

1.9.98



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 91 OF 1997

BETWEEN:	Jacques Scott & Co. Ltd.	PLAINTIFF
AND:	(1) The Immigration Board (2) Island Companies Ltd.	DEFENDANTS

For the Plaintiff: Pierre Lamontagne Q.C., instructed by Charles Adams Ritchie & Duckworth

For the 1st Defendant: Mr. Ivor Archie, Solicitor General

For the 2nd Defendant: Ramon Alberga Q.C., instructed by Bruce Campbell & Co.

REASONS FOR ORDER

This was an application by the Plaintiff for judicial review of the decision of the Immigration Board ("the Board") to grant to Island Companies Ltd ("ICL") a licence under sections 10 and 11 of the Local Companies Control Law ("the LCCL"), following which I made the following Order and Declaration -

1. That the decision of the first defendant of 9th December, 1996 to grant the second defendant a local company licence under the provisions of sec. 10 and 11 of the Local Companies (Control) Law (1995 Revision) be removed to this court for the purpose of its being quashed.
2. It is declared that the said licence is null, void and of no effect.
3. That the second defendant's application for the said local companies licence be further considered by the first defendant in accordance with sec. 11 of the said Law and that notice of the date specified for the meeting of the first defendant when such reconsideration is to take place be advertised in the Caymanian Compass at least seven (7) days prior to such meeting.

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4. That the first defendant, in considering the said application, shall have regard to the written submissions made by the plaintiff to the first defendant on 10th December, 1996.
5. That the second defendant be permitted to trade until such time as the first defendant shall have reconsidered its said application.
6. That the plaintiff pay the defendants' costs of the preliminary point raised herein by the plaintiff.
7. That the defendants pay the plaintiff's costs of the application for judicial review."

16 Since that time consolidated appeals which was then pending against an order of the
17 Grand Court which affirmed the Board's consent to the transfer of 51% of ICL's
18 shares to a non-Caymanian company known as Nuance International Holdings Ltd
19 ("Nuance") has been determined by the Court of Appeal. Nuance is part of a major
20 international group and the competitive advantage which this status may bring to it
21 has been a source of some consternation in the local business community. The
22 consolidated appeals were successful and the Grand Court order was vacated.

23

24 The Court of Appeal ordered that the Board should rehear the application by ICL
25 under the, LCCL observing procedural fairness, that is to say the duty to inform ICL
26 of the substance of the objections to its application and to give it an opportunity to
27 make representations both in writing or orally.

28

29 However, before the Board was so ordered, and on the basis of the judgment and order
30 of the Grand Court which was subsequently vacated, the attorneys for ICL wrote to
31 the Board asking for its immediate written consent to the transfer of 51% of its shares

1 to Nuance International Holding Limited pursuant to Section 8(1) of the law. The
2 Board's decision to consent to the transfer of the shares was ratified at its meeting on
3 November 18th and perfected by a letter dated December 4th 1996. By a letter dated
4 December 5th ICL renewed its application for a licence under Section 10 of the law.
5 On Monday 9th December the Board granted the licence pursuant to Section 11 to
6 ICL. The following passage appears in an affidavit of Miss Lisabeth Walton, the
7 Secretary of the Board -

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9 "In doing so the Board considered all the factors set out in Section
10 11.3 of the LCCL and saw fit to impose conditions pursuant to
11 Section 11.2. The Board took into consideration all the representations
12 made to it up to that date and noted that there had been no change in
13 policy between the time of the original application of March 12th 1996
14 and December 9th 1996.

15
16 In view of the protracted period that ICL's applications had been in the
17 public eye due to the aforementioned legal proceedings the prior
18 advertisement in early 1996 and the many representations received
19 from members of the public including competitors of ICL the Board in
20 the exercise of its discretion to regulate its own procedure did not
21 consider it necessary to invite further objections or to require ICL to
22 advertise again."

23
24 It is convenient to repeat here the description by The Court of Appeal of the process
25 under Sections 8, 10 and 11 of the LCCL which was given in the consolidated appeals
26 to which I have referred (CICA No. 8 of 1996 and M9 of 1996) -

27
28 "Section 8, subsection 2 of the LCCL provides:

29 "[2] The directors and officers of a local company
30 shall decline to register any transfer of shares in the
31 Company if such transfer will, to the knowledge or
32 belief of the Directors, or any of them, result in the
33 number of shares beneficially owned by persons who
34 are not Caymanians exceeding forty per cent of the total
35 number of the shares issued by the Company unless
36 prior consent is given by the Board in writing."

1 If the consent of the Board is obtained under Section 8, the Law
2 provides in Section 10 that the Company may then apply to the
3 Board for a licence to carry on business in the Islands. The law
4 therefore envisages two stages:
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7 [1] an application under Section 8[2] for consent to
8 the transfer of shares; and

9
10 [2] an application under Section 10, if prior consent,
11 to the transfer of the shares has been obtained under
12 Section 8[2], for the grant of a licence to carry on
13 business in the Island.”
14

15 The Court of Appeal was clearly not troubled by the fact that until the shares have
16 actually been transferred the company remains a local company and has no locus to
17 make an application under section 10 but once the shares have been transferred a
18 company already in business which continues to trade will be trading illegally until
19 the licence under Section 10 has been obtained. Sometimes strict logic has to yield to
20 practical common sense. In fact there was preliminary argument at some length as to
21 the true date of transfer of the shares under the share purchase agreement as amended
22 and the jurisdictional consequences. Interesting though these were I do not think that
23 at this point in time it will be useful for me to canvass them. I addressed the point in
24 my order by providing that ICL be permitted to trade until such time as the
25 Immigration Board had considered its application.

26

27 In considering whether the Board should grant a licence under Section 10, the Board
28 must have regard to Section 11(3) of the Law which provides, among other things for
29 the Board to have regard to the following matters -

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- 1 [a] the economic situation of the Islands and the due protection
2 of persons already engaged in business in the Islands;
3
- 4 [b] the nature and previous conduct of the company and the persons
5 having an interest in that company whether as directors, shareholders
6 or otherwise;
7
- 8 [c] the advantage or disadvantage which may result from that
9 company carrying on business in the Islands;
10
- 11 [d] the desirability of retaining in the control of Caymanians the
12 economic resources of the Islands;
13
- 14 [e] the efforts made by the company to obtain Caymanian
15 participation;
16
- 17 [f] the number of additional people from outside the Islands who
18 would be required to reside in the Islands were the application to be
19 granted;
20
- 21 [g] whether the company, its directors and employees have and are
22 likely to continue to have the necessary professional, technical and
23 other knowledge to carry on the business proposed by the company;
24

1 [h] the finances of the company and the economic feasibility of its
2 plans;

3

4 [i] whether the true ownership and control of the company have been
5 satisfactorily established; and

6

7 [j] the environmental and social consequences that could result from
8 the carrying on of the business proposed to be carried on by the
9 company.

10

11 A licensee may be subject, under section 11(2), to such terms and conditions as the
12 Board may see fit to specify therein.

13

14 It was on 10th December 1996 , one day after its decision to grant the licence, that the
15 Board received a memorandum of objection from Jacques Scott & Co. Ltd. (“Jacques
16 Scott”).

17

18 It is well known, and I take notice, that Jacques Scott is a major supplier of alcoholic
19 and other beverages in the Cayman Islands. In essence, I view the complaint of
20 Jacques Scott as being that the Board should have directed further advertisement of
21 ICL’s application for a licence under the LCCL.

22

23 It is important to notice the nature of the advertisements which, before any application
24 had been made to the Board, had been placed in a local newspaper inviting local

1 participation on four occasions during February 1996. The advertisements were
2 identical and each read as follows -

3

4 "LOCAL PARTICIPATION IS INVITED IN CONNECTION WITH
5 THE SALE OF 51% OF A LOCAL DUTY FREE, DUTY PAID AND
6 DESTINATION RETAIL COMPANY OPERATING RETAIL
7 STORES IN THE CAYMAN ISLANDS.

