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IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 367 OF 1997

BETWEEN: THOMPSON SHIPPING COMPANY LIMITED

PLAINTIFF

AND: PORT AUTHORITY OF THE CAYMAN ISLANDS

DEFENDANT

PROCEEDINGS had and taken before The Honourable
Mr. Justice Graham on March 11, 1998, in George
Town, Grand Cayman.

APPEARANCES:

ON BEHALF OF

MR. P. LAMONTAGNE, Q.C.,

THE PLAINTIFF:

Instructed by Mrs. K. Thompson

ON BEHALF OF

MR. I. CROXFORD, Q.C.,

THE DEFENDANT:

Instructed by Mrs. C. Bridges

of Ritch & Conolly

(WEDNESDAY, MARCH 11, 1998)

1 COURT COMMENCED ON WEDNESDAY,

2 MARCH 11, 1998 AT 9:51 A.M.

09:51 AM

3

4 THE COURT: Mr. Croxford, before you begin you will 09:54 AM
5 see that a shorthand writer is here. I thought I would 09:54 AM
6 record the events leading up to today for posterity, if I 09:54 AM
7 may put it in that way. 09:54 AM

8 MR. CROXFORD: Certainly, My Lord. I'll sit down. 09:54 AM

9 THE COURT: Yes. The case is called cause number 367 09:54 AM
10 of 1997 Thompson Shipping Company Limited plaintiff, and 09:54 AM
11 the Port Authority of the Cayman Islands defendant. 09:54 AM

12 The plaintiff in this matter seems to have begun 09:55 AM
13 shipping operations around about 1977, so far as material 09:55 AM
14 facts arise. On the 21st of September 1979, it applied for 09:55 AM
15 a licence to operate a crane in the port of George Town. 09:55 AM

16 On the 26th of September of 1978, in Exhibit WTB Exhibit 09:55 AM
17 17, a letter was written by Mr. Bush in which he explained 09:55 AM
18 that he was willing to grant a licence subject to certain 09:55 AM
19 terms and conditions. That letter specially rejected the 09:56 AM
20 proposed series of charges which Thompsons had set out for 09:56 AM
21 the use of their crane for operators other than themselves. 09:56 AM
22 Consequently what was put forward was in effect a rejection 09:56 AM
23 of an offer previously put -- I assume on the telephone or 09:56 AM
24 by some letter which I do not have -- and he also suggested 09:56 AM
25 rates in substitution of that already suggested, together 09:56 AM

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1 with certain conditions precedent. In particular, the 09:56 AM
2 payment of the fee and the like. There was no reply to 09:56 AM
3 that letter that I have seen -- and I assume that I would 09:56 AM
4 have seen one -- had there been such a letter. 09:56 AM
5 Accordingly, I have to ask myself whether an enforceable 09:56 AM
6 agreement ever came into effect. A letter which writes to 09:57 AM
7 someone setting out the terms of a proposed agreement in 09:57 AM
8 the ordinary circumstances is dealt with by another letter. 09:57 AM
9 There was no such letter. As I read it, the most that 09:57 AM
10 could have come into being by the events that took place -- 09:57 AM
11 because some informal arrangement appears to have been come 09:57 AM
12 to -- was that a bare licence which arose from the conduct 09:57 AM
13 of the parties. A bare licence is determinable upon 09:57 AM
14 reasonable notice. Incidentally, what appear to have been 09:57 AM
15 inchoate conditions precedent were never complied with 09:57 AM
16 because, inter alia, the fee was never paid, and there was 09:58 AM
17 no final agreement between the parties in legally 09:58 AM
18 enforceable terms as to the charges were to be levied on 09:58 AM
19 third parties. In a contract of this kind, if there were 09:58 AM
20 to be such a contract, it plainly should be spelt out in 09:58 AM
21 writing. I say for the future that the Port Authority 09:58 AM
22 really should go to its attorneys, whom they employ and be 09:58 AM
23 charged no doubt a modest fee, to have the matter done 09:58 AM
24 properly. But there it is. That is what seems to have 09:58 AM
25 happened. As I say, the most that I can spell out of the 09:59 AM

