IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO G 168 of 2016

BETWEEN

(1)BDO CAYMAN LTD.

(2) DELOITTE AND TOUCHE

(3) ERNST & YOUNG LTD

(4) KPMG

(5) PRICEWATERHOUSECOOPERS

Applicants

AND

(1) THE GOVERNOR IN CABINET

(2) THE ATTORNEY GENERAL

Respondents

IN CHAMBERS

Appearances:	**Mr. M Imrie, Mr. C McKie Q.C. and Mr. C La-Roda Thomas of Maples and Calder on behalf of the Applicants**
	Ms. J Wilson, Solicitor General, and Ms. M. Brandt of the Attorney General's Chambers on behalf of the Respondents
Before:	**The Hon. Justice Ingrid Mangatal**
Heard:	**2 November 2016**
Ruling Delivered:	**2 November 2016**
Transcript Circulated:	**4 November 2016**

EX TEMPORE RULING

This is an application for Leave to Apply for Judicial Review of the decision made by the Governor in Cabinet to dismiss appeals made under S.17 of the ***Trade and Business Licensing Law*** (2007 Revision) which was in force at all material times, and as communicated to the Applicants by letters received on or after 10 June 2016.

2. The Relief sought is set out in the Statement at page 2 of the application, and consists of an order of certiorari and a number of declarations and further or other relief as the Court sees fit.

3. The Applicants are all accounting firms carrying on the business of accountancy in the Cayman Islands.

4. The application was initially in September 2016, placed before my brother Williams J for consideration ex parte on the papers, without a hearing pursuant to GCR O.53, Rule 3(3). Williams J took the view that the application was not suitable for being dealt with on the papers, that the matter should be listed for a hearing, to come before any Judge if he was not available, and that the Applicants should ask the Attorney General/Respondents to attend the hearing.

5. The Applicants were so directed by the Listing Officer and were also referred to the decision in ***Morrison and Bodden-Cowan v Work Permit Board & Chief Immigration Officer*** – [2014(2) CILR Note 4.

6. Consequently, the application was listed for hearing and was listed before me for hearing today. The Attorney General's Chambers have come before the Court and have opposed the application for Leave on a number of bases.

7. One preliminary point taken, which has been consented to, or conceded, is that in fact the Attorney General ought not to be named in this application for judicial review. It is agreed that the Attorney General's name is to be removed.

8. Another point taken is that the 1st, 2nd, 4th and 5th Applicants have not filed affidavit evidence in support of the applications and therefore O. 53 Rule 3 of the Grand Court Rules (1995) Revision has not been complied with.

9. In my view, this is a very technical point, since Ms. Nelson, who has indicated in paragraph 1 of her affidavit that she is authorized by the 3rd Applicant to make the affidavit in support of the application for permission, has exhibited to her affidavit, letters from each of the 1st, 2nd, 4th and 5th Applicants indicating their support of the application.

10. The evidence is that all of the Applicants are in similar positions in that they all filed appeals pursuant to S.17 of the relevant ***Law*** and their appeals were all dismissed on the same day on the same basis.

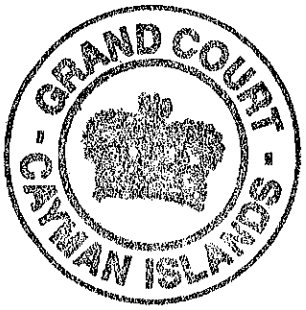
11. However, Order 53 Rule 3 (6) does require that an affidavit which verifies the facts relied upon be filed and O.53 Rule 3(7) provides that the Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

12. I am satisfied that all five Applicants have a sufficient interest. However, Judicial Review is a quite technical area of the law and I am of the view that I should take Mr. Imrie up on his offer/undertaking to have verifying affidavits filed by the 1st, 2nd, 4th and 5th Applicants and I am prepared to accept an undertaking for him to do so by 3:00 p.m. on Friday 4th November 2016.

13. The Grounds on which the Relief is sought are stated to be as follows:-

"1. Unlawfulness: the decision maker made an error of law in making the Decision.

i. On the plain and ordinary meaning of the language in sections 12 and 14 of the Law (then in force), and the Schedule of the Law, the only fee payable in respect of an application for a trade and business licence for accountancy firms, such as the Applicants, is the Per Firm Fee under item 2 of the Schedule.



ii. *There are a number of different ways the legislature could have clearly expressed a requirement that Accountancy firms are to pay two sets of fees. These include referring to applicable "fees" within the Law (then in force), or including a specific reference to the Per Firm Fee being payable in addition to the Per Accountant Fee.*

iii. *This Law was subsequently changed on 1 January 2016, when the definition of "Accountancy Firms" in the Schedule was amended to include an express requirement that the Per Accountant Fee is payable in addition to the Per Firm Fee. This amendment changed the ordinary meaning of the Law, which previously required the Applicants to pay only the Per Firm Fee.*

iv. *The Decision amounts to a breach of the principle of doubtful penalization pursuant to which laws that interfere with or restrict economic interests including the carrying on of a trade or business (and which are unclear) should be construed in favour of the fee payer.*

