a judge by filing –
>
> (a) a notice – containing a statement of
> (i) the name and description of the applicant;
>
> (ii) the relief sought and the grounds upon which it is sought

(iii) the name and address of the applicant's attorney (if any); and

(b) an affidavit which verifies the facts relied on."

Pursuant to the above provision, DYC by Notice of Application dated June 5, 2002, sought leave to apply to the Full Court for Orders of Mandamus, Prohibition and Declarations. Declarations formed the bulk of the relief sought. They primarily relate to the duties and powers of the Minister and the Competent Authority under the Aquaculture Act. However, the principal relief sought was Prohibition. Among the Orders of Prohibition sought is an order to prohibit the Competent Authority, which has the authority under the Aquaculture Act, from considering any applications for licences under the Act unless they are in strict compliance with all prerequisites thereunder. Another such Order seeks to prohibit the Minister and/or the Competent Authority from renewing any of the licences under s.15 of the Act, issued by the Competent Authority between April 1, 2001 and May 25, 2001.

Miss Mangatal for the Minister submitted **in limine** before Anderson J that the time for making application under the Judicature (Civil Procedure Code) (Amendment) (Judicial Review) Rules 1998 had passed. This submission was accepted by the learned trial judge.

Seven grounds of appeal were filed on behalf of the appellant DYC. I will confine myself to Grounds 1,3, and 4 which are as follows:

1. The Learned Judge erred in law and in fact in holding that the applicant's application was either premature or out of time.

3. The Learned Judge erred in finding that the relevant grounds giving rise to the application for prohibitive relief sought by the Applicant/ Appellant arose solely out of the grant of the relevant licences in the year 2001.

4. The Learned Judge further erred in law and in fact in failing to find that the determinant ground for the Applicant's application for prohibitive relief was the expiration of the existing licences under the Aquaculture Act and the imminent prospect of renewal of the said licences by the Defendant/Respondent, the relevant date for which was on or about May 25, 2002.

Was the application out of time?

Section 564D of the Rules reads:

> "(1) An application for leave to apply for judicial review shall be made promptly and in any event within 3 months from the date when grounds for application first arose unless the court considers that there is good reason for extending the period within which the application shall be made. (emphasis provided)
> (2)...
> (3)..."

The application for judicial review was made on the 5th June, 2002. The important question therefore is – when did the grounds for the application first arise? Miss Mangatal's submissions as recorded by the learned trial judge were as follows:

> "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 the 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".

On the other hand Mr. Dunkley's submissions on behalf of DYC as recorded by the learned trial judge were:

> "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 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 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."

At this point it may be helpful to state that it is not in dispute that the licences were initially issued on May 24,2001. Section 13 of the Aquaculture Act provides that "a licence granted pursuant to this Act shall not be transferable and shall be valid for such period not exceeding twelve months as is specified therein". It is also not in dispute that the licences were due for renewal on May 25, 2002.

It is the contention of DYC that during the inspection and licensing process the Minister, through his servants – the Inspectors, the Competent Authority and the Veterinary Committee, committed numerous infractions of the Aquaculture Act and the Regulations. These infractions were documented in detail in affidavits filed in support of the application for judicial review. The

licences which DYC alleged were issued in contravention of the law, had all expired on or about May 24, 2002 and due for renewal.

The learned trial judge referred to the further submissions of Mr. Dunkley that the grounds first arose when it became apparent that the Competent Authority intended to renew the said licences in breach of the law, as alleged. In this regard the judge said:

> "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"(emphasis added)

Mr. Dunkley submitted that in so holding the learned judge fell into error. I think Mr. Dunkley is right. There can be no doubt that the conditions which existed at the time of the initial grant are only relevant to that grant and cannot be considered upon application for renewal. Further, the contention of DYC which is supported by affidavit evidence and documents is that, the Competent Authority contravened the provisions of the Aquaculture Act and/or failed to carry out its functions and duties under the Act in that none of the licensees met all the requirements of the Act and the Regulations in the first instance. Thus in the face of the uncontroverted affidavit evidence adduced by the applicant it cannot be assumed that the conditions that existed at the time of the initial grant

justified that grant. On the contrary the assumption in my view, would be that they would continue to issue licences although the conditions were not fulfilled.

Further, the affidavit evidence shows that the circumstances that existed at the time of the initial grant remained unchanged.

