IN THE CAYMAN ISLANDS COURT OF APPEAL

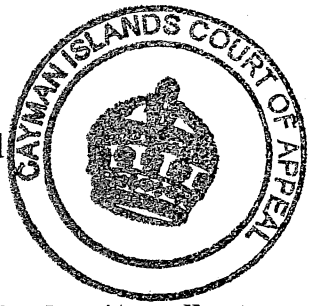
Civil Appeal No. 9 of 1999
Grand Court Cause No. 429 of 1998

BETWEEN:

JOSE'S LIMITED

(f.k.a. JOSE'S ESSO LIMITED and

t/a JOSE'S SERVICE CENTRE)



Defendant/Appellant

- and -

ESSO STANDARD OIL S.A. LIMITED

Plaintiff/Respondent

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Rt. Honourable Mr. Justice P. T. Georges, J. A.
The Honourable Mr. Justice I. D. Rowe, J. A.

Mr. Ramon Alberga Q.C. and Ms. Cherry Bridges instructed by Rich & Connolly for the appellant, and Mr. Roger Ellis Q.C. and Mr. James Chapman instructed by Boxalls for the appellant.

April 17th, 18th, 19th, 20th, 25th, 26th 2000; August 16th 2000.

JUDGMENT

GEORGES, J. A.

This is an appeal from a judgment of Murphy J. in which he granted declarations claimed by the respondent ("Esso") affirming the validity of agreements entered into in 1988 between Esso and the appellant, Jose's Limited (Jose's). Esso is a wholesale distributor of petroleum products in the Caymans. Jose's operates a petrol station retailing Esso products. The effect of the agreements, if valid, would restrict Jose's to selling Esso's products and Esso's products alone until 2008. Jose's

sought to free itself of those restrictions on the ground that at the date of the making of the agreements Esso did not have a valid licence under the Local Companies (Control) Law 1999 (the Control Law) to carry on business in the Caymans. The agreements were, therefore, illegal and unenforceable.

Two sets of issues accordingly arose -

(1) Whether Esso did have a licence under the Control Law to carry on the business which it was in fact carrying on and in the course of which it entered into the challenged agreements; and,

(2) If Esso did not, in fact, hold the requisite licence at the relevant time, whether this lapse resulted in the agreements being illegal and unenforceable.

In his comprehensive judgment Murphy J. found for Esso on all issues - hence this appeal. I shall, in this judgment, begin by discussing the second issue since its resolution is determinative of the appeal. Thereafter, out of deference to the detailed arguments on the first issue, I shall state my views on it.

The Control Law was passed in the Legislative Assembly on 13 December 1971 and came into operation on 27 March 1972. The Memorandum and Objects and Reasons for the Law state that the effect of the Work Permit Law (which required persons not having Caymanian status to obtain a work permit before engaging in gainful employment) could be circumvented by forming a Cayman company which in the terms of the law would be a local company and carrying on through the

company gainful activities. This situation could be controlled by requiring all companies doing business locally to be under the control of local people or be licensed to carry on business in the Caymans.

Section 2(2) defines carrying on business in the Islands as including "carrying on business of any kind or type whatsoever by that company". Certain exceptions are set out which are not relevant to the circumstances of this case. The definition can be described as broad.

Section 4(1) reads -

> "4(1) Subject to subsection (3), no company shall carry on business in the Islands unless it is empowered by its its Memorandum of Association and .....
>
> (b) it is licensed under this Law and under the Trade and Business Licensing Law (Revised) and, at the relevant time, is carrying on such business in accordance with the terms and conditions imposed in such licence and not otherwise;....."

Subsection (2) states -

> "4(2) Any company which contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine of two hundred dollars for each day the offence continues and on conviction on indictment to a fine of one thousand dollars for each day the offence continues."

Subsection 3 states -

> "4(3) The Governor-in-Council may, in exceptional circumstances, having regard to the public interest, exempt any company from all or any of the provisions of this Law subject to such terms and conditions as the Governor-in-Council may deem fit."

