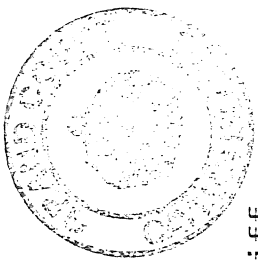


Wolter

OPEN COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS

Cause 881/97



Between: Hadsphaltic International Limited Plaintiff

AND: The Immigration Board 1st Defendant
H.M. Attorney General 2nd Defendant

Appearances:

Mr. Ramon Alberga Q.C. and Mr. Jeremy Walton
for the Plaintiff

Mr. Steven Hall-Jones, Senior Crown Counsel
for both defendants

Before Graham J.

JUDGMENT

1. The plaintiff ("HIL") is a building company which for over thirty year has traded in the Cayman Islands. I am told that it built the Courts and the Legislative Assembly Building. More to the point, it had been trading in the Islands prior to the passing of the local Companies (Control) Law of 1971. The present day form of that Law is the Local Companies (Control) Law (1995 Revision).

Section 25 thereof reads:-

"This law shall apply to companies incorporated before, or after the date of the coming into operation of this Law:

Provided however, that notwithstanding Section 11 (3), 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) to the grant of a licence."

The plaintiff qualified under Section 25 as did two other companies, McAlpine & Company Limited, the well-known international construction company and Bob Soto Limited, a company involved with Diving, car hire and kindred interests. There were and are known as the "grandfather companies."

2. Before the passing of the 1971 legislation, the Cayman Islands were free of any restriction on the operation of non-Caymanian companies. It was truly an example of the free market economy in its purest form. The perceived difficulty was that large international companies with huge financial resources might create, by means of predatory pricing and the like, an impossible economic environment in which smaller scale local enterprises could compete. The result was the passing of the 1971 legislation. Section 25, (supra) set out to exempt the three companies which I have named from the effects of Section 11(3) of the Law which provides as follows:-

"Subject to any general directions which the Governor may from time to time give in respect of the consideration of

such applications the Board shall, in deciding whether or not to grant a licence, have regard inter alia to the following matters:-

- (a) the economic situation of the Islands and the due protection 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) the 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;
- (e) the efforts made by the company to obtain Caymanian participation;
- (f) the number of additional people from outside the Islands who would be required to reside in the Islands were the application to be granted;
- (g) whether the company, its directors and employees have and

are likely to continue to have the necessary professional, technical and other knowledge to carry on business proposed by the company;

(h) the finances of the company and the economic feasibility of its plans;

(i) whether the true ownership and control of the company have been satisfactorily established; and

(j) the environmental and social consequences that could result from the carrying on of the business proposed to be carried on by the company".

3. It is to be noted that in addition to the extensive criteria to be considered by the Board, the Governor can vary the terms of that legislation by executive order to make the criteria more or less extensive. This is very widely drafted legislation.

I am satisfied that Section 25 was designed to create an exemption from the operation of Section 11 (3) of the Law and to treat the "grandfather companies" as if they were local companies in view of their long connection with the Islands and their respective contributions towards local economic development. The legislature well knew the history and quality of those companies and framed the legislation with that in mind. New applications for business

licences were subjected to the rigorous criteria contained in Section 11 (3) of the Law which I have already quoted. That Law was designed to subject non-Caymanian companies seeking to trade in the Islands, to a series of rigid tests to ensure that local people would not be frozen out from competitive commercial activity and involvement in local projects. In addition, other matters including the economic control of local companies, overseas recruitment, the economic resources of applicants and environmental factors were to be given consideration by the Board. This is, in my judgment, a very different regime to that bestowed on the Section 25 Companies.

4. On the 24th April 1997 the Immigration Board, in response to an application by ("HIL") for the renewal of their license wrote as follows to the attorneys for ("HIL").

"I am directed to advise you that the Board has consulted with the Solicitor General and has declined to reconsider the previous decision.

This decision was taken in accordance with the provisions of Section 11(1) of the Local Companies (Control) Licence Law (1995) Revision, having regard to legal advice and in protection of local interests."

That letter was in response to the decision of the Board made on the 12th December 1996 to restrict ("HIL") to development projects over 1.5 million dollars.

Attorneys for ("HIL") had written to the Board asking them to reconsider that decision and the response was as set out in the letter of the 24th April 1997. It is that restriction, later confirmed by the Governor in Council, that this Court is asked to say was ultra vires the Board.

5. Section 11(2) reads:-

"A licence issued 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, upon the written application of the licensee may from time extend the scope of the licence."

It is submitted to me by Senior Crown Counsel that the Board was entitled to insert a condition under Section 11 (3) (a) as if the applicant for renewal was a non-Caymanian company seeking a licence. I regret to say that I find such a construction of 11 (2) wholly illegitimate and I decline so to construe it. It is clear that by use of the words "may be subject to such terms and

conditions as the Board may see fit to specify" a considerable discretion is conferred on the Board as to the terms of the licence to be renewed. It is to be noted that by virtue of Section 25 ("HIL") had a legal right to a grant subject only to Section 11 (2) and not Section 11 (3). I am satisfied that had the legislature intended companies such as ("HIL") to be subjected to the rigours of Section 11 (3) it could easily have said so, it did not. What the legislature had in mind were matters such as health and safety considerations and matters such as the geographical areas in which the company was permitted to operate and any change of ownership of the shares of the company. It is to be noted that the licence granted on the 17th November 1984 contained restrictions as to operational locations and the transfer of shares. No restriction such as the one purported to be inserted on the 12th December 1996 appeared in the licence granted on the 17th November 1984. Obviously the Board at that stage took a very different view of the powers conferred upon it than did the Solicitor General and the Board on the renewal of this licence. It is impossible to construe the legislation as granting a substantive right in one section and removing it by another unless this is specifically set out in the Law.

The Board purported to insert in the licence a restriction based on Section 11 (3) (a)

- (a) "the economic situation of the Islands and the due protection of persons already engaged in business in the Islands."

They purported to ban HIL from undertaking any construction work costing less than 1.5 million dollars. This was a very significant alteration in the terms of the licence and to the potential detriment of the business of the company.

6. I accordingly conclude that the purported exercise of a power under Section 11 (2) was ultra vires the Board and I bring up that portion of the order to the Grand Court and quash the same. I order that the costs of this application be the applicant's to be taxed in default of agreement. Leave to appeal rejected.



12th June 1998

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