19-12-96

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 345 OF 1996

BETWEEN: **ISLAND COMPANIES LTD**

KIRK FREEPORT PLAZA LTD.

APPLICANTS

AND: **REGINA**

IMMIGRATION BOARD

RESPONDENTS

APPEARANCES:

Mr. Ramon Alberga Q.C. instructed by Mr. Shaun McCann of Bruce Campbell & Co. for Island Companies Ltd.

Mr. Jeffrey Jowell Q.C. instructed by Mr. Adrian Taylor of Orren Merren & Co. for Kirk Freeport Plaza.

Mr. Ivor Archie, Solicitor General for the Immigration Board.

11.7.96 In Chambers

Mr. Alberga:

This is an ex parte application but out of courtesy to the Board and because of a conference I have had with Mr. Archie, I have served him with this application that he become fully informed. Under the Maria Smith v Commissioner of Police 1980-83 CILR 126 case - he has no right of audience but if he wishes to make comments I have no objections.

Your Lordship knows something about this matter but it is appropriate that you hear this matter because of having heard the related matter. (Kirk Freeport Plaza Ltd v. The Immigration Board). Part of the application here is that this application be consolidated with that so that the matters can at the same time be dealt with.

This is an application for leave to apply for Judicial Review seeking an order of certiorari to bring up and quash two decisions of the Board dated 15th April 1996 and 24th April 1996, respectively. Both decisions were in relation to an application made by Island Companies Ltd. to the Board and which took a rather unusual course.

The application is made pursuant to G.C.R Order 53 r.3(7).
The test is simply that I show we have a sufficient interest and that we have an arguable case.
See: Maria Smith v Commissioner of Police (supra).

See Mr. Moxam's affidavit - a few aspects - application made, then heard by the Board on 10th April 1996. Apparently objections filed but applicant never invited to the Board to deal with those objections. Board turned down the application.

Subsequently, the applicant through Mr. Moxam, had a meeting with the Chairman who confirmed it was turned down and told him there were five objections or objectors

He complained of not having been given a chance to be heard. She took that seriously and suggested he write a letter to the Board.

He was invited back to another meeting of the Board on 17th April 1996. He responded to this invitation. He wrote a letter on the 16th April. He addressed the Board. That night the Chairman told him the Board had allowed the application.

He never did get a formal letter stating that his application had been granted. On 25th April he phoned to get that, he was told that on the day before, on 24th April, the Board had revoked its decision of the 17th April.

Before embarking upon judicial review he made further representations to the Board - it was decided that Board would fix another meeting.

I felt at that stage(as the counsel) if that was going to be the approach let that be the case. We were preparing to go on the 29th April to have a full dress debate. To my surprise the objectors got an order of prohibition to prevent - rather got a stay. (having gotten leave to seek judicial review by way of prohibition).

I need to bring my own process to get the relief I need.

I say decision of the 10th April was given in breach of the rules of natural justice, tainted and nullified and by procedural impropriety and illegality.

I say the meeting of the 17th was quite proper and that decision is a good decision. And that if the Board was going to reconsider their decision on the 24th that was a breach of natural justice.

The basis of my application is that I need to bring my own process to seek positive relief as well.

See my notice for application for leave. As to item 4 - see G.C.R. Order 53 r.12 or under G.C.R. Order 4 r.3

Mr. Archie:

If leave is granted prudent and sensible that they (the two actions) be consolidated.

Mr. Alberga:

Time of the essence to this agreement(of sale of shares to foreign interests). We would hope that the matter be heard well before August.

In addition date fixed in middle of the Court of Appeal session. I am in a serious problem from the 12th - 16th August. I would wish that the matter be brought forward.

Mr. Archie:

The other difficulty is that the Board would need to respond through the Chairman who has been ill. Barring that if it were to come a couple of days earlier than the middle of August there should not be too much difficulty.

Court:

Leave granted and draft order approved as amended.

Mr. Archie:

I should note for the record now that the Board is still quite prepared to proceed with the sort of hearing it had contemplated for the 29th April 1996.

Smellie J. 11.7.96

9.9.96 OPEN COURT 10:00 A.M.

Mr. Alberga:

Welcomes Mr. Jowell.

Mr. Jowell:

There have been subsequent events in another application for judicial review, as result of which we sought to amend the grounds on which we seek to rely.

Leave to amend pages 18 -19 - of our bundle. Page 138 contains the affidavit. We are applying under Order 53 rule 6 subsection (2) for the amendment and addendum.

Mr. Archie: No objections.

Mr. Alberga: No objections.

Court: Leave granted.

Mr. Alberga:

We have had discussions as to the order in which the matter should proceed.

Suggest: Since I got leave subsequent to the leave granted to my learned friend preventing the Board from proceeding, my learned friend is saying that the decision I got was not a decision at all. I should go first and then reply.

Mr. Jowell:

I am content with that subject to a small compromise - one preliminary issue - what decision he wishes to have reviewed and then to hear the other side as to what we are reviewing ie: to take the preliminary point first.

Mr. Alberga:

I will begin with that issue.

The proceedings before the court today arise out of an application to the Immigration Board by Islands Companies Limited on the 12th March 1996, by letter of same date to the Board from Bruce Campbell & Company, the attorneys for Island Companies Limited:- Exhibit D to the affidavit of Renard Moxam. Tab D to Exhibit II.

The application was made under the Local Companies Control Law (1995 Revision) and was in effect an application for the Board's consent for the existing shareholders to transfer an equal number of shares held by each one of them to a company called Nuance

International Holdings Limited which is a subsidiary of Swiss Air Ass. Companies Limited - so that Nuance would become a 51% shareholder in Island Companies Limited.

Nuance is a foreign company and whenever it is contemplated that shares exceeding 40% in a Cayman Islands Company are to be beneficially owned by non-Caymanians consent of the Immigration Board to such a share structure is required - Tab D.

Apparent from the application it is in effect for approval for the transfer of existing shareholdings to Nuance of 51%.

That application to the Board was dealt with by the Board in most unusual and bizarre manner.

Between 10th April 1996 and 17th May 1996, the Immigration Board made five decisions in relation to this application and the procedure to be followed in relation to it.

The manner in which the Board has proceeded has given rise to two applications for Judicial Review.

On 28th May 1996 leave was granted to Kirk Freeport Plaza Limited to apply for an order of prohibition - to prohibit the Board from undertaking a fresh consideration of Island Company's application

indicating by letter dated 17th May 1996, that it proposed to do so on 29th May 1996. The order stayed any further proceedings by the Board until the determination of the substantive application for Judicial Review.

On 11th July 1996 leave was granted to Island Companies Limited to apply for Judicial Review and for the following relief:

(i) An order of certiorari to quash the decision of the Immigration Board made on the 10th April 1996, declining Island Company's application.

(ii) An order of certiorari to quash the decision of the Immigration Board made on the 24th April 1996, whereby the decision of the 17th April 1996 which had granted Island Company's application was revoked on the basis that the Board had no power to make the decision which it made on 17th April 1996.

(iii) A declaration that the decision of the Board granting Island Company's application was a valid decision and should stand. Also that proceeding arising from leave granted to Kirk Freeport and from leave granted to Island Company Limited should be consolidated and heard together.

Both have filed notices of originating motions now before the Court.

The relief sought is contained in the file. Island Company Limited ex parte order Tab 12. Notice of Motion Tab 13. Summary of Relief sought Tab 10.

As to Kirk Freeport Plaza Limited application for leave - Tab 1; Order - Tab 6; Amended Originating Motion - Tab 8 and Relief Sought - Tab 7.

Facts relied upon by Island Company Limited are contained in affidavit of Moxam and exhibits thereto.

I shall also refer to affidavit of Chairman of Immigration Board, served on 24th August 1996, confirms largely what Moxam says, except in one minor respect.

Moxam - Tab 11. As to paragraph 11 - 5 objections; paragraph 12 - important; as to paragraph 13 - the Board apparently recognised it had proceeded unfairly and in breach of the rules of natural justice, I will argue.

As to paragraph 14; I will submit the Board was entitled to invite the parties for a rehearing on 17th April.

As to paragraph 17- there is a letter written on 23rd April 1996, written to the Board about the decision of 17th April.

H.O. Merren affidavit - Tab 4; Exhibit HOMII page 1. Questions will arise as to whether objectors are entitled to an oral hearing and should have been called to the meeting of 17th April.

This letter caused the Board to meet on the 24th and to revoke the decision of 17th, not on the basis of any factual consideration, but on the basis that they had no power because they had already reached a decision on the 10th.

Mr. Archie: That is conceded.

Mr. Alberga: Basically they did so and reverted to the decision of the 10th. If decision of 10th was a nullity, it is incapable of restoration and ratification.

Exhibit K to Moxam's affidavit - letter of 25th April 1996 from Board. 2nd paragraph is most misleading. Does not indicate that there was a grant on 17th after refusal on 10th, nor what happened on 24th.

As to paragraph 18 - invitation to attend a further hearing on 29th April 1996. Invitation accepted. Exhibits M & N.

Up to that time we had seen no objection. The first time we saw the objection was when the affidavit in support of Kirk Freeport Plaza Limited's application for judicial review was served on us.

As to paragraph 22 - we also applied for an order for a declaration that the decision of the Board of 17th April is valid and should stand. Exhibit 3 to HOM's affidavit on behalf of Kirk Freeport Plaza Limited - letter of 23rd May 1996. See affidavit of the Chairman of the Board - Tab 15.

12 noon: Proceedings continue:

Mr. Alberga: (Continues)

(Affidavit of Mrs. Hampson read). As to paragraph 8 - letter of 1st April 1996 at Tab 4 HOM III Exhibit HOM I. See correspondence in Exhibit C to HOM I. Letter of 1st April 1996 - HOM III's Exhibit 1.

Submits: Not that they are not entitled to make allegations of this nature, what I say is that the applicant should be given at least the gist of the allegations, and an opportunity to address them. We do not know to what extent any of these allegations affected the mind of the Board in taking the decision taken on the 10th April.

Return to Mrs. Hampson's affidavit - paragraph 11.

Not only did they give Moxam the opportunity to address them on the 17th, but suggested that he write, which he did in a letter of 16th April - the day before the meeting.

See Moxam's letter of 16th April 1996. Board seems to have accepted his objection to how they proceeded on 10th April 1996.

Mrs. Hampson's affidavit paragraph 12 - the only point of departure between the two affidavits - not important for present purposes.

As to paragraph 15 - no facts at all were considered on 24th. All that happened is that the Board said they had no power to reconsider, which I say is wrong.

As to Exhibit E to Hampson - see page 244 of 1st Applicant's bundle.

As to Mrs. Hampson's paragraphs 20 - 21 see - as to the Law - Tab 21 of Mr. Archie's bundle of authorities. The Law - section 8.

Mr. Archie: It is now common ground that the Board did not have power to grant a license under Section 10 because the company did not come within that section.

Mr. Jowell: Law is at Tab 33 of our bundle. We say it was an application under Section 8 not Section 10.

Mr. Alberga: I am not too troubled about the technicalities. What Island Company Limited was asking for was that the situation be approved whereby 51% could be owned by non-Caymanians.

2:30 p.m.

Mr. Alberga: Now agreed that I should deal with all the issues generally.

Mr. Jowell: Agreed.

Mr. Archie: Agreed.

Mr. Alberga: We submit that there are five decisions of the Immigration Board made between 10th April and 2nd May 1996 falling for consideration.

(i) Decision of 10th April 1996 refusing the application of Islands Company made by Bruce Campbell & Co., for Island Company Limited

There is no doubt that the Board considered that application and arrived at a decision not to grant it.

(ii) Decision to grant a hearing to Island Company Limited on 17th April 1996, after objection made by Island Company Limited to the Chairman.

(iii) Decision of the hearing on 17th April 1996, after hearing given to Island Company after they had considered letter from Mr. Moxam.

So that they did consider this on its merits and decided after hearing objections.

(iv) Board sat on 24th April and decided to revoke the decision of 17th April. Taken after considering no facts or dealing with it on the merits, but took the view that they were not entitled to reconsider. We say that was wrong in Law.

(v) Decision to hear the application afresh on 29th May 1995.

<u>As to decision of 10th April 1996.</u>

Submit: tainted with illegality and procedural irregularity void, inoperative and of no effect because Board did not, as it should have done, inform Island Company Limited of the objection lodge by Orren Merren & Co., on behalf of Kirk Freeport Plaza Limited. Nor was Island Company Limited given any opportunity to respond to the several allegations and statements conveyed in the letter of 1st April 1996, and attachments thereto and which were highly prejudicial to Island Company Limited.

Paragraph A of Mrs. Hampson's affidavit - Tab 15. Paragraph 12 of Moxam's - Tab 11. See page 3 my skeleton arguments. My bundle of authorities -Surinder Singh Kanda v Government of the Federation of Malaya - Tab 1. See first Wade's Administrative Law - pages 531 and 535.