Esso is incorporated in the Bahamas. It is part of the international conglomerate engaged in the exploration for oil worldwide, the operation of refineries and the sale and distribution of petroleum

products worldwide. It has been carrying on business in the Caymans for many years before the enactment of the Control Law.

Although the Control Law imposed on Esso an obligation to obtain a licence under that law from 1 January 1975, Esso did not apply for such a licence until 1981. The licence was duly granted for a period of 12 years from 1 January 1975. Its expiry date would accordingly be 31 December 1986.

Esso did not apply for a licence under the Control Law until 8 May 1989. The licence was issued on 29 September 1992 for a period of 12 years with effect from 1 January 1987.

Meanwhile, on 23 August 1988 Jose's and Esso entered into a series of transactions. Jose's was the registered owner of a parcel of land in George Town East on which it operated a petrol station. Jose's granted a lease of that parcel of land at a rent of US$40,000.00 per annum to Esso for a period of 10 years from that date with an option to renew for a further ten years. Esso paid to Jose's the sum of US$400,000.00 being the rent which would accrue due during the period of the lease. Esso granted a sublease of the said parcel to Jose's for 10 years with an option to renew for a further 10 years at a rent of US$12,000.00 per annum. Jose's undertook to operate a service station on the parcel of land. Only Esso products would be sold at the service station and Jose's would operate the station in keeping with standards defined by Esso. A separate dealership agreement specified the reciprocal obligations of the parties.

Esso agreed to lend to Jose's such sums as it might require up to US$565,000.00 at an interest rate

of 10% on the outstanding balance. This sum was to be spent on the construction of service station buildings on the land. To secure this loan Jose's gave a charge to Esso on its interest in the parcel of land in addition to a debenture on the assets of the company.

The correspondence establishes that, by the end of 1995, Jose's wished to bring to an end its connections with Esso.

On 22 January 1998 Esso wrote Jose's giving notice of its intention to exercise its option to renew the lease for a further period of 10 years from the date of its expiry - 21 August 1998. By letter dated 18 February 1998 Jose's replied stating that for reasons, now no longer urged, the lease was unlawful and the option could not be exercised. Nonetheless, should the lease in fact be found valid Jose's gave notice that they intended to exercise their right to be granted a renewal of their sublease. The upshot was that Esso filed an action claiming a declaration that the Headlease had been validly renewed by Esso and that the sublease had been validly renewed by Jose's.

In his judgment Murphy J. found:

(1) that Esso did hold a valid licence under the Control Law on the 23 August 1988 the date it concluded its agreement with Jose's;

(2) that these licences permitted Esso to do business in the Cayman Islands;

(3) that if Esso had no licences to carry on business in the Cayman Islands on 23 August 1988 that that fact would have no effect on the validity of these agreements.

The judgment did not fully dispose of all the issues raised by Jose's. There remained issues relating to the agreements being void by reason of being in restraint of trade. That part of the dispute was adjourned.

The Effect of Section 4 of the Control Law

For the purposes of this analysis it will be assumed that at the relevant date Esso did not hold a licence under the Control law. The argument for the appellant is that if Esso did not have such a licence then it was carrying on business in contravention of the provisions of the law and thus committing a criminal offence for which on conviction on indictment it could be fined $1000.00 for each day the offence continued. The consequence was that the contracts concluded on 23 August 1988 between Esso and Jose would be illegal and unenforceable. The option to renew the lease until 2008 and the dealership agreement which would be part of such renewal would be unenforceable.

The leading old authority is the judgment of Parke B in Cape v Rowlands (1836) 2 M & W 149. The statutory provision in the case prohibited any unauthorised person from acting as a broker in the City of London. The statute imposed a penalty of £25 for every such offence. It was held that an otherwise valid brokerage contract made by an unauthorised person was illegal and void.

Parke B stated at p. 159

> "The clause, therefore, which imposes a penalty, must be taken to imply a prohibition of all unadmitted persons to act as brokers and consequently to prohibit, by necessary inference, all contracts which such persons make to themselves for so acting."

