Judgment Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT SUIT C.L. 1999/D-058

AND

SUIT NO. C.L. 1999/S-134

MOTIONS 16 and 17 OF 1999

COR: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON (AG.)

BETWEEN:	NATURAL RESOURCES CONSERVATION AUTHORITY	APPELLANT
	SEAFOOD AND TING INTERNATIONAL LIMITED	RESPONDENT
AND	NATURAL RESOURCES CONSERVATION AUTHORITY	APPELLANT
	DYC FISHING LIMITED	RESPONDENT

Lennox Campbell, Senior Assistant Attorney-General
Nicole Foster, Assistant Attorney-General and
Cheryl Lewis, Crown Counsel, instructed by Director
of State Proceedings for the Appellant

R.N.A. Henriques, Q.C., and Carlton Melbourne instructed
by Carlton Melbourne and Company for the Respondents

June 18, 21, 22, 23, 29 and July 1, 1999

DOWNER, J.A.

INTRODUCTION

The respondents Seafood and Ting International Limited and DYC Fishing Ltd. who process conch for export sought and obtained an order for an Interim Injunction

from Courtenay Orr, J. with prohibitory and mandatory features. The mandatory feature ordered the appellant to grant the respondents permits for export. Leave to appeal was granted to Natural Resources Conservation Authority, the appellant by this Court to appeal that order and this forms the first aspect of this appeal. The appellant sought to discharge the Interim Injunction but Orr, J. refused the application without hearing from the applicant and the second aspect of this appeal is to decide whether their prayer ought to have been granted. The third aspect of this proceeding concerns the grant by this Court at the inception of these hearings for a stay of proceedings of contempt of court instituted by the respondents against the appellant and its servants. The orders awarded on appeal will be accompanied by the necessary declarations of law which ought to be helpful to the parties as well as the Attorney-General. It should also be noted that the respondents have a pending action against the appellant so there is a Statement of Claim and this therefore is an interlocutory appeal.

The initial proceedings before Orr, J.

The importance of this is that if there are averments that the common law tort of interfering with the trade or business of another person by doing unlawful acts then the remedy awarded on appeal may make a trial superfluous if Orr's J. order is affirmed.

What is the law pertaining to interim injunctions which have both prohibitory and mandatory features?

In **Elinor Inglis** and **William McCabe v Verne Granburg** (1990) 27 J.L.R. 107, 109 this Court said:

> "Interim injunctions belong to that exceptional category of remedies which are granted in the absence of the defendant. In exercising its discretion to grant such a remedy an essential prerequisite was that the matter was of such urgency that there was no time to serve the defendant. In exceptional cases the certainty of success at the interlocutory stage may persuade the Court to grant the remedy where urgency is not established, but this must be a rare event. Generally speaking,

the time granted for these injunctions is between five and seven days. Seton, J., in **March v. Campbell** 3 J.L.R., p. 194 in refusing an interim injunction did so on the basis that the grounds to justify the remedies being granted ex parte were not sufficiently strong. This can be taken to mean that he dismissed the matter in limine. Rowe, P., in the course of argument, referred to the case of **Bates v. Lord Hailsham** [1972] 1. W.L.R. 1373 and Mr. Goffe relied on the following passage at page 1380A:

> 'If there is a plaintiff who has known about a proposal for 10 weeks in general terms and for nearly four weeks in detail, and he wants an injunction to prevent effect being given to it at a meeting of which he has known for well over a fortnight, he must have a most cogent explanation if he is to obtain his injunction on an ex parte application made two and a half hours before the meeting is due to begin. It is no answer to say, as Mr. Nicholls sought to say, that the grant of the injunction will do the defendants no harm, for apart from other considerations, an inference from an insufficiently explained tardiness in the application is that the urgency and the gravity of the plaintiff's case are less than compelling. Ex parte injunctions are for cases of real urgency, where there has been a true impossibility of giving notice of motion. The present case does not fall into that category. Accordingly, unless perhaps the plaintiff had had an overwhelming case on the merits, I would have refused the injunction on the score of insufficiently explained delay alone'."

As for Interlocutory Mandatory Injunctions the court will also lay down rigid conditions before they are granted. Here is how it was put in **Locabail International Finance Ltd. v Agroexport and others The Sea Hawk** [1986] 1 All ER 901 at 906 by Mustill L.J.:

> "I shall deal first with the question of the test which is to be applied. In my judgment this is correctly stated in 24 Halsbury's Laws (4th edn) para 948 in a passage headed 'Mandatory injunctions on interlocutory applications'. That passage reads:
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> > "A mandatory injunction can be granted on an interlocutory application as well as at the hearing but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which

> the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff... a mandatory injunction will be granted on an interlocutory application'."

Then the learned Lord Justice continued thus:

> "One of the cases cited in support of that passage is the decision of Megarry J in **Shepherd Homes Ltd v Sandham** [1970] 3 All ER 402, {1971] CH 340; in the course of his judgment Megarry said ([1970] 3 All ER 402 at 412, [1971] Ch 340 at 351):
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> > 'Third, on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory Injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction'."

So if the case on an interlocutory application is clear and ought to be decided at once then the grant of a mandatory injunction is permissible. As the exparte injunction granted in this case was for a period of 15 days it has now expired. But the fact that it existed has certain legal effects which makes this case exceptional. Contempt proceedings can be and have been instituted because there was no compliance with the mandatory order to award export permits. It must be emphasised that to grant an interlocutory injunction may enable the plaintiff to have his grievance redressed without a trial. In the case of an exparte injunction it would enable him to get the injunction without hearing from the other side. Hence the caution stressed by Carey J.A. in **W.D. Miller and W. Parkes v O'Neil Cruickshank** (1986) 23 JLR 154 at 160 where he said:

> "Indeed as **Cayne v. Global Natural Resources plc** [1984] 1 All E.R. 225 demonstrates:
>
> > 'Where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action, the court should approach the case on the broad principle of what it can do in its best endeavour to avoid

> injustice, and to balance the risk of doing an injustice to either party. In such a case the court should bear in mind that to grant the injunction sought by the plaintiff would mean giving him judgment in the case against the defendant without permitting the defendant the guidelines requiring the court to look at the balance of convenience when deciding whether to grant or refuse an interlocutory injunction do not apply in such a case, since, whatever the strengths of either side, the defendant should not be precluded by the grant of an interlocutory injunction from disputing the plaintiff's claim at a trial'."

Against this background of law what were the basic facts and issues before Orr, J.? Firstly, as to the facts the judge's bundle for Seafood and Ting International (Sea Food) comprised seventy seven pages. That for DYC Fishing Ltd. (DYC) was one hundred and twenty seven pages. Secondly, the issue of law which ultimately convinced this court emerged quite late in Mr. Henriques' Q.C. submission. It was not mentioned in the skeleton argument or in the very able submissions of Ms. Nicole Foster for the appellant. In her reply she neither challenged the principle or the applicability of the law governing the tort in issue. Thirdly, the issue of law relied on was a tort that could hardly be described as well known and the principle had to be applied to novel circumstances. What was put before Orr, J. was that there was no legislation governing the issue of permit and that there was no contract between the appellant and the respondents.

As for the facts they need only be mentioned briefly at this stage. Both respondents process conch for export. Before Jamaica's accession to the Convention On International Trade In Endangered Species Of Wild Fauna And Flora (the "Convention") they processed and exported conch without let or hindrance subject to a National Quota being established. It is true that they obtained a licence from Jamaica Promotions Ltd (JAMPRO) but that was granted as a matter of course.

In this instance the appellant has refused to grant the Convention in International Trade in Endangered Species (CITES) permit which is mandatory by international law if the export of conch is marketed in countries which are signatories to the Convention. There is a distinction between the respondents. Sea Foods did not receive any quota at all. DYC is discontented with the quantum allotted. Here is the evidence from Sea Food which was before Orr, J. It comes from Donna-Marie Roberts the managing director of Sea Foods.

> "7. That prior to 1994 export of conch was without any restriction or any government regulations in respect of procedure for exportation and the quantities to be exported. In order to export at that time, the Plaintiff had to maintain itself on the list of exporters maintained by Jamaica Promotion Limited (JAMPRO), prepare shipping documents for clearance of products through Jamaica Customs and ship the products after they have been cleared for export.
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> 8. That in 1993 conch, referred to biologically as Strombus Gigas, were placed on appendix 11 of the CITES Convention. This CITES Convention regulates the International Trade in Endangered Species. The parties placed conch on Appendix 11 of the Convention thereto, because it was felt that it would become extinct if it was not effectively regulated. At the trial of this action the Plaintiff will refer to and rely on the terms of the said CITES Convention for its full terms, meaning and effect.
>
> 9. Jamaica did not voluntarily elect to be a party to the CITES Convention, but was forced to do so in order to maintain the conch trade with its international trading partners who are parties to the Convention.
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> 10. This Convention provides that parties thereto shall not allow the export of conch without the prior grant and presentation of an export permit and that the permit shall not be granted unless a Scientific Authority of the exporting state advise that the export will not be detrimental to the survival of the conch and a Management Authority of the said state of export is satisfied that conch was not caught in contravention of local laws for its protection. Where the Scientific Authority determine that the export shall be limited to maintain the Species in the Ecosystems, it shall

advise the Management Authority of suitable measure to limit the grant of the export permits.."

Then she continues thus:

"15. That since 1994 the Plaintiff has not been able to export conch without first obtaining CITES certificate from the defendant under the system described herein. The plan and procedure implemented by the Fisheries Division provides for the restriction of entry of persons to the conch exports industry and the admission of no new players in the sector.

16. There is no law in Jamaica, which provides that the exporter of conch requires a quota from the Fisheries Division or Minister in charge of Agriculture before the said exporter can obtain a permit from the defendant to export the product. The defendant and the said Fisheries Division or Minister of Agriculture have no legal power and authority to determine, who can or cannot export conch from Jamaica, and what quantities exporters can ship."

Be it noted this was the point of law raised before the judge and argued by both sides on appeal until the issue of law of torts was introduced late in the hearing.

Then Donna-Marie Roberts continues thus:

"17. The Plaintiff says that the regime under which the defendant assumed the authority to institute a procedure involving the Fisheries Division of the Ministry of Agriculture for the issue of export permits for the export of conch is illegal and entirely without basis in law. The CITES Convention does not require the allocation or division of the said quota among any particular group or number of persons or exporters to the exclusion of others and the restriction of entry of persons to the conch export industry. The defendant has no power and authority to act on anything from the Fisheries Division or any division or Minister of Agriculture as to who can or cannot export conch from Jamaica and in what quantity persons can export.