We say the statements made "substantially affected" us.
As to Kanda - I rely on that case and the results are applicable here.

Attorney-General v Thomas Ryan - Tab 2.
Principle that where an application such as this one is refused and the hearing which gave rise to refusal was not just, because principles of natural justice not followed, the decision is a nullity.

We say our case is even more so - there were objections to have been brought to our attention pages 149 - 150, 152 followed and applied by our Courts in Roper.

Graham Thompson and Associates v Liquor Licensing Board & AG - Tab 7 (Mr. Archie's bundle). Based on these cases I submit: (see skeleton p.3).

R v Huntington District Council exp. Cowan et al - Tab 5 pages 503-505.

Mr. Jowell: (At the invitation of the Court):

What we say is that in a case of this kind involving an application there was no duty on the Board to inform Island Company Limited of the objections made by any member of the public or to inform the applicant in advance of any matters troubling them.

Mr. Archie: The Board's position is set out in my arguments.

Mr. Alberga: Huntington: page 508. See also Wade's Administrative Law - 7th Edition: at bottom of page 3, of my skeleton arguments

Smith v Commissioner of Police - Tab 7.

Reading the Caymanian case - revocation of a license without hearing, but important because I say on the 17th April they granted me my application and if they were going to revoke that, the principles of this case apply. Quite apart from fact that what they purported to do on 24th was contrary to Law (to return later in arguments).

Second matter - (page 4 of skeleton) decision of the Board to grant hearing of the 17th April.

This decision was taken after Moxam's objection. See his affidavit and Chairman's affidavit. He accepted invitation, wrote letter of 16th April 1996.

Affidavit - Tab 11 Exhibit J.

After that letter Mr. Moxam was invited and attended meetings in person. He did not deal with those objections because he had not seen them.

Chairman confirmed the decision in the telephone call.

No doubt that the meeting took place or that the decision was arrived at. I will submit a decision is a decision once confirmed - told of before the administrative practice of communicating in writing is put into effect because the Board takes sometime to do that.

My submission is that the Board accepted that they had proceeded hastily and wrongly on the 10th and that the decision taken on the 17th was one which was illegally taken. See skeleton arguments.

I am saying it is a decision which was arrived at but not confirmed on the 24th April because the Board proceeded wrongly on the basis that they could not have held the hearing on the 17th, that was the only reason why the decision was not confirmed.

Mr. Jowell: I think there is one other point in Mrs. Hampson's affidavit. She said she told Moxam that he was in no position to act on that information.

Mr. Archie: See Mrs. Hampson's affidavit at paragraph 15. What was up for confirmation on the 24th April was of the minutes, not of the decision. I see that as having some significance.

Mr. Alberga: The minute contained the decision arrived at on the 17th.

Ridge v Baldwin and Others - Tab 11 Archie's bundle. Headnote, page 79.

I submit that is exactly the scenario that took place in this case, meeting of 10th void, further representations allowed - which we did.

I submit that decision is valid and it is highly technical and pedantic to suggest that because it was not confirmed against the background why it was not confirmed, that it was not valid.

To Court: I am saying it is a matter of inference, but the clearest possible inference. Mr. Archie has said in his skeleton that the Board did not proceed on the 24th for any factual reason.

Mr. Archie: I am in a position to say that the Legal Department was consulted and advice given in a very general context and no indications that anything was amiss with the proceedings on the 10th April - more in the nature of general discussions.

Mr. Jowell: That accords generally with what Mrs. Hampson says in paragraph 15.

Mr. Alberga: I am grateful to Mr. Archie for that indication.

So what my submission will be is that the Board proceeded on the 24th April in the mistaken belief that it had no power to give a second hearing on the 17th. That was an error of law. If that is accepted by the Court then my submission is that the decision on the 17th was perfectly valid and one which would have been confirmed had it not been for the legal error made on the 24th April.

Posluns v Toronto Stock Exchange et al - Tab 10, pages 168 - 173 headnote. Let me say that had the decision of the Board on the 17th been the same as on the 10th, I would not be here to complain.

I respectfully submit that this case is a very careful analysis of Ridge v Baldwin. Drawing the distinctions, the principle to be extracted from both cases is that where there is a mistake remedied in a second hearing in which all the requisites of the rule of natural justice are followed the decision is valid, whether new or a confirmation of the previous decision - it is a case from Canada of persuasive authority.

See: De Verteuil v Knaggs and Another. As to passage at top of page 563 - if he had acted properly as to his findings of fact, the appellate

tribunal could not have criticised the decision - discretion exercised after a proper hearing.

So there is powerful authority for the position I contend for, where a tribunal has proceeded erroneously, it not only can, it has a duty to give a proper hearing and if it does so, its decision will be proper and valid, not open to challenge and that in reversing it, the Board made an error of law and of procedure.

See page 5 of skeleton: top.

Mr. Alberga: It is no longer being contended that the validity of the decision of 17th April was affected by the fact that Kirk Freeport Limited were not given an oral hearing.

Mr. Jowell: I confirm that. Top of page 6 skeleton - I go to that.

Mr. Alberga: See Jowell's skeleton - bottom of p.2 - so not in dispute that there was a very full hearing on the 17th April and there is no evidence at all to suggest that the meeting of 17th was other than a full meeting at which this matter was considered in detail, including the objections.

To Court:

Mr. Archie: There is no evidence on that. Mr. Alberga said those written submissions his client did not see until the affidavits were filed.

It is clear that questions were put to the 2nd applicant. We do not know what those questions were. All we can say is that it appears whatever was troubling the Board was satisfied.

Mr. Jowell: All we can say is what is set out at Hampson's affidavit, paragraph 11. So I cannot rely to any further extent on my skeleton arguments.

Mr. Alberga: The inference to be drawn is that whatever was troubling them they were now satisfied about, and that they arrived at the decision to grant against that background. If it is to be suggested that there was anything wrong about that meeting, then it would have to be the subject of evidence by affidavit. We say that the Board proceeded properly at that meeting. They had the written objections, had Moxam's letter of the 18th, and had him before them.

Only inference to be drawn is that the Board proceeded properly before that decision of the 17th was reached.

Mr. Archie: I do not say otherwise.

Mr. Alberga: As to the decision of the 24th, it seems to be being argued that that served to resurrect the decision of the 10th.

Submit: See my skeleton arguments. See Archie's skeleton - VII that is the Board's stance in relation to that decision.

Back to my skeleton - page 6 - two grounds on which to attack the decision of the 24th - both on the premise that the decision of the 17th was valid. Procedural irregularity and illegality.

See Smith v Commissioner of Police

If on the 24th the Board felt they should revoke their decision of the 17th, we should have been given an opportunity to make the submission to them as to why this was wrong. For having granted my application procedural fairness required me to be given an opportunity.

If they had given that opportunity, we would have advised them that they were proceeding on an erroneous conception of the law, thus the decision of the 24th was tainted with illegality and procedural irregularity.

See pages 133, 142, 165, 178 & 179 - to support my alternative submission - procedural irregularity.

As to ICL's failure to appeal - skeleton p. 6.

Does that preclude Island Company Limited from presenting an application for Judicial Review after the decision of 10th April was communicated to ICL. For those purposes, I will assume that upon a refusal by the Immigration Board that a right of appeal to the Governor-in-Council either under the Local Companies Law or the Immigration Law, exists.

As to the Local Companies Law.

I accept that in cases where it is not intended that more than 40% of shares in a company to be owned by foreign corporations, there is no need for a licence under the Law.

However, the application that was made on 12th March 1996 made it clear that the agreement was entered into subject to the more than 40% to be held by the foreign corporation. A full and frank application.

Therefore, it is my submission that that application was a composite application in which two things required. Firstly, the consent or approval for the transfer and secondly, a licence under the Law to the company.

That appears to be the effect of the application. No dispute that directors are forbidden to transfer more than 40% and are criminally responsible if they do it without consent of the Board.

I do not contend that if there was a proper and fair hearing on the merits and the refusal of it that there would no right to appeal, and for the purposes of my argument I enter into no controversy as to under which law the right to appeal would lie.

My broad submission is that there is no absolute rule of law that a right of appeal to the Governor-in-Council in this case prevents an application for Judicial Review being considered and ultimately granted. What we say is that the Court has a discretion whether or not to entertain or hear an application for Judicial Review where there is a right of appeal.

In the circumstances of this case we say - that the discretion ought to be exercised in favour of hearing the application and acceding to the request for the order of certiorari and declaration sought.

See: Wade's: Administrative Law p. 721.
We start with the position that there has never been a case where the court has refused judicial review or prerogative relief merely because an alternative remedy was not pursued.

What emerges from the principles is that there is a discretion, but in circumstances where illegality as distinct from merits is the basis of the objections then you are not precluded from Judicial Review - because where there are technical factors then the appellate tribunal may be more appropriate than the court, but where only questions of law arise as in case of decision of 24th April, that is a matter peculiarly suitable for the Court.

Moreover, there was nothing on the merits to appeal upon in the 24th April decision.

To Court:

Mr. Jowell: As to reference to "only" remedy in page 724 of the text - I will submit that should read "proper".

Mr. Alberga: I commend that text to the Court Halsbury Laws - Tab 17 (supplements show no change) particularly footnote 7. A view of the matter which I adopt and commend to the Court. I say this appeal does not give rise to any question of merits involving the particular or technical knowledge (of the Board).

See Godon's Crown Office Proceedings - Tab 18. In latest supplement I have found no change. "Alternative remedies" paragraph C4-082.

I adopt what is said ---- "matter of discretion" and I submit that in those circumstances discretion should be exercised to allow Judicial Review Relief.

See page 8 of the skeleton.

Preston v Inland Revenue Commissioners - Tab 21. per Lord Scarman implicitly acknowledging that there is no principle that judicial review not available when an alternative remedy available. See also Lord Templeman.

R v Hallstrom and Another, ex parte pages 781, 785, 756.

R v Birmingham City Council ex parte Ferrero pages 534-536 & 538.

Submit in exercise of and as a matter of discretion - it is most appropriate that the Court hear the matter.

10:00 A.M. 11.9.96

Mr. Alberga: (continues)

See page 9 of skeleton.

A further aspect not in my skeleton - it is this: the 1st applicant has applied for judicial review by way of prohibition.

Obviously undesirable for Court to consider that matter in isolation and for two aspects of the matter to be debated before two different

tribunals. Obviously more convenient and appropriate for Court to hear matter to be heard together.

To questions put by the Court: The application for certiorari does not involve the issues involving the socio-economic factors and a determination as to whether the Board was right or wrong.

The Board on the 17th when it gave what we submit was a proper hearing must have applied its mind to the socio-economic factors and to Section 11 of the Law.

What happened on the 24th was not a rehearing of that at all.

<u>As to Birmingham ex parte Ferrero case:</u>
Assuming that the issue which the Court of Appeal formulated is right that is not the issue which this Court should formulate.

Not binding on the Court, if Court prefers the view expressed by the trial judge, the Court is entitled to prefer it.

If the Court asks itself what is the real issue in relation to the application of the 24th, it is one as to whether the decision of 24th April was arrived at illegally and because of procedural irregularity - then the approach of the judge below should be preferred.

Mr. Archie: As to the nature of Ferrero's complaint: a composite judicial review application. Having found no duty to consult, they were left with the other two limbs and on that basis, they said those were matters more properly geared to the statutory provision.

This is a matter of law - assuming the decision taken on the 17th could have been validly done, those considerations would not arise here.

Mr. Jowell: I believe that the Ferrero's case is overwhelming authority against the position of the second application. The Ferrero's case must be seen in the context of the courts discarding the view expressed by Professor Wade. Court should only grant judicial review in a highly exceptional case difficult to rebut.

In that context Lord Justice Taylor (later became Chief Justice) - He asks the question, what is the issue to be determined, not that before the Court - always issues of Law. What is the issue? Whether more than 40% of shares should be transferred. Court should be reluctant to interfere and to defer to the intentions of Parliament as expressed by the statutory scheme. After all, what is it that Island Companies wants in this case?

What they are really after is the consent, the licence and then the question becomes - irrespective of the legal minutia - who is more

suited to determining those issues. The Classic grounds of Judicial Review were cited in that case the Appeal Tribunal could not address the legal issues.

It was an exceptionally robust approach, but the question or issue is whether the real issues could properly be decided by the appellate tribunal.

What Ferrero was saying, this is the wrong step, the right step is to the Appeal Tribunal and even though the tribunal could not have decided them - not exceptional enough.

I will return to look at this issue with an even stronger decision of the Privy Council.

Mr. Alberga:

As to Immigration Board to rehear the matter - see my submissions at foot of page. If for any reason the Court concludes that the decision of 17th was not valid, then the decision of the 10th could not be valid. Then the court may in that scenario decide that the matter be sent back to the Board, but if decision of 17th is valid, no ground for rehearing.