The statute provided that brokers were to be admitted to act as such by the Court of Mayor and

Aldermen "under such restrictions and limitations for their honest and good behaviour as the Court shall think fit and reasonable." There was thus an express indication that a purpose of the statute was the protection of the public.

In St. John Shipping Corp v J. Rank Ltd [1956] 3 All E.R. 683 at p. 687, Devlin J. reaffirmed this principle.

> ".....the court will not enforce a contract which is expressly or impliedly prohibited by statute.....if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, one has to consider not what acts the statute prohibits but what contracts it prohibits."

At p. 691 he adds -

> "I have said enough, and perhaps more than enough to show how important it is that the courts should be slow to imply the statutory prohibition of contracts and should do so only when the implication is quite clear."

In some of the cases cited in argument the language of the legislation has been quite explicit. Thus, an unregistered money-lender sued to recover sums lent to the defendant under an agreement in Victorian Daylesford Syndicate Ltd v Dolt [1905] 2 Ch. 524. The Money-lenders Act 1900 provided that a money-lender must register himself under the Act and secondly that he shall not enter into any agreement in the course of his business as a money-lender otherwise than in his registered name. Once the money-lender is not registered he cannot enter into any valid agreement with respect to the advance and repayment of money. The Act therefore declared invalid the very agreement on which the money-lender sought to recover.

In In re Mahmoud and Ispahani [1921] 2 KB 716 the order by the Food Controller in force on the

relevant date stated that until further notice -

> "A person shall not either on his own behalf or on behalf of any other person buy or sell or otherwise deal in, any articles specified in the schedule hereto .....except under and in accordance with the terms of a licence issued by or under the authority of the Food Controller."

Among the items listed in the Schedule was linseed oil. The plaintiff, who was misled by the defendant into believing that he had a licence, entered into a contract to sell him linseed oil. The defendant in fact had no licence, and refused to accept delivery under the contract on the ground that the contract was illegal. The defence succeeded.

Bankes L.J. at p. 724 noted -

> "The Order is a clear and unequivocal declaration that this particular kind of contract shall not be entered into .. [as] the language of the order clearly prohibits the making of this contract, it is open to a party, however shabby it may appear to be, to say that the Legislature has prohibited this contract, and therefore it is a case in which the Court will not lend its aid to the enforcement of the contract."

In Jackson Stansfield & Sons v Butterworth [1948] 2 All E.R. 588 the prohibition was set out in the Defence (General) Regulations 1938. This specified that the carrying out of any building specified in a certain schedule -

> "shall be unlawful except in so far as there is in force in respect thereof a licence granted by [the Minister of Works]."

It was an offence to carry out any works in contravention of that regulation and both the person who carried out the works and the person at whose expense it had been carried out were guilty of an offence.

The plaintiffs, a firm of builders, obtained a licence in the proper form to carry out repairs on a building owned by the defendant in an amount not exceeding £35.00. The plaintiffs in fact carried out works in excess of that sum and sued to recover the excess. The owner contended that the sum could not be recovered. He succeeded on appeal. Again in this case there was a specific prohibition of a particular class of contract into which the parties had entered.

The distinction between prohibiting the carrying on of a business by a given enterprise and the prohibition of the entry into contracts in the course of carrying on a business was discussed in the decision of the High Court of Australia in Tango Pastoral Co. Pty Ltd. v First Chicago Australia Ltd.(1978) 21 A.L.R. 585. The language of the prohibitory enactment is in similar terms to the sections of the Control Law under discussion. Section 8 of the Banking Act 1959 reads -

> "Subject to this Act, a body corporate shall not carry on any banking business in Australia unless the body corporate is in possession of an authority under the next succeeding section to carry on banking business. Penalty - ten thousand dollars for each day during which the contravention continues."

The respondent lent to the appellant a sum of money secured by a mortgage. The appellant defaulted in its payments. The appellant sued under the personal covenants in the mortgage. The appellant contended that the mortgage was illegal and void by reason of the provisions of section 8. The case was argued on the basis that the respondent at the date of the transaction was carrying on business contrary to section 8. The respondent succeeded in the Supreme Court as well as on appeal. The appellant's appeal to the High Court of Australia was dismissed.