18. There is no legislation or any other law in Jamaica implementing, enforcing or which makes CITES Convention part of the law of the country and binding and enforceable against the Plaintiff. The draft bill prepared by the defendant to give effect to the Convention (refer to as the Trade In Endangered Species Convention Act 1998) is not

even ready for laying before parliament. The Plaintiff says that the enactment under which the defendant operates cannot by themselves, give the defendant power to implement the procedure of the Fisheries Division when there is no specific legislation implementing the Convention in Jamaica. I exhibit herewith marked DMR 2 for identity copy of the draft bill.

19. There is nothing in the legislation constituting the defendant or in any other law which gives the defendant any power or authority to institute any procedure involving the Fisheries Division for the granting of export permit or certificate, or to act on any mandate, authorization, direction,, instructions, recommendation or the like from the Fisheries Division or any other Division or Minister of Agriculture in the granting of export certificate in any way as to limit the quantities that the Plaintiff can export."

The evidence from Frank Samuel Cox for DYC is of a similar nature.

Applying the principles of law adumbrated above it seems at first blush that Orr, J. wrongly exercised his discretion to grant an Interim Injunction. The material part of the Order granted reads as follows:

> "...AND the Plaintiff by its Attorney-at-Law undertaking to abide by any Damages as this Honourable Court shall hereafter be of the opinion that the defendant has sustained by reason of this order which the Plaintiff ought to pay. **IT IS HEREBY ORDERED:-**
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> "1. That the Defendant be restrained until the 15th day of June, 1999 or until further order from doing whether by itself, agents, representative of otherwise the following acts or any of them that is to say:-
>
> **a)** from doing anything or acting in anyway to deny the Plaintiff of its right and entitlement to permits or certificates from the defendant for the purpose of exporting its conch products to such country as the Plaintiff wishes to export such products.
>
> **b)** from acting on any mandate, authorization, directions, instructions, recommendations or anything from the Minister of Agriculture or any division of the Ministry of Agriculture in anyway so as to deny or deprive the Plaintiff of any permits or certificates applied for or

required by it for the export of any conch products that it desires to export.

c) from using any conversion factor or ratio in determining the amount of 50% dirty conch that is equivalent to a pound of 65% semi processed conch meat, 85% semi fillet processed conch meat or 100% fully fillet processed conch meat in such a way as to prevent the Plaintiff from exporting all the products process at 65%, 85% or 100% conch meat."

These are the prohibitory features. A further mandatory feature which is at the heart of the respondents' case reads thus:

"2. That the defendant is compelled by Injunction until the day 15th of June, 1999 or until further order to issue or grant the permits or certificates applied for by the Plaintiff for the export of the quantities of conch products that the Plaintiff wishes to export."[Emphasis supplied]

Then there are the supplemental provisions which are as follows:

"3. Liberty to apply.

4. Cost to be cost in the cause."

As Miss Foster submitted the Interim Injunction gave the respondents what they requested in their Statements of Claims. If duration was way beyond the five to seven days the urgency required for this remedy she contended was not established. Normally I would have no hesitation in agreeing with those submissions but this is an unusual case so I would not grant the prayer.

"For an Order that:

1. That the Order dismissing the Defendant Applicant's Summons to Discharge Injunction be set aside.

2. That the operation of the said Order on Interlocutory Injunction be suspended or discharged.

3. The Cost of the Court below and of this appeal be the Appellants."

These orders sought seem to be in the alternative. At 1 it assumes the interim order was regular but ought to be discharged. At 2 it assumes the order was irregular and should be suspended or discharged. Both prayers were heard together. So that Orr J, had the opportunity to hear the matter inter-partes and affirm the Interim Injunction and to extend it as an Interlocutory Injunction if the occasion warranted it. As this is a Court of re-hearing this Court is empowered to do what Orr J, ought to have done and this is how we treated the matter.

It is convenient to set out the grounds of appeal to see how the submissions were developed during the hearing:

> "AND TAKE FURTHER NOTICE that the grounds of this appeal are that:
>
> 1. The learned Judge erred in law in requiring the obedience of the Injunction as a prerequisite for hearing an Application to discharge the Injunction.
>
> 2. The learned Judge erred in law and/or wrongfully exercised his discretion in not allowing the Defendant/Appellant to make submission in support of its Summons to Discharge Ex-Parte Injunction.
>
> 3. The learned Judge erred in law and/or wrongfully exercised his discretion in failing to find that the Ex-Parte Injunction was wrongfully granted."

As for the prohibitory injunction I think that ought not to have been granted either on an exparte application. The point to note however if the mandatory injunction was granted then the prohibitory feature was superfluous. As the interim mandatory injunction was the main remedy sought by the respondents it is convenient to concentrate on this aspect of the matter.

What ought Orr, J. to have done at the application for an Interim Injunction?

The learned judge should have directed the respondents to serve the papers on the appellants and then decide the issues. To reiterate, since this is a court of rehearing we are entitled to do what Orr, J. ought to have done.

What did the appellant get?: What ought the learned judge to have done?

The appellant sought to discharge the ex parte order and to follow the events it is best to turn to the Affidavit of Urgency in support of motion for leave to appeal and stay of injunction and stay of proceedings. The affidavit of Cheryl Lewis Crown Counsel in the Attorney-General's Chambers has the relevant paragraphs which read as follows:

> "7. On Monday June 7, 1999 a Summons to Discharge the Ex Parte Injunction was filed by the Defendant. Counsel, Miss Nicole Foster spoke with officers at the Supreme Court requesting a date later in the week but was informed that if the matter was to be set before the judge who had granted the Injunction, his schedule would not permit a hearing in the course of the week. The date given by the court was June 14, 1999.
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> 8. In the meanwhile, on Thursday June 10, 1999 the Defendant was served with an Interlocutory Summons for Injunction set to be heard on Wednesday June 16, 1999.
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> 9. Further on or about Friday June 11, 1999 the officers of the Defendant were served with Notices of Motion for Writs of Sequestration and Attachment set to be heard on Thursday June 17, 1999.
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> 10. That on Monday 14th June, 1999, Summons to discharge the Injunction came on for a hearing before the Honourable Mr. Justice C. Orr, who had granted the ex-parte injunction."

As indicated earlier the learned judge instead of hearing the application dismissed the Summons without a hearing. It must be unusual for the Attorney-

General to complain that he was denied a fair hearing by a Supreme Court judge pursuant to section 20(2) of the Constitution. Returning to the narrative it unfolds thus:

> "11. That the Learned Judge asked whether the ex-parte Interlocutory Mandatory Injunction had been obeyed. Counsel indicated that it had not been. The Learned Judge referred Counsel to two cases one of which was the case of **Grafton Isaacs v Emery Robertson [1984] 3 WLR Page 705.** The Learned Judge then stated that the injunction should have been obeyed and that the Defendant should come to the court with clean hands. Counsel argued that the case could be distinguished but this was not accepted. Without allowing Counsel to make any submissions on the substantive matter of the discharge of the Injunction, the Learned Judge thereupon dismissed the Summons to Discharge the Injunction and refused Leave to Appeal his decision.
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> 12. In all the circumstances the Defendant has been afforded no opportunity to respond to the grant of the Injunction and its officers are in danger of being found to be in contempt of court."

Then the other relevant paragraph in this affidavit reads thus:

> "14. The said CITES export permits once issued cannot be cancelled or it will be difficult to do so as the goods are shipped almost immediately on grant of the permit."

Before examining whether the decision of Orr, J. was correct it is pertinent to exhibit his Order:

> "UPON THE SUMMONS TO DISCHARGE EX-PARTE INJUNCTION filed herein coming up for hearing this day and after hearing Miss Nicole Foster and Miss Cheryl Lewis Attorneys-at-Law instructed by the Director of State Proceedings for the Applicant/Defendant and Mr. Carlton Melbourne, Attorney-at-Law for and on behalf of the Plaintiff/Respondent IT IS HEREBY ORDERED:
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> 1. Summons dismissed.
>
> 2. Costs to the Plaintiff, to be taxed if not agreed
>
> 3. Leave to appeal refused."

It is regrettable that neither at the stage of the grant of the Interim Injunction nor at the Summons to discharge did the learned judge give any reasons. We must reiterate that this Court depends to a large extent on reasons given at first instance and the absence of a reason puts it at a disadvantage. Further parties at a hearing are entitled to know the reasons for the decision. This case has attracted a wide public interest and that is another reason why the learned judge should have delivered a written judgment. We can require a judge to give the reasons for his decisions but we refrained from doing so in this case because of the need for promptitude in deciding and delivering our judgment.

Since the learned judge relied on **Emery Robertson** [1984] 3 W.L.R.705 as the basis of making his order that case must now be examined. That was a case where there was no application made to set aside an irregular order made by the High Court of St. Vincent a court of unlimited jurisdiction. Lord Diplock said at 707 said:

> "The appeal came on for hearing in April 1981. The reasons for judgment of the Court of Appeal (Peterkin C.J.,) Berridge J.A. and Robotham J.A. (Acting) were delivered by Robotham J.A. (Acting) on 20 July 1981. The appeal was allowed; the defendant was found to be in contempt of court for disobeying the interlocutory injunction on 31May 1979; no penalty by way of fine or imprisonment was inflicted because the Court of Appeal held that he would have been entitled to succeed in an application to have the injunction set aside if he had made such application; but he was ordered to pay the plaintiff his costs of the appeal and those incurred by the plaintiff on the application for the interlocutory injunction and in the committal proceedings in the High Court."

Further on page 708 Lord Diplock said:

> "The main attack by the defendant on the Court of Appeal's judgment was based on the contention that as a consequence of the operation of Ord. 34, r. 11(1)(a) of the Rules of the West Indies Associated States Supreme Court (rev. 1970) the order made by the High Court granting the interlocutory injunction on 31 May 1979 was a nullity; so disobedience to it could not constitute a contempt of court. Glasgow J. accepted this

contention; the Court of Appeal rejected it, in their Lordships' view correctly, upon the short and well established ground that an order made by a court of unlimited jurisdiction, such as the High Court of Saint Vincent, must be obeyed unless and until it has been set aside by the court. For this proposition Robotham J.A. (Acting) cited the passage in the judgment of Romer L.J. in **Hadkinson v Hadkinson** [1952] P. 285, 288:

> 'It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. 'A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it ... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null and void - whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question; that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.' (per Lord Cottenham L.C. in **Chuck v. Cremer** (1846) Cooper temp. Cottenham 205, 338.) Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court... is in contempt and may be punished by committal or attachment or otherwise."

