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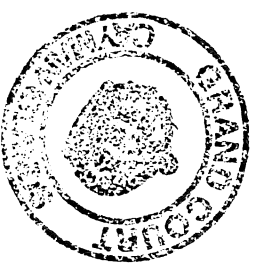
OPEN COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS

IN THE MATTER OF APPLICATIONS FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE LOCAL COMPANIES (CONTROL) LAW

(1995 REVISION)



BETWEEN:

THE QUEEN

Cause No. 854 of 1997

-and-

THE IMMIGRATION BOARD

Respondent

ex parte

KIRK FREEPORT PLAZA LIMITED

Applicant

AND:

THE QUEEN

Cause No. 272 of 1998

-and-

THE IMMIGRATION BOARD

Respondent

ex parte

DEREK B. WIGHT

Applicant

BEFORE GRAHAM J.

Appearances

For both Applicants: Mr. Jeffrey Jowell Q.C. and Mr. Adrian Taylor
of Oren Merren & Co.

For the Immigration Board: Mr. Samuel Bulgin, Acting Solicitor General
and Miss Jacqueline Willson

JUDGMENT

The background



1. The confusion which has characterised the fraught history of this case was engendered by the form of the original application by the Island Companies Limited (ICL) in their letter of application to the Immigration Board dated 12th of March 1996. That letter not only sought the consent of the Board to the transfer of 51 % of its shares to Nuance International Holdings (Nuance), but attempted to put the Board in a position where, in the event of a successful application to the Board under Section 8, there would be some form of implied undertaking that the consequent Section 10 application would more likely than not to be granted. It would appear that the Chairman of the Board, Mrs. Lorna Hampson, appears to some extent to have fallen into that trap (if it was a trap) as, in her letter dated the 25th April 1996 to ICL, and in her affidavit in the original judicial review proceedings before Mr. Justice Smellie, she seemed to treat Section 8 and Section 10 Applications as being part of the same process. She appears to have thought that she had to advise the Board to test the Section 8 Application by reference to Section 11 (1) of the Law. The Board then proceeded to reject that application. That event was but the culmination of an extremely sorry series of events which must, to some extent, have shaken public confidence in the Board. They refused the ICL application on the 10th April 1996; then allowed it on the 17th April 1996, only to revert to its first decision on the 25th April 1996. Oral representations were then permitted to ICL and to Kirk Freeport Limited, the lead objector, on the 17th April 1996, after charges of unethical and



improper conduct had been laid against it by KFL. I will return to that topic later in my judgment.

2. The combination of those events was an application for judicial review to Mr. Justice Smellie (as he then was) by KFL. This resulted in his quashing all the decisions previously made save that of the 'grant' of the Section 8 consent on the 17th April 1996, that decision had not been communicated in writing, as it should have been to ICL. That order was, in turn, quashed by the Court of Appeal on the 28th November 1997 in which the Board was directed to re-hear ICL's application under Section 8 "observing procedural fairness". The actual order of the Court at paragraph 6 read:-

"The new application is to be heard within 7 days, if not, the undertaking by Nuance is to be honoured."

The "undertaking" was in relation to the re-assignment of the shares sold to Nuance in the event of a failure to obtain a Section 8 consent. The Board construed the order of the Court of Appeal as requiring it to complete the Section 8 Application within 7 days. I do not so construe it, but I note that others appear to have construed it in precisely that way, in particular the attorneys representing ICL and even those representing Kirk Freeport Plaza Limited (to judge by the terms of their immediate letter to the Board). I read it as an order nisi, to deal with the situation which might

arise if the shares were not re-transferred to the original beneficial owners by ICL in those circumstances a criminal offence might arise. I pause at this stage of the narrative to observe that if ICL had either by oversight or design sought to compress the Section 8 and 10 proceedings they must by this stage have reflected that if it was by design then they had been too clever by half! As I have already pointed out, it was the confusion consequent upon these tactics has which caused a good deal of the friction which has resulted from this protracted litigation. KFL have joined in with a will and made a series of allegations of improper conduct against ICL and sought procedural relief on a number of occasions.

3. I revert to the judgment of Mr. Justice Smellie in which he made it plain that there is a plain distinction between Section 8 and Section 10 Applications. I respectfully agree with his analysis of the Law which to me seems patently clear. A two stage procedure is envisaged by the Law:-

(1) The promoter of a scheme in which the acquisition of more than 40% of the shares of the local company is to be acquired by a foreign company must apply to the Board for its consent to the allocation of the shares. The concept of the “consent in principle” is a legal nonsense. The duty of the Board is to grant the application or to reject it and it must do so in writing.