Gibbs A.C.J. stated at pp. 589-590 -

> "The language of s. 8 indicates that it is directed, not at the making or performance of particular contracts but at the carrying on of any banking business. In the course of carrying on such a business a body corporate may make and perform contracts, many, if not all of which might be made equally by a bank or by a company which is not carrying on banking business. A contract to lend money on mortgage is one example a contract of employment is another. Although all of the contracts made by a body corporate in the course of carrying on a banking business are ex hypothesi things which it does in carrying on the business, ie. in the doing of that which is unlawful, it is impossible to accept that the legislature intended to invalidate all such contracts with the result that contracts to pay employees or those who provided it with services would be void."

The reasoning is persuasive and is in my view applicable to this case.

The Tango case is cited in Phoenix Insurance v Halvanon Insurance [1987] (supra). Kerr LJ stated at p. 275.

> "I then turn briefly to the judgment of Legatt J in the Stewart case [1955] Q.B. 988. He concluded that the Act of 1944 merely prohibited unauthorised insurers from carrying on business as insurers, but that it had no effect upon any contracts of insurance made by them, in line with the decision of the High Court of Australia in Tango Pastoral Co. Pty Ltd. v First Chicago of Australia Ltd 139 CLR. 410. For the reasons already explained I would greatly have preferred to reach that conclusion but I cannot do so."

The reasons to which he referred had been set out at p. 267 of the judgment. There he had pointed out that though section 2(1) of the Insurance Companies Act 1974 imposing the prohibition , and section 11 creating the offence, made no reference to specific contracts, these were referred to in the definition section. He accepted the submission of counsel that it made no difference that the reference to specific contracts was only to be found in the interpretation section. As a matter of statutory construction the definition section had to be read in full into every other provision to which it was relevant. Unlike the Tango case the Phoenix case was one in which there was a prohibition

of specific contracts.

I find nothing in the Control Law which would require any prohibition of specific contracts to be read into that Act. Indeed there are indications otherwise. Thus the penalty, for the contravention, is a fine for each day that the contravention continues. This was noted in Tango Pastoral v First Chicago of Australia (supra).

Gibbs A.C.J. stated at p. 589 -

> "It is immaterial whether on any day the body corporate makes one contract or one hundred the penalty is the same. This is an indication that the Parliament did not intend to prohibit each contract made in the course of the business, but only to penalize the carrying on of the business without authority."

He referred to Victoria Daylesford Syndicate Ltd. v Dolt [1905] 2 Ch. 524 mentioned earlier to contrast a provision in which the penalty could be imposed in respect of each contract.

The underlying purpose of the Control Law is adequately served by treating the prohibition as one attaching to the carrying on of business and not to the invalidation of contracts made in the course of carrying on such business. The law was enacted to empower a statutory board to control the level of participation in business by persons who were not Caymanian. There is no apparent intention to protect a particular section of the public who would be liable to exploitation unless some checks and balances were put in place or to ensure effective control of resources in times of crisis, or to protect the public generally by ensuring that professionals offering specialised services are duly qualified. Here the intention is to ensure that entities which can claim Caymanian status by being incorporated in the Caymans but which are in fact controlled by persons who do not have Caymanian status will

not be able to carry on business, unless licensed by the Cayman Protection Board. This objective can effectively be achieved by laying charges against entities which infringe the law and imposing fines calculated on the basis of the number of days during which the infringement occurs. An even more drastic method of control is available. Where the circumstances justify such an action the Board is also empowered to revoke licences which have been granted thus bringing the enterprise completely to an end.

In my view, section 23 of the Control Law also supports the interpretation that the Legislature did not intend to prohibit specific contracts made in the course of carrying on business. The section reads -

> "For the avoidance of doubt it is hereby declared that no business transaction shall be void or voidable by reason only that, at the relevant time, any party thereto is in breach of this Law."