As in this case, the appellant sought to have the interim injunction discharged it is difficult to envisage how it could be successfully contended that the appellant ought to be prosecuted for contempt, since they sought to discharge the exparte order. Had the learned judge heard the Summons to discharge he may well have concluded that he could affirm the interim order and that it could have been extended by a further order. Since the permit was not granted it would be a necessary ingredient of the respondents' submission that the interim order be extended.

The proceedings on Appeal

The foundation of the appellants' claim to discharge the injunction was based on the proposition that there was no legislation governing the matter or any contract between the parties. The respondents' case as developed by Mr. Henriques Q.C. was that it was the law of torts as part of the law of obligations which gave validity to the Order of Orr J. and that even if it was correct that it should have been made inter-partes, since it existed, it could be extended as an interlocutory injunction to save time and expense of hearing the application for an Interlocutory injunction which was filed in the Supreme Court. It was a bold submission but if it is correct and the evidence exists, this Court should not hesitate to give effect to it.

The Convention requires exporters to obtain a CITES permit in order to export to countries which are parties to the Convention. The relevant provisions read in part:

"Article IV

Regulation of Trade in Specimens
of Species Included in Appendix II

1. All trade in specimen of species included in Appendix !! shall be in accordance with the provisions of this Article.

2. The export of any specimen of a species included in Appendix 11 shall require the prior grant and presentation of an export permit. An export permit shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species:

(b) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of Fauna and flora; and

(c) a Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped

> as to minimize the risk of injury, damage to health or cruel treatment."

There is no dispute that conch is listed in Appendix 11. What is the effect of this Convention on municipal law. In **J.H. Rayner Ltd. v. Department of Trade** [1989] 3 W.L.R. 969 at 980 Lord Templeman said:

> "The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The Courts must enforce those laws; judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation in order to enforce a treaty.
>
> A treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual."

Then Lord Oliver makes the same point at pp 1001 to 1002:

> "It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves in the plane of international law. That was firmly established by this House in **Cook v Sprigg** [1899] A.C. 572, 578, and was succinctly and convincingly expressed in the opinion of the Privy Council delivered by Lord Kingsdown in **Secretary of State in Council of India v. Kamachee Boye Sahaba** (1859) 13 Moo. P.C.C. 22, 75:
>
> > 'The transactions of independent states between each other are governed by other laws than those which municipal courts administer; such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make'."

Further Lord Oliver continues thus:

> "It must be borne in mind, furthermore, that the conclusion of an international treaty and its terms are as much matters of fact as any other fact. That a treaty may be referred to where it is necessary to do so as part of the factual background against which a particular issue arises may seem a statement of the obvious. But it is, I think, necessary to stress that the purpose for which such reference can be legitimately be made is purely an evidential one. Which states have become parties to a treaty and when and what the terms of the treaty are, are questions of fact. The legal results which flow from it in international law, whether between the parties inter se or between the parties or any of them and outsiders are not and they are not justiciable by municipal courts."

The fact is that the government has deputed the appellant to issue permits of exportation of conch as part of its administrative duties without providing the necessary legislative framework to incorporate the Convention. Here is the evidence on this aspect of the matter from Yvette Strong:

> "1. That I reside and have my true place of abode and postal address at 34 Mannings Hill Road, Kingston 8 and I am a Senior Director for the National Parks, Protected Areas and Wildlife Branch at the Natural Resources Conservation Authority and that I am principally responsible for issuing CITES permits and I sign these permits to allow the export of conch from Jamaica.
>
> 2. That I am authorised to give this Affidavit on behalf of the Defendant.
>
> 3. That the Defendant now administers only that part of the Convention on International trade in Endangered Species of Wild Fauna and Flora (CITES) hereinafter referred to as the "Convention" that requires the issuance of permits for the export of species listed under Appendices I and II and III of the Convention."

Then she continues by explaining the treaty and how the appellant came to be involved:

> "4. That the Convention is a global treaty that was adopted in 1973 and entered into force on the 1st day of July 1975. The Government of Jamaica became a party to the

Convention on the 22nd day of June 1997 by deposition of an instrument of accession on the 19th day of March 1997. There is now produced and shown to me marked "YS 1" for identification, a copy of the instrument of accession.

5. That the Convention has as its purpose the regulation of trade in endangered species of wild flora and fauna which are threatened by extinction and those which although not necessarily threatened with extinction may become so unless trade in such species is subject to strict regulation in order to avoid utilisation incompatible with their survival under Appendices 1 and 11 of the Convention.

6. That the Cabinet had given approval for accession to the Convention in 1992. Jamaica voluntarily became a party to the Convention in 1997 in recognition of the fact that there were many Jamaican species under Appendices I and II of the Convention threatened with extinction or which could become so if not subject to strict regulation. Jamaica species under Appendix I include the American Crocodile (*Crocodylus acutus*), Homerus Swallowtail *(Papillio homerus)*, Jamaican Boa *(Epicrates subflavus)*, Jamaican Iguana *(Cyclura collei)* and West Indian Manatee *(Trichechus manatus)*. Jamaican species that were significantly traded under Appendix II included Orchids (Orchidaceae) and Queen Conch (*Strombus gigas)*.

7. That in 1992 Queen Conch was listed on Appendix II of the Convention. Jamaica is the largest producer and exporter of Queen Conch in the world. Queen Conch or *Strombus gigas* was listed in Appendix II at the 8th meeting of the Conference of the Parties. The listing came into effect in June 1992. There is now produced and shown to me marked "YS 2" for identification a copy of the Convention.

8. That the Defendant was designated by the Ministry of Environment and Housing as the Management Authority for the Convention in 1993 in light of Article 9(1) (a) of the Convention and that this designation is consistent with section 4(1)(e) of the Natural Resources Conservation Authority Act hereinafter referred to as "the Act'. Art. 9(1)(a) of the Convention mandates that each State party for the purposes of the Convention must designate one or more Management Authority competent to grant permits or certificates on behalf of that Party."

Then explaining the administrative arrangement she said:

> "9. That the Defendant as Management Authority appoints a Scientific Authority every two years. The main function of the Scientific Authority is to advise as to whether an export will be detrimental to the survival of the species. The Scientific Authority advises the Management Authority on the National Quota set by the Fisheries Division and indicates whether it approves of it, and not individual quotas for exporters. The CITES Secretariat is then informed of the said quota set yearly. The Fisheries Division or the Minister of Agriculture then establishes individual quotas based on the National Conch Fishery Management Plan.
>
> 10. That after Jamaica became a party to the Convention the CITES Secretariat which is located in Geneva, Switzerland by notification dated September 1997 advised all other State Parties including in particular the United States, Puerto Rico, Martinique and Guadeloupe that the Defendant was a Party to the Convention and was designated as the Management Authority for Jamaica."

Then comes this very important paragraph:

> "11. That the Defendant has made every effort to have legislation put in place to implement the provisions of the Convention and that there is currently a draft Bill on the Convention on International Trade in Endangered Species of Wild Fauna and Flora. That there are strict requirements under the Convention that permits granted should include the advice of the Scientific Authority that such exportation will not be or is not likely to be detrimental to the survival of the species, and whether the export of the specimen should be limited in order to maintain the species. Further the Management Authority must be satisfied that the specimen was not obtained in contravention of any law of Jamaica for the protection of flora and fauna."

She continues thus:

> "12. That in 1993 the Fisheries Division of the Ministry of Agriculture established a national quota system to determine a sustainable harvest level for Conch in Jamaican waters and a study was conducted in 1994 by the Fisheries Division which showed that the Jamaican Queen Conch fishery was significantly threatened if trade continued to be unrestricted. Based on this study the Fisheries Division devised the Jamaican Conch Fishery

Management Plan in 1994 which established a sustainable management plan for Queen Conch to the year 2000 and adopts a quota system with a conversion factor to control harvest levels and permissible exports. The quota system is based on stock abundance and the potential yield of *Strombus gigas* from the Pedro Banks. There is now produced and shown to me marked "**YS 3**" for identification a copy of the Jamaican Conch Fishery Management Plan.

13. That in recognition of the potential threats to the Conch fisheries the Defendant accepted in principle the Jamaican Conch Fisheries Management Plan prepared by the Fisheries Division in consultation with the exporters of Queen Conch and pursuant to Section 4(1)(a) of the NRCA Act and cognizant of the requirements of the Convention continues to assist in the implementation of the plan in order to conserve and protect this natural resource. That the national and individual quota determined by the Minister of Agriculture and the Ministry of Agriculture Fisheries Division under the Jamaican Conch Management Plan is on a reducing basis until the fishery can be managed on a sustainable level. In the 1995-1996 conch season there was a national quota granted of 4,188,740 lbs. In the 1996-1997 Conch Season there was a National Quota granted of 3,968,280 lbs. to 15 companies. In the 1997-1998 Conch Season the National Quota was 3,747,820 lbs for 18 companies and in 1998-1999 Conch Season the National Quota was 3,011,483.60 lbs for 5 companies with a balance of 731,483 lbs not yet allocated by the Fisheries Division or the Minister of Agriculture."

Then comes the evidence of administrative regulation which the respondents contend have no authority in law. It reads thus:

"14. That there is no law in Jamaica which provides that exporters of conch require a quota from the Fisheries Division or the Minister of Agriculture or for CITES permit to be granted by the Defendant. Trade in species listed in Appendix II of the Convention can only occur with State Parties to the Convention if each exporter has a CITES permit issued by a designated Management Authority. The Export of Conch to Non-State Parties may occur without a permit. Queen Conch is on Appendix II of the Convention and CITES permits may only be granted by the Defendant within a system that restricts the trade in these species as required by the Convention. Although Jamaica is not mandated by the Convention to introduce a quota system the Convention requires the strict regulation of trade. The

quota system strictly regulates the export of Queen Conch from Jamaica. The Defendant has no authority to grant an individual exporter a permit outside of a quota system recommended by the Fisheries Division or the Minister of Agriculture. The Defendant has been facilitating exporters within the industry to allow them to continue their trade.

15. That pursuant to section 8 of the Act, the Ministry of Agriculture, the Fisheries Division and the Minister of Agriculture are mandated to consult with the Authority in the performance of any function over any matter in respect of which the Authority has functions. The Management of Conch Fisheries in Jamaica thus falls within the mandate of the Defendant. The Defendant has no power to act on its own in making a decision on the export of Queen Conch from Jamaica and that the Defendant grants permits in light of the provisions of the Convention and after consultation with the Fisheries Division of the Ministry of Agriculture concerning persons and companies to whom quotas are allocated."