Mr. Jowell: We are saying the Board acted legally in all respects, if not perfectly. Let us face it, a Board such as this is subject to immense pressure. It perhaps acted with vascillation.

In the end it was advised to stick to the decision of 10th April and I say it is a proper decision.

The Board must steer a line between responsiveness as an administrative value and finality and certainty.

Our criticism is that in May it should not have abandoned that position in the absence of any genuinely new application. We are saying above all that the step for the applicant's complaint about the April decision was not this Court, but the Governor-in-Council.

Addendum to first applicant's skeleton argument:
We do not agree there were five decisions. We say there are two decisions in all that of the 10th April as communicated on the 25th April (formally) and that of the 17th May to reconsider the application on the 29th May.

See addendum to skeleton arguments:
Two steps normally required. Normally two to have full legal effect - resolution not enough, but notification when required especially so if

decision required in writing, could be qualification by informal notification, doctrine of legitimate expectation.

Then see points 2 and 3 of skeleton.
Decision of 17th April 1996 - not a decision, not reviewable.

3. (a) "confirmation" recognises that previous decision not final.

(b) not confirmed.

(c) decision bristling with qualifications and ambiguous.

(d) never communicated - to the contrary, see what was formally communicated. See letter of 25th April 1996 - page 197 of bundle. I say a proper letter.

Mr. Alberga said this was a 'cute' letter - revocation of a permission granted on the 17th April, but that does not refer to "permission revoked", but that "application is declined".

4. Submit that was the decision of the Board that the court must look at.

I could simply say there was a decision communicated on 12th made on 10th. All we need to know - the rest internal to the Board, but from the strictly correct point of view that must be the decision

published to the world. Normally that does not permit in Public Law for the veil to be lifted, but I need not take that position.

I take the view which I do - the decision was made on 10th April and informally communicated on the 12th April, but then we know that the operation of the decision was suspended pending reconsideration. Same legal effect when suspended, but not complete legal effect. The decision on the 24th April and communicated in the letter of the 25th was to lift that suspension.

Board under no obligation to disclose its internal workings in the meantime.

It may be open to the Court - although I say not - to find that the decision of 10th was tainted with procedural or irregularity, illegality because of what happened after - but by no means improper of the Board linked in some way to a democratic process.

Mr. Alberga says decision of the 10th is void and a nullity, therefore, he said it could not be confirmed on the 24th April because a nullity cannot be confirmed. I reply that the law today states as follows: that decisions are presumed lawful unless and until a court of competent jurisdiction declares them unlawful. No such declaration was made as to the decision of 10th April during that point in time.

See De Smith's paragraph 5-048

One other point to reinforce what I say about decision of 17th April, even if decision of 10th April to be struck down - that would not breathe life into the 17th April decision. Board has to go back. The decision of the 17th April was not confirmed - not communicated.

It would be appalling if legal effect could be bestowed upon such a thing.

To Court:

I accept it would be open to the court to declare the decision of 10th April void, but not the decision of the 17th April because no decision then taken. See ex parte Pearce Homes Ltd. - Tab 38.

Position there that planning permission as communicated in letter was at odds with the resolution of the Council.

It is said that - as in this case -it is not only that the resolution of 17 April does not have any legal effect, until such time as it is formally communicated.

Distinguishable on basis that planning permission runs with the land and a document should be available. But here also the public wants to learn what the decision is - decision of 17 April has never been held out to the public.

Regina v Inland Revenue Commissioner ex parte Matrix Securities - Tab 199.

Ex parte M.F.K. Underwriting - Tab 23 - one of those recent cases where the notion of substantial legitimate expectation has crept into the law.

If representation held out by a public body - acting within its powers in clear unambiguous terms - it will be bound by that communication.

In EEC - certainly a form of legitimate expectation. (exactly the same point as in Preston's case yesterday).

Pages 1566, 1570 - what we are saying is that the representation by the Board - about the 17th April decision - was communicated informally to Mr. Moxam, by no means clear and unambiguous - could not possibly bind the Board.

As to Interpretation Statutory Framework - I have no difference with Mr. Alberga's description, but I will read from paragraph 7 of the skeleton. LCC Law - Tabs 33. Immigration Law - Tab 34.

Section 11(3) "inter alia" socio-economic factors and mixed with previous conduct of the company. Subsections(4) and (5) - different form of appeal.

It is common ground that there can be no objection to the Board adapting the criteria set out in Section 11 for the proposes of Section 8.

As to Alternative Remedy:

As to Section 11(1) of the Immigration Law - see that the grounds of appeal are entirely open an all purpose appeal, not like some Tribunals confined to a determination of facts or merits or law or anything else.

The grounds are entirely open-ended and we submit like those - may be questions relating to the criteria which we saw under Section 11(3) of the LCC Law or indeed, as to position of law or substance or even procedure.

Submits: And the appeal may be held De Novo - the terms of Section 11 are not fashioned so as to indicate that the appeal is the equivalent of the review and it is possible for the appellant to request to be heard personally.

The Governor, I do concede, does have discretion in that respect and on receipt of the notice - the Appellant Tribunal shall decide.

Section 10 of the Immigration Law must be read with Section 5(h) and Section 11. Board - I submit, got it right when they said you have an appeal under Section 11 of the Immigration Law.

Convenient now to go to paragraph 32 of my skeleton.

As to alternative remedy

Here I will ask the Court to set aside leave or to refuse the grant on exercise of discretion etc.

Notwithstanding Wade - recent cases have provided that where alternative remedy available, judicial review jurisdiction will not be exercised where other remedies are available and will not be used.

Ex p Fairpo - Tab 7 - an indication in England of the recent trend.

Harley Development Inc. v Commissioner of Inland Revenue - Tab 8 - headnote, page 735 letter B. I cite this as the highest authority and here the Immigration Appellate Scheme is without bounds, even less confined than in that Privy Council case.

2:30p.m. 11.9.96

Harley Development p 730 letter B. Page 732 - not quite as open ended as Section 11 of the Immigration Law. Letters B-D - I would

say that the right of objection is unqualified - separate and divisible reasons. Then to paragraph 19 of my outline skeleton. Ferrero case ; Harley Development.

Ex p Bratsky - Tab 10 - p. 217 as to the hearing of 17th April - that should be the principle (first questions) - paragraph 11 of my skeleton.

Ex p Chan - Tab 14 headnote, page 71 - denial of natural justice alleged,

Roper case (Cayman Islands) - although Board's predecessor had made the decision about the work-permit - applicant twice appealed to the Governor-in-Council before coming to the Court, and if decision is so flawed as to be a nullity can be challenged dispute the purported ouster clause in the Immigration Law: Amisminic case

..... but one must assume that the appellate tribunal would not act in anyway without jurisdiction.

To sum up - it is not for the courts to seize a matter in judicial review where an alternative remedy lies, unless the appeal body is exceptionally disqualified to hear the matter.

My second proposition is that even where what is asserted is that the decision was a nullity, that there was a breach of natural justice or where there has been an unreasonable exercise of power - even in those cases appeal, rather than review, is the normal route. See - Harley: the P.C.; - Ferrero: Court of Appeal; and Chan.

My third point is that judicial review may be allowed in cases of extreme abuse of power.

How do we define that - I would say that implies the most extreme form of unreasonableness amounting to oppressive action that needs urgent rescuing and where judicial review is the most suitable way to carry out that rescue operation.

My fourth point is that on the facts of this case, the appeal procedure is a comprehensive one. There are no limits in respect of the merits of the case the policy questions involved or matters of law which it is not equipped or authorised to determine.

My fifth point is that the real issue to be determined (Ferrero) can perfectly satisfactorily be determined by the appeal body.

The real issues to be determined involved matters set out in S. 11(3) A-J of the LCC Law, and there is nothing to preclude issues of legality, procedural propriety or irrationality being determined by the appeal body either.

In many ways the Governor-in-Council's procedures are far more suitable than those of the Court in judicial review and I would list here some of the issues in the Ferrero case:

- Leave does not have to be obtained.
- Evidence not confined to affidavit evidence.
- Confidentiality can be provided (see some of the allegations made in some of the documents before us).

My sixth point is that even if the decision of the Immigration Board is a nullity an appeal may still lie and that any procedural defects that might have taken place before the Board, can be cured on appeal.

See Wade Administrative Law pages. 953-95.

Calvin v Carr

Can a subsequent appeal de novo hearing which was fair, cure the initial invalidity?

Submit they apply to this kind of case p. 589 G - 590; 594-597.

As to judicial review being granted because it had been granted in the May decision to rehear - first of all the additional application for judicial review has significantly lengthened these proceedings.

Secondly, in respect of both decisions judicial - the decision to reopen the matter by the Board was not appealable. We were a third party aggrieved. We had sufficient interest in the application.

Mr. Archie:

Would arguments apply not also to the 1st applicant as to the right of appeal?

Mr. Jowell

I would like to think about that, but I would tend to think now that however much one stretches it, the Governor-in-Council would not have the jurisdiction of the court to hear "any" interested person. Order 53 gives us locus standi. I doubt the Immigration Law could give such wide locus standi. I wish to come back to that.

Mr. Alberga:

I think court is entitled to take judicial notice of the fact that the Governor-in-Council has never permitted legal representation.

Mr. Archie:

My point simply is that if the 1st applicant had a right to make representations before the Immigration Board, why not on appeal?

Mr. Jowell

There were five objectors - judicial review is wider. I think I will stick by my earlier submissions on that.

As to outline submissions page 8.

(a) it has never been admitted by the Board that there has been a breach of natural justice.

(b) the reason on the 24 April for not confirming was that the Board had no fresh application before it - see Hampson.

Secondly, after the 10th April decision, following representations from Mr. Moxam, it was agreed to hear him on 17 April. It should not necessarily be inferred from that - that that was an admission of any kind that the decision of 10 April was not perfectly, fair despite the failure to hear Mr. Moxam in person.

Paragraph 24 of my outline. McInnes v Onslow-Fane - Tab 16 and Council for Civil Service Unions.

Before coming to deal with those cases I must look at the authorities relied upon by Mr. Alberga - difficult to avoid.

Graham Thompson and Association Ltd. V Liquor Licensing Board & A.G.

We think there may be no right of appeal there. If so distinguishable on that basis - applicant had exercised the licence for 5 months before it was taken away.

Huntington v Cowan

Here I throw up my hands on that, but I say with all due respect to both learned judges in those matters, things have moved on for good or for ill and that the Council for Civil Service Unions case has completely taken hold.

I can find no other case where people in an application case have been given judicial review.

Distinction between right and privilege discarded, but new distinctions introduced to allow public bodies to get on with the job of governing and rights of natural justice of applicant much weaker than those with vested rights.

Take for example, application for planning permission. Normally application comes in and objections sought from interested parties. It may be the practice here and in England to tell the applicant the gist of the objections, but it has never been suggested that the applicant has a right to know the gist of the objections in that situation, particularly where the applicant can appeal and any possible defect of natural justice may be cured.

See Gainman v National Association of Mental Health p. 333.

This indicates that in an application the situation is different - particularly where there is an objection and there is right of appeal.

The practical reason for it - here that were five objections - could have been on many of the criteria set out in Section 11(3) - to be given a hearing. In respect of 11(3)(b) - if there were any particular allegations made and damming - it may be they require a response from the other side.

McInnes Onslow-Fane - headnote p. 1528.

Could it be said that a person applies for a licence on a number of grounds and refused people will ask what is the reason for refusal - p. 1531 letter H, pages 1532 and 1553(c).

10:00 a.m. 12.9.96

Mr. Alberga:

The feeling is we will not conclude tomorrow with all the replies to come. Two options - sitting late today and tomorrow. Not all together sure that that would solve the problem. But, if not, we would wish to see if Monday is available. We would all not wish to have the matter part-heard.

Mr. Jowell:

We would certainly prefer sitting late this week, if possible.

In response to the Court's question yesterday evening - re exhaustion of alternative remedy relating to the complexity of the issue of dates decisions in this matter and whether as a result of that the case would fall into the exceptional category - see further written submissions.

To page 7 of the skeleton arguments

Submit: the more criteria there are for decisions the less will the refusal indicate a slur on the personal character of the applicant.

Agree where previous conduct of applicant as in liquor licensing is an issue, right to a hearing to be inferred.

In a case such as this where there are 10 criteria inter alia, many of which relate to general national policy - I suggest a refusal might not necessarily raise an inference of any slur or defect of character.

Council of Civil Service Unions and Others v Minister for Civil Service:

First case to recognise category of legitimate expectations. Page 408 letter E, letter G-H.

That is the definitive statement: reason why only a few cases where a person seeking a benefit or privilege which he does not already possess or in respect of which he has no legitimate expectation (such as Huntington and Cowan) - such as applicant who have no right in public law.

In a sense, Lord Diplock's words move the law on - up to that point it was thought by many that in order to qualify for judicial review, it was thought that a person had to have a right, as distinct from a claim for a privilege - here goes on to include legitimate expectations.