Arguments may be advanced that transactions which may be neither void nor voidable may nonetheless be unenforceable at the instance of a party who has acted in breach of the law. Whether this is so or not, the section does indicate that the legislature did not intend to make illegal specific contracts made in the course of carrying on a business at a period when there was no licence in force.

Accordingly, I would conclude that the contracts entered into between Esso and Jose's on 23 August 1988 are not prohibited under the Control Law and cannot be said to be unenforceable for that reason.

There is, however, another argument which merits consideration. Even though the contracts themselves may not be prohibited they were concluded in the course of carrying on a business which can be characterised as being in breach of the law. The well settled common law maxim of "ex turpi causa non oritur actio" should, therefore, preclude their enforcement.

The maxim expresses pithily a consideration of a public policy in the administration of the law. Its application can, however, conflict with an equally important consideration - that contracts freely concluded should be enforced.

The resolution of these conflicting principles was discussed by Gibbs CJ. in the Tango Pastoral case (supra). That case, as will be recalled, was concerned with a bank operating without a licence and the consequence of this breach of the law or its entitlement to recover a loan.

He stated at p. 600 -

> "The weighing of considerations of public policy in this case and the decision in favour of enforcing the contract is influenced by the form of the particular legislation. In this case the Act, as I have mentiioned, is to a large extent directed to aiding the Government in executing its fiscal policy rather than regulating the relationship between banker and customer per se, a feature which lends support for the view that the provision of a large recurrent penalty for offences against s.8 is Parliament's determination of the consequences of breach of the section and is the only legal consequences thereof."

He continues at p. 601 -

> "In saying this I am mindful that there could be a case where the facts disclose that the plaintiff stands to gain by enforcement of rights gained through an illegal activity far more than the prescribed penalty. This circumstance might provide a sufficient foundation for attributing a different intention to the legislature. It may be that the court will refuse to enforce a transaction with a fraudulent or immoral purpose

> .....On this basis the common law principle of ex turpi causa can be given an operation consistent with, though subordinate to the statutory intention, denying relief in those cases where a plaintiff may otherwise evade the real consequences of a breach of a statutory prohibition."

This case, like the Tango case, is one in which the Control Law is directed to the implementation of the fiscal policy of the Government of the Caymans.

The transaction does not bear the hallmarks of either fraud or immorality; nor, in my view, is there any taint of oppression. Jose's, on the signing of the lease, collected the full rent for its term as a lump sum - $400,000.00. Esso made available as a loan the sum of $565,000.00 at a reasonable rate of interest which was used to develop the property.

Clause 4(f) of the headlease gave Esso the right to exercise an option to renew the lease for a further period of 10 years at a rent of $40,000.00 per annum but payable monthly. Jose's would be entitled to a sublease for the like period at the rent of $12,000.00 per annum to continue the operation of the petrol station. The arrangement does bind Jose's to continue as a distributor of Esso's products for a further 10 years. This, however, is a widely practiced arrangement in the distribution of petroleum products industry.

In my view, therefore, on the assumption that Esso did not at the relevant date hold the appropriate licence under the Control Law for the distribution of petroleum products, the agreements entered into on 23 August 1988 are enforceable. This conclusion, in effect, disposes of the appeal.

At the hearing before Murphy J. there was detailed argument on an alternative basis on which to rest the validity of the headlease and option. It was described as the proprietary approach to the enforceability of these two contracts. Murphy J. stated that it was not strictly necessary to deal with it since Esso had succeeded on the basis he had already discussed. I endorse that view.

The principal authority analysed on this aspect of the argument was Tinsley v. Milligan [1994] 1 A.C. 340. In that case it was common ground that the parties litigating over the ownership of the property there in dispute had both engaged in a fraud on the Department of Social Security to procure some of the money which had been invested in the purchase.