There is one other relevant paragraph. It is paragraph 28 which reads:

"28. That the Defendant has been issuing CITES Certificates prior to 1986 and that in 1997 the Defendant changed this procedure in accordance with instructions from the CITES Secretariat to issue permits with a permit number and a security stamp. These permits have only been issued by the Defendant in order to facilitate the export of Queen Conch from Jamaica to other State Parties."

The tort of unlawful interference with business

The evolving common law on this issue is illustrated by **Nagle v Feilden and other** [1960] 2 W.L.R. 1027 and **Acrow (Automation) Ltd v Rex Chainbelt Inc. and another** [1971] 3 All E.R. 1175. As regards **Nagle** Lord Denning MR stated at p. 1031:

"The plaintiff is aggrieved by the refusal of a licence to her. So she has brought an action claiming a declaration that the practice of the stewards (in refusing a licence to any woman trainer) is void as against public policy, and also an injunction ordering the stewards to grant her a licence."

Then Lord Denning states the problem thus at page 1032:

> "By refusing or withdrawing a licence, the stewards can put a man out of business. This is a great power. If it is abused, can the courts give redress? That is the question."

Then the law was stated thus at 1033:

> "The common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it. If they make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad. It is against public policy. The courts will not give effect to it. Such was held in the seventeenth century in the celebrated case of the **Tailors of Ipswich (1614) 11 Co.Rep. 53a.** where they had a rule that no person was to be allowed to exercise the trade of a tailor in Ipswich unless he was admitted by them to be a sufficient workman. Lord Coke C.J. held that the rule was bad, because it was "against the liberty and freedom of the subject": see **Ipswich Tailors'** case.**(1614) 11 Co.Rep.53a.** But if the rule is reasonable, the courts will not interfere. In the eighteenth century, the Company of Surgeons required as a qualification for an apprentice an understanding of the Latin tongue. The governors rejected an apprentice because on examination they found him to be totally ignorant of Latin. Lord Mansfield C.J. declined to interfere with their decision: see **Rex v Surgeons' Co. (Master).(1759) 2 Burr. 892."**

Then as to the reasons for the decision, Lord Denning said at p. 1034:

> "We cannot, of course, decide the matter today. All I say is that there is sufficient foundation for the principle for the case to go to trial. We live in days when many trading or professional associations operate "closed shops." No person can work at his trade or profession except by their permission. They can deprive him of his livelihood. When a man is wrongly rejected or ousted by one of these associations, has he no remedy? I think he may well have, even though he can show no contract. The courts have power to grant him a declaration that his rejection and ouster was invalid and an injunction requiring the association to rectify their error. He may not be able to get damages unless he can show a contract or a tort. But he may get a declaration and injunction. Thus in **Abbot v Sullivan [1952] 1 K.B. 189; [1952] 1 T.L.R. 133; [1952] 1 All E.R. 226, C.A.** the comporter (although he had no contact with the committee) obtained a declaration that he was entitled to be reinstated on the register: and this court would, I think, have granted an injunction but for the fact that he had already been reinstated before the judgment. In **Davis v Carew-Pole**

> **[1956] 1 W.L.R. 833; [1956] 2 All E.R. 524** the livery-stable-keeper (although he was not a member) obtained a declaration that the decision of the stewards disqualifying him was void, and an injunction restraining them from treating him as a disqualified person. I know that in the later case of **Bryne v. Kinematograph Rentals Society Ltd., [1958] 1 W.L.R. 762; [1958] 2 All E.R. 579** that those two cases could be based on contract. But I think that could only be done by inventing a ficticious contract. All through the centuries courts have given themselves jurisdiction by means of fictions; but we are mature enough, I hope, to do away with them. The true ground of jurisdiction in all these cases is a man's right to work. I have said before, and I repeat it now, that a man's right to work at his trade or profession is just as important to him as, perhaps more important than, his rights of property. Just as the courts will intervene to protect his rights of property, they will also intervene to protect his right to work."

Since Miss Foster based her claim for discharge of the injunction on the absence of any legislative framework or a contractual nexus it is appropriate to cite the answer given by Salmon L.J. at p. 1041-1042. It states:

> "It has been argued on the stewards' behalf that even if they capriciously and unreasonably refused a licence, the courts have no power to intervene; by so acting, the defendants would expose themselves to the risk of being controlled by legislation, and anyone who may be injured by their caprice must look to Parliament for protection, but the courts are powerless to help them. This is a familiar argument on behalf of anyone seeking to exercise arbitrary powers free from any control by the courts. It was, e.g., recently advanced in this court on behalf of the Crown in **re Grosvenor Hotel (London) (No. 2) [1965] Ch. 1210; [1964] 3 636. W.L.R. 992; [1964] 2 All E.R. 674.** when the question of Crown privilege was under consideration. I must confess that I do not find this argument attractive. One of the principal functions of our courts is, whenever possible,, to protect the individual from injustice and oppression. It is important, perhaps today more than ever, that we should not abdicate that function. The principle that courts will protect a man's right to work is well recognised in the stream of authority relating to contracts in restraint of trade. The courts use their powers in the interests of the individual and of the public to safeguard the individual's right to earn his living as he wills and the public's right to the benefit of his labours. The classic exposition of this branch of the law is to be found in Lord Macnaghten's speech in **Nordenfelt v. Maxim**

Nordenfelt Guns & Ammunition Co. [1894] A.C. 535, 565, 10 T.L.R.

> 'All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable - reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public'."

The next case is **Acrow (Automation) Ltd v Rex Chainbelt Inc. and another** which shows how the common law responds case by case to felt needs. Lord Denning M.R. said at p. 1181:

> "So here Rex Chainbelt know all about the injunction. If they comply with the instructions of SI, they will be helping SI to impede Acrow and thus aiding and abetting SI in breaking the injunction. That is clearly unlawful. It means that Rex Chainbelt will themselves be guilty of contempt of court. But Acrow, quite understandably, have not proceeded against Rex Chainbelt for contempt of court. Rex Chainbelt are in an embarrassing position and no judge would wish to punish them. So Acrow has issued a fresh writ against Rex Chainbelt and asked for an injunction against them. I think that was an entirely proper course. I do not see anything in the recent case of **Elliott v Klinger [1967] 3 All ER 141, [1967] 1 WLR 1165** to prevent it; for there no fresh action was brought. Acrow did right to bring a fresh action against Rex Chainbelt in this case, because it is the best way of enabling all the issues to be resolved."

Then the Master of the Rolls continues thus:

> "I think that this court has the power to, and should, relieve Rex Chainbelt and Rex International of the embarrassing situation in which they find themselves. I take the principle of law to be that which I stated in **Torquay Hotel Co. Ltd. v Cousins, [1969] 1 All ER 522 at 530, [1969] 2 Ch 106 at 139,** namely, that if one person, without just cause or excuse, deliberately interferes with the trade or business of another, and does so by unlawful means, that is, by an act which he is not at liberty to commit, then he is acting unlawfully. He is liable in

damages; and, in a proper case, an injunction can be granted against him."

Concerning the principle of law applicable to the facts of the case the Master of the Rolls said:

"Apply that principle to Rex Chainbelt and Rex International. By refusing to supply chain to Acrow, they interfere deliberately with the business of Acrow. They make it impossible for Acrow to manufacture or sell the lo-tow equipment. This interference with Acrow's business is done by unlawful means, because it is done in obedience to an unlawful direction of SI. It seems to me that if a person complies with a direction by another, which he knows or has reason to know, is unlawful, then he is acting unlawfully himself. He is aiding and abetting the unlawful act. He participates in it. He cannot excuse himself by saying that he was under contract to obey the direction, because no person is bound to obey a direction which is unlawful. So here Rex Chainbelt are acting unlawfully. They are refusing to supply Acrow and are doing so in obedience to unlawful orders given them by SI and are guilty of contempt of court. They are thereby themselves using unlawful means to interfere with the business of Acrow. It is unlawful interference which can be restrained by the court. I think that an injunction should issue to restrain the Rex companies from obeying the orders of SI which purport to prohibit them from supplying the chains. But I go further. In order to protect Rex Chainbelt and Rex International from being harassed by SI, we should make a mandatory order against them. They are quite willing to supply these chain belts, if they are free to do so. So we should make a positive order whereby they shall use all reasonable endeavours to supply the chains which are needed for the manufacture of the lo-tow articles, the subject of the licence agreement."

A modern case which applied the principles of the earlier case is **Newport Association Football Club Ltd and others v Football Association of Wales Ltd.** [1995] 2 All ER 87. In that case Jacob J said at p 93:

"(d) Injunction granted at trial

In a number of cases the courts have referred to the possibility of the grant of an injunction at trial when the only 'cause of action' was for a declaration that an arrangement is void. Thus Lord Upjohn said in

Pharmaceutical Society of GB v Dickson [1968] 2 All ER 686 at 701, [1970] AC 403 at 433:

> ' A person whose freedom of action is challenged can always come to the court to have his rights and position clarified subject always, of course, to the right of the court in exercise of its judicial discretion to refuse relief in the circumstances of the case. In the judicial exercise of this discretion the court may declare the rights of the parties and by way of ancillary relief grant injunctions, and so on.'

Mr Goudie sought to cast doubt on the generality of this proposition. He suggested that an injunction could only be granted where the party seeking it was in contractual relationship with the defendant, as was so in the case of Mr. Dickson and in the Australian case **Buckley v Tutty 125 CLR 353.** The Injunction would be to restrain the opposite party from acting in breach of contract by acting ultra vires. But that cannot be right. Lord Upjohn followed the passage I have cited by a reference to **Nagle v Feilden.** So did **Barwick CJ** in **Buckley v Rutty,** referring with express approval to **Nagle v Feilden.** And in **Greig v Insole** Slade J, plainly considered he had power to grant an injunction against defendants who were not in contractual relationship with the plaintiffs."

Further on page 94 Jacobs J said:

> **"(e) <u>Injunction crucially dependent on grant of declaration</u>**
>
> Once one recognises that a claim for a declaration is a cause of action, then I see no reason to say that the injunction can only be granted once the court had determined the claim. Where there is a cause of action for invasion of a right the court does not need to wait until trial - to find out whether the claim is good - before it has power to grant an injunction. It can do so before trial simply on the basis that the claim may be good. So also, in any judgment , where the claim is for a declaration of rights. The injunction, whether at trial or interlocutory, is in support of a cause of action in its widest sense."