We submit that here we have a pure application situation.

Page 430 letter C - 411 A - R v Secretary of State for Health exp. U.S. Tobacco International Inc. - Tab 15 page 362 letter A page 369 letter H - stressing the point I made about consultation, generally with the public and the right of persons consulted to know the contents of complaints from the public and there was a legitimate expectation - here only an application case.

If no duty to give reasons (as under Section 11 or 8) implies that it is up to the Board to consider the 10 criteria and not necessarily to inform the applicant of what might be troubling it on its way to the decision or to give any reasons after the decision.

Further point not in skeleton

Section 11(5) of the LCC Law. To do with the revocation of a licence - notice in writing of intention required etc. - fair hearing required.

But nowhere else set out for a first application - inclusive umius exclusio alterius - that natural justice not intended under the other section particularly as Section 10 excludes duty to give reasons.

As to irrationality - page 8 of the skeleton.

As to decision of the 24 April, we accept that the reason for deciding in that way, on that date was, in the words of the Chairperson (paragraph 15 of the affidavit) their view that in the absence of any fresh application, the Board had no power to reconsider its original decision and no new application had been made.

That decision was made after Mr. Moxam had put in his letter on 16 April - page 193 of our bundle (see also p. 169 - 12 March letter) - not a fresh application.

Point I seek to make is that the Board did not consider that that letter of 16 April amounted to a fresh application.

(Mr. Alberga and Mr. Archie: We accept that).

Mr. Jowell: Question:

Does the fact that the Board considered that it had no power to go back on its decision of 10 April, in the absence of a fresh application, mount to an irrational decision on the part of the Board?

See paragraph 27 of my skeleton.

Mr. Alberga:

I am not contending that the decision taken by the Board on 24 April was irrational. I say if they thought that decision of 17th was bad they should have heard my client further assuming decision of the 17th was proper, the 24th amounted to a revocation and therefore, procedural irregularity both at Common Law and Statute.

Mr. Jowell:

I say "irrationality" is the proper test. As to whether decision of the 24th was a revocation, I dealt with that yesterday. I say that is an argument not worthy of proper legal argument- never formally confirmed or communicated.

As to why irrationality rather than illegality, - paragraph 31 - because we thought a different point on illegality was to be taken - statutory framework. "Legally" normally refers to the formal powers conferred on the decision maker.

Question: Has the decision maker exceeded the terms of the formal power? - the question of vires. The power which authorises the

making of the decision, eg: did they take account of some irrelevant criteria - outside those set out in Section 11(3). See DeSmith's top of paragraph 6-001. The mischief at which the statute is aimed.

The issue of the power of the Board to rehear was not a matter germaine to the authorised power of the Board. The advice given was about the way in which it should exercise its vires - its authorised powers. That is a matter to be decided under the head of "procedural propriety" of process or "irrationality".

Court Query:
Is the point that even if the decision of the 24th was wrong, that the Board was bound - and was not entitled to reconsider the matter in the absence of a fresh application - by the decision of the 10th and that in any event the decision of the 24th cannot be deemed "irrational" because it was taken on (considered) legal advice.

That even if in the process, a legitimate expectation arising from the decision taken and informally communicated on the 17th is overridden, although perhaps amounting to an abuse of power, that does not give rise to ground for judicial review if there is the avenue of appeal de novo.

This is because it was reasonable, even if not correct, to follow the advice.

Mr. Jowell:

I think I would accept that as a fair summary of my submission on the point of irrationality.

We also say the objectors had a legitimate expectation of consistency arising from the decision of the 10th April - one of consistency.

Mr. Alberga:

Well what is sauce for the goose is sauce for the gander. If they had such a legitimate expectation out of the decision of the 10th, we would have in respect of the decision of the 17th.

Mr. Archie:

I have a fundamental difficulty with respect of the decision of 10th giving a legitimate expectation - we have been using that in respect of something which someone enjoyed or hoped to continue to enjoy. What could that be in respect of Kirk Freeport - the first applicant? There is no right not to have a competitor transfer shares to a foreign owner. One may expect consistency from the tribunal, but that is not a right.

Mr. Alberga:

I accept that the evidence shows that the decision of the 17th was informally communicated to Mr. Moxam, but where is the evidence that the decision of the 10th was communicated to the first applicant?

Mr. Jowell:

Three issues arising.

My front line position.

1. If 10th April created a legitimate expectation why not the 17th - crystal clear the decision of the 17th was hedged with qualifications. It was not a decision - Hampson said you cannot go ahead until it is communicated. But decision of 10th was communicated as a decision.

2. There are two aspects of legitimate expectations - people have leg. Exp. not just because they were competitors but because they had participated in the decision making process to the extent that they respond to the consultation process and their legitimate expectation is that a decision of the Board which fundamentally affects their interests (not saying anywhere that they have a right) be consistently adhered to.

I will come to arguments in a moment about consistency. So in two ways they are affected by the substance of the decisions and by the consistency - that the decision should stand.

See what is meant by "sufficient interest" in the application. See order 53 - sufficient interest in the matter to which the application

relates - not in the public law sense - the interest would be too remote. At some point the line crosses between their remote and the sufficient interest, but we contend that there can be no doubt that they have crossed the line, that has been implicitly acknowledged in the leave given to them to apply.

3. Evidence - what evidence is there? I will come back after lunch. See bottom of page 7 of my submission.

I rely on that passage to the effect that the advice given on the 24 April was perfectly good advice. Perfectly acceptable. You make a decision on the 10th that is the one to stick by. That which was informally communicated on the 24th and formally communicated on the 25th - a public body should be consistent.

That is to have arrived at a different decision on the 17th in the absence of any fresh matters or fresh application being brought before the Board - was internally inconsistent.

It has never been denied by the 1st applicant that had there been a generally fresh application that the Board could consider that, but we have seen that on the 24 April, the Board considered that there had been no fresh application. In other words, it did not regard the new letter from the 16 April from Mr. Moxam, as a fresh application.

We say on legal advice, the Board has absolutely the right to say "no new application". Could not be said to be "irrational". I say in May that precisely the same principles apply (although see paragraph 33- a frustration of legislative interest) - but as a second point see paragraph 34. The principle of finality - see page 9-10.

On the 17 May when it made the decision to review, it had received nothing further after the 16 April to justify that proposed rehearing.

Frustration of Legislative Intent - looking at the Vires point - paragraph 33.

Mr. Alberga:

I am now concerned that my learned friend is seeking to draw a distinction between the manner in which the decision of the 10 April and 17 April were communicated. That the latter was qualified, so as to put it on a different footing to the communication of the former.

He said that the decision of the 17th was not a decision because it was qualified (as well as because it was not formally communicated). I am, therefore, concerned as to how the court is going to reconcile the conflict between Mr. Moxam and the chairman on this important issue in their respective affidavits (paragraph 12 of Hampson).

The question of the true nature of the communication becomes a relevant matter. It may be necessary for the Chairman of the Board and Mr. Moxam to be cross-examined on this issue.

Mr. Jowell:

It is a defining feature of judicial review procedures that they proceed on affidavit evidence alone. Highly unusual for cross-examination to be permitted, but in any event, the matter of the expectation induced by the decision of the 17 April is addressed in the affidavit of Mrs. Hampson. But the matter of the lack of formal communication, the letter of the 25th makes no reference to it, but only to the decision of the 10th.

Also, if there is a conflict of evidence that usually disposes of the matter, it can be taken no further. And in a case such as this, he who asserts must prove. If what Mr. Moxam is asserting is denied, that is the end of the matter. (I will attempt to cite authority).

Mr. Archie:

For my own part on behalf of the Board, I could not see how bringing Mr. Moxam or Mrs. Hampson into this Court will take this matter any further.

I am still of the view that this is very much a peripheral issue. No dispute as to what transpired at the Board meeting of 17th. Mrs. Hampson's statement that nothing could be done until there was a written communication was simply in accordance with the Law. As to a legitimate expectation - once it was communicated it would have that effect.

Mr. Jowell:

Based on the dicta of Bingham LJ. master of the Rolls in MFK - Tab 23 p. 1570B the communication must be clear, unambiguous and unqualified representation: that is the only representation that can induce a legitimate expectation with legal effect.

Mr. Archie:

I fail to see what is the ambiguity we are trying to clear up by calling this evidence. She expressed no reservation about the decision itself. She did not indicate in anyway, shape or form that there was to be any further reconsideration of the decision.

What she said was that the minute had to be confirmed and officially communicated.

My point is that it is clear and unambiguous not that it gives rise to a legitimate expectation or any other right.

Mr. Jowell:

Well we say it is clear and unambiguous that it has no legal effect until communicated. Crystal clear that you can't go ahead on this, but the point about the MFK case is that it must be crystal clear in the other direction, in order to found a legitimate expectation.

2:30 p.m.

Mr. Jowell: (continues)

See page 143 of our bundle. Was the decision of the 10 April informally communicated to the 1st application? See Captain Eldon Kirkconnell - paragraph 2 - that statement is not contested by Lorna Hampson in her affidavit.

Mr. Archie:

I accept that.

Mr. Alberga:

Yes.

Mr. Jowell:

On the question of the conflict of affidavits. See DeSmith's page 688, 689. I admit I am party - no authority cited, but I ask that it be taken as authority at this stage.

See RSC Rule 8 Order 53 - no rule 8 in Cayman. There would be difficulty here in ordering cross-examination.

Mr. Alberga:

It may be that this is covered under the Evidence Law. It may be that Order 53 Rule 8 was excluded because other rules as to cross-examination on affidavits is provided for elsewhere.

Mr. Archie:

In the RSC notes thereto 1995 Edition p.866 - Order 53 Rule 8 53/1 - 1440.

O'Reilly v Mackman [1983] 2 A.C. 237 per Lord Diplock p. 282. I would suggest the circumstances must be exceptional to justify an order for cross-examination of the deponents. See also Judicial Review Supplestone v Goudie p.377 on to 378. What we have is two conflicting statements as regards what was said during the telephone call of the 17th.

Mrs. Hampson says it is the policy of the Board to say to applicant they are not to regard a decision as having legal effect until communicated in writing. That is quite in accordance with the state of the law.

So if one is on the balance of probabilities to weight I would submit that if this was the policy and that which the Board would tell persons and in line with what we know to be the legal position that would be a matter that the Court should have no difficulty in reconciling, by preferring Mrs. Hampson's recollection.

I make the further representation that the Board is not here taking a position as to whether that created a legitimate expectation, but whatever Mrs. Hampson said it would have been open to him to do preparatory things. The only thing he would not have been able to do is transfer the shares.

Mr. Alberga:

I would only add that this absence of Order 53 Rule 8 from our rules may be because it was thought that Order 38 Rule 2(3) was sufficient to cover this situation.

I shall be arguing and submitting that having communicated the decision of the 17th, it did create a legitimate expectation that that decision would be confirmed in writing in the course of the administration of the Board.

And I say that irrespective of whether the court accepts this Mrs. Hampson's version of the conversation, but if that is ....

Mr. Jowell:

If I could just be clear about that - in paragraph 12 of Hampson. She said two things - I also told him that nothing could be done until communicated in writing and for his information only and paragraph 15 - the minutes for confirmation.

Court:

Cur Ad Vult as to whether cross-examination may be required to assist the court.

Mr. Jowell:

To Court: As to why we might have an interest sufficient to give rise to a legitimate expectation, but not locus to appeal under the statute see G.C.R. Order 53 Rule 7 - "sufficient interest".

I stand by what I said yesterday. Over the years, the notion of standi to sue has alternatively been widened and narrowed. The court has not been consistent. Until Order 53 was introduced in 1977 standi was considered in judicial review proceedings and other practice before the Court, legal and appellate.

Order 53 Rule 7 considerably widens standing in respect of judicial review proceedings. So as not only to allow the applicant access to the Court, but also those with a sufficient interest and the reason for allowing broader standing on judicial review matters was that those

matters frequently dealt with matters of public law - the broader public interest.

This is a unique procedure. Unless provided by statutes specifically, all other legal or quasi-legal bodies only permit standing in law or practice to those who are directly affected by the decision, not to those who have a broader interest, unless provided by statute. For example, in England in relation to planning tribunals, it is specifically provided that the Inspector may in his discretion hear interested parties.

In the absence of this, it is generally assumed that where a person applies for a specific benefit, that it is only that person who may appeal to an appeal tribunal because it is nobody else's concern, unless statute provides otherwise.

So, if we look at section 11 of the Immigration Law, this is made absolutely clear - Tab 34.

Nothing there that indicates that anyone, but the original applicant may appeal, the practice of judicial review is the only procedure that would appear to the first applicant in this case to allow interested parties to have access to it. No other procedure provides that, unless statute provides, and in this case statute does not provide.

Bulk of skeleton arguments p. 8.

Wednesbury - Tab 18.

Ex parte Preston/ Ex parte Matrix Securities made the same point.

Padfield v Minister of Agriculture, Fisheries and Food - Tab 22 - how illegality differs from irrationality. Paragraph 33 of skeleton.

I would add one point - the decision that we are seeking to have prohibited is that of 17 May - to hold a rehearing on 29 May.

There is a communication from the 2nd applicant dated 29 May, but we submitted that still does not amount to a new application. The relevant date to decide the question - was there a fresh application before the Board - was 17 May not 29 May.

We submit that on 17 May nothing further had been submitted to the Board after Mr. Moxam's letter of 16 April which the Board on the 24 April considered did not amount to a fresh application - see Hampson paragraph 15.

There was no fresh application. The Board has no power to act as an appellate body from its own decision.

To page 35 of my skeleton argument.

British Oxygen Co. Ltd. v Min of Technology p. 611 - Tab 25

Doctrine that Board must always keep its position unfettered, but even that applies to something new.

Ex Parte Onibiyo as to what is a fresh claim.

I will not rely on res judicata, instead I rely on what I have said and make the following submissions:

1. That the 17 April decision has no legal effect.

2. That the 10 April decision had some legal effect when informally communicated, clearly and unambiguously without qualification on the 12th April to the applicant and to other interest parties including the first applicant.

3. That full legal effect was confirmed by the Board on the 24 April, upon the decision of the 10 April, which was then formally communicated to the applicant on the 25 April.

4. The Court should not entertain the application for judicial review in relation to the 10 April decision because of the failure of the second

applicant to pursue their proper route of appeal to the Governor-in-Council.

5. That in any event, the 10 April decision was not infected with procedural impropriety, illegality or irrationality because of any failure or irregularity either on 10 April or between April 10 and April 24.

6. The decision on 17 May and communicated on 17 May to rehear the matter in the absence of a fresh application is both illegal because :-

(a) it is in conflict with the Statutory Scheme which envisages an appeal to the Governor-in-Council and not to the Board, from its own decision; and

(b) was irrational in view of the Board's breach of the fundamental principles of public law of consistency and finality.

Ruling as to cross-examination

If a legitimate expectation is to be found in favour of the second applicant, it can only be found on the basis that Mr. Moxam had been told of the Board's favourable decision of the 17 April.

There is no dispute that he was so informed.

It is a matter of law whether that decision would be finally binding without having first been confirmed in the minutes and communicated in writing.

If those are to be necessary prerequisites, they must be implied and nothing said by the Chairman could properly have been relied upon to avoid them.

It is to be inferred from Mr. Moxam's - evidence at the first line of paragraph 17 of his affidavit - that he did not regard the decision to be finally and completely binding until received in writing. In that context the question whether or not he had also been told by the Chairman that he might inform his staff and nuance of the decision, is to be seen as a peripheral issue.

Any legitimate expectation properly arising would have arisen from the representation that a favourable decision had reached, one which, subject to the remaining legal formalities, would be conveyed in writing, in due course.

In this context, the real issues to be decided (subject to the preliminary point of appeal being the appropriate remedy) will first of

all be whether, if such a legitimate expectation did arise, it gave rise also to a right to a hearing before the decision of the 17th could have been properly reversed.

That will be subject to the other point - which is whether the legal advice on which the Board acted to reserve the decision of the 17th was correct, whether the decision of the 10 April would have been final and conclusive subject only to appeal, in any event.

These being the contextual issues I see no need for cross-examination upon the marginally relevant question of whether Mr. Moxam was given the further representations which he alleges.

That will all be subject to the more basic question: whether the decision of the 10 April was valid, binding and conclusive.

Mr. Archie: commences his submissions:

Was this a section 8 application or section 8 with section 10? Note section 10 does not require a written communication in writing.

1. Statutory basis for application on 12 March whether it can be heard, whether there is any appeal procedure available under the statute and what constitutes a decision are all issues which depend on the statutory footing on which the application rests.

2. What constitutes a decision of the Board.

3. Examination of a right of appeal if any from the 4 decisions.

4. Whether the decision of 10 April is vitiated by any procedural irregularity.

5. If so was that irregularity cured by the hearing on the 17th.

6. Whether the decision of 24 April was itself illegal.

7. What if any alternative remedies available apart from judicial review and whether they should be pursued in any event.

8. Whether the Board was entitled to hear a new application (as distinct from a fresh application) - because between the 24 April and 17 May I think it right to say that no new information put before the Board.

(Mr. Alberga: I accept that).

It is common ground that section 10 of the LCC Law gave no power to the Board to grant or refuse a licence to ICL as it was constituted on 12th March, when the application was made.

If that is so, then it must follow that any decision purportedly made under section 10 can have no validity.

That may have some consequences for what, if any, legitimate expectations may have been raised by any of the respective decisions of the Board.

As to how the Board and the applicant treated the application. See p. 169 of Kirk Freeport Plaza Limited bundle - the letter of 12 March from ICL.

To be put in context, Mrs. Hampson's affidavit indicates that the normal type of application for approval in principle comes from companies not yet incorporated, but where the steps are contemplated to bring the company into the terms of subsection 1 of section 10 of the LCC Law.

On the face of it the Board is given no statutory power to entertain an application unless it comes from a company constituted as per section 10(1).

However, the Board has developed a practice for applications for approvals in principle.

I would subject nothing wrong with that principle.

Assuming that the Board can do this, the approval-in-principle can have no force in law other than possibly to raise a legitimate expectation that a license will be granted in due course, unless there is further information coming to the Board's notice, or perhaps a change in policy.

When the applicant wrote on the 12 March, they applied for the grant in principle of a local company control licence - no mention of section 8.

On the 1 April when BC& Co. wrote (p.190) - again no reference to any particular section of the law (p. 175) - the advertisement refers to application for the grant of LCC Law licence - no mention of section 8.

On the 18 April - page 193 - when Mr. Moxam wrote pursuant to the invitation to come before the Board again - no reference to any section.

Finally on the 25 April when the Board wrote - p. 197. Reference to section 11(1) of the LCC Law - which cross-refer to section 10 and right of appeal.

See the letter - reference to section 11 of the Immigration Law. Clearly paragraphs 2 and 3 of that letter are at odds.

Section 11 of the LCC Law provides for an appeal. I think what had happened, that because the Board in the ordinary case of an approval in principle would not have been considering section 8, but section 10 because in the ordinary case, the company would not yet have been formed. They purported to refuse it under section 11 (Mrs. Hampson - this particular application was unusual).

But the only way to reconcile paragraph 2 with paragraph 3 of the letter I think is to say that notwithstanding the fact that they purported to refuse it under section 11, they had in mind something else, another section which is why a different route of appeal was suggested.

If we are to ask the court to accept the arguments in the way they had been put forward so far, as a first step the court will have to accept that what the Board had in mind, bearing in mind the proposals set out in the letter of 12 March was an application under section 8 and not an application under section 10.

Because if they were purporting to refuse a licence under section 10 - then there was no power to do that - that is in the letter of the 25 April

and the refusal of an application in principle could have no binding or final effect insofar as section 10 was concerned.

And while the approval of a transfer under section 8 might raise the legitimate expectation of the subsequent grant of a licence under section 10, that expectation is raised under section 8 and not under section 10.

In other words, if one considers the legal effect insofar as it purports to be an application under section 8, the Board had jurisdiction and it would be proper to try it as such, but insofar as it purports to be under section 10 then any decision has no legally binding effect.

That may have very important consequences for the question whether there is a statutory right of appeal because it has been advanced on behalf of the first applicant that by implication the right of appeal under section 10 of the Immigration Law applies to decisions taken under section 8 of the LCC Law and the link by which that is said to be exercised is via section 5(h) of the Immigration Law as read with Sections 10 and Section 11.

I think it is helpful to look at the legislative history of those provisions we are considering.

At Tab 30 is the LCC Law as it was in 1976. Section 7(2) of that Law - no requirement for consent. The only provision which then gave the Board power to appeal or revoke anything was section 10, which is now section 11 and then there was an appellate procedure built into the statute. So no reason to imply or infer that the appeal provisions in the Cayman Protection Law as it then was would have applied to the LCC Law. It was self contained so far as that was concerned.

What we have had historically is a number of statutory regimes. Immigration Law, T&B .L. Law and LCC Law which happens to be administered by the same statutory body, but each had its own set of rules and procedures. And see section 21 of the old LCC Law.

The Caymanian Protection Law at that time had provisions in similar terms to the present section 5(h) - see section 6(g). Section 11 of the old law equivalent to section 10 (less the proviso).

In 1975 there would then have been no reason to infer that this right of appeal extended to the LCC Law for decisions taken thereunder because the LCC Law had its own appeal procedure in respect of the one provision which gave the Board the power to grant or revoke anything.

In 1977 - Tab 31 - for the first time, the Board's consent is required in respect of the transfer of shares, by amendment to section 7.

It is doubtful whether one can infer a retrospective extension of the powers under the Immigration Law to the LCC Law at that stage because for one thing if Parliament had intended to do that it could and it also had the opportunity for amending the Law to include a subsection similar to them section 10 to provide for an appeal.

What section 5(h) of the Immigration Law appears to do is to permit a statutory body - the immigration board created under that Law to exercise powers and functious as permitted by other laws, but it confers no authority on Executive Council nor does it confer unless by indirect inference any right to an applicant under another law to appeal under Immigration Law provisions.

Having regard to the history that we have just seen it is probably unlikely that that is what the legislative intended in 1977 when it exercised that amendment as it said "for the purpose of exercising greater control over company and licences".

Looked at another way - if it were the intention that the procedure and powers under the Immigration Law were to be of general application on the LCC Law, there would be no need for a separate right of appeal under section 10 (now section 11) of the LCC Law. The only

difference is that there is a 21 day time limit under the Immigration Law whereas under the LCC Law there is none. And no need for section 22 - the provisions for making rules.

And when the legislative intended to assimilate the procedures of the Immigration Law it did so. Section 28(1) of the LCC Law - Tab 33 - that refers to proceedings under the Immigration Law and confidentiality - Section 7(1) of that Law. We can note in contrast the provisions.

Mr. Jowell: interjects: Is my learned friend saying that the Board actual illegally in referring to a right of appeal?

Mr. Archie: Not illegally, but mistakenly perhaps and I accept that the Board in the past has taken the view that there is such a right of appeal in respect of an application for approval in principle.

I have no instructions that any appeal of this nature has ever been before Exco. No one of whom I have enquired knows of such an actual appeal, but I accept that the terms of the letter imply that the Board regards that there is such a right of appeal.

Mr. Jowell:

That gives rise to a whole raft of new matters - custom and so on.

Mr. Archie:

It is important because the Board purports to refuse the application under section 11 and this refers to a right of appeal under section 11 of the Immigration Law.

It is a question of law and it may be that that was an error.

To Court:

If one were to take the view that section 5(h) contemplates the Law as it may stand from time to time, then one may not need to ascribe to it any retrospective effect, but we may still need to deal with the legislative history and intent - why the need for a separate course of appeal.

Mr. Jowell:

Well there was no need for an appeal before - only notice, not consent required.

Mr. Archie:

Well if that was the intention they could have done so by the simple means of inclusion in section 10.

If there is no right of appeal under section 8 that obviously has implications for the alternative remedies argument it would also have implications for the question whether the Board was entitled to rehear

applications although we shall be submitting that the Board has the power to rehear an application in any event.

What constitutes a decision

Mr. Jowell submitted that the decision of 17 April 1996 was not a decision at all - because:

1. Notification is a necessary complement.

2. It was in any event provisional.

3.That the decision was notified to the opposite effect in the letter of the 25 April 1996.

In relation to the decision of 10 April - the submission of Mr. Jowell is that it was informally communicated on the 12 April (to KFPL).. My concern is that if communication in writing was a necessary complement of the decision then it had not been completed at that stage and I think Mr. Jowell put it in terms that its operation was suspended pending reconsideration.

It follows from that that it would have been open to the Board as it did to reconsider the matter and come to a different conclusion on the 17th and indeed, since there was no written communication of the decision of the 17 April, it presumably would have been open to the Board to change its mind again on the 24th April.

So what in effect was notified by the letter of the 25 April in that analysis would be the decision of the Board taken finally on the 24 April.

That appears on its face to be at odds with the argument that the Board did not have power in the absence of a fresh application to reverse a previous decision.

Mr. Jowell:
First one point of clarification. I said that the effect of the invitation to make further submissions was to suspend the operation of the decision of the 10 April, but I never conceded that that was the legally proper thing to do.

Mr. Archie:
I think that that must be correct. It must for the purposes of Jowell's arguments depend on the view the court takes of whether the decision of the 10th was valid or not.

Mr. Jowell:
What we are saying is that the practical effect - normally the practice is to make the decision on one day and conclude on the other.