In the Australian case of Nelson v. Nelson (1995) 132 A.L.R. 133, where analagous issues were discussed, it was common ground that Mrs. Nelson had transferred her house to her son and daughter to conceal her ownership and become eligible for a government subvention to enable her to purchase another house. The Australian Court held that the presumption of advancement by Mrs. Nelson to her children could be rebutted and that she was entitled to the proceeds of sale of the first house, despite the fact that the transfer had been effected in order to perpetrate a fraud

In both these cases there was admitted fraud on the part of the claimant. No issue of fraud arises in this case and this basis for justification does not need to be pursued.

Detailed arguments were, however, advanced before Murphy J. and elaborated in this Court on the issue as to whether or not Esso did hold a licence under the Control law. They deserve consideration

particularly as the conclusions may give guidance to the Cayman Protection Board on the ambit of its powers under the Law as fresh combinations of circumstances arise.

Section 9 of the Control Law provides that a company which is not a local company may apply to the Board for a licence to carry on business in the Caymans. The Board as defined by section 2(1) is the Cayman Protection Board set up under the Cayman Protection Law. The application must be in such form as is specified by the Board. Enclosed must be the Memorandum and Articles of Association or the by-laws of the company and a statement of the business which the company proposes to operate.

The power to grant a licence is set out in section 10 -

> "10(1) Subject to the provisions of this Law, the Board may, in its discretion, grant a licence in respect of which application has been made under section 9, but if the Board is of the opinion that it would not be in the public interest to grant a licence, it may refuse to grant one without giving any reason for so refusing, but an appeal shall lie from such refusal to the Governor-in-Council and the Board shall inform the applicant of its right of appeal.
> (2) A licence issued under this section shall be for such duration, not being less than twelve years, and may be subject to such terms and conditions as the Board may see fit to specify therein, and the Board may from time to time extend or restrict the scope of such licence."

Section 10(3) sets out matters to which the Board should have regard in relation to the granting of the licence.

In 1988 the matters to be considered were -

> "(a) the economic situation of the Islands and the due consideration of persons

already engaged in business in the Islands;
(b) the nature and previous conduct of the company and the persons having an interest in that company whether as directors, shareholders or otherwise;
(c) any advantage or disadvantage which may result from that company carrying on business in the Islands;
(d) the desirability of retaining in the control of Caymanians the economic resources of the Islands; and
(e) the efforts made by the company to obtain Caymanian participation.

There is an obligation on the Board to take these matters into consideration but apart from that the discretion of the Board appears to be at large.

Reference was made to paragraph 10 of Local Companies (Control) Regulations made under the Control Law. The form of the licence to be issued is set out in that paragraph and states that the applicant company is licensed under the provisions of the Control Law "for a period of __ years from the date of issue of this licence".

It was submitted that the language of the form required that licences become effective only from the date of issue and that a licence which was stated to commence from a date prior to the date of issue was nugatory.

While it is the case that regulation 10 prescribes that "Licences granted under section 10 shall be in the following form", I do not think that the language of the form can restrict the language of the law itself vesting in the Board the power to issue licences. The only restriction on the power of the Board is that the term of the licence it is authorised to grant must not be less than 12 years.

The well-known principle of statutory interpretation that a statute may not be interpreted to operate

retroactively in the absence of specific language has no application here. Although the licences were issued to commence from a date earlier than the date of issue, that date fell after the date on which the Control Law had come into force.

There was also the submission that even if a licence could be made to be effective from a date earlier than the actual date of issue, it could not in any event be made effective from a date earlier than that on which the application for the grant of the licence had been made. The date on which the Control Law required companies like Esso to hold licences under that Law was 1 January 1975. In fact Esso did not apply for a licence under the Control Law until 7 August 1981.

By letter dated 7 April, 1976 the Secretary of the Cayman Protection Board wrote the Esso manager drawing to his attention that such a licence was necessary enclosing the appropriate application forms and asking that they be returned with the appropriate fee of $400.00 - $200.00 for each of the years 1975 and 1976. In fact the application was not made until some date after 27 January 1981. This was granted on 7 August 1981 for 12 years from 1 January 1976. Expiry date would thus have been 31 December 1987 and a new licence would have to be obtained effective 1 January, 1988.