The other pertinent passage in the judgment reads at p.96:

> "Both parties referred me to **Nottingham Building Society v Eurodynamics Systems plc** [1993] FSR 468. In that case Chadwick J (at 473) first quoted what Hoffman J said in **Films**

Rover International Ltd v Cannon Film Sales Ltd [1986] 3 All ER 772 at 780-781, [1987] 1 WLR 670 at 680-681:

> 'The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the "wrong" decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial_ or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle... the features which justify describing an injunction as "mandatory" will usually also have the consequence of creating a greater risk of injustice if it is granted rather than withheld at the interlocutory stage unless the court feels a "high degree of assurance" that the plaintiff would be able to establish his right at a trial ... semantic arguments over whether the injunction as formulated can be properly classified as mandatory or prohibitory are barren. The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction... If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a "high degree of assurance" about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction.'

Chadwick J himself then summarised the principles as follows (at 474):

> 'First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be "wrong" in the sense described by Hoffman J. Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo. Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of

> assurance that the plaintiff will be able to establish his right at a trial. That is because the greater degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted. But finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted."

The relevant facts of this case in relation to the law

The respondents' contention was that the authorities suggest that since they had a right to export conch without let or hindrance then that position cannot be abridged without legislative intervention. In fact both sides would welcome legislation and the respondents have actually prepared a draft bill. What is certain is that the Convention cannot be administered so as unlawfully to interfere with the respondents' business interests. The livelihood of the respondents and others is dependent on the export of conch. So we are dealing with a matter of great public importance.

Any regulation of the export trade in conch in the absence of legislation must facilitate the trade, not restrict or hinder. In this context it must be emphasised that the appellant has given the reason for refusing the permit to export and the essence of the respondents case with which I agree is that the reasons are unlawful. Here is evidence in the case of **Seafood:**

> "Mrs. Donna-Marie Roberts
> Seafood & Ting International Limited
> 5 Lindsay Crescent
> P.O. Box 504
> Kingston 10
>
> Dear Mrs. Roberts:
>
> The Natural Resources Conservation Authority (NRCA) is in receipt of your letter dated May 13, 1999 requesting five (5) CITES Export Permits for Queen Conch (***Strombus gigas***).

> We wish to advise that your application has been denied as your company has not been allocated a quota for the 1998-99 conch fishing season by the Fisheries Division.
>
> Yours sincerely
>
> Yvette Strong (Miss)
> for Executive Director"

As for DYC, the affidavit of Frank Samuels Cox on this aspect reads:

> "61. That the Plaintiff applied to the first defendant for permit or certificates to export an amount of 530,000 lbs of 50% conch meat. The defendant has refused to grant the said permit or certificate on the grounds that the Fisheries Division of the Ministry of Agriculture has not approved the granting of the same. The Defendant advised the plaintiff to get permission for the certificate from the said Director of Fisheries. The said Director has advised the Plaintiff that only the Minister of Agriculture can grant permission for the Plaintiff to obtain allocation for the additional products that the Plaintiff has to export and instructed the Plaintiff to apply to the said Minister. I exhibit herewith copy of the said application to the defendant and reply thereto marked "FSC 10" for identity"

Then paragraph 63 reads:

> "The Plaintiff says that the acts and conduct of the defendant in denying the Plaintiff the permit or certificate to export its product is unlawful arbitrary and unreasonable. There are large amounts of quota for which no permits have been granted and there is less than 35 days before the end of the conch harvesting seasons. The Plaintiff says that the majority of the person allocated quota will not be able to harvest and export the quantities given to them due in part to the very late opening of the season by the Minister. Large amount of quota in excess of 830,000 lbs will not be harvested and exported, while at the same time the Plaintiff is being starved of permits under the illegal system for the product that it has in storage and that is now coming and will be coming to it."

The respondents recognise and accepted that there must be a national quota system as without regulation of fishing which is governed by the Fishing Industry Act

the export trade which is the largest in the world would perish. It is against this background that the respondents claim that the interim injunction was rightly issued.

What relief is available to the respondents in these proceedings?

The result of the above analysis is that the appellant Natural Resources Conservation Authority has lost its appeal. So the appeal is dismissed. The respondents Seafood and DYC have been successful in their contest that the interim injunction should not be discharged.

So we must return again to the provisions of that injunction to see what relief is available. The interim injunction was in the following terms:

> **'IT IS HEREBY ORDERED:**
>
> 1. That the defendant be restrained until the 15th day of June, 1999 or until further order from doing whether by itself, agents, representatives of otherwise the following acts or any of them that is to say:
>
>   a) from doing anything or acting in anyway to deny the Plaintiff of its rights and entitlement to permits or certificates from the defendant for the purpose of exporting its conch products to such country as the Plaintiff wishes to export such products.
>
>   b) from acting on any mandate, authorization, directions, instructions, recommendations or anything from the Minister of Agriculture or any division of the Ministry of Agriculture in anyway so as to deny or deprive the Plaintiff of any permits or certificates applied for or required by it for the export of any conch products that it desires to export.
>
>   c) from using any conversion factor or ratio in determining the amount of 50% dirty conch that is equivalent to a pound of 65% semi processed conch meat, 85% semi fillet processed conch meat or 100% fully fillet processed conch meat in such a way as to prevent the Plaintiff from exporting all the products process as 65%, 85% or 100% conch meat."

Of special importance is this mandatory provision:

> "2. That the defendant is compelled by Injunction until the day 15th of June, 1999 or until further order to issue or grant the permits or certificates applied for by the Plaintiff for the export of the quantities of conch products that the Plaintiff wishes to export."

So it is permissible to extend this injunction in these proceedings which sought to discharge the injunction and it is so ordered. There will be a provision for Liberty to apply which recognises that there could be a further appeal. It was in **Acrow Ltd. v Rex Chainbelt** [1971] 3 All ER 1175, 1181 where Lord Denning said:

> "I know that this means that, on this interlocutory application, we are virtually deciding the action, but that often happens. I would therefore allow the appeal, and, subject to any consideration of details, make an order both in the negative and positive terms as asked in the notice of appeal."

These words with the necessary adaptation are relevant to this appeal.

As for the Statement of Claim, the material facts with respect to the tort in issue are pleaded in paragraphs 50 and 52 for Seafood and paragraphs 57 to 59 for DYC.

Conclusion

That the export trade in conch is a matter of international concern and ought to be regulated in the interests of the environment is evident. That legislation is necessary to implement the provision of the Treaty is a constitutional imperative is well known. Yet this court was compelled to decide the important issues in this case on common law principles because of the failure of the Executive to seek to incorporate the treaty provisions by legislation. Because of the public interest in this case it is necessary to make this known. It is anticipated therefore that the Law Officers of the Crown will tender the appropriate advice to the Government as a matter of urgency.

This appeal is dismissed and the mandatory injunction granted by Orr J. has been extended at a hearing inter partes. The undertakings given by the respondents stand. So the order of this Court in respect of both respondents should read:

(1) Appeal dismissed with respect to the Interim Injunction.

(2) Mandatory injunction granted by Orr, J. to be continued until trial

(3) Appeal against dismissal of the summons to discharge interim injunction dismissed.

(4) Registrar to return sealed envelopes to Assistant Attorney General.

(5) Liberty to apply.

(6) The appellant must pay the taxed or agreed costs of the respondents.

(7) The respondents' undertakings before Orr J. continue.

HARRISON, J.A.:

This is an application for leave to appeal against the order of Orr, J. on June 14, 1999, dismissing a summons filed by the defendant/appellant (NRCA) to discharge a mandatory injunction ordered on June 7, 1999, and, in addition, that this court set aside the said injunction.

The plaintiffs/respondents ("DYC Fishing and Seafood and Ting") issued endorsed writs and statements of claim against NRCA claiming, inter alia:

> "1. A declaration that the Plaintiff is entitled as of right to permits or certificates from the defendant for the purpose of exporting its conch products to such countries as the Plaintiff wishes to export such products.
>
> 2. A declaration that the defendant has no power and authority in law to:
>
> (a) deny the Plaintiff any permits or certificates to export any conch products that it desire or require to export based upon the mandate, authorization, directions, instructions, recommendations or of any emanating from the Ministry of Agriculture or any division of the Ministry of Agriculture.
>
> 3. For an Injunction to restrain the Defendant by itself, its servants, employees, agents or otherwise from:
>
> (a) doing anything or acting in anyway to deny the Plaintiff of its rights and entitlement to permits or certificates from the defendant for the purpose of exporting its conch products to such country as the Plaintiff wishes to export such products.

(b) acting on any mandate, authorization, directions, instructions, recommendations or anything from the Minister of Agriculture or any division of the Ministry of Agriculture in anyway so as to deny or deprive the Plaintiff of any permits or certificates applied for or required by it for the export of any conch products that it desires to export.

4. An Injunction to compel the defendant to issue or grant the permits or certificates applied for by the Plaintiff or required by it from time to time in the course of its business for the export of the quantities of conch products that the Plaintiff wishes to export."

The respondents also claimed damages.

The said judge on May 31, 1999, heard ex parte applications for injunctions and issued injunctions against NRCA "...whether by itself, agents, representatives or otherwise..." in the prohibitory terms stated above and also mandatorily:

> "... that the defendant is compelled by injunction until June 15, 1999 or until further order to issue or grant the permits or certificates applied for by the plaintiff(s) for the export of the quantities of conch products that the plaintiff(s) wish to export."

On June 14, 1999, NRCA applied by summons to discharge the said mandatory injunction, not having complied with it. Orr, J. refused to hear the application on the ground of its non-compliance and dismissed the said summons. The relevant facts are hereunder.

Seafood and Ting, since 1993, and DYC Fishing, since 1990, have been engaged in the business of exporting seafood, principally conch, from

Jamaica. Their main markets are the United States, Puerto Rico and the French islands of Martinique and Guadeloupe, to which over 90% of the conch produced is exported.

Jamaica is the largest producer and exporter of Queen conch, biologically named strombus gigas, in the world. Prior to 1993, such conch was exported from Jamaica without the exporter requiring a permit or licence. Yvette Strong, on behalf of NRCA, in her affidavit dated June 9, 1999, stated:

> "...there is no law in Jamaica which provides that exporters of conch require a quota from the Fisheries Division or the Minister of Agriculture or for a CITES permit to be granted by the Defendant..."