My point is this - that when the decision was made on 10th, in view of the fact that it was communicated informally on the 12th, it

acquired some legal effect - to induce expectations that in the absence of changed circumstances it would be finally communicated as made.

I do not say that at that point it had full legal effect - see the addendum to the skeleton argument - practical suspension until the 25th - suspension lifted on the 24th because there had been no new application.

Mr. Archie:

The point I try to make is that when we speak of decision we have to know what we are reviewing - there has to be a decision and the communication of it in writing - which is what gives the applicant the legal authority in this case to transfer the shares.

If Mr. Jowell is saying that once a decision is taken the expectation is and that the Board has a duty to communicate it in that same form - then it is a decision of the Board and that would apply equally to the decision of the 10 April and the 17th April and the 24th April.

What we need to establish is whether the Board is entitled to change a decision that has been made. If the decision of 10th was flawed for any reason was it then entitled to reconsider on the 17th and having taken a decision on the 17th was it then entitled to reconsider on the 24th April.

That is why I found it a little odd that the first applicant is no longer contending that they had a right to be heard on the 17th.

Mr. Jowell:

We say because there was no proper basis for that hearing of the 17th and more important no basis for a change of the decision as there was nothing new - not so much the procedure, as the decision.

Mr. Archie:

The only difficulty is that we have no evidence as to what questions were asked and answers given on the 17th - it was not just a matter of the letter of the 16 April - oral representations were also made.

The Board was satisfied on the basis of what it heard that it should grant the licence. The fact that the applicant had still not yet seen the letter of the 25 April would suggest that it probably did not play a big part in the Board's decision of the 17th - but we simply do not know. I don't' think we can go so far as to say that the Board is not entitled to come to the conclusion that it did on the 17th April for want of anything new, substantially new facts so far as the written submissions go - because we know what was in the letter of the 16 April.

And we know that insofar as the letter of the 1st April from the 1st applicant is concerned, the 2nd applicant had not had sight of its

contents, so in that respect at least the decision of the 17th was probably in that respect, no better than the decision of the 10th. The 2nd applicant did say he did not know of the contents of the letter of 1st April.

Court: But the Board could have raised the matters in the letter of the 1st April which concerned them (in the context of the hearing of 17th April).

Mr. Archie: That is so.

Now we come to the communication of that decision of the 17th April. The Board says there was a decision, albeit a decision which had no full legal effect because for want of written communication to the 2nd applicant, no authority was thereby conferred to the 2nd applicant to transfer the shares.

That is why I part company with Mr. Alberga - because if the making of the decision is distinct from the written authorisation then the second applicant did not have a licence taken away - so this could not be a revocation case.

But it was nonetheless a decision of the Board and one it could properly reach and the intention of the Board on the 17th, as appears on Mrs. Hampson's affidavit was to grant a licence. That intention

was communicated orally - see Hampson paragraph 12 - Tab 15 Alberga's bundle.

If we take the distinction between the taking of the decision and its communication, it is the Board's submission that where Mrs. Hampson says "I also told him that nothing could be done until the decision was minuted and communicated in writing" - all Mrs. Hampson was doing was reminding him that it was the written consent which gives ICL the authority to proceed and not her communication of the decision via telephone.

In other words the communication stands on no different footing to the verbal communication of the decision of the 10 April.

The 1st applicant seeks to persuade that it was hedged with qualifications.

I refer to Ex parte Pearce Homes Ltd - Tab 38.
Clearly something more to be done on the part of the applicant and as to both parties an agreement before the planning permission could be issued.

But Mrs. Hampson nowhere indicates that the Board was to undertake a further consideration of the matter. What she said was that the decision was to be officially minuted, an administrative exercise to

ensure that the written record of the Board's proceedings accurately reflects what transpired at its meeting.

Mr. Jowell:

Is my friend saying that the procedure of what is called universally "the ratification procedure" is simply a fait accompli.

Mr. Jowell to Court: I accept that the distinction is between reconsideration and confirmation, but implicit in the latter is the ratification process whereby it must be open to the Board to change their minds on some irrational or proper legal basis - for example, that the decision was taken illegally - not on some whimsical or illegal basis - at least that must be accommodated by the ratification process.

Mr. Archie:

In that case I will accept that if the Board receives advice and acts on it, then their decision will not be irrational. I think the real issue is whether:

1. The Board did in fact have the power on the 17th to change their mind; and
2. Whether the intention, as formed on the 17th April, of the Board - was not carried out on the 24th and 25th because of a mistake in relation to what the true legal position was.

That decision of the 24th April was predicated on the assumption that the first decision of 10 April did not suffer from procedural impropriety - ie that they did not have any power to arrive at the decision taken on the 17th April - there being no new application.

But that decision was not reached in the context of any assertion that the decision of the 10 April was flawed.

Because as we have seen from some of the authorities, they do suggest that the Board would have the authority to rehear a matter if it was persuaded that the applicant was not given a hearing which he should have had.

And I would submit that by the same token, if it turns out that on the 24 April the Board proceeded under a mistaken assumption, then it could properly reopen the matter as it has offered to do.

We should not forget that this was precipitated in part by the letter of 23 April of the 1st applicant claiming a legitimate expectation and a right to be heard.

Mr. Jowell:

(At invitation of the court): it is correct that we say the decision of the 10th as communicated on the 12th remained valid until confirmed on the 25th in writing. Our submission that the decision on the 17th

May to rehear the matter is invalid stands or falls on that view of the decision of the 10th April.

2:30 p.m. 13.9.96

Mr. Archie continues:

As to Pearce Homes Ltd. - the principle applies although there the planning permission ran with the land.

Decision of the 10 April - was it vitiated by procedural irregularity: The first observation I would like to make is that it would be impossible for the Board to function if every applicant had a right to an oral hearing. That insofar as matters of general public policy, the socio-economic factors in subsection 3 of 11 a,c,d,e,f,-j are matters which would ordinarily be addressed and were addressed in the application of the 11 March and as a general proposition I would submit that the Board is not required to give the applicant a hearing.

Ex parte U.S. Tobacco - Tab 15 - p370 letters e-f.

So as a general proposition, the Board is not required to hear in person the applicant insofar as it relates to those matters of general policy - as to the first application of 10 April.

As to case of McInnes v Onslow Fane.

I do not place great reliance on it because it was said in that case that character was not put in issue.

I think frankly, it is there like Mr. Jowell that I have some difficulty because we then come up against the case of Thompson and Ex parte Cowan - the Huntington case. I will go further to say that where there has been a legitimate expectation enjoyed either as a previous representation or a right having been enjoyed in the past, then there is a stronger onus on the tribunal to grant a hearing if it is minded to act or to alter the situation in a manner detrimental to the application.

I would further submit that if there was evidence which the Court accepted that the Board gave no weight to, on the 10 April, to the allegations that had been made, then there would not necessarily have been any need to give a hearing.

The fact of the matter is that the applicant does not know that and while I believe and submit strongly that the Board did not give any undue weight to the allegations made about character and sharp business practice, when we are on the question of judicial review, it is often the appearance of justice which is just as important as the question whether the Board in fact had been unfair to the applicant.

The fact that they on the 17th, did not apparently bring the letter to Mr. Moxam's attention suggests that no undue reliance was placed on it but he would have been entitled to complain.

Mr. Jowell:

If he was not aware of the letter what was he entitled to complain about, and even when he was heard on the 17th, if he was not given the gist of the complaint against him, then the hearing was no more fair than before.

Mr. Archie:

Yes, he says he was not given the gist of the allegation and that is not controlled by the Board - Mr. Alberga said in his opening not told - but Moxam does not deal with that in his affidavit.

Mr. Alberga:

I never indicated whether he was given the gist or questioned about them - we just don't know. What I say is that he was not given the gist nor an opportunity to know them on the 10th.

Mr. Archie:

There is no dispute that he had heard of the (paragraph 13 of his affidavit) refusal - but nothing about the gist of the objection.

On the 12th he complained about denial of opportunity to respond - the Board then quite properly said we will give you a chance to respond - but the difficulty is that we really do not know to what extent they relied on the objections and that is the difficulty.

And I think the question is not just whether the Board was obliged to give him a hearing - that is one issue. The other issue is whether before the ratification process as Jowell describes it - if the Board took the view that the way in which the decision arrived at on the 10th should have been different were they prevented in law from doing so? If so, why?

Mr. Jowell:

We do not say they were prevented in law from doing so - they should be inhibited from thwarting a legitimate expectation - but until such time as the decision was formally communicated, of course, they were entitled to reconsider the situation, but having seen that they were not required to change their original decision, they were then required to stand by it and would have become functus officio. I do not dispute the point Mr. Archie now makes.

Mr. Archie:

The difficulty with that is how can we say there was no basis for changing the decision when we know questions were asked.

I think there are two separate arguments - there is Mr. Alberga's argument as I understand - that they were obliged to give him a hearing and therefore acted illegally for not doing so.

There are the other arguments that the decision of the 10 April - not having been given full effect, could the Board validly change it if it had good reason for doing so.

As to whether they are entitled to a hearing one would have to consider the case of Graham Thompson - a case in which the applicant, although the previous owner of the store had a licence, the applicant company was in fact applying for the first time. If that is good law, then it would seem that since that was also a case in which one of the considerations that the Board took into account was its view of the applicants' conduct what I would say in this case is that by contrast there was an express admission in that case whereas here we simply do not know. If we are to look at the matter in the light of what the court knows now, there was before the Board an objection which raised allegations about character which were not brought to the applicant's attention - a decision was made against him and if we were to disregard everything that has happened since then I would have to concede that I have difficulty in distinguishing in principle that case from the Thompson case.

But I was not basing the right of the Board to reconsider on that ground. I think there is a general right to rehear applications and I say this notwithstanding the fact that it is accepted that it is desirable to have finality and consistency in the decisions of the Board.

But those principles do not operate to deprive the Board of the right to rehear an application before it. What they mean is that the Board is under no duty to hear applications repeatedly which are in substance the same. I think that was the point in the McInnes v Onslow-Fane case - Tab 16 p. 1524 - the point was that the Board was not obliged to give him a hearing but the Board did consider the applications and rejected them.

For the general principle that the Board can rehear licensing applications - Regina v City of London Licensing Justices ex parte Davys - Tab 19 of respondent's bundle.

Here, difficulty - the 2nd applicant faced with is that in relation to an appeal, difficult to formulate without reasons (for Board's decision).

I cite this case for the broader proposition that the making of a decision is no bar to a further reconsideration even in the absence of changed circumstances. It was suggested in the skeleton argument (not really pursued by Mr. Jowell) - that from the authority of McCafferty that the Immigration Board is a judicial authority but I

would submit that that can relate only to that Law - the Immigration Law.

Mr. Jowell:

We do not pursue the issue estoppel point - that they were a judicial authority and thus estopped from hearing it again, but I am not pressing that point. We say the Board is precluded from a rehearing as indicated in the letter of 17 May because of frustration of legislative intent and finality and internal consistency our application is entirely on that point.

Mr. Archie:

Ex parte MFK - Tab 23 of Jowell's bundle.

That case insofar as it relates to inconsistency had to do with a deviation from a stated policy.

Page 1565 letter H - not even saying it cannot change policy - all it is saying is that if you have raised a legitimate expectation and you now wish to deviate from that then the people affected must be given notice and a chance to make representations.

For a decision to be internally inconsistent it has to be inconsistent with something. In that case, inconsistency with the policy - no such consideration here. At the very highest if there is a legitimate

expectation raised (in favour) of the first applicant the Board is saying we wish to reconsider this matter and if you want an opportunity to persuade us otherwise then you can have it. What is wrong with that?

That is giving procedural effect to any legitimate expectation which the court may hold arises in favour of the first applicant, but that case is not with respect authority for any wider proposition that because the Board decided on way in April it cannot reconsider the matter at the end of May.

If its original decision is good it may be obliged to but it is not prevented from doing so.

At to the Onibiyo case - Tab 26. It is accepted that there was no substantially new application on the 17th May. All that was decided in Onibiyo - p. 910 letter G - this whole case revolved around the question of whether there was a right of appeal (there had been a previous appeal) and the question whether the applicant had the right of appeal in respect of this renewed application - turned on whether it was a fresh application or not.

In that case it did not prevent the Secretary of State from hearing additional submissions. So, if it is being cited as support for the proposition that the Board cannot reconsider substantially the same

application, it is only of assistance as to what constitutes a fresh application.

Mr. Alberga: That's right.

Mr. Jowell: (Nods in agreement).

(Short break)

Mr. Jowell:

I am embarrassed that I am not to be here early next week, but my clients are absolutely adamant that the counsel of their choice be present when the arguments are being taken.

Mr. Archie:

I do not relish the prospect of interrupting my submissions now to take them up in a month's time, but if the court reporter is available and I have the opportunity over the week-end of tidying my submissions so that the length can be reduced, then what I would ask is that a verbatim transcript of the remainder of my submissions be taken on Monday so that a break can be taken to a date mutually convenient to hear the rest of the submissions.