2. *Unreasonableness/irrationality:*

i. *The wording of sections 12 and 14 of the Law (then in force) and the Schedule to the Law is so clear and unambiguous, - i.e. that only one fee is payable in respect of a trade and business license for an "Accountancy firm" – that the Decision is plainly wrong and no reasonable decision maker could have made the same decision.*

3. *Breach of Natural Justice:*

i. *Natural justice requires that every tribunal is required to follow basic principles of procedural fairness, which includes:*

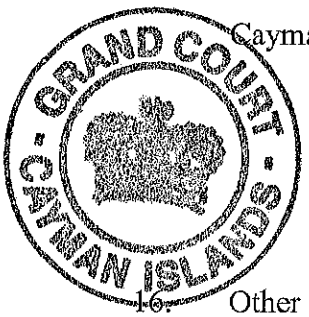
a. *Giving each party an equal and reasonable opportunity to present its case; and*

b. *Ensuring that each party is fully apprised of any arguments against it and is given a reasonable opportunity to comment.*

ii. *In refusing the express requests of the Applicants to be heard, and/or to make legal submissions through their representatives and/or attorneys-at-law, Cabinet infringed upon the basic principles of procedural fairness and the Decision amounts to a breach of natural justice."*

14. I am satisfied that there is no alternative remedy available to the Applicants, for example, by way of further appeal. I am also satisfied that that there is no discretionary bar, such as delay, applicable herein. Indeed, the Respondent has not sought to argue that there has been any delay on the part of these Applicants.

15. The Court, in considering whether to grant leave to apply for judicial review is acting as a gatekeeper. Its role at this stage is to eliminate frivolous or vexatious claims. As stated in ***Smith v Commissioner of Police*** [1980-83 CILR 126], cited by Mr. Imrie, by the Cayman Islands Court of Appeal, per Carberry J.A.:



"At this stage all that it is necessary to show is that there is some arguable case or claim which is not obviously untenable, vexatious or frivolous."

16. Other more recent authorities, such as the Privy Council's decision in ***Sharma v Antoine*** [2006] UKPC 57, demonstrate that the applicant must show that it has arguable grounds for judicial review having a realistic prospect of success. I accept that that is the test.

17. It is plain to me that the Applicants have met the required threshold. The grounds of Unlawfulness and Unreasonableness/Irrationality are plainly arguable with real prospects of success. In essence, the applicants say that there have been errors of law in the Governor in Cabinet's interpretation and understanding of the relevant Law. These are plainly matters susceptible to judicial review, by what is referred to in Fordham's well-known work *Judicial Review Handbook*, 6th Edition, paragraph 16.3, cited by Mr. Imrie, as "*hard-edged review*".

18. See also paragraphs, the Chapter 48 headed "*Error of Law. A body must not make a material error of law.*"

19. With all due respect to the Respondents, there is nothing to the point in claiming that the Applicants are in essence seeking to appeal from the decision of Cabinet. They are not; they are seeking to activate this Court's important supervisory judicial review powers.

See also in particular paragraph 16.1 of the Fordham which provides a full answer to the Respondents' arguments addressed to the forbidden substitutionary approach, where the learned author points out that "*hard-edged*" questions represent an important exception to the rule against the forbidden substitutionary approach.

20. As to the ground claiming that there has been a breach of natural justice, that is also clearly arguable, is not obviously untenable, and the Applicants in my view ought to be allowed to advance this ground also.

21. The Respondents have raised arguments about the conduct of the Applicants but these are clearly matters, if they are to be considered at all, that should be addressed at the substantive hearing stage. In this case, it cannot reasonably or justifiably be held by this Court that, as Ms. Wilson sought to argue, with reference to paragraph 9-063 of Sir Clive Lewis' Work on *Judicial Remedies in Public Law*, that there is no point in granting permission as the Court would not ultimately grant any remedy in any event. It's an interesting submission, but finds no applicability on the facts and circumstances of this case.

22. Accordingly, I grant Leave to apply for judicial review as sought.

23. The Applicants have applied for costs, arguing that costs should follow the event, or at any rate, there should be costs in the cause. However, as Ms. Wilson points out, the Respondents' Counsel attended the hearing at the Court's invitation. In the circumstances, I felt it appropriate that there be no order as to costs.

GRAND COURT · CAYMAN ISLANDS

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT