

Early on it became clear that the appellant could more efficiently discharge and load cargo at the port of George Town if it operated its own crane. It applied to the respondent in September 1978 for a licence to operate a crane at the Port. Correspondence was exchanged. The precise categorization of the arrangement agreed is disputed but the respondent did on 22nd September 1978 grant the appellant permission to operate a crane in the Port Area. The permit was for one year and renewable annually. In May 1980 the respondent granted permission for the operation of a second crane. In granting this permission the respondent informed the appellant that it planned in the future to provide and operate cranes in the port area whereupon the appellant would no longer be able to operate any cranes within the Port Area.

On 30th January, 1996 the appellant received a letter from the Director of Ports stating that the Respondent had decided to operate it's own crane in the Port Area. Only in the event of a disruption of service would the Director allow other operators on the property.

By letter dated 5th May, 1997 the Director of Ports informed the appellant that it intended to commission its crane for use in loading and unloading vessels requiring crane service at the port of George Town as of 23rd June, 1997. The respondent was required to move it's cranes no later than 22nd June, 1997. The appellant did not in fact move the cranes and by further letter dated 15th July 1997 the Director of Ports notified the appellant that any licence or permit which the appellant might hold was thereby terminated pursuant to its terms or the provisions of the Port Regulations from noon on 16th July, 1997. The appellant moved it's cranes on 23rd or 24th September 1997.

In the statement of claim as originally filed the appellant did not claim damages but it did allege that the respondent's crane could not unload the appellants cargo as efficiently as did the appellant's cranes which it had been compelled to move. The appellant was as a result unable to keep its schedules particularly when there was inclement weather. The appellant was forced to use its own cranes at a cost of C.I. \$500,000 per annum.

In that original statement of claim the appellant claimed declarations that it was the holder of a contractual license to keep and operate two cranes at the wharf and an injunction restraining the respondent from compelling the appellant so long as the contractual licence was in force to remove the cranes.

The appellant applied to the Grand Court for an interlocutory injunction restraining the respondent from compelling removal of the cranes. This was refused on 22nd August, 1997. On 22nd September, 1997 Harre CJ, as a single judge of the Court of Appeal affirmed the order of the Judge of the Grand Court. It was as a result of this order that the appellant moved the cranes as has been mentioned above.

Prior to the hearing of the application for the interlocutory injunction an order had been made by consent on 18th June, 1997 requiring the parties to give discovery of documents by way of exchange of lists within two weeks of the date when pleading would be deemed to be closed. In fact the appellant did not file its list until 27th January, 1998. The list contained no documents dealing with damages. The appellant contends that this was quite properly so since at that stage the pleadings contained no claim for damages – only a prayer for an injunction.

On 27th February, 1998 the respondent, by summons applied for an order that the appellant forthwith give discovery of all documents relating to the quantum of damages. At the hearing of that summons the appellant applied for leave to re-amend the statement of claim in effect to delete all references to injunctive relief and claim the remedy of damages. The draft re-amendment was produced. The summons for discovery was adjourned to 9th March, 1998 – which had been fixed as the first day of the trial. The appellant issued its summons for re-amendment of its writ of summons and statement of claim on 6th March 1998. That summons was heard on 9th March, 1998 and, leave to re-amend was granted. The summons for discovery was heard and it was ordered:

1. the Plaintiff having failed to comply with the Order for discovery made herein on 18th June 1997 do forthwith initiate the discovery process in respect of the documents named hereunder. The Accountant for the Plaintiff, Mr. Alan Wilson to meet the Accountant for the Defendants in order to identify these documents; viz. – all documents relating to the alleged quantum of damages:
 - (i) all documents touching and concerning the alleged costs referred to in paragraph 36 of the re-amended Statement of Claim
 - (ii) the Plaintiff's accounting records since June 1997 in respect of all charges to customers and rates of charge to customers
 - (iii) Annual Accounts for 1996 and 1997
2. The Plaintiff pay the Defendant the costs of and occasioned by this Summons in any event to be taxed if not agreed.
3. The Plaintiff's application for leave to appeal is refused.
4. The Plaintiff's application for an adjournment of the trial to seek leave to appeal from the Court of Appeal is also refused.

This hearing was in Chambers.

Mr. Lamontagne stated that he could not comply with the order for discovery which had been made because both he and his instructing attorney needed to be present while the discovery process ordered by the judge was taking place. It appears that the sequence of events envisaged by the judge was that the accountants would identify the relevant documents while the trial proceeded. Since some ten days has been allotted for the trial the expectation was that by the time the issue of liability had been concluded and that of damages came to be considered the documents relating to that issue would have been discovered and be available.

Mr. Lamontagne contended that the order was, in effect, an order which would make available to the respondents "the commercial secrets" of the appellants. He could not be in court proceeding with the case when he would be required to be at the offices of the appellants to consider and decide what documents should be made available.

Proceedings then moved into open court for the hearing of the substantive action. Mr. Lamontagne then informed the judge that he proposed to take no further part in the proceedings. He would call no evidence. Understandably the judge asked him carefully to consider the course of action he was taking. Mr. Lamontagne maintained his position.

There were before the judge for hearing then three proceedings –

- (a). 367 of 1997 which was the claim for damages in which the order for discovery had been made.
- (b). 613 of 1997 which was an application for judicial review by way of certiorari of a decision by the Port of Authority or the Director of the Port Authority to cancel the permit issued by one or other of them to conduct the business of mobile crane operator at the port of George Town, and

- (c). 150 of 1998 which was an application for judicial review by way of certiorari of the appellants decision of 15th January, 1998 to treat the appellant's application for the renewal of a permit as an application for a new permit.

No evidence having been led by the appellant in support of the claims therein the judge dismissed them with costs. The respondent led evidence in support of his counterclaim and were awarded the damages proved.

The appellants applied for leave to appeal against the dismissal of these actions. Leave was refused. He also applied for a stay of execution of the award of the damages against it on the counterclaim. Leave was refused. The proceedings before this Court also included an application for leave to appeal against the refusal of the application for stay of execution. The sum awarded has since been paid so that that application falls by the wayside.

There was some discussion as to whether there was an obligation to apply for leave to appeal in the action for damages and for judicial review – 367 of 1997, 613 of 1997 and 150 of 1998. The order made in these actions were final judgments, and were not interlocutory as was the order for discovery. It became clear in the course of argument that whatever view may be taken on that issue, the time for filing appeals against these judgments would have lapsed and leave would have been required in any event for extending time. No arguments were advanced that the matters to be considered in each case would be different.

It was not disputed that the order for discovery made by the trial judge was unusual. It was unusual because it contemplated that a representative of the respondent who had made the application for discovery was to be present and would take part in the decision whether the

document should be disclosed or not. Normally discovery is made by the delivery of a list. After delivery, the party who has requested discovery can call for production, inspection and the taking of a copy of any document listed. The order as made required that the accountant for the appellant meet the accountants for the respondents 'in order to identify these documents, viz.-all Documents relating to the alleged quantum of damages'.

This irregularity is on the face of it an arguable ground of appeal on a challenge to the order – sufficient to justify the granting of leave to appeal.

The situation in this case is, however, also unusual. The order for discovery was made in action 367/97 which has itself been dismissed. Unless leave to appeal should also be granted against this dismissal, it would be futile to grant leave to appeal against the order for discovery.

The judge did not order that the action 367/97 should stand dismissed on failure to comply with the discovery order. There had been an order of 9th March, 1998 that the action commence with a sub-trial of two issues -

“(a) the existence or non-existence of the contract pleaded by the Plaintiff;

(b) the forms and effect, if any, of any such contract.”

Effectively the determination of these issues would decide the question of liability. Granting that the judge's discovery order was flawed, the decision on the issue of liability may have made it unnecessary to try any issue as to damages. If the decision on damages was

favourable to the appellants there could be further argument then as to the validity of the order for discovery. Had the trial judge decided then that he would not proceed with an assessment of damages because there had been no compliance with the order, an appeal could have been filed then challenging that refusal.

In those circumstances counsel's decision not to lead evidence in support of his claims was not an inescapable consequence of the order for discovery made by the judge. It was a course of action decided on by counsel on assessment of the circumstances. The choice could have been made to continue.

Accordingly leave to appeal cannot be granted in action 367 of 1997, 673 of 1997 and 150 of 1998. These applications are dismissed. In the result no useful purpose would be served by granting leave against the order for discovery and leave to appeal against that order is also refused.

The appellant will pay the costs of this appeal to be taxed if not agreed.

President

Justice of Appeal

Justice of Appeal