The 1st applicant is being represented by two counsel. If we do what I suggest on Monday - counsel for the 1st applicant will not be disadvantaged, if he gets a transcript to reply to.

Mr. Alberga:

I regret that I am opposing the application made by Mr. Jowell.

Time is of the essence to my client. The shorthand writer will be available on Monday. Mr. Archie to complete within an hour and a half on Monday - transcript to be made. No disadvantage at all.

As far as my reply is concerned we had proposed that that be the same procedure.

I have no objection if he returns next week, if he wishes to make any proper reply in my absence. I just cannot possibly be here after Wednesday next week.

I urge the court to follow that course.

(Further discussions take place as to the possibility of continuing tomorrow Saturday 14th to allow Mr. Jowell to be present for as much of the submissions as possible)

COURT: We will continue tomorrow Saturday the 14th, 8:30 a.m.

8:30 a.m. 14.9.96

Mr. Archie: (continues)

Ex parte Davies Licensing Act - S. 21 does give a right of appeal - interesting subsection (2) - contemplated in that statute that an objector might appeal. Also important because it does appear that there was an alternative remedy, but nonetheless the application for judicial review was granted.

Mr. Jowell:

Simply to observe a distinct difference between second and first applicant.

Mr. Archie:

Whether decision of 10th April flawed and if so, whether discretion to hear a new application.

It is our submission that the effect of that decision at the most when considered was to raise at the most a legitimate expectation that a written decision in similar terms would be sent. We do not know what was said on the 17th and the decision to reconsider came after the applicant's protest that he had not been fairly treated.

Jowell's three reasons why the Board should not be allowed to hear a renewed application: consistency; finality; and frustration of legislative intent.

With regard to the last - if there is no right of appeal that does not arise and I might say that it is not so shocking to finding a statute that grants no right of appeal - Padfield - Tab 22 Jowell.

Submit that had to do with the refusal of a Minister to exercise his discretion. The facts are the complete opposite from this case in which the first applicant is trying to prevent the Board from exercising its discretion.

One can see the distinction immediately - in that case the farmers would have had no means of redress if the Minister had not applied himself to the matter as he had a statutory duty to do.

That is a completely different situation from a case where there may or may not be an alternative route and the applicant may be free to choose this route if the Board is willing to hear.

There is no need to read into the Local Companies Control Law a legislative intent that he must never approach the Board and ask it to reconsider formally whether the Board was functus officio.

Reason why important to come back to some consequences of the statutory underpinnings of the application - insofar as it is only approval in principle under section 8 and section 10 it can only be a principle application - not yet an application for the licence - how could they be funtus?

We say and we rely on Davies - that the Board does have a discretion to rehear even when there is no change of circumstances. And if only for that reason, the first applicant should be denied the relief that they seek.

There is another limb to the argument which proceeds on the basis that the decision of the 10th April was flawed.

Mr. Jowell submitted that there are really only two decisions - 17th May to rehear and 10th April and conferred on 24th April and communicated on 25th April.

If the 10th April decision was flawed then it cannot have been cured by any ratification without further consideration.

I think we are now all agreed that if the decision of 10th April was flawed then it could have been cleared by a rehearing on the 17th.

The decision of the 17th was a decision - it had validity as a decision though there was no legal authority to transfer the shares until it was communicated in writing. The most that the oral communication could do was raise some sort of expectation, the written communication is what gives permission to act. But underlying every written permission or refusal must be a valid decision.

So what we are really considering is not so much the decision of the 10th, but the decision of the 24th which reversed the decision of the 17th, and the question before the court is whether that decision was flawed or void for illegality.

Mr. Alberga has put it on the basis of illegality. Mr. Jowell has sought to confine illegality within ...

Mr. Alberga (interjects)
I should clarify this when I say illegality - I mean error of law - the decision of 24th April.

Mr. Jowell:
Is Mr. Archie assuming that the decision of 10th April was flawed?

Mr. Archie:
That is the assumption here.

See De Smith's as to illegality. For the purposes of my argument I draw no distinction between a decision that is void as for illegality or which procedural on the basis for an error of law. They are both reviewable - an example of the latter is in the Padfield case in which the Minister appeared to be under a misapprehension as to his powers.

Padfield p.1009 - 1010 - clearly a mistake as to his powers was one of the grounds for mandamus.

I think that does no violence to the language in Council for Credit Union. p. 410 letter C at letter F. I submit that statement is exactly as the language in the case - if you misunderstand the law that applies to the decision - making process that is a ground for judicial review of illegality because you are bringing to bear considerations which should not apply.

As to Alternative remedies:

I proceed on the basis for the purpose of the argument that there is a right of appeal. I like that statement in: Calvaley page 433 (a) - 434(b).

What we can extract is a number of propositions :-

- where there is a suitable alternative remedy such as an appeal - judicial review will not normally be granted.

- Categories of exceptional circumstances not closed.
- Among factors to be considered are the relative speed - in this case no evidence one way or the other.
- Whether the appellate procedure will resolve question at issue fully and directly.
- Whether matter depends on some special knowledge more readily available to the alternative body.
- Whether there are issues of general public interest to decide - Ex parte Cowan -Alberga p.507 letter F - top 508 letter B.

So one of the things to be thrown into the balance is whether issues like the right of appeal, the right to be heard, legitimate expectation - all of which have been raised in relation to the decision of the 24th, are of sufficient general importance to the functions of the Board and in the public interest to justify judicial review.

With regard to the factors to be considered relating to whether there is any particular or technical knowledge more readily available to the appellate body and so on. We have to identify what the real issue is.

The Board on the 17th April decided that the application should be granted.

The question is not so much whether it should have been granted, but whether the reversal of the decision of 10th without a further consideration of the merits was illegal.

That is attended with all the other issues in this case which may be relevant, but the central issue is whether they proceeded in an error of law - that is very much a legal question.

On an appeal, assuming there is an appeal available under the Immigration Law - the Governor-in-Council will - see Section 11(1) - be concerned with those matters.

What they would then be engaged in would be an appeal de novo. Whether it is necessary to do that or whether you only need do that if the Board refuses to rehear you is another issue, but presumably the appellant will be able at that hearing also to make representations in respect of any matters contained in the original application and presumably in respect of the objections of which he now knows. Unfortunately by way of judicial review application all of which could have been avoided if the rehearing had proceeded - everybody would have been given an opportunity to be heard.

Mr. Jowell:

I would assume that a normal appeal process would take up the record of what goes on below.

Mr. Archie:

I understand it to be really a reconsideration of the matter on the merits. I am not saying it may not also contain matters of objections but certainly from the statute that is not required.

It may be difficult to make sense the decision of the objections are not attached.

Mr. Archie:

I would offer to get a further affidavit from the Chairman as to what the form of the appellate record would be.

Mr. Jowell:

I would have no objection to that - it could only help to resolve a fundamental issue in the case. I am willing to accept that it could go against us.

Certain inconsistency in Mr. Alberga's approach. On one hand he was willing to have the Board rehear the matter de novo, but his appeal would not be de novo.

Mr. Alberga:

When we were informed of the decision of 24th our stand has always been that that decision was wrong.

We only accepted the suggestion to go back before the Board in the interest of time and expense - since we are frustrated on that we would have to consider against that background what our grounds would be. We would have to consider whether the Board was wrong in its decision of 24th to reverse the decision of the 17th April.

Mr. Jowell:

With all due respect that simply begs the question - the decision that ICL had was the one that was communicated to them by the Board. He never had the decision in writing in his hand so he could not be purporting to appeal only against that.

Ruling

This matter impinges on the preliminary point as to whether judicial review is the proper relief to be sought in circumstances where, as it is argued, a statutory right of appeal exists.

The proposed affidavit may shed some light on the extent of the appellate record which one might expect to be submitted to the Governor-in-Council on such an appeal.

That in turn relates to the issue whether an appeal would have afforded the fullest opportunity to the appellant, in this case the 2nd applicant, to obtain its proper redress, not just of any errors of the law

committed by the Board, but also on the merits of the application generally.

As is manifest from the last exchanges of submissions, this case is hardly the typical matter coming before the Board.

In an earlier exchange I did invite submissions from counsel as to whether an exceptional feature may not be in itself, the multiplicity, or as Mr. Jowell has put it "the layers of decisions or purported decisions" in the matter.

Mr. Alberga's objection to the proposed measure of a further affidavit brings to light that complexity. The question implicit in his objection is from just what particular decision or decisions would the right to an appeal arise.

Another aspect of the complexity of the case is the fact that the 2nd applicant is said not to have known of the contents of the objection prior to the filing of the affidavits in these proceedings. In comparing the suitability of these proceedings to the appeal as a means of redress that is also a relevant factor.

I must proceed on the facts of this case, on the basis that an appeal would not have afforded the 2nd applicant the opportunity to address those objections, had the 2nd applicant been obliged to pursue the

avenue of appeal instead of coming to the court. This is so even if the appellate records going up to the Governor-in-Council would have contained the objections. There is no reason to suppose the 2nd applicant would have addressed those objections in its grounds of appeal as it did not know of their existence prior to the decision of 10th April.

For those reasons, while it may be of some assistance in comparing the relative suitability of the two processes, I conclude that a further affidavit as to the nature of the appellate record, would be only of marginal assistance in this case.

I therefore decline the invitation to order that it be submitted.

Mr. Archie:

The question whether the appellate procedure may or may not also be available to an objector:

Mr. Jowell submit that standing is provided only to those affected. The question is whether the 1st applicant is affected so as to be a party with standing. It is clear that they were an affected party, but what the court is called upon to consider is section 10 of the Immigration Law.

"Person Aggrieved by ----"

I have two cases to cite with differing results.

Ealing Borough Council v Jones - seems to confine the category to those suffering a financial or legal burden as a result of the decision appealed against.

AG of Gambia v N'Jie p. 510 letter F. - seems the authorities are all over the place while Ealing makes the point that not just somebody exercising a protest on a general public interest who can have standing.

AG of Ganbia - the Ag constitutionally is uniquely the protector of the public interest - perhaps not too much in conflict with Ealing therefore.

As to this statute: Clearly cannot include a mere busy body - "person aggrieved" here must be read as referring to somebody who though not a party has a personal interest over and above that of any member of the general public.

What causes some difficulty is the words in Section 10 which speak of right to apply within 21 days of "the communication of the decision" to him because I do not think the Board is under a duty to communicate its decisions to every objector. It does so when

solicited and if the Board feels there is a genuine interest which entitles the objector to know.

For the purpose of this case insofar as it relates to the first applicant - their complaint is in relation to the decision on 17 May to rehear the matter (as expressed in letter of 23 May) - but that was not a decision which was susceptible to an appeal - no ruling under section 8 or section 10 in May.

What the first applicant is saying there is that you are purporting to do something which you have no right to do and that can only be dealt with by way of judicial review in the nature of prohibition.

What the Board is saying is that we have the discretion to rehear the matter and that is exercisable regardless of whether the decision of the Board was bad or not and we say that that is a complete answer to the 1st applicant's application.

However if the court were to find that the decision of the 24th was flawed then it would be appropriate for the Board to rehear the matter as we have offered to do.

In answer to the 2nd applicant, we say that the decision of the 17th only had legal effect until it was reversed by the decision of the 24th so there is no right to have it directly reinstated. So if the decision of

the 24th is flawed there is no proper basis for reinstating it and the only proper thing to do is rehear the matter.

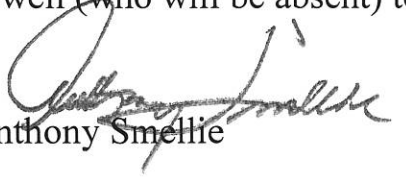
In other words, the judicial review process is not an appeal - they have sought judicial review and if they are successful in that then the remedy is that offered in respect of the 24th April decision - a rehearing.

So far as the decision of 10 April is concerned on the Mr. Alberga's submission and on ours any defects in that decision, if they existed would have been cured by a grant of a hearing on the 17th.

So far as the 2nd applicant is concerned there is really only the decision of the 24th for the courts' consideration.

Buxton v Minister of Housing - adopts the Ealing case - takes a restrictive view of the expression "a person aggrieved". Supports my submission as to the first applicant.

Adjourned to Monday 16th September at 10:00 a.m. - further submissions to be taken by the stenographer and provided to Mr. Jowell (who will be absent) to facilitate his reply, on any new points.



Anthony Smellie
Judge of the Grand Court

30.9.96 9:30 a.m

Mr. Taylor: I am saying the 21st October is the date I mentioned to my friend yesterday for the submission of Mr. Jowell's written reply.

Mr. Alberga: This is most unsatisfactory - the court reporter's transcript was received on Tuesday and in Jowell's hand in London on Friday 27th September. A week has gone by. If he had come to deliver his reply orally it would have to been done a day or so after he got it, now they want one month after the receipt of the transcript. My understanding is that doing it in writing would save time.

