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IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 267 OF 1996
CAUSE NO. 345 OF 1996

BETWEEN:	**REGINA**	
AND:	**THE IMMIGRATION BOARD**	**RESPONDENT**
AND:	**KIRK FREEPORT LIMITED**	**FIRST APPLICANT**
AND:	**ISLAND COMPANIES LIMITED**	**SECOND APPLICANT**

APPEARANCES:
Mr. Ivor Archie, Solicitor-General for the Respondent.
Mr. Jeffrey Jowell Q.C. and Mr. Adrian Taylor instructed by Merren & Co. for the first applicant.
Mr. Ramon Alberga Q.C. and Mr. Shaun McCann instructed by Bruce Campbell & Co. for the second applicant.

RULING AS TO COSTS

I refer to the parties and other entities herein as I did in the written judgment.

When that written judgment was delivered in this matter on the 25th October 1996, counsel on all sides acknowledged that the costs should follow the event Mr. Jowell for KFL did however submit that the real complexity of the action and the attendant costs did not arise from "the

narrow confined and specific point" pleaded by his client and that there should be an apportionment. Mr. Alberga and Mr. Archie also advised a fair apportionment of the costs but that in general costs should follow the event in the sense that the only clear "winner", ICL, should be entitled.

Notwithstanding that, on the 31st October 1996 a letter was submitted by Orren Merren and Company on behalf of KFL seeking the recovery of all KFL's costs from the Board. As KFL was in no wise a successful party, this was a reversal of the earlier concession that the costs would follow the event.

I allowed an opportunity on 8th November 1996 for ICL and the Board to respond and when further submissions were also made by KFL.

As a matter of the exercise of my discretion and in the interest of fairness, I can see no reason to depart from the basic principle that the successful party should have its costs and that, in that sense, cost should follow the event. However, given the complexities of this case and the various positions advanced or opposed by the respective parties, "the event" to be followed is not obviously defined.

ICL was the only winner in the sense that only it obtained a positive order in declaratory terms in its favour. But in the course of the arguments considerable time was taken to address points which ICL also sought to advance for a result much more favourable than it attained at the end.

The most significant of those was ICL's argument that its application to the Board was one compositely made both under sections 8 and 10 of the Law and that the decision in its favour, taken on the 17th April 1996, served not just as a grant of the Board's prerequisite consent to the transfer of shares to Nuance, but also as the outright grant of the licence under section 10.

The judgment in ICL's favour fell well short of that. The decision of the 17th April created in its favour only a legitimate expectation that the written confirmation of the Board's consent to the transfer of shares would in due course emanate from the Board or else a fair prior opportunity given to address any reasons for the Board's failure to do so.

ICL, for its part, also gave support to the Board's unsuccessful argument to the effect that ICL had no right of appeal and thus no recourse but to Judicial Review. Although at the end it was determined that ICL properly sought Judicial Review, some considerable time was taken in the presentation of those arguments.

Much of the complexity of the case stemmed from the confusion generated by the treatment of ICL's application by the Board. The Board attempted to deal with the application on no less than four occasions and by way of four different decisions. While this confusion no doubt also stemmed from ICL's ill-framed application and from the pressures of KFL's adversarial posturing throughout, the gordion knot which was presented for unravelling in the litigation was much the making of the Board's mistakes.

Those considerations are not much alleviated by the Board's conciliatory offer on the 17th May of a further meeting on the 29th May when it proposed to hear all sides and to decide the matter afresh. Although ICL expressed no reservations about that course, KFL might be excused any misgivings it might have had about going back before the Board while that state of confusion reigned.

KFL's application, as initially framed and although for very different reasons than were justified at the end, properly sought relief from that decision of the Board.

On the other hand, it is also to be borne in mind that KFL primarily and unsuccessfully argued that the Board became functus officio immediately upon the taking of the decision of 10th April by which it purported to deny ICL's application.

From that broad overview of the history and conduct of the case, it seems to me three basic principles emerge to guide the award of costs.

First, that in each case the actual institution of proceedings, first by KFL and then by ICL, was not without merit.

The second is that in seeking to define "the event" to be followed I might not lose sight of who was the eventual winner: in this case in the sense that ICL was the only party to obtain a positive order in its favour.

The underlying principle, even where, as here, the considerations are complicated, is that the winner, whoever maybe described as the winner, is in general entitled to be paid its costs: Lipkin Gorman & Karpaneli Ltd [1989] 1W.L.R. 1340 at 1388 letter c.

Third and perhaps most significant for present purposes - and notwithstanding the initial entitlement in each party to recourse to the court and to having the issues dealt with by way of judicial review - the eventual complexity of the case and time spent in preparation and presentation was largely due to the manner in which the issues were joined and framed.

Each side took some bad points. In that regard two issues particularly stand out as having been badly and all too keenly contested: whether ICL's only recourse was its statutory right of appeal and whether the Board became functus officio upon the taking of the decision of the 10th April.

Those became the pivotal issues and much of what followed to the end stemmed from them. On each ICL was successful and KFL unsuccessful. On each the Board's position was no more than fairly and properly presented.

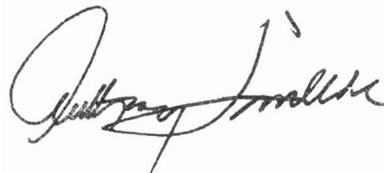
Those two issues therefore to a large extent, defined the event to be followed.

Having stated all that I should be careful to explain that costs are not to be assessed by an attempt to measure or by reference to the time and effort taken up in the preparation and arguments of those specific issues. That approach to the award of costs has long been discouraged: see Cinema Press Ltd v Pictures and Pleasures Ltd [1945] K.B. 356 per Lord Goddard at page 363. And although it remains within the discretion to make such an order against him where a discrete issue has been unsuccessfully raised by a party - Texaco Ltd v.Arco Technology Inc an Another The Times 13th October 1989 - such an order would be exceptional. One obvious reason for

so regarding that sort of order is the likely difficulties and attendant costs to arise in the actual taxation process.

Instead my approach here is to order an apportionment of the costs having regard to the overall significance of the pivotal issues to the outcome.

With that approach in mind and against the background explained, I consider a fair order to be that ICL shall have one-half its costs paid by KFL, to be taxed if not agreed. And in recognition of the countervailing other issues raised and argued, there will be no order for costs either in favour of or against KFL or the Board.



A. Smellie Q.C.
Judge of the Grand Court

Dated this 19th Day of December 1996