

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 851 OF 1997

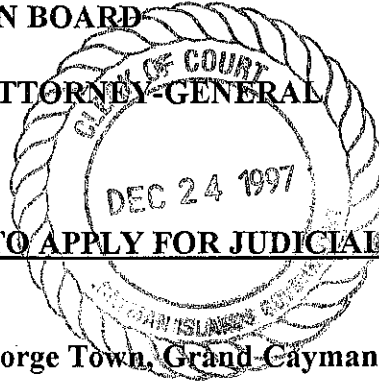
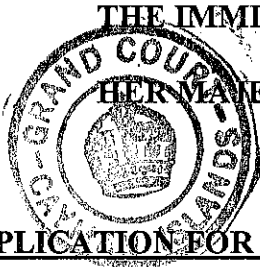
IN THE MATTER of an application by Hadsphaltic International Limited for leave to apply for an Order of Certiorari and/or Mandamus by way of Judicial Review pursuant to O. 53

AND IN THE MATTER of the Local Companies (Control) Law (1995 Revision)

BETWEEN: HADSPHALTIC INTERNATIONAL LIMITED Plaintiff

AND: THE IMMIGRATION BOARD First Defendant

AND: HER MAJESTY'S ATTORNEY-GENERAL Second Defendant



APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

To the Clerk of the Court, Law Courts, George Town, Grand Cayman

Name, address and description of applicant(s)

Hadsphaltic International Limited, of P.O. Box 502GT, Trafalgar Place, West Bay Road, Grand Cayman, Civil Engineering and Building Contractors.

Judgment, order, decision or other proceeding in respect of which relief is sought

The decision of the Immigration Board to grant the Plaintiff a Local Companies (Control) Licence subject to the condition that the Plaintiff be restricted to construction development projects over CI\$1.5 million and the decision by the Governor-in-Council contained in a letter dated 25th September 1997 not to allow the Plaintiff's appeal against the said decision of the Immigration Board.

Relief Sought

Judicial review in the form of:

- (1) An Order of Certiorari to remove into the Grand Court of the Cayman Islands and to quash the said decisions made by the Governor-in-Council and the Immigration Board; and/or

- (2) An Order of Mandamus to oblige the Governor-in-Council and the Immigration Board to reconsider their decisions in accordance with the law and/or the Plaintiff's legitimate expectation and to compel the Defendant to direct the Immigration Board to grant the Plaintiff a Local Companies (Control) Licence without conditions; and/or
- (3) A Declaration that the decision made by the Immigration Board to grant to the Plaintiff a Local Companies (Control) Licence subject to conditions was unlawful and/or in breach of statutory duty; and/or
- (4) A Declaration that the Plaintiff was and is entitled to be granted a Local Companies (Control) Licence without conditions; and/or
- (5) Interim relief in the form of a stay of execution of the Immigration Board's said decision, to the effect that the grant to the Plaintiff of a Local Companies (Control) Licence not be made subject to any conditions.
- (6) Interim relief in the form of an injunction, pending determination of the Plaintiff's Application for Judicial Review, restraining the Immigration Board from revoking the Plaintiff's Local Companies (Control) Licence for any contravention of the condition subject to which the said Licence was purportedly granted, namely for tendering for, entering into, executing or carrying out construction development projects at or less than C\$1.5 million; and/or

The Plaintiff requests an oral application for leave in view of the interim relief sought.

Name and address of applicant's attorneys, or, if no attorneys acting, the address for service of the applicant

Ritch & Conolly, 3rd Floor Royal Bank Building,
P.O. Box 1994, George Town, Grand Cayman.

Signed *Ritch & Conolly*

Date *24th December 1997*

GROUNDS ON WHICH RELIEF IS SOUGHT

THE FACTS

1. The Plaintiff has been operating in the Cayman Islands since 8th September 1966. At all material times the Plaintiff has not carried on business as a local company within the meaning of section 2 of the Local Companies (Control) Law (1995 Revision).

2. Upon the coming into force in 1971 of the Local Companies (Control) Law, the Plaintiff was obliged by section 4 thereof to apply to the Immigration Board for a Licence to carry on business in the Cayman Islands.
3. A Local Companies (Control) Law Licence was duly obtained by the Plaintiff on 16th November 1972 for a period of 12 years. The Licence was subject to no terms or conditions.
4. A new Licence was applied for on behalf of the Plaintiff in 1984. By a letter dated 19th November 1984, the Caymanian Protection Board (as the Immigration Board was then known) notified the Plaintiff that it would be granted a Licence subject to the condition that the Plaintiff should only engage in construction projects the total of which under separate or overall contracts was not less than \$750,000.00.
5. In subsequent telephone conversations with John Bostock, the then Secretary of the Protection Board, the Plaintiff by its attorneys, Messrs. Ritch & Conolly, questioned the legality of imposing conditions on the grant of a Licence to the Plaintiff.
6. As a result, the Protection Board by a letter dated 12th February 1987 notified the Plaintiff that it had been granted an unrestricted Licence for a further period of 12 years.
7. By a letter dated 28th October 1996, Ritch & Conolly on behalf of the Plaintiff applied for a third Local Companies (Control) Law Licence.
8. By a letter dated 12th December 1996, the Plaintiff was notified that the Immigration Board had agreed to grant a Licence subject to the Plaintiff's being "restricted to the construction developments projects over 1.5 million dollars".
9. By a letter dated 23rd December 1996, Ritch & Conolly on behalf of the Plaintiff invited the Immigration Board to reconsider the matter on the ground that the imposition of the said condition was ultra vires and void.
10. A notice of appeal to the Governor in Council under section 10 of the Immigration Law 1992 was lodged on behalf of the Plaintiff on 17th January 1997.
11. The lodging of this appeal was acknowledged by a letter from the Clerk of the Executive Council dated 21st January 1997.
12. By a letter dated 24th April 1997, the Plaintiff was notified that the Immigration Board, having taken the Solicitor General's advice and "in protection of local interests", had declined to reconsider its previous decision.
13. By a letter dated 13th May 1997, Messrs. Ritch & Conolly on behalf of the Plaintiff wrote to the Clerk of the Executive Council in order to amplify and clarify the grounds of the Plaintiff's appeal.

14. By a letter dated 8th July 1997, the Clerk of the Executive Council invited Messrs. Ritch & Conolly to provide her with (1) a statement of those projects in which the Plaintiff was currently involved which were outside the terms of the conditions purportedly imposed, and (2) such written representations as Messrs. Ritch & Conolly deemed appropriate to form part of the submission to the Governor-in-Council.
15. By a letter dated 31st July 1997, Messrs. Ritch & Conolly responded to the request of the Clerk of the Executive Council.
16. The decision of the Governor-in-Council was communicated to Messrs. Ritch & Conolly by a letter from the Clerk of the Executive Council dated 25th September 1997.

THE LEGISLATION

17. Section 11(2) of the Local Companies (Control) Law provides that:

“A licence issued shall be for such duration, not being less than 12 years, and may be subject to such terms and conditions as the Board may see fit to specify therein; and the Board, upon the written application of the licensee may, from time to time, extend the scope of such licence.”

18. Section 11(3) of the Law provides that:

“Subject to any general directions which the Governor may from time to time give in respect of the consideration of such applications the Board shall, in deciding whether or not to grant a licence, have regard *inter alia* to the following matters:

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

...”

19. Section 25 of the Law provides that:

“This Law shall apply to companies incorporated before, on or after the coming into operation of this Law:

Provided however, that notwithstanding section 11(3), any company which was carrying on business in the Islands at the time of the coming into operation of this Law shall, on making application for a licence under section 10, be entitled, subject to section 11(2), to the grant of a licence.”

GROUNDS FOR REVIEW

Illegality

20. The imposition of a restriction on the Plaintiff's Licence was in excess of the Immigration Board's jurisdiction under the Local Companies (Control) Law and is therefore unlawful and void.
21. Section 25 of the Law confers upon the Plaintiff an absolute entitlement to an unrestricted Licence, by virtue of having been carrying on business in the Cayman Islands prior to and at the time that the Law came into operation.
22. The legislative intent and objective behind section 25 was the protection of non-local companies in return for their long-standing contribution to the economy of the Islands, to ensure that they were treated in the same way as local companies with whom they had competed on an equal unrestricted footing before the enactment of the Law.
23. By virtue of the words in section 25 "notwithstanding section 11(3)", the Immigration Board was not entitled to consider any of the matters listed in section 11(3) of the Law in granting a Licence to a company which had been carrying on business in the Cayman Islands prior to and at the time that the Law came into operation.
24. It follows that the words in section 25 "subject to section 11(2)" are, to this extent, ineffective or at most have a very limited application: the inclusion of these words when read in conjunction with the words "notwithstanding section 11(3)" can at most mean that only conditions other than those arising from consideration of, and in response to, the factors listed in section 11(3) of the Law could lawfully be imposed.
25. An example of such a condition would be a condition imposed on construction businesses generally for the purposes of maintaining health and safety standards, or a restriction against carrying on a peripheral business activity such as that of estate agents.
26. The words in section 11(2) "subject to such terms and conditions" must therefore be construed, in cases in which the proviso to section 25 applies, so as to exclude any term or condition relating to any of the matters set out in section 11(3). Any other construction would defeat entirely the proviso to section 25 of the Law.
27. It is clear from their letter dated 24th April 1997 that the Immigration Board took into account factors listed in section 11(3) of the Law, and in particular section 11(3)(a), which was unlawful and in excess of their jurisdiction and which constitutes an error of law on the face of the record.

Irrationality

28. It follows, from the fact that an applicant for a Licence in the position of the Plaintiff cannot

be refused a Licence by virtue of section 25 of the Law, that what cannot be done directly cannot be done indirectly by the imposition of conditions which render the grant of a Licence nugatory.

29. Since it would be unlawful for the Immigration Board to consider the factors listed in section 11(3) of the Law to refuse a Licence, it would be irrational to make use of any of the same factors for the purpose of imposing conditions on a Licence. This is what is meant by the use of the word "notwithstanding" in section 11(3) of the Law.
30. It is the Plaintiff's case that the restriction on the Licence preventing it from engaging in construction projects under CI\$1.5 million does render the grant of its Licence nugatory, since such projects constitute a significant proportion of the business conducted by the Plaintiff in the Islands.

Legitimate expectation

31. Alternatively, if the Plaintiff's absolute entitlement extends only to the grant of a Licence, it has at least a legitimate expectation, in the sense of a substantive right, that it would not be subject to conditions. The Plaintiff will rely in this regard on the dictum in R -v- Devon County Council, ex parte Baker [1995] 1 All ER 73 at 88e-h.
32. This legitimate expectation arises from the fact that having carried on business in the Cayman Islands since the 