I am concerned for two reasons: these delays are running into election time on 20th November. I fear that we will hear that the Board be dissolved and that this matter will go into January. That is a position that may be suitable to KFPL but not at all to my client.

I would want to see those replies reach the court long before the 20th October.

Mr. Taylor: It is true to say Jowell did receive the transcript but he thought he would have received them one day after the hearing.

Court: That was not the court's understanding.

Mr. Taylor: By the time he received it he had other commitments. He has now read it and started on the replies but he is off to South Africa tomorrow not to return until the 14th October. He proposed to prepare a fax to send to the court. If he takes his Lap Top to South Africa the reply might be filed in court during the week of the 14th October.

Mr. Archie: Obviously the urgency in this matter was from Mr. Alberga's client's point of view primarily, but the letter we got refers to rulings he was present for.

Mr. Taylor: It will be three weeks delayed.

Court: I direct that KFPL be required to submit its replies by 16th October 1996 to allow the court to be able to give its decision by 25th October 1996.

25.10.96 Chambers 9:30 a.m. before Open Court at 10 a.m.
(Present: all counsel and parties as at the outset).

Court: Written judgment delivered.

Mr. Alberga: I apply for costs in favour of ICL against KFPL - their application for prohibition is refused. In all respects the application of ICL has been affirmed. I submit KFPL should pay the costs of ICL.

Mr. Jowell: I cannot resist the view that costs should follow the event. The Board was also the respondent to ICL and should pay costs in the second application.

Mr. Archie: As between the Board and ICL is that which in the ordinary course the cost should follow the event, it must be remembered that ICL itself had no objection to the offer of the rehearing and their application was only brought about because the first applicant intervened and prevented the rehearing.

Insofar as any costs incurred after the rehearing - that should not fall on the Board, also the letter from the 23rd April from the first applicant which triggered the question of a rehearing at all. The Board should not be condemned by costs.

Mr. Jowell: KFPL applied for judicial review on a short and narrow confined and specific point in relation to a rehearing as suggested by the Board.

The amount of time spent on that was minimal. It is true that some of the history of the matter would have to be considered. But it was the application from ICL contending the 10th and 24th April decisions which led to the complexity and length of the hearing - that was not KFL's intention. Their case was a simple and narrow one which took up a short time.

As to the second point - it is simply not true that the Board failed to contest a great deal of what was alleged by ICL.

Mr. Archie was on his feet for almost two days and although he conceded a number of points relating to the allegations of the second application, he also sturdily resisted a number of other points. And also then sided with the position of the first applicants - in that case we must insist that the chief respondent in one of the applications in this consolidated action bear a degree of responsibility for the costs incurred.

The Board was at fault in a number of these matters bearing a great deal of responsibility and in a number of conclusions they and not the first applicants have been taken to table.

Mr. Alberga: It seems the cost of ICL have to be paid either by the Board or KFPL. But KFPL triggered the whole matter by challenging our application for a declaration. They could have

conceded the declaration we sought. They have been unsuccessful in everything and I submit that the costs be paid by them.

Mr. Jowell: My client intends to appeal and I request a stay of execution.

This to me seems to be a classic case where if it is not stayed the appeal would be rendered nugatory.

That is particularly true in a case of this kind where, if the execution of judgment were not stayed, it is clear that the transfer of shares to a majority holding in a foreign company is imminent. In such a case (a) the shares will be in foreign hands and; (b) no likelihood of any kind of restitution.

Expectations would be induced and the appeal would have no point of the decision were reversed.

It is not only a question of whether my clients would be prejudiced but an appeal would be rendered nugatory. One essential question is whether the shares should be transferred to a foreign interest and if they may not be brought back to local hands the appeal would be rendered nugatory.

My client is an affected party as a competitor.

The appeal is also in the public interest. Clear that if the shares now leave this country in the midst of an appeal and if the appeal goes the other way no possibility of redemption will be there.

We accept that subject to the matter of security for costs and the like, the line must be drawn as the appeal would be rendered nugatory.

Then there is the ineluctable application under section 10 of the Law which flow from the grant of the consent to the shares.

Mr. Alberga: First as to a stay - there must be some adjudication as to whether he has the locus standi to appeal against the orders made in favour of ICL. In one breath he says a matter between ICL and the Board

My first submission is that KFPL has no locus standi except in relation to the refusal of prohibition. Secondly, if I am totally wrong about, then he has asked for a general stay. This is not a case where money has changed hands.

We would be quite prepared to seek to obtain an undertaking that if the shares were transferred and the appeal succeeded they would be retransferred. A stay could be made on that basis.

Mr. Jowell: That would be acceptable and ....

Order: By consent: The judgment decision given is stayed in terms of the drafted order handed to and initialled by me. Decision reserved on the question of costs - to a time to be notified.

Smellie J. 25.10.96

5.11.96 Open Court

(In Chambers by agreement)

Court: (These proceedings follow on the letter submitted by Orren Merren and Co. in respect of costs).

Mr. Alberga: I would wish to respond point by point to that letter, but if they have anything to add let them speak how or hold their peace.

Mr. Taylor: As to our application for prohibition - clear that it was a necessary application - no appeal open to KFPL - held that the decision to rehear of 17th May was wrong - had it not been for the declaration granted to the second applicant prohibition should have been granted. I would ask the Board to pay the costs of our application.

Much of the confusion arose out of the manner in which the application was submitted.

Next issue is ICL's application amenable to judicial review. The Board raised the point that there was no appeal - we had to go through the argument that there was a right of appeal - although I must admit that ultimately we would have argued that the case did not justify judicial review. But the real point was what was the more appropriate remedy. But that was not the test - it is whether there were exceptional circumstances.

In relation to decision of 10th April - again had the Board conducted itself in a fair and proper manner then the question would not have arisen. It was the Board's failure to conduct itself in a fair and proper manner. On that basis I would ask that the Board bear the costs in relation to that argument.

As regards decision of 17th April - second applicant suggested firstly, a declaration that the decision was valid insofar as it granted the full licence under sections 8 and 10 - the declaration granted fell far short of that - it created no more than a procedural legitimate expectation that the section 8 application would in due course be granted after fair ratification procedure. It would be unfair for the first applicant to be held to pay the costs of that. We submitted throughout that it needs

to be confirmed in writing - that was upheld. The costs in that matter should be held to be paid by the Board and ICL.

As to the decision of 24th April - it was the Board's action that gave rise to that difficulty - the Board should pay the costs in that matter. And finally, as to the decision of 17th May - this was our application for prohibition. It was held that the decision was wrong - only a matter of common sense why prohibition was not granted. I submit the costs ought to be apportioned - that is the costs of the first applicant's application as between the Board and the second applicant.

Mr. Alberga: It is well settled that costs are in the discretion of the court, but to be exercised judiciously and the basic rule that costs follow the event is the rule that prevails unless there are special reasons.

Submit court should look at what essentially the parties asked for and what essentially were the results of the various applications.

The old system by which issues were analysed and costs awarded based on issues is no longer the approach. It is an overall approach as to who was successful, who failed and what was the overall result.

Inevitably alternative submissions are raised - costs should not be affected by that only.

Broad submissions: The proceedings which came before the court arose entirely as a result of the unreasonable actions taken by KFPL.

[Bundle of documents and letters put together and submitted to the court].

I will show this by reference to the correspondence: On 23rd April 1996 Orren Merren and Co. wrote - paragraph 2. Started off by complaining that they were not heard - that position was maintained until withdrawn by Jowell.

On 17th May Board wrote to both sides indicating that they were prepared to hear the application over again.

On 22nd May we wrote confirming that we accept the invitation. Second letter of 22nd May.

23rd May Orren Merren and Co. wrote.

29th May set - the morning of the hearing confirming our acceptance of the invitation.

6th August we wrote a letter to Orren Merren and Co. - not letters we intended to produce to the court. We tried to save the costs of the proceedings. See response 8/8/96.

Submit that every issue raised in those letters was pursued vigorously and exhaustively at the trial and they lost on every single one of them. It is amazing that they are now contending that their costs should be paid. The whole proceedings could have been avoided except for their arrogance.

Everybody thought we would be going back to the Board - their letter said so - but instead they came to the court and got an order preventing that - everything flowed from that - we would have wished to avoid that.

The Board may have made mistakes, we would have let them pass and go back to the Board but KFPL said no - they sought an order of prohibition to get to that base that they had to establish that the decision of the 10th April was valid, that the decision of the 17th was wrong and that the decision of the 24th April was a good decision.

They joined issue on each and everyone of those points and lost miserably on each and every one.

Mr. Archie was frank - he advanced very minimal submissions on that as to 10th April decision. The whole of the argument was with KFPL.

As far as decision of 17th April was concerned KFPL argued it was bad. Mr. Archie contended the Board had a right to do that. I contended that not only a right but a duty to do so because of the vicious objections raised by Orren Merren and Co. - resolved in our favour and against KFPL.

Decision of the 24th April - we said that decision bad for reasons we gave.

KFPL joined issue contended it was a good decision - that Board was right to go back to decision of 10th April - they lost on that also.

So quite apart from them being the person who caused the matter to come to court, they also lost on every point they raised.

Now see letter of 31st October 1996 from Orren Merren & Co. - they contend the application was meritorious - that is astounding - it was refused.

They simply wanted to prevent the Board from considering the matter any further - they not only lost on theirs, they lost in opposition to ours.

How can they ask for the costs of a failed application to be borne by somebody else. They say I contended that they should have appealed. I did not contend that - I said to the contrary - I did not submit that they should have appealed.

Also not the case that ICL should bear a significant portion of their own costs.

As to whether the Board should be penalised - the Board made an offer to allow everyone to come back. KFPL took a calculated risk to come to court, but because of that ICL had to apply - hence the consolidated applications.

KFPL advanced more strongly than did the Board itself that the decision of the 10th April was right.

We say a considerable amount of time was not taken in presenting the argument that there was no legal right of appeal under section 8. In my reply I merely adopted what Mr. Archie had said, but I made the alternative submission that judicial review was the right approach -

that is the only issue on which it could be said KFPL succeeded - but we succeeded on the alternative submission.

It is therefore ridiculous to suggest that KFPL should not be responsive for any of ICL's costs.

In my submission - not only the costs of ICL, but also the Board's should also be borne by KFPL.

If the court is of opinion that one issue which took an inordinate amount of time was lost by the successful party - then the court would say it reduced the costs that the party was entitled to be reduced by a percentage. Perhaps see Order 62 the notes thereto.

Mr. Archie: I preface my brief comments by saying that I am astonished to hear KFPL say that the Board should pay KFPL's costs. I heard Jowell (when judgment given) say that he cannot oppose the view that costs follow the event.

So far as the merits are concerned I know if no authority for the proposition that a party can say I did not succeed but since if you had not granted ICL's application, you would have granted mine.

KFPL's application was based on the contention that the decision of 10th April and 24th April were valid and binding that the decision of 17th April was wrong - that has been rejected.

In fact the court has expressed the view the decision of 17th May was wrong for exactly the opposite reasons than they contended.

In deciding on the appointment of costs in this matter the history of the matter is important.

The letter of 23rd April prompted at least in part, the very decision to rehear which they subsequently turned around and attacked - and dispite the offers made in August they only abandoned that position at the hearing.

So when Merren says the whole action arose out of ICL's application for a "licence in principle" that cannot be right.

They cannot argue unsuccessfully against ICL's application and take no responsibility for the costs - arguments which they are even now maintaining before the Court of Appeal.

It is no longer a matter between ICL and the Board. KFPL is an active party to the action. They must therefore bear at least a substantial portion of the costs, if not the whole.

It is disingenuous in the extreme for KFPL to say that the court has found that judicial review is the appropriate remedy - there was considerable exertion by all counsel - at the end of the day the court found against them.

The Board has never argued that appeal was the only route. In fact I advanced the argument that there may not have been an appeal - that is minor. I submit when taken in the overall view that judicial review is the appropriate remedy.

The only other point so far is the decision of April 17th is concerned - the court has accepted the respondent's contention that it did not amount to a grant under section 8. ICL was therefore only partially successful, but a part, at least, of those costs should be paid by KFPL. Part of their argument was an attack upon the decision of 17th April - so far as the 10th April - court has found that the defect was cured by the hearing of the 17th April - that has always been the Board's contention.

We only spent so much time on that because of KFPL's contention. So the Board should not be punished with costs in relation to that decision.

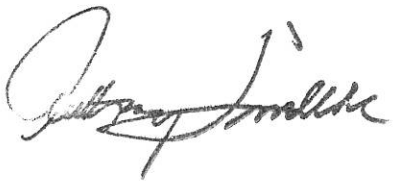
(Written submissions handed up).

Court: Cur Adr. Vult to a time to be announced.

Smellie J. 8.11.96

19.12.96

Court: As to costs - written ruling delivered.



Smellie J.