The authority for and the purpose of the grant of the CITES permit by the NRCA is for the protection from extinction of Queen conch in Jamaica.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is a global treaty in force since July 1, 1975. The Jamaican Cabinet gave approval for accession to the Convention in 1992. Jamaica did not become a signatory party until 1997. The purpose of the said Convention is to regulate the trade in endangered species of wild flora and fauna to protect it from threatened extinction. Queen conch was placed under Appendix II of the Convention in 1992 as an indication that it had to be strictly regulated in order to avoid its extinction. NRCA was designated in 1993 by Jamaica, not then a signatory to the treaty, as the Management Authority as required by Article 9(1)(a) of the Convention. The

Ministry of Environment and Housing did the said designation. As the Management Authority to the treaty, the NRCA is advised by a Scientific Authority which it appoints, whether it approves of an annual national quota set by the Fisheries Division of the Ministry of Agriculture, for the harvesting and export of Queen conch which amount would not be detrimental to the preservation of the species. The NRCA accordingly advises the CITES secretariat in Geneva, Switzerland, for approval. Any export of Queen conch from Jamaica, such conch being on Appendix II, requires the NRCA as the competent authority designated by Jamaica, to issue a CITES permit before such export of conch can be received by another state party to the Convention.

Also in 1993 "the Fisheries Division of the Ministry of Agriculture established a national quota system to determine a sustainable level" to protect conch in Jamaica from threatened extinction. The said division conducted a survey which showed that the species was threatened and as a consequence devised a Jamaican Conch Fishery Management Plan, in 1994. The said Ministry of Agriculture thereafter established an individual quota system whereby it allocated annual quotas to individual conch exporters, and advised the NRCA of its allocation.

Both DYC Fishing and Seafood and Ting had been cooperating and subjected themselves to this system of individual allocation, mindful of the necessity to manage the environment for the protection of the species.

The national quota for the 1998-99 conch fishing season was declared by the Ministry of Agriculture as 3,011,483.6 pounds and the NRCA was so advised. In a memorandum dated May 10, 1999, containing the said advice, the individual allocation to each of the five selected companies including DYC Fishing was revealed and it concluded:

> "There is currently a balance of 731,489 lbs. that have not been allocated. If there are any further allocations of conch quota you will be duly informed."

Seafood and Ting and some other conch processing plants, on the advice of the Veterinary Services and The Fisheries Divisions of the Ministry of Agriculture, developed and upgraded their plants to the specifications of the requirements of the European Union, after the Union, in June 1997, banned the French Government from importing conch into Martinique and Guadeloupe from Jamaica.

The said company, in addition, paid in excess of US$15,000, since 1994, to the Ministry of Agriculture to conduct conch surveys, on receiving assurances that all exporters of conch "would be assured their export status and that necessary legislation would be put in place for the quota and export permit allocation system."

Seafood and Ting has been a substantial exporter of conch, exporting for the conch seasons, 1993/94 -- 150,000 pounds; 1994/95 -- 175,000 pounds; 1995/96 -- 200,000 pounds; 1996/97 -- 250,000 pounds and 1997/98 -- 250,000 pounds.

In the allocation memorandum of May 10, 1999, Seafood and Ting received no quota allocation.

Accordingly, Seafood and Ting applied to the NRCA for a permit to export 227,000 pounds of conch meat. The NRCA refused to grant the said permit on the ground that the "Fisheries Division of the Ministry of Agriculture has not approved the granting of same", and referred the company to the Fisheries Division which declined to grant the permits advising that:

> "...only the Minister of Agriculture can grant permission to obtain allocation for permit to export."

Seafood and Ting applied by letter dated June 18, 1999 to the Minister of Agriculture which reads, inter alia:

> "The Director of Fisheries Mr. Andre' Kong and Miss Y. Strong of the NRCA have advise us that we were not allocated any conch export quota for the 1998/1999 conch season.
>
> We have been consistent exporters of conch over the years and have always shipped out all of our allocation.
>
> We have over 55,000lbs of conch processed and ready for shipment and another 139,000lbs that will be ready for shipment in another fourteen days.
>
> We ask that sufficient quota be allocated to us to make this shipment Urgently. We need to make this shipment to enable our business to survive and to provide employment for our workers and to prevent the bank from taking away our premises.
>
> Kindly deal with this allocation as a matter or urgency."

The said Minister failed to reply to the said letter. In addition to its woes, Seafood and Ting had received on January 25, 1999, a mortgagee's notice of sale of its business premises.

DYC Fishing, like Seafood and Ting, paid in excess of $25,000 for conch surveys, upgraded its plant on the advice and encouragement of the Ministry of Agriculture after the European Union ban, and according to Frank Cox in his affidavit dated May 27, 1999:

> "... revamped the structional (sic) configuration of its plant and in accordance with the relevant directives, installed new, improved, and more versatile equipment and processing facilities, embarked on expensive training of its staff and international certification of its plants and brought in foreign consultants and experts to prepare many programmes and procedures to ensure and monitor product safety standards."

DYC Fishing purchased new premises, and has one of the largest capacity and has the "best facility to process conch in Jamaica". In April 1999, it was the only plant approved by the European Union inspectors for export of conch to the European Union member countries. DYC Fishing has been the largest exporter of conch since 1966, exporting for the season 1996/97 -- 1,500,000 pounds and 1997/98 -- 1,200,000 pounds of conch.

By the said letter of advice dated May 10, 1999, DYC Fishing was allocated 385,000 pounds of conch for export.

Frank Cox, Managing Director of DYC Fishing, in his affidavit dated May 27, 1999, said of the said allocations:

> "... four other plant with smaller and inferior processing capacities and capabilities were given quota ranging from 450,000 - 600,000 lbs..."

Three of the companies, none of which passed the European Union inspection, received together "nearly 50% of the national quota" and each received a larger allocation than DYC Fishing, although possessing a smaller processing capacity than DYC Fishing. DYC Fishing, as a result, applied to the NRCA on May 13, 1999, for CITES permits for the export of 530,000 pounds of conch meat. The application was refused by the NRCA, "...on the grounds that the Fisheries Division of the Ministry of Agriculture has not approved the granting of the same", and referred DYC Fishing to the Minister of Agriculture. By letter dated May 18, 1999, to the said Minister, DYC Fishing applied for the said permit. It reads, inter alia:

> "We are advised by the NRCA and the Director of Fisheries that only 368,000lbs of quota was given to our processing establishment and that no further permits can be issued to us without your approval.
>
> We have 190,000lbs of conch that needs to be shipped urgently and other products coming to us on a daily basis for which we have made advance payments. We hereby apply for an urgent allocation of 460,000lbs to allow us to ship the finished products in storage and that for which advance payments have been made.
>
> Our processing establishment is by far has the largest capacity and best capability and facilities for the processing and export of conch. It is the only processing establishment that has passed the April 1999 E.U. Inspection for the export of conch to Europe.

> We therefore cannot understand why you gave us the smallest allocation, much less than other processing establishment that could not export their allocation last year.
>
> We think you are deliberately punishing our company because we have always protested against the illegal system for the allocation of quota and because we operate in competition with R. Bunny Francis and Sydney Francis.
>
> You will recall that in March of this year, you called me to a meeting at the Terra Nova Hotel and told me that you will not allow me to compete with Bunny Francis and Sydney Francis even if it means that large amounts of the quota remains in the sea and is not exported. The same thing was repeated to me when I came to your constituency to beg to open the season and issue quota.
>
> Our business is collapsing because of your decision, it is on the verge of Bankruptcy. There is over 380,000lbs of quota not yet allocated and you know that some of the processing establishment you gave quota will not be able to export their allocation.
>
> We ask that as the Minister with the responsibility, you give this matter urgent consideration."

The Minister failed to reply to this letter also.

DYC Fishing was then, and is currently, faced with large outstanding bills for water and electricity consumed for its business, unpaid fishermen who supplied it with seafood products, unpaid workers, outstanding purchase payment for its premises and accumulated stock.

Consequently, in all those circumstances, both Seafood and Ting and DYC Fishing issued the said writs.

As stated previously, on May 31, 1999, an ex parte mandatory injunction was granted by Orr, J. and on June 14, 1999 the summons to discharge the said injunction was dismissed.

Miss Foster for NRCA argued before this court, that there was no evidence of any urgency to prevent the defendant/respondent being served at the ex parte stage nor was there any sufficiently strong or clear case for the grant of the mandatory injunction. There was no enforceable right to the CITES permit, issued in accordance with the Convention which if not incorporated in municipal legislation is unenforceable. The NRCA is an agent of the Government against whom no injunction may be granted and the said grant gave to the plaintiffs/respondents the major relief sought and therefore should not have been granted. She concluded that the said judge erred in maintaining that the injunction ought to have been obeyed before the application for discharge could be heard.

Mr. Campbell, also for the NRCA, argued that the issues were public law issues and the proper approach is by judicial review.

Mr. Henriques, for Seafood and Ting and DYC Fishing, submitted that the court may grant a mandatory injunction on an ex pare application in certain circumstances and in the instant case there is no dispute on the facts. It is the legality of the actions of the NRCA, whose functions emanate from statute, that is questioned.

The Fishing Industry Act, he said, which provides for the licensing of fishermen, does not confer authority on the Minister to issue quotas and

permits for conch; NRCA admits, and the Ministry of Agriculture acknowledges, that there is no such law. The parties, prior to the Convention, enjoyed the right to export and they should not be prevented from pursuing their trade or business by the act of the NRCA. That is a right, he added, which the court will protect in a manner similar to its protection of property rights.

The NRCA is a corporate body, the main aims of which are the management of the environment and the preservation from extinction of its natural resources.

The Natural Resources Conservation Authority Act, section 4, reads, inter alia:

> "4.--(1) The functions of the Authority shall be--
>
> (a) to take such steps as are necessary for the effective management of the physical environment of Jamaica so as to ensure the conservation protection and proper use of its natural resources;
>
> ...
>
> (d) to advise the Minister on matters of general policy relating to the management, development, conservation and care of the environment; and
>
> (e) to perform such other functions pertaining to the natural resources of Jamaica as may be assigned to it by the Minister or by or under this Act or any other enactment."
> [Emphasis added]

The Act then proceeds to stipulate what the NRCA may do in performing its functions. The "Minister" referred to in section 4 is the Minister

of Environment and Housing, not the Minister of Agriculture. The provisions under the said Act are wide enough to enable the NRCA to effect measures to ensure that there is no over-harvesting of the natural resources nor, in these specific circumstances, no depletion of the conch species.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973, (CITES) entered into by Jamaica by signing in 1997, recognized that:

> "...international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade."