I cannot agree with the learned judge that "given the construct of the legislation, the intention to renew must have arisen at the time of the initial grant provided the licensees maintained the conditions which allowed for the grant in the first place." The construct of the legislation provides the conditions for renewal. To renew a licence the Competent Authority must exercise its discretion **afresh** and it is bound by the conditions imposed by section 15 of the Aquaculture Act. Section 15 of the Act provides:

> "**15.**- (1) A licence granted pursuant to This Act may be renewed by the competent authority if –
>
> (a) an application for such renewal is made not later than thirty days before the date of expiry or within such longer period as the competent authority may allow;
>
> (b) the competent authority is satisfied that –
>
> (i) the applicant is operating in compliance with the provisions of this Act or any regulations made hereunder;
>
> (ii) the equipment in the licensed establishment or licensed vessel is being operated in an efficient and hygienic manner;
>
> (iii) only those export operations for which the establishment or vessel

is licensed are being carried out by the applicant;

(c) the applicant has paid-

(i) any fee charged by the competent authority for services performed at, or in respect of the establishment or vessel to which the application relates;

(ii) any other fees or charges payable pursuant to this Act or any regulations made hereunder in relation to that establishment or vessel;

(d) 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 in accordance with subsection (2);

(e) the applicant or his servant or agent has not been convicted of any offence specified in section 14 (2).

(2) Where -

(a) an application for the renewal of a licence is made after the expiration of the period specified in subsection (1)(a); or

(b) the competent authority is satisfied that a material change of circumstance has occurred since the licence or certificate was granted,

it shall treat the application as a new application, and accordingly, the provisions of sections 10,11,12, and 14 shall apply to that application."

Indeed given the legislative scheme I would daresay that the Competent Authority cannot properly and lawfully decide at the time of the initial grant to renew the licence on its expiration.

In further addressing the period within which the application for leave should be made the learned judge said (pp.162-3 of the Record):

> "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 it 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".

The learned judge seemed not to have accepted the applicant's contention that the pith of its claim is an order of prohibition to stop the Minister and/or his servants or agents from continuing to issue or renew licences in breach of the Aquaculture Act and Regulations. It seems that by referring to the "act of the public authority" the judge was concentrating on the relief of certiorari which was not in the appellant's prayer. Certiorari is available to quash an "act" already done. However, prohibition is available to prevent future unlawful acts or to stop any continuing unlawful act. Thus as counsel for the applicant submitted, prohibition may go to prevent the imminent renewal of licences which would stop the continuing unauthorized issuance of Export Health Certificates and certification of products for export.

The affidavits filed by the applicant gave numerous instances of continuing breaches of the Act and Regulations. The licences were issued on an annual basis and were due for renewal on the 25th May, 2002. It is my view that the computation of the three month time period for filing an application for prohibition should start from the 25th May, 2002. The application in the instant case was filed on the 5th June, 2002 and was clearly within the stipulated time period. The case of **R (on application of *Burkett and another) v. Hammersmith & Fulham London Borough Council*** [2002] 3 All ER 97 lends support to this conclusion.

Accordingly, I came to the conclusion that the learned judge erred when he found that the application was out of time. This ground would in my view be enough to dispose of the appeal. However, the Court went on to consider whether leave to apply should be granted. In this regard I will content myself with saying that there is ample evidence to support the contention of counsel for the appellant, DYC, that the grounds for judicial review are arguable. Indeed the learned trial judge seemed to have accepted such a contention and no doubt would have granted leave had he not found that the application was out of time.

Even if the application was out of time section 564D of the Rules allows for the extension of the time period in which to make the application for leave.

In holding that "an extension of time would be detrimental to good administration as it would prejudice persons who were operating legitimately under the terms of the licences previously issued to them", the learned judge

failed to give effect to the fact that all the licences issued in May 2001 would not be valid after April, 2002. The challenge by DYC was to any future renewals in breach of the law. Indeed the applicant is contending that the licensees were not operating legitimately under the terms of the licences previously issued to them and that renewal of those licences would be in contravention of the Aquaculture Act and Regulations. "Administration outside the law is bad administration" - ***R v Hammersmith and Fulham London Borough Council ex parte Burkett*** [2001] Env.L.R.684. C.A. The remedies sought were intended to prohibit future unlawful practices and to ensure the good administration of the Act.

I have in the foregoing pages endeavoured to give my reasons for holding that the learned trial judge erred in refusing the application for leave and that leave should be granted and the matter remitted to the Judicial Review Court.

The Order of the Court made on the 18th October, 2002 is as follows:

> Appeal allowed. Order of the Court below set aside. Leave granted to appellant D.Y.C. Fishing Limited to apply for Judicial Review. Matter remitted to the Judicial Review Court to hear application for Prohibition, Mandamus and Declaratory Orders.
>
> The agreed or taxed costs for four (4) days and costs below to be paid to the appellant by the Minister of Agriculture.
>
> Expedited hearing before the Judicial Review Court ordered.