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1 circumstances and documents is a bare licence. I do so on 09:59 AM
2 the papers, I stress, I have heard neither viva voce 09:59 AM
3 evidence nor argument, but on what I have read, this is how 09:59 AM
4 I see it. If I am wrong, and that a contractual licence 09:59 AM
5 emerged, then it can only have been a licence intra vires 09:59 AM
6 the Port Authority; that is to say, they were only 09:59 AM
7 empowered by law to issue a licence under regulation 120(1) 09:59 AM
8 of the Port Regulations, and if so, there are specific 10:00 AM
9 powers in that regulation to "review, vary or revoke" that 10:00 AM
10 licence. Whether I am right as to proposition one, or as 10:00 AM
11 to the fall-back proposition two, that 'licence' or 10:00 AM
12 whatever it was was revocable upon reasonable notice. By 10:00 AM
13 letter dated the 12th of May 1980, the Port Authority wrote 10:00 AM
14 that it had plans for the provision of a crane or cranes.
15 "Proper notice will be given to you regarding the cessation 10:01 AM
16 or renewal of your permit." That was the situation which 10:01 AM
17 the plaintiffs happily or unhappily lived with up until the 10:01 AM
18 30th of January 1996, when notice was given. By further 10:01 AM
19 letter dated the 5th May 1997 Thompsons were required to
20 remove their cranes (then there were two of them) on the
21 22nd June 1997. Accordingly Thompsons had 18 months'
22 notice of the changes in the informal arrangements.
23 There was a meeting on the 12th of April 1996 in 10:02 AM
24 which Mr. LaMontagne, then retained obviously by 10:02 AM
25 Mrs. Thompson, appeared. There was correspondence. Never 10:02 AM

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1 was it claimed in correspondence by Mr. LaMontagne or Mrs. 10:02 AM
2 Thompson that a contractual licence had arisen until it 10:02 AM
3 appeared in a letter dated the 9th of May 1997. That claim 10:02 AM
4 was repeated in the Statement of Claim on the 9th of June. 10:02 AM
5 Any court looking at that would be bound to ask, was this 10:02 AM
6 at best, an ex post facto rationalisation? This question 10:02 AM
7 has a particular resonance when it appears that there were
8 negotiations as to the possibility of the sale of one of
9 Thompson's cranes to the Port Authority in which Mr.
10 LaMontagne and Mrs. Thompson both took part.
11 The next significant date is the 22nd of August 1997 10:02 AM
12 when an application was made for an injunction in front of 10:03 AM
13 the acting judge Mr. Justice Kipling Douglas. It is a 10:03 AM
14 succinct and trenchant judgment -- I might say a 10:03 AM
15 characteristic judgment -- he isolated the point at issue 10:03 AM
16 and he set it out in a manner with which I respectfully 10:03 AM
17 agree. Of course, it was done in short order because what 10:03 AM
18 he was concerned with was whether, even if the plaintiffs 10:03 AM
19 could establish a colourable claim, he should deal with 10:03 AM
20 that by way of injunction or damages. He dismissed the 10:03 AM
21 application and that application was appealed to the Chief 10:03 AM
22 Justice (acting as a single judge of the Court of Appeal). 10:03 AM
23 He dismissed it as well. So the plaintiffs knew from then 10:03 AM
24 on that they had a considerable legal mountain to climb. 10:03 AM
25 Then what happened? The matter was set down for 10:04 AM

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1 trial before this court in January 1998. The matter came 10:04 AM
2 before me on half an hour's notice last Wednesday. It was 10:04 AM
3 apparent to me that there were problems in the case for the 10:04 AM
4 plaintiff -- or seemed to be. I suggested that the correct 10:04 AM
5 approach would be for there to be a trial as to the 10:04 AM
6 identity and scope of any alleged contract and that was to 10:04 AM
7 be dealt with first. Then any question of damages would 10:04 AM
8 either flow from that or not at all. 10:05 AM
9 There were before me two summonses on that day. On 10:05 AM
10 behalf of the plaintiffs for leave not to serve the core 10:05 AM
11 bundle. I was not able to grant that request, but that is 10:05 AM
12 relevant in the context of what I am about to say, because 10:05 AM
13 the Statement of Claim that day was radically altered. It 10:05 AM
14 was altered by deletion with the indication of a likely 10:05 AM
15 substitution of a claim for damages which, of course, was 10:05 AM
16 implicit but not explicit in the claim for an injunction, 10:05 AM
17 because damages in lieu was always an alternative to an 10:05 AM
18 injunction. Alive to this possibility, Mr. Croxford and 10:05 AM
19 Mrs. Bridges, on behalf of the defendants, had previously 10:05 AM
20 sought discovery of any documents relevant to the claim for 10:05 AM
21 damages which were alleged to flow from the alleged breach 10:05 AM
22 of contract and which would be particularised in the 10:06 AM
23 re-amendment of the Statement of Claim and arose if an
24 injunction were not granted. This was discovery which 10:06 AM
25 should have taken place a long time before. At that, Mr. 10:06 AM

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1 LaMontagne told me he wished to have some time to consider 10:06 AM
2 how he wished to plead the case for damages. I told him 10:06 AM
3 then that it was in my mind to make an order for discovery 10:06 AM
4 and he knew -- and those behind him knew -- from that 10:06 AM
5 moment, if they did not know before, which would be hard to 10:06 AM
6 believe anyway, that there would be an order for discovery 10:06 AM
7 made, and that it would be, because of the time set aside 10:06 AM
8 for this case, an order in preemptory terms, as it would 10:06 AM
9 have to be, because the court order had already been 10:06 AM
10 ignored, in that discovery had not taken place as 10:07 AM
11 previously ordered by the Chief Justice on the 18th June
12 1997. Mr. Croxford, at that stage, indicated that he might 10:07 AM
13 wish to oppose the application for leave to amend, but on 10:07 AM
14 any clear view, he was unlikely to succeed. On mature 10:07 AM
15 reflection he did not oppose the amendment and it was 10:07 AM
16 granted on the Monday morning.
17 The case began on Monday morning and it began in 10:07 AM
18 chambers. Mr. Croxford, whose summons on Wednesday had 10:07 AM
19 been adjourned pending the service of the re-amended 10:08 AM
20 Statement of Claim addressed me and asked for the 10:08 AM
21 predictable information required. The basis for the claim 10:08 AM
22 of damages was simply exactly what one would expect. The 10:08 AM
23 Thompsons were, I gather, saying that by not being able to 10:08 AM
24 use their own equipment, they had incurred additional 10:08 AM
25 charges. To test the veracity of that claim in simple 10:09 AM

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1 terms one had to say "well let's have a look at your profit 10:09 AM
2 and loss account as between the time when you were 10:09 AM
3 operating your own crane with your own employees and see 10:09 AM
4 what has in fact taken place after the demarche by the Port 10:09 AM
5 Authority." Such documents are discoverable with ease. A 10:09 AM
6 simple matter of tapping a computer -- unless I have wholly 10:09 AM
7 misunderstood the way that major companies conduct 10:09 AM
8 themselves. In this context Mr. LaMontagne told me that 10:09 AM
9 discovery would take three weeks.
10 In addition, Mr. Croxford sought a schedule or any 10:09 AM
11 re-scaling of charges to customers because if it transpired 10:10 AM
12 that any increased charges arising from the change of 10:10 AM
13 circumstances had accrued to Thompsons, Thompsons had the 10:10 AM
14 option of passing them on to their customers. They might 10:10 AM
15 have alleged, of course, a decline in trade, but that is 10:10 AM
16 not their pleaded case as I have noted. Let us 10:10 AM
17 hypothesize; if they passed charges on to their customers, 10:10 AM
18 then they suffered no loss or damage. If they did, then 10:10 AM
19 there might be an analysis to whether that was reasonable 10:10 AM
20 in trading terms. We never got that far. Mr. LaMontagne, 10:10 AM
21 to my astonishment, told me that he and his instructing 10:11 AM
22 attorney would have to supervise the obtaining of this 10:11 AM
23 information. What I had ordered, it is to be noted, for 10:11 AM
24 the avoidance of any doubt, was that the 'accountant' for 10:11 AM
25 the Port Authority should meet Thompson's 'accountant', who 10:11 AM

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1 I gather is Mr. Wilson, to discuss and identify the 10:11 AM
2 documents and to commence the procedure of discovery. I 10:11 AM
3 did not order the immediate production of those documents. 10:11 AM
4 What I said was that by the time we came to damages, and 10:11 AM
5 allowing for the three weeks which we had for the trial of 10:11 AM
6 this action, I expected the discovery process to be 10:11 AM
7 complete and the defendants put in a position where they 10:12 AM
8 could resist the claim. As I put it to Mr. LaMontagne, he 10:12 AM
9 had to assume that his argument on primary liability was to 10:12 AM
10 going to succeed and then the court had to proceed to the 10:12 AM
11 question of damages. Mr. LaMontagne then said to me, "Oh 10:12 AM
12 well, you're threatening to jail Mr. Wilson." I told him 10:12 AM
13 that was palpable nonsense, which indeed it was. He also 10:12 AM
14 told me that I had in fact issued an Anton Pillar order and 10:12 AM
15 I told him that that was also palpable nonsense -- perhaps 10:12 AM
16 a slip of the tongue on his part. But most significantly 10:12 AM
17 of all, Mr. LaMontagne said to me that, in effect, I had 10:12 AM
18 ordered the discovery to the Port Authority of Thompsons' 10:13 AM
19 commercial secrets. I said if necessary yes, I had. It 10:13 AM
20 seems to me and the court draws this conclusion, that what 10:13 AM
21 was more important to Mr. LaMontagne and to the lady behind 10:13 AM
22 him who, of course, is not only an attorney for Thompson 10:13 AM
23 Shipping Company, but is a prominent family member, and 10:13 AM
24 therefore well-acquainted with the inner workings of that 10:13 AM
25 company and therefore is in a position with greater 10:13 AM

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1 knowledge than most attorneys would ever be. The 10:13 AM
2 protection of commercial secrets was more important than
3 futile litigation which they knew must fail. It is in that
4 context that I have briefly set out the problems they faced
5 in setting up an irrevocable contract. It was in that 10:13 AM
6 context that I, having said that, told Mrs. Thompson that 10:13 AM
7 she could, if she wished, leave court to supervise any 10:14 AM
8 discovery process, but I could not for the moment see why 10:14 AM
9 it would be necessary, but that was up to her, but Mr. 10:14 AM
10 LaMontagne would have to be in the position to open his 10:14 AM
11 case to me the moment we went out of chambers and into open 10:14 AM
12 court. I was asked to rise for 20 minutes after my order 10:14 AM
13 for discovery so that Mr. LaMontagne and Mrs. Thompson
14 could contact the accountant and inform him of the order of
15 the court. When I returned to court Mr. LaMontagne told me
16 that although Mr. Wilson was believed to be at work they
17 could not contact him. No further time was asked for in
18 order to make contact. The court was left with the
19 impression that under no circumstances were Thompsons going
20 to disclose "commercial secrets" to the Port Authority. I
21 further informed Mr. LaMontagne that he could address me on
22 the admissibility and liability for discovery of any
23 particular document.
24 When we went into open court, Mr. LaMontagne told me 10:14 AM
25 he proposed to take no further part in these proceedings 10:14 AM

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1 nor to call evidence. I took a careful note of what then 10:14 AM

2 transpired which I have here. I asked Mr. LaMontagne 10:14 AM

3 carefully to consider what course of action he was 10:14 AM

4 adopting, to consider the consequences of it, and in 10:14 AM

5 particular, to confirm with his instructing attorney, who 10:14 AM

6 is in a very unique position in this particular litigation, 10:14 AM

7 as to whether he was taking a course that was within the 10:14 AM

8 scope of his authority and having done so, he maintained 10:14 AM

9 his position. Accordingly, although experiencing a sense 10:15 AM

10 of dismay, I entered judgment for the defendants with 10:15 AM

11 costs. 10:15 AM

12 You have an opportunity now Mr. LaMontagne to correct 10:19 AM

13 any issue of fact that you wish to do so. Do you wish to 10:19 AM

14 do so? 10:19 AM

15 MR. LAMONTAGNE: At this stage? 10:19 AM

16 THE COURT: Yes. 10:19 AM

17 MR. LAMONTAGNE: No, My Lord. 10:19 AM

18 THE COURT: Thank you very much. 10:19 AM

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The Honourable Mr. Justice Graham

25 Judge of the Grand Court

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