8

9 THE TOTAL COST OF 51% INTEREST IS US\$8,262,000.00.

10

11 EXPRESSIONS OF INTEREST ARE INVITED FROM
12 CAYMANIAN INDIVIDUALS OR COMPANIES WHICH SHOULD
13 BE ACCOMPANIED BY EVIDENCE OF THE APPLICANT'S
14 ABILITY TO MAKE THE FINANCIAL COMMITMENT
15 MENTIONED ABOVE, WILLINGNESS TO ALLOW EXISTING
16 LOCAL MANAGEMENT TO REMAIN IN PLACE AND AN
17 ABILITY TO FUND EXPECTED CAPITAL NEEDS OF THE
18 COMPANY.

19

20 IN THE EVENT THAT THERE IS NO LOCAL PARTICIPATION
21 FORTHCOMING, AN APPLICATION WILL BE MADE TO THE
22 IMMIGRATION BOARD FOR THE GRANT OF A LOCAL
23 COMPANIES CONTROL LAW LICENCE.

24

25 ANY INQUIRIES SHOULD BE ADDRESSED TO P.O. BOX 268,
26 GRAND CAYMAN, CAYMAN ISLANDS, QUOTING
27 REFERENCE 5016."

28

29 On receipt of the application of the 12th March 1996 the Board deferred making a
30 decision with the request that the proposal continued to be advertised for a further
31 period of thirty days to allow ample opportunity for expressions of local interest (if
32 any). In fact the local interest was of a different nature from that solicited by the
33 advertisement. A number of written representations were made to the Board from
34 retailers who could be regarded as competitors of ICL. Jacques Scott was not among
35 these. The group of objectors did, however, include Kirk Freeport Plaza Ltd ("KFL")
36 which was a party to the consolidated appeals. KFL offers high class duty free

1 personal items such as jewelry and watches to customers but is not in the duty free
2 liquor business. The difference in the nature of the businesses of Jacques Scott and
3 KFL took on some significance in this case.

4

5 The advertisements which related to the application to transfer the shares, were part of
6 the first stage of the two stage process under Sections 8,10 and 11 of the LCCL. The
7 advertisements were invitations for local participation, not local objection. The name
8 of the enterprise concerned is not even mentioned. Nevertheless it is argued that
9 because of these advertisements and the publicity surrounding the 1996 Grand Court
10 proceedings relating to the S. 8 application sufficient opportunity was given to
11 Jacques Scott and to any other person to object and Jacques Scott has only itself to
12 blame for having lodged no objection before the decision to grant the application
13 under S. 10 was taken. Jacques Scott has acknowledged in its evidence that it took the
14 decision to object on learning of an application for a liquor licence by Mr. Renard
15 Moxam, a director and shareholder of ICL. It is now a matter of record that the
16 application has been strenuously contested. The decision of the Liquor Licensing
17 Board not to grant the licence has been the subject of an appeal to the Grand Court
18 and thence to the Court of Appeal. The decision of the Court of Appeal has been
19 reserved and is awaited.

20

21 The war has therefore shifted to another front since I made my order. I intend
22 therefore to keep these reasons brief and, where I deem it appropriate, to refer to the
23 decision of the Court of Appeal in the consolidated appeals Nos. 8 and M 9 of 1996.

24 There Kerr J.A. dealt succinctly with the issue of legitimate expectation, thus -

1 “..... in any event, a legitimate expectation arises only where a person
2 has been permitted in the past to enjoy or when he has received an
3 assurance of a hearing before being deprived of an existing benefit -
4 but not a mere hope of a future benefit - **Council of Civil Service**
5 **Unions v. Minister for the Civil Service [1985] 1 AC 374 at 408**
6 **(F-H);** and **Attorney-General for New South Wales v. Quin [1992]**
7 **LRC (Const) 751** and, accordingly, the facts of the case did not
8 support the finding of a legitimate expectation by the Judge.
9

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11 While from its very nature there can be no definite unassailable
12 limitations to the concept of legitimate expectation, having regard
13 to the submission of Counsel for KFL, I am of the view that it would
14 be an unwarranted extension of the principle of legitimate expectation
15 to meet the circumstances of the instant case.”
16

17 These observations apply equally to the present case. The issue on which it turns is
18 one of procedural fairness. Statutory bodies such as the Board undoubtedly have a
19 general duty to act fairly. What is fair in any particular case is largely a matter of
20 intuition, arising from the circumstances of a particular case, and other cases are for
21 that reason often of limited applicability. Certain principles do, however, emerge. I
22 adopt again, as I have already done recently in another judicial review matter the
23 words of Lord Templeman in Dooey v. Secretary of State for the Home Department
24 (1993) 3 All ER 92. He said this -

25
26 “What does fairness require in the present case? My Lords, I think
27 it unnecessary to refer by name or to quote from, any of the often-cited
28 authorities in which the courts have explained what is essentially an
29 intuitive judgment. They are far too well known. From them, I derive
30 the following. (1) Where an Act of Parliament confers an
31 administrative power there is a presumption that it will be exercised in
32 a manner which is fair in all the circumstances. (2) The standards of
33 fairness are not immutable. They may change with the passage of
34 time, both in the general and in their application to decisions of a
35 particular type. (3) The principles of fairness are not to be applied by
36 rote identically in every situation. What fairness demands is dependent
37 on the context of the decision, and this is to be taken into account in all
38 its aspects. (4) An essential feature of the context is the statute which
39 creates the discretion, as regards both its language and the shape of the

1 legal administrative system within which the decision is taken. (5)
2 Fairness will very often require that a person who may be adversely
3 affected by the decision will have an opportunity to make
4 representations on his own behalf either before the decision is taken
5 with a view to producing a favourable result, or after it is taken, with a
6 view to procuring its modification, or both. (6) Since the person
7 affected usually cannot make worthwhile representations without
8 knowing what factors may weigh against his interests fairness will
9 very often require that he is informed of the gist of the case which he
10 has to answer.”

11
12 The public interest which this case has aroused has caused the procedures under the
13 LCCL to be dealt with in an unusual way, in that major issues have had to be dealt
14 with under the procedure pursuant to S. 8 which imposes no express requirements as
15 to the factors which the Board has to consider when granting permission for an
16 allotment or transfer of shares which would result in the number of shares beneficially
17 owned by persons who are not Caymanians exceeding forty per cent of the total
18 number of the shares issued by the company. The section appears to be addressing the
19 issue of the sharing of the economic benefits arising from Caymanians having a stake
20 in companies rather than the general public interest which the Board must consider
21 under S. 11(1) and the specific matters set out in S. 11(3) to which the Board must,
22 *inter alia*, have regard. In fulfilment of those specific statutory requirements the
23 Board is under a duty to act fairly.

24
25 The plaintiff says that in order to discharge this duty the Board was under a duty to
26 communicate (probably by advertisement) to those whose vital business interests
27 would be adversely affected by its grant the fact that an application for a licence under
28 the LCCL had been made by ICL; that this could not have been done before the
29 application for the licence was made on 5th December 1996; that instead, a conscious

1 decision not to advertise the application was made and it was dealt with in secret and
2 with unusual haste on 9th December, with a weekend intervening after the application
3 on the 5th; and that the advertisements of February 1996 and the publicity given to the
4 legal proceedings which arose from the issues under S. 8 were not a fair basis for the
5 decision of the Board not to advertise the application under S. 10.

6

7 The defendants' case with regard to the duty to act fairly is essentially that having
8 regard to the history, background and circumstances surrounding this matter between
9 February and December 1996 the Board did so act and was not in breach of any duty
10 towards Jacques Scott or anyone else. In addition I am invited to refuse relief to
11 Jacques Scott on the following grounds, as a matter of discretion -

12

13 “(i) On their own evidence they have not established that they
14 have been sufficiently affected or prejudiced by the grant of
15 the licence which they now seek to have quashed.

16

17 (ii) The motive of the application for certiorari by Jacques Scott &
18 Company Ltd is unworthy being as it is an attempt to forestall
19 by a collateral attack the grant of an application for a liquor
20 licence made by Mr. Renard Moxam to the Liquor Licencing
21 Board in August 1996 to sell liquor at an outlet of Island
22 Companies Ltd situated in the Anchorage Centre.

23

24 (iii) The reason for the belated opposition to the application for a
25 Local Companies Control Law licence by Jacques Scott &
26 Company Ltd has nothing to do with Caymanian interest in
27 general but to do with their special interest in the outcome of
28 the liquor licence application and to forestall the liquor licence
29 application being considered or granted.

30

31 (iv) The grant of the Local Companies Control Law licence would
32 not of itself entitle Island Companies Ltd to sell liquor and as
33 Jacques Scott & Company Ltd have made it clear that they do
34 not seek to stop Island Companies Ltd trading under the licence
35 and that their doing so, apart from the sale of liquor, would not
36 affect Jacques Scott & Company Ltd in any way, it must follow

1 that the present application for certiorari is a collateral use of
2 the judicial process namely to attack a decision of the
3 Immigration Board which attack if successful would make the
4 grant of a liquor licence irrelevant.”
5

6 It is not good enough to say that an advertisement inviting local participation in an
7 unnamed enterprise, even if that name is not hard to guess, serves the purpose of
8 giving notice to those having sufficient interest to wish to object. The notice serves a
9 quite different purpose and if the invitation to local participation is accepted objection
10 at that stage would be a waste of time and money. The stated intention to apply for a
11 LCCL licence is conditional on an uncertain future event. In fact there were vehement
12 objections at that stage but I do not think that Jacques Scott can be criticised for not
13 being among them or for not having acted immediately following the Grand Court
14 decision of October 1996.

15

16 One of the factors which the Board is bound to consider under S. 11(3)(a) of the
17 LCCL is “the due protection of persons already engaged in business in the Islands.”
18 One business may be selling one kind of product, another may be selling another.
19 Their grounds for seeking protection may not be the same. Each, in my judgment, is
20 entitled to object for its own reasons. I see nothing wrong in objection in those
21 circumstances, to borrow the words of Mr. Alberga “thinking purely of themselves,”
22 as Jacques Scott did when they became aware of Mr. Moxam’s intention to seek a
23 liquor licence at one of the ICL premises.

24

25 An LCCL licence may, pursuant to S. 11(2) of the LCCL, be subject to such terms
26 and conditions as the Board may see fit to specify therein. I find the distinction

1 between an "indirect" interest of Jacques Scott in the LCCL application and a "direct"
2 interest in the application by Mr. Renard Moxam under the Liquor Licensing Law to
3 be an artificial one. The outcome of each might directly affect their business. A
4 direct interest is not confined to cases where there is a "case to answer", such as a
5 revocation of a licence where a duty to give the company concerned an opportunity to
6 object is set out in S. 11(4) of the LCCL. The powers and duties of the Liquor
7 Licensing Board and the Immigration Board are easily distinguishable. Issues which
8 could be canvassed before the Immigration Board under the LCCL might well be
9 found to be beyond the powers of the Liquor Licensing Board to determine.

10

11 While the Board can determine its own procedure, that is subject to the overriding
12 duty of fairness. Although the question before me was not whether I thought the
13 Board should have acted otherwise than in the way it did but whether it was wrong to
14 such a degree that the Court should interfere, I concluded that in the very unusual
15 circumstances of this case I should do so. I am not by this decision seeking to lay
16 down any general rule of procedure, save to say that it is the duty of the Board to
17 consider carefully in the light of the requirements of S. 11(3) of the LCCL the extent
18 of the consultative process which fairness, both to the applicant and others, demands.

19

20 I will, however, make one last observation. The spate of litigation which has arisen
21 out of the cumbersome procedures with which the Immigration Board has been
22 saddled under the LCCL makes it desirable that the drafting of the Law be scrutinised
23 with a view to improvement.

24

1 Leave to appeal against order to strike out.

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7 1st September 1998

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G.E. Harre
Judge