(2) Only when the Section 8 requirement has been achieved can a Section 10 Application be made. As his Lordship in his judgment said, there must be appropriate advertising so that interested parties may put in objections subject to Section 11 of the Law. It has been a key part of the submissions of Mr. Jowell Q.C. on behalf of KFL, that in carrying out their statutory duty

under Section 8 the Board is required to have general regard to the relevant parts (depending on the nature of the enterprise proposed) of Section 11. He contends that in the context of the order of the learned President of the Court of Appeal that this requires advertisement of the application under Section 8 of the Law. He submits that the public have a right to object to the applicant's transfer of the shares within the criteria of Section 11. I will deal with that critical part of Mr. Jowell's submission in the course of this judgment.

5. Section 8 of the Law creates a difficulty for the Board, for promoters, attorneys and Judges. It is plainly concerned with the notification to the Board of changes of share allocations in local companies which could result in a non-Caymanian entity beneficially owning more than 40% of the shares. That concept would cause no difficulty in interpretation had it not been for the use of the word "consent" both in subsections (1) and (2) of that Section. I am quite satisfied that, pace, the submissions of Mr. Jowell, it is not the Law that the Board must have regard to the criteria in Section 11 at that stage. Section 11 arises in part 2 of the Law in connection with the business licensing of foreign controlled companies. The legislature must have required the Board to exercise some degree of discretion in the context of the change of level of real Caymanian participation, but it can in my judgment only relate to matters such as direct or indirect control of Caymanian enterprises. I realise that Section 11 (3)

(1) "whether the true ownership and control of the company has been satisfactorily established" provides a degree of duplication in that that concept re-emerges in part 2 of the Law.

It is to be noted that a positive duty of proof is put upon the applicant in Section 11

(3) (1) which does not exist in Section 8. Accordingly I interpret Section 8 as meaning that an investigatory procedure is required, so that the Board may establish the true extent of Caymanian participation in an apparently locally controlled company. The Section may also include, for consideration of the Board, broad issues of public policy not set out in Section 11. The Judgment of the Court of Appeal (at page 29) appears to envisage the valid reception by the Board of objections at their first stage. Such broad issues of public policy would include potentially undesirable investors in Cayman companies. This could be described as being alive to the concept of “fronting”, both in terms of real Caymanian control and commercial entities in the hands of undesirable persons. Discretion is always limited by the context in which it appears. See Padfield v. The Ministry of Agriculture Fisheries and Food [1968] A.C. per Lord Reid at p. 1030 and it is in that context that I interpret the limited degree of discretion given by the use of the word “consent”. The assertion that the legislature intended Section 11 criteria to be considered at the Section 8 stage is fallacious, otherwise they would not have created that requirement in part 2 of the Act under provisions dealing with the applications for business licences. Such a procedure would be a pointless exercise as a decision containing the Section 11 criteria would already have been made. I am bound to say that if the legislature had required the Section 11 Application to precede the Section 8 Application all these difficulties would have been avoided with real commercial advantage to a promoter. A bona fide promoter could obtain the necessary approvals without making a cash or resource commitment.

6. It is an essential function of the Board to deal quickly with the task in hand and to see to it that there is no confusion between the criteria in Section 8 and the procedure under Section 10. I am aware that KFL's original objections contained serious imputations as to the business ethics of ICL which went well beyond the scope of Section 8 and strayed into Section 11. KFL also appears to have fallen into the trap of confusing the Section 8 and 10 procedure. After the decision of the Court of Appeal KFL presented further objections to the Board on the 3rd December 1997 dealing with such matters as they considered relevant at that point in time.

7. The second applicant for judicial review, Mr. Derek B. Wight has a very close family connection with Mr. Kirkconnell, the Chairman of KFL. By a letter on the 3rd of December 1997 his then attorneys, Hunter & Hunter, wrote to the Board asking for it to "furnish us with all material filed by Island Companies Limited which are strictly confidential." This letter was neither acknowledged nor replied to by the Board. This was serious discourtesy by the Board and must never happen again. Failures of that type cause anxiety to objectors who are likely to believe that their objections are being ignored and not being treated in the proper manner. I am however, satisfied that if the Chairman of the Board, Mrs. Hampson, had replied to that letter she would have rejected its request as a quite outrageous piece of fishing. It was her duty not to disclose confidential information and I am quite satisfied that although it was discourteous of the Board not to reply to the letter, no injustice can possibly have been suffered by Mr. Wight by reason of that failure. It is to be noted that Mr. Wight did not put in written or other objections to the Section 8 Application although his close kinsman Mr. Kirkconnell had put in fresh objections on the 3rd

December 1997. I observe that Mr. Wight was not an original objector. In the event, the Board granted ICL Section 8 Application on the 8th December 1997, a timescale described as showing “indecent haste” by Mr. Jowell. I do not know what period of reading and consideration Mr. Jowell would regard as appropriate!. This Court granted leave to seek judicial review in the case of KFL on the 31st December 1997 and in the case of Mr. Wight on the 28th of April 1998. I can say that it was the unexplained absence of a reply to the letter from Hunter & Hunter dated the 3rd December 1997 which was the primary motive in my allowing that application to proceed so long after the event, and to have it consolidated with the application made by KFL. If it had stood on its own I would not have given leave. I note that the application made certain claims based on the concept of “legitimate expectation.”