Queen conch of Jamaica, having been placed on Appendix II of the Convention, was regarded as being in danger of extinction requiring protection. Article IV of the said Convention reads:

> "The export of any specimen of a species included in Appendix II shall require the prior grant and presentation of an export permit." [Emphasis added].

Jamaica, a member state party to the Convention, designated the NRCA, as the Convention required it to do, as its Management Authority for the issuance of such permits - (Article IX).

The grants of permits, the issue in the suits, therefore originate and have their existence under the said Convention, the terms of which are cognizable and enforceable by member states in international law only. A treaty such as the said Convention is unenforceable as between individuals,

and entities within a state, unless the said treaty has first been incorporated in the domestic law of that state.

> "A treaty entered into by the executive of a sovereign state does not automatically become a part of the domestic law unless it has been incorporated by legislation. Only then do any rights and obligations arise thereunder with reference to its nationals" (per Harrison, J.A. in *Lewis v. Attorney General et al* (unreported) S.C.C.A. 104/98 dated 18th December, 1998, at page 8, relying on *Maclaine Watson & Co. Ltd. v. Trade & Industry* [1989] 3 All E.R. 523 at p. 544).

See also *J. H. Rayner Ltd. v. Department of Trade* [1989] 3 W.L.R. 989.

The CITES treaty, despite being acceded to in 1997, was never incorporated into domestic law of Jamaica. The executive could easily have done so, and regulated by statute its national quota, individual quotas and fair allocation principles. They neglected to do so, despite the urgings and assistance of the exporters of conch. There are, therefore, no local laws concerned with, or governing the issuance of the permits contemplated under the Convention in respect of the export of conch from Jamaica. The defendants, DYC Fishing, and Seafood and Ting, accordingly cannot properly claim a legal right to such permits in domestic law.

Consequently also, the Minister of Agriculture has no power under any statute or any authority otherwise to assume the right to issue permits to regulate quotas or to dictate or advise or influence who should be granted quotas or in what amounts. His actions in this matter are absolutely without

any legal authority or force and is an intrusion into the operations of the NRCA as it relates to the conch trade.

In the circumstances, the mandatory injunctions should not have been ordered by Orr, J., based on the arguments which appeared to have been put forward.

The injunction has a varied classification. The author Spry in the *Principles of Equitable Remedies* (2nd Edition) said at page 304:

> "An injunction is an order of an equitable nature restraining the person to whom it is directed from performing a specified act, or, in certain exceptional cases ...requiring him to perform a specified act. Injunctions are hence often classified into prohibitory or mandatory injunctions, according as they either restrain or require the performance of the act which is in question. They may further be classified as interlocutory or interim injunction, on the one hand, where the order itself is expressed to have effect only until a further hearing takes place or until a named day or else contains some similar limitation... They may further be classified as either ex parte injunctions or injunctions which are made on inter partes applications."

DYC Fishing and Seafood and Ting claimed in the indorsement of their writs filed:

> "1. A declaration that the Plaintiff is entitled <u>as of right to permits</u> or certificates from the defendant for the purpose of exporting its conch products...
>
> 2. A declaration that the defendant has no power or authority in law to:
>
> (a) deny the Plaintiff any permits... to export any conch products... based upon the

> mandate ...directions ...emanating from the Minister of Agriculture...
>
> 3. For an Injunction to retrain the Defendant ...from:
>
> (a) doing anything or acting in any way to deny the Plaintiff its rights and entitlements to permits... from the Defendant for the purpose of exporting its conch products...
>
> (b) acting on any mandate... from the Minister of Agriculture...
>
> ...
>
> 4. An injunction to compel the defendant to issue or grant the permits ...applied for by the Plaintiff ...for the export of ...quantities of conch products.." [Emphasis added].

They were, therefore, seeking the grant of prohibitory and mandatory injunctions, as of right.

I agree with the submission of Miss Foster, before us, that a mandatory injunction is granted only in a strong and clear case, and at the interlocutory stage, it is granted only in special circumstances.

In ***Shepherd Homes Ltd. v. Sandham*** [1970] 3 All E.R. 402, Megarry, J., said of the injunction at page 412:

> "...on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case, the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and there is a higher standard than is required for a prohibitory injunction."

This case was followed in *Locabail International vs. Agroexport* [1986] 1 All E.R. 902, the headnote of which reads, on page 902:

> "A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed as a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff."

In *Esso Standard Oil v. Chan* (1988) 25 J.L.R. 110, following the above cases, it was held, in setting aside a mandatory injunction issued inter partes, that a mandatory injunction is not granted unless the case is "unusually strong and clear".

An injunction is less likely to be granted ex parte, unless the applicant can show that the matter is of such urgency that there is no time to serve the defendant (*Inglis et al v. Granburgh* (1990) 27 J.L.R. 108). Nor, as a general rule, will an injunction be granted where the effect of its grant would give to the plaintiff the entire relief he claims, at the interlocutory stage, without giving to the defendant the chance to defend, thereby creating an injustice to the defendant (*Miller et al v. Cruickshank* (1986) 23 J.L.R. 154 following *Cayne et al v. Global Natural Resources* [1984] 1 All E.R. 225).

In the instant case, DYC Fishing and Seafood and Ting had no entitlement "as of right to permits" in our domestic law. Nor was an "urgency" shown, despite the fact that the subject matter, refrigerated conch, was a perishable commodity. The applicants should have been

ordered to serve the defendants and the matter heard inter partes. This was a more advisable course, moreso, in that mandatory orders were being sought.

The mandatory injunctions having been granted and served, it was an absolute requirement and an unqualified obligation that the NRCA obey the order of the court (*Hadkinson v. Hadkinson* [1952] 2 All E.R. 567). It is a contempt of court to disobey such an order of the court, whether or not the person against whom it is made is of the view that it is irregular or improper, in the circumstances. A court will refuse to hear such a person until he obeys such an order (*Hadkinson's* case). However, in such circumstances, the correct approach is to apply promptly to discharge the said order. The issue of its disobedience would then be subsumed by the application for discharge (*Isaacs v. Robertson* [1984] 3 W.L.R. 705). The NRCA should have been heard by Orr, J. when the application for discharge was made. For the above reasons, both because of the evidential substance on which it appeared to have been based (no reasons of the said judge being before us) and the procedural issue, the mandatory injunction granted by Orr, J. on the arguments before us can stand.

Mr. Henriques, for the respondents, argued before us further, that the said injunction should not be discharged for the further reason that the action of the NRCA, in refusing to grant the permits on the instructions of the Minister of Agriculture, was an interference with DYC Fishing and Seafood and Ting in the pursuit of their trade or business, which action is a tort subject

to restraint by injunction. He relied, inter alia, on *Nagle v. Feilden et al* [1966] 2 W.L.R. 1027 and *Acrow (Automation) Ltd. v. Rex Chainbelt Inc.* [1971] 3 All E.R. 1175. Although the aspect of interference with trade or business was not advanced before Orr, J., it was referred to, obliquely, in the statements of claim, paragraph 50:

> "The unlawful conduct of the defendant in denying the Plaintiff the right, and the permit to export the product that it want to export has brought the Plaintiff to the brink of irreversible and irreparable financial and economic ruin. The Plaintiff will be put out of business forever if it is unable to export the product for which it has made application. The Plaintiff will be exposed to many heavy, costly and indefensible lawsuits in local court and from suppliers of conch and other services."

In *Nagle v. Feilden et al* (supra), the Court of Appeal, in restoring the statement of claim of the appellant which had been struck out on the ground that no cause of action arose, held that it was an arguable case that such a cause of action existed and an injunction would be granted where a declaration was sought, that the practice of the stewards of the Jockey Club to refuse a trainer's licence to a woman was void against public policy. The headnote reads, inter alia, at page 1028:

> "*Per curiam.* A man's right to work at his trade or profession is just as important to him as his rights of property. Just as the courts will intervene to protect his rights of property, so they will also intervene to protect his right to work."

In *Acrow (Automation)*(supra), the right not to be unlawfully interfered with in the pursuit of one's trade or business was reinforced. The headnote reads, inter alia, at page 1176:

> "...(i) If one person, without just cause or excuse, deliberately interfered with the trade or business of another, and did so by unlawful means, i e by an act which he was not at liberty to commit, then he was acting unlawfully, and in a proper case an injunction could be granted against him.
>
> (ii) A person acted unlawfully if he complied with a direction of another which he knew or had reason to know was unlawful, for then he was aiding and abetting an unlawful act and participating in it and could not excuse himself by saying that he was under contract to obey the direction for no person was bound to obey an unlawful direction."

In the instant case, DYC Fishing and Seafood and Ting have a right to pursue their legitimate businesses without any unlawful interference. The NRCA knew that the Minister of Agriculture had no statutory or other lawful right to control the issuance of permits for the export of conch. Yvette Strong, on behalf of the NRCA, in her affidavit dated June 9, 1999, said at paragraph 14:

> "That there is no law in Jamaica which provides that exporters of conch require a quota from the Fisheries Division or the Minister of Agriculture or for a CITES permit to be granted by the Defendant."

Section 19 of the Fishing Industry Act empowers the Minister of Agriculture to declare by order, any period to be the close season for any species of fish, a definition which includes conch. In the Jamaica Gazette

Supplement dated June 29, 1998, it was declared that the close season for "Conch Genus Strombus" for the year 1998 ended on October 31, 1998. The season for harvesting for 1999 would presumably run from November 1, 1998 to July 31, 1999; that is the extent of the said Minister's statutory protection of the conch trade to assist in ensuring that harvesting of conch remains within the national quota declared; being for the 1998/1999 season 3,011,483.6 pounds.

The NRCA accordingly could be seen to know that it was aiding and abetting the unlawful act of the Minister in impeding the lawful business of the respondent companies from pursuing their lawful trade or business and may, therefore, be restrained by injunction.

It is unthinkable to visualize that in the alleged delicate economic climate in Jamaica, a Minister of Government would seek to hinder the exportation of 731,483 pounds of conch, one third (1/3) of the total national quota harvestable, with the consequent loss of product and foreign currency. This is, indeed, curious and a cause for some query.

The Minister could be seen to have arrogated to himself, for reasons best known to him, the power to decide who should be granted quotas to export conch and in what quantities. He allegedly directed that DYC Fishing and Seafood and Ting, in particular, would not be granted the permits they sought, well knowing that he had no statutory power so to do. This would amount to an unmasked display of interference and an abuse of power, to say the least, that ought to be restrained.