In this connection it is of interest to note that section 25 of the Control Law provides that the Law shall apply to companies incorporated before, on, or after the date of the coming into the operation of this law. This was, however, subject to this proviso -

> "Notwithstanding section 11(3) [which dealt with the considerations to which the Board should have regard in deciding whether or not to grant a licence] any company

> which was carrying on business in the Islands at the time of the coming into operation of this law, shall, on making application for a licence under section 10, be entitled, subject to section 11(2) [which provided that a licence should be for not less than 12 years] to the grant of a licence."

The grant of a licence retroactive to the date of the coming into force of the law seems a sensible application of this section, which in effect acknowledges a company's entitlement to the licence.

In fact the application for the new licence was not made until 8 June, 1989. There is a letter in the file from Esso's attorneys dated 7 August, 1981 stating that the licence was enclosed. The licence itself was not enclosed and is presumably misplaced.

There was correspondence between Esso's attorneys and the Cayman Protection Board. Esso, it would appear, sought in its words in a letter of 8 June 1989 a "new licence according to the wider nature of business as outlined in the new application form". In the last paragraph of this letter Esso expressed concern "that the licence had been allowed to lapse" and stated that its failure to apply for the renewal earlier was a "mere inadvertence on their part and not an intentional flouting of the law".

Licence No. 16/92 under the Control Law was issued to Esso "for a period of twelve years w.e.f. 1/1/87". Since the form used was the form contained in the Regulations the words "years from the date of issue of this licence" follow the date "1/1/87". The licence was for bulk fuel installation. This is defined in the Trade and Business Law 1971 section 2 as -

> "The business of storing petroleum products, propane gas or any other fuel products in bulk for distribution to other persons."

It was contended that the business in which Esso engaged went beyond that set out in the definition. As appeared from the agreements of 23 August 1988 Esso entered into leases of land. It granted subleases of the lands leased. It lent money on interest to dealers for the construction of the buildings required for the efficacious operation of service stations. In its dealership agreements it specified in some detail how the stations were to be managed including proper lighting, neat and attractive forecourts and approved uniforms. The premises would, of course, be tied premises selling only Esso products.

It was submitted that in effect this level of micro-management went beyond the terms of the licence - storage and the bulk distribution of petroleum products. The evidence does not establish this. Leasing or owning property on which petroleum products are retailed does not make Esso a retailer of such products. It does not make Esso a dealer in real estate. Taking steps to ensure that Esso retail outlets are competitive enables Esso to use its storage and bulk distribution installation more profitably by increasing throughput. There was no evidence that Esso's method of operation was outside the mainstream of companies engaged in a similar business.

Finally, I must refer to an unusual argument advanced to support the submission that on 7 August 1988 Esso was the holder of an appropriate licence. It was prompted by the contention that the Cayman Protection Board had no jurisdiction to issue a licence purporting to be effective from a date earlier than the date of issue. If that position was accepted then the first licence which was issued on or about 7 August 1981 would have remained in effect until 6 August 1993. This was so since

a licence could not be issued for a period of less than 12 years. Esso would, therefore, have held a valid licence on 7 August 1988 when the relevant agreements were concluded. I find this argument unacceptable. If the Cayman Protection Board did not have the jurisdiction to back date a licence to such date as in its discretion it thought fit to do, then any licence issued in the purported exercise of that power would be a nullity.

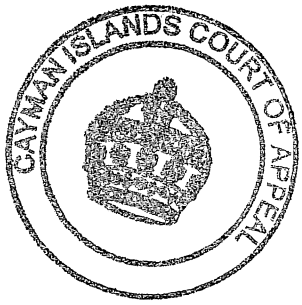
Accepting the argument would involve a rewriting of the licence issued by the Board. The Court would, in effect, be rewriting the licence in a manner which the Board did not intend.

In the result, I would hold that the licences could be granted retroactively to cover the period during which Esso had in fact been operating to the knowledge of the Cayman Protection Board.

Accordingly, the appeal is dismissed with costs to the respondent.

Zacca P.

I agree.



Rowe J.A.

I agree.