The application for judicial review by ICL was based upon three propositions:-

- (a) the Board failed to provide a re-hearing by failing to consider the application by ICL in accordance with circumstances and opinions prevailing at the time of the re-hearing in December 1997.
- (b) the Board failed to observe procedural fairness in failing to consult interested parties, such as KFL who had a legitimate expectation of being consulted on a new application, such legitimate expectation arising out of past practice and an express promise to be consulted in the matter to which the application relates.
- (c) the Board acted in breach of the rules of natural justice by failing to advertise the application or to permit interested parties to make representations about its merits.

It is to be noted that Mr. Jowell abandoned any claim based on the concept of “legitimate expectation” at the hearing of these two applications.

Mr. Kirkconnell, on behalf of KFL, set out his claim for judicial review in his affidavit dated the 31st December 1997 by claiming that the Order of the Court of the Appeal ordering a re-hearing obliged the Board to “set in motion an entirely fresh enquiry taking into account all relevant interests and issues pertaining at the present time, ignoring stale or irrelevant considerations and seeking out and fully taking into account new facts circumstances and opinion at the date of the re-hearing.” He contended that that Order of the Court required the Board to re-advertise the applications. There should also be a deadline within which objections might be received. Mr. Jowell submits to the Court that the Board on the authority of dicta in

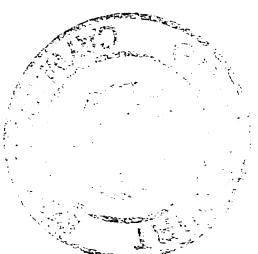
Rhodes v. The Ministry of Housing & Local Government [1963] 1 W.L.R. 61 should

“rout about” of its own volition for objectors and objections. That submission is wholly to confuse the role of a planning Inspector or the Minister in dealing with objectors under the Town and Country Planning legislation in the United Kingdom, with that of the duty of the Board. The duty of the Immigration Board in this context is quite different; it is to receive such objections as are put before it. It was further submitted that it is the duty of the Board to obtain evidence and consider relevant factors relying on the dicta of Lord Green in *Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 233*.

“He must call his own attention to the matters which he is bound to consider”.

Nowhere in the judgment of Mr. Justice Smellie nor in the dicta in the Court in Appeal is there any suggestion that there should be advertisement at the Section 8

stage, indeed there is clear dicta to the contrary. There is nothing in the legislation to suggest that the Board must set inquiries afoot of its own in motion and I reject the submission that Mr. Jowell makes in that regard.



8. Mr. Kirkconnell's affidavit was replied to by Mrs. Lorna Hampson on the 15th April 1998. She deals with the claim that a Section 8 Application should be advertised by saying that the Board has never taken this course. In my judgment procedural fairness does not require it.

Companies such as ICL have themselves advertised in the past that a hearing was to take place. That, of course, is not a matter which can be relied upon by Mr. Kirkconnell as requiring such a practise to be adopted by the Board. The Board has never adopted this procedure and in my judgment never should at the Section 8 stage.

In any event no claim of detriment can be made by Mr. Kirkconnell as he did in fact put in fresh objections to the Board after the Ruling of the Court of Appeal. Mrs. Hampson goes on to deal with the suggestion that oral representations should have been sought and heard by the Board. She said that on the 17th April 1996 she had permitted Mr. Moxam on behalf of ICL and Mr. Kirkconnell on behalf of KFL to address the Board because of the exceptional circumstances which had then arisen. The frequent changes of mind by the Board and the allegations of improper conduct.