The issue of the said permits is a facility enforceable, if breached, between states in international law and a protective device by a member state party to the CITES treaty in order to protect the Queen conch species from over-harvesting and consequent extinction. The respondents are not seeking to, and cannot enforce the issuance of permits by the NRCA, which is the province of international law. What they seek is the right not to be obstructed in the pursuit of their trade or business by the withholding by the NRCA of the documentation particularly required when their products reach a destination in a foreign state. The said permits are not legal requirements in our domestic law, instead, it is a facility to ensure the removal of any obstruction at the departure point of the conch products, and the unhindered acceptance at the port of arrival, provided that the NRCA ensures that no permits issued exceed the national quota, as declared by the Ministry of Agriculture to be 3,011,483.6 pounds for the 1998/1999 season, and approved by the Scientific Authority of the NRCA, which itself so advised the Secretariat of CITES in Geneva, Switzerland.

It is my view that the respondents have shown a strong clear case at the interlocutory stage before this court. For the above reasons, the injunctions not to maintain the obstacle by refusing to grant the permits should remain, in all the circumstances, with costs to the respondents.

PANTON, J.A. (Ag.)

On the 31st May, 1999, Courtenay Orr, J. granted, ex parte, a mandatory injunction against the appellant. On the 14th June he dismissed a summons to discharge the said injunction, without having heard the appellant's application to discharge same. The learned judge also refused an application for leave to appeal.

Before us is an appeal from his decisions.

The Injunction Sought

The ex parte summons for injunction sought an order to restrain the appellant, its employees or agents from:

> **(1)** doing anything or acting in any way to deny the respondents of their rights and entitlement to permits or certificates from the appellant to export its conch products; and
>
> **(2)** acting on any "mandate, authorization, directions, instructions, recommendations or anything" from the Minister of Agriculture or any division of that Ministry in any way so as to deny or deprive the respondents of any permit or certificate applied for or required by them to export conch product;
>
> and also to compel the appellant to issue the permits or certificates applied for by the respondents for the purpose of exporting conch products.

The Factual Situation

Both respondents are companies incorporated under the Companies Act of Jamaica and both are engaged in the business of exporting conch. The appellant is responsible for issuing permits for the export of conch meat

from Jamaica. This responsibility was assigned to the appellant in 1993 by the Government of Jamaica. Prior to that, there was no restriction on the export of this product. An exporter merely needed to register with Jamaica Promotions Limited (JAMPRO) and follow the procedures set out by the customs authorities.

Jamaica is a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter referred to as "the Convention"). Although the Jamaican Cabinet gave approval in 1992 for accession to the Convention, it was not until the 19th March, 1997, that the instrument of accession was signed. Notwithstanding these decisions and developments, the Convention does not form part of Jamaica's domestic law.

The Convention provides that an export permit is necessary for specimens of species listed in the Appendices. Queen conch (strombus gigas) is so listed. As a result, the system prescribed by the Convention has been put into operation. That accounts for the involvement of the appellant which is the Management Authority for the purposes of the Convention. The appellant, as provided in the Convention, has appointed a Scientific Authority which gives advice as to whether an export will be detrimental to the survival of the Queen conch (strombus gigas) species. A national quota is set each year by the Fisheries Division of the Ministry of Agriculture, and the Scientific Authority advises the appellant whether it approves of the

quota. The Fisheries Division or the Ministry of Agriculture establishes individual quotas within the national quota.

Both respondents are not new entrants in the business of conch meat exportation. They, or their directors, have been so engaged from a period of time that precedes the involvement of the appellant. Both respondents were incorporated prior to Jamaica's accession to the Convention.

The respondents contend, and there has been no challenge, that there is virtually no market for conch meat in Jamaica and that over 99% of the conch produced is exported. They say further that this business provides Jamaica with a valuable source of foreign exchange while providing a livelihood for many persons during the harvesting season.

Since the appellant has become involved in the industry, the Ministry of Agriculture has urged and encouraged persons who operate processing plants to close inefficient ones and to centralize their operations. Assurances were given that those who cooperated with this proposal would be given their annual quotas in the usual manner. The respondent Seafood and Ting International Limited decided not to expand its operations as a result of this assurance. On the other hand, the respondent DYC Fishing Limited leased new premises in order to relocate and expand its operations. This respondent spent large sums of money to develop its plant to the specifications of the European Union, as requested by the Ministry. Both

respondents also contributed significantly to the cost of conducting national conch surveys.

The Refusal to Grant Permits

Seafood and Ting applied for permission to export 227,000 pounds of 50% conch meat, but was denied an individual quota for the current season, although it has, since 1993/1994, fulfilled the quotas granted to it each year. The appellant has refused to grant a permit to this respondent on the ground that the Fisheries Division of the Ministry of Agriculture has not approved the grant. This respondent has written to the Minister of Agriculture since May 18 but to date there has not been the courtesy of a response.

In respect of the respondent DYC, there was an allocation made. However, DYC has in stock a quantity of conch meat that exceeds the allocation and wishes to export it within the amount that is still outstanding so far as the national quota is concerned. Some exporters have not used their quotas and, apparently, will not use same. In addition, there is an unallocated amount which has not been earmarked for allocation. It is within these limits that DYC is seeking a permit so as to prevent huge financial losses to its operations.

The Injunction Granted

Orr, J. acceded to the request for an injunction, with the condition that the restraint would be "until the 15th June, 1999, or until further order." The

effect of his order was to give the respondents the whole of the reliefs sought in the endorsement to the writs filed by them.

The injunction granted was in the terms sought. It forbade the denial of the respondents' rights and entitlement to permits as well as it compelled the appellant to issue the permits [Emphasis added]. There are two noteworthy features of this injunction. Firstly, it was granted ex parte; secondly, it is mandatory in nature.

Although ex parte orders are permitted, the words of Ormrod, L.J. in ***Ansah v. Ansah*** (1977) 2 All E.R. 638 at 642 should not be overlooked:

> "Orders made ex parte are anomalies in our system of justice which generally demands service or notice of the proposed proceedings on the opposite party ...Nonetheless, the power of the court to intervene immediately and without notice in proper cases is essential to the administration of justice."

In my view, this was not a proper case for an ex parte order. For the injunction to be of any value, a positive act is required of the appellant - the issuance of the permits. Service of the order of the court would have to be effected before the appellant could comply. In the same manner that the respondents expected to serve this order on the appellant in order to secure the permits, so might they have served the appellant prior to the ex parte hearing. In my view, the learned judge erred in making the order ex parte.

The Refusal to Hear the Application to Discharge the Injunction

The appellant, having been served with the order of the court to issue the permits, sought to present its side of the story to the learned judge. He refused to hear them, saying he would only do so after the order had been complied with. That was most unfortunate. A judge is under a sacred duty to hear the opposite side on every issue on which he is required to adjudicate. In refusing to hear the application, he deprived himself of the opportunity to address the issues in the case before him, and then to do justice according to law. His authority for refusing to hear the application was ***Isaacs v. Robertson*** (1984) 3 W.L.R. 705. In that case from Saint Vincent, an interlocutory injunction was granted to restrain the defendant from trespassing on certain land. No application was made to set it aside. The plaintiff subsequently sought the defendant's committal for contempt on the basis that he had disobeyed the court order. The Privy Council, in dismissing the defendant's appeal from the decision of the Court of Appeal of St. Vincent, held that an order by a court of unlimited jurisdiction, such as the High Court of Saint Vincent, had to be obeyed by the person against whom it was made unless and until it had been set aside by the court.

The learned judge seems to have been expressing the view that blind obedience was required. He apparently ignored the fact that there is always room for an application to be made to discharge the injunction. At page 708

of the judgment in ***Isaacs v. Robertson***, there is a quotation from Romer, L.J. in ***Hadkinson v. Hadkinson*** (1952) P. 285, 288:

> "It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged." [Emphasis added]

It follows that the requirement that one should obey the order of a court is, depending on the circumstances, subject to an application to discharge that order.

When all the affidavits in this case are examined, it is undisputed that there is no law that authorises the appellant to require exporters of conch meat to apply for permits. There is also no law that authorises the regime that is in operation in respect of the export of conch meat. It is to the credit of the respondents that, notwithstanding the absence of appropriate statutory provisions, they have cooperated with the appellant and the Ministry of Agriculture as well as other agencies in an effort to bring some order in this area of activity which impacts on the environment as well as on the business of exporting. The respondents have spent much time and money in facilitating surveys and establishing some order. It is ironic that, having done so much, they now find themselves in a situation in which they are being penalized and placed on the edge of bankruptcy by the failure of the appellant to issue permits to them.

Had the learned judge listened to the application to discharge the injunction he would have concluded that the absence of legislation, and the imminent destruction of the respondents as business entities, militated against the discharge of the injunction. He would no doubt have recognized the arbitrariness of the appellant's conduct and would have rejected the outrageous contention that because there is no statute, the courts of this country cannot interfere. So, notwithstanding the error in granting the injunction ex parte, having heard the contending views, he would have concluded that the granting of a mandatory injunction was right.

In ***Esso Standard Oil S.A. Ltd. v. Chan*** (1988) 25 J.L.R. 110 at 112, this court (per Campbell, J.A.) said:

> "The principle applicable to the grant of a mandatory interlocutory injunction which is comparable in its nature and function to a mandamus is that it will ordinarily be granted only where the injury is immediate, pressing, irreparable, and clearly established and also the right sought to be protected is clear." [Emphasis added].

In my view, the circumstances of this case fit squarely within this principle. Accordingly, it is my opinion that the injunction should not be discharged. The situation is, therefore, not unlike that mentioned by Lord Denning, M.R. in ***Acrow Ltd. v. Rex Chainbelt*** (1971) 3 All E.R. 1175 at 1181:

> "I know that means that, on this interlocutory application, we are virtually deciding the action, but that often happens."

For the Future

It is imperative that the Convention should be made a part of the domestic law of Jamaica as early as possible - if the protection of the environment is a serious national objective. The proper regulation of matters relating to the environment is not something that should be left to individual desires or business interests. The failure to enact appropriate legislation is a recipe for chaos and unfairness. There is evidence in the record before us that the Minister of Agriculture may have expressed a view which indicates that the respondents are not entities that he favours. Even if he expressed no such view, and we must be mindful that he was not a party to the proceedings before us, it seems improper for a Minister to be involved with the process of individual allocations.

The Order

For the reasons that I have herein stated, I agreed with the order proposed in the judgment of my learned brother Downer, J.A.