She tells the Court that she told the Board "that a new application was before the Board and they had to consider the matter afresh and further advised the members of the Board that they had to consider all the relevant objections before the Board, together with the provisions of the Law and all the relevant circumstances existing at

the time’. The Board then deliberated and arrived at a decision to consent to the renewed application. The allegations in the Kirkconnell affidavit that the Board failed to conduct a genuine re-hearing taking into account relevant criteria under Section 11 (3) of the Law were totally false. When the Board consented to the hearing of the new application on the 8th December 1997 it observed the roles of procedural fairness by giving due consideration to all the objections that were before the Board and by having regard to ICL’s representations with regard to the objections. In addition an objection by Caymania Airport Duty Free was considered and rejected. I note that on my findings in this judgment the Board did consider Section 11 criteria when they should not have. This was to the potential detriment of ICL and to the benefit of KFL. Accordingly, KFL cannot be heard to complain about this!

9. It is submitted by Mr. Jowell that in deciding not to permit oral representations to the Board that it “fettered its discretion”. The Board is entitled to set its own rules of procedure provided the rules of procedural fairness are adhered to. Oral submissions were permitted on the 17th April 1996 in the exceptional circumstances set out in Mrs. Hampson’s affidavit which demonstrates that the Board has no fixed or immutable view on this matter and uses its discretion in each case. It may have a general policy not to hear oral evidence, but matters of discretion of that sort are not subject to review by this Court. I accordingly reject this submission by Mr. Jowell. In the absence of evidence, as opposed to speculation, I am driven to accept the evidence of Mrs. Hampson that the hearing on the 8th December 1997 accorded with the rules of procedural fairness and I reject suggestions to the contrary.

Accordingly I decline to quash that decision. I take judicial notice of the fact that Mrs. Hampson has four years experience on the Board. She holds the rank of Senior Crown Counsel and is an experienced attorney. When she tells the Court that she explained the rules of procedural fairness to the Board I am driven to accept that she did so, and that she did so accurately, fully and fairly. I therefore reject speculative criticism of her and the Board. I wish to record that I asked Mr. Jowell if he wished to cross-examine Mrs. Hampson on her affidavit - he declined to make such an application.

10. Mr. Wight's affidavit on the 22nd April 1998 complains about the failure of the Board to acknowledge the letter from his attorneys of the 3rd December 1997. That was the egregious attempt by his attorneys to obtain confidential information to which he was not entitled. He says in his affidavit that he intended to put together a consortium of local business-men including himself, to buy the shares "sold to Nuance". My reaction to that is that he can still do so at the Section 10 stage. It will then be up to him to pursue whatever commercial negotiations he wishes with ICL. It is to be noted in this context that the papers reveal that KFL had made exactly that attempt in the past with a conspicuous lack of success. His claim by his counsel in this Court that he did not know the "gist" of the ICL application has a hollow ring in view of his expressed interest in the progress of the litigation, as disclosed in his affidavit, and his close connection with the Kirkconnell family. I find that he knew precisely what was going on at all stages and that his application to the Board after the quashing of Mr. Justice Smellie's decision by the Court of Appeal was a mere attempt to back up the Kirkconnell objection to the Section 8 Application. His real complaint as to procedural unfairness is that his objection was never before the Board. That complaint, together with his complaints as to the non-disclosure of confidential information and the failure to advertise at the Section 8 stage are dealt with in the affidavit of Mrs. Hampson. That affidavit reads as follows:

“The Board did not accede to the applicant’s request (for confidential information) for a number of reasons. Firstly, it is not the Board’s policy to give out material which is submitted the Board by an applicant in support of an application under the LCCL Law or any other Law. Secondly, the Board regarded the materials submitted by ICL in support of the application as confidential and decided that in those circumstances the applicant is not entitled to the same. Thirdly, the Board was of the view that the materials submitted by ICL were not reasonably required by the applicant in order for the applicant to object to ICL’s application and fourthly, that the Board consider that to furnish the applicant with the materials sought would set a bad precedent. Unfortunately, however, the Board through oversight failed to respond to the said letter.”

And later,

“it is not normal procedure for the Board to require an applicant to advertise an application under Section 8 (2) of the LCCL as alleged nor is there any statutory requirement to do so. Such applications are sometimes advertised as a result of an applicant’s own initiative but not as a result of any requirement of the Board.”

And later,

“on the 8th December 1997 the Board considered ICL’s application under Section 8 (2) (d) to the LCCL. On that date there were objections before the Board by Kirk Freeport Limited and Caymania Airport Duty Free Limited,

neither of whom has been provided with material submitted by ICL. In considering ICL's application, the Board was mindful of the observations of Mr. Justice Smellie in Cause 267 and 348 of 1997."

That as a matter of legal machinery, it would at the stage of the Section 10 Application that advertisement under Section 11 (3) of the LCCL was required.

11. In short there was no real objection by Mr. Wright at all, although Mrs. Hampson says it was considered by the Board. It is particularly to be noted that what I might term the "parent objections" by KFL had proceeded without a request for confidential information and no complaint has ever been made by KFL that they were not able to make their application by reason of not having that knowledge. I accept Miss Wilson's submission therefore, that his application is an abuse of the process of the Court and is quite without merit. Accordingly, I reject it.

In both cases I asked Mr. Jowell if he could point out any detriment or potential detriment arising out of his claims that in the case of each applicant procedural unfairness had taken place. I gave him the period of an overnight adjournment to deal with those issues. In the event, he was unable to point out any matter of substance in either case. He went on to base his complaint on the alleged failure of a public law right. Although I have decided that no public law right has been infringed in either case I must point out that if any of the alleged breaches had been established, then in the particular case I would have refused to exercise my discretion to bring up and quash the decision of the Immigration Board by way of certiorari.

My reasons for that view are:-

1. Sections 10 and 11 of the Law provide a perfect remedy for the hearing of grievances. Both applicants will be able to put before the Board all such matters and arguments as they think fit. In addition this judgment will see to it that their submissions are properly targeted at the real issues between the parties. As I am satisfied that no detriment has taken place and that no vested right has accrued to ICL by reason of their success in relation to Section 8, then the reasoning in Save Britain's Heritage and Number One Poultry Limited [1996] W.L.R. p. 153 is of particular assistance to the Court. The Court of course reminds itself that that was an appeal under the United Kingdom Town and Country Planning Act 1971 and was not an application for judicial review. The reasoning of Lord Scarman at page 852 referred to in ex parte Preston [1984] A.C. reminds the Court that judicial review is a collateral challenge and that where an appeal lies the Court will rarely intervene by use of a prerogative writ. By a parity of reasoning I would apply the same principle to the full range of remedies available to both applicants under Sections 10 and 11 when read together. I must reiterate of course, that in fact in neither application have there been breaches of the rules of procedural fairness, bearing in mind where the burden of proof lies, that is to say, upon each applicant. I am aware that on the authority of Gillick v. The West Norfolk and Wisbech Health Authority [1986] App. Cases 116 that the non-binding effect of success under Section 8 does not of itself bar a successful application for judicial review. But it does to my mind represent a powerful factor in the exercise of the discretion of the Court.
12. It is perhaps the sanguine hope of this Court that matters will now proceed to a Section 10 hearing. I have pointed out that as a matter of law, ICL can entertain no expectation of success based on its obtaining of a Section 8 consent. It must present

its case, having regard to any general directions which the Governor may have made, and *inter alia* the criteria set out in Section 11 (3) a-j. As I have said, there must be appropriate advertisement together with the period of at least one month after the last insertion for written objections to be sent to the Board and for the applicant to consider those objections and to reply to them. Objectors and applicants must be given sufficient information on matters of concern to the Board in such terms as to enable proper representations to be made. *R v. Secretary of State ex parte Fayed*

[1997] 1 ALL.E.R. 228. That is to say the “gist” of the point being made by the other side must be disclosed so that a “target” is presented in respect of which further submissions and evidence can be forwarded to the Board. This is a vital issue so that procedural fairness is not only done but to be seen to be done. It is important that both objectors and promoters know the general nature of the application being made and the objections being made. It is of course quite critical that if allegations of improper behaviour and bad faith are made then the person in respect of whom such allegations are made must know specifically what those allegations are. If KFL carry out the threat which they have made in Court that they propose to make new and further allegations as to the conduct of ICL, then the Board is reminded that those objections are only to be considered by the Board if they are set out in detail. If not, they should be rejected by the Chairman in limine. It would be quite wrong if lay members of the Board were to be exposed to unsubstantiated and general allegations which should never be before them at all. The Board is reminded of the dicta of **Lord**

Nichols of Birkenhead in Re H. Minors [1996] A.C. 563 as to the standard of proof required in non-criminal proceedings where grave allegations are made. The Board will recall that the Law is that he who states must prove and the more serious the

allegation the more cogent must the evidence be to establish such an allegation or allegations.

13. In conclusion I would respectfully recommend to the new Board set up as from the 10th April 1998 (when jurisdiction passed from the Immigration Board to the Trade and Business Licensing Board) that they should be punctillious, as I am sure they will be in relation to the acknowledgment of objections and other correspondence. An acknowledgment of every item sent to the Board is a sine qua non. Decisions of the Board should never be communicated verbally as has happened in the past. All communications as to the results of applications must be sent to both the applicants and objectors together with copies to the other side. Administrative convenience must never stand in the way of justice.

14. Each applicant will pay 50% of the costs to be taxed if not agreed.
15. Application for stay pending appeal is rejected.

H G S Graham



The Hon. Mr. Justice Graham
Judge of the Grand Court

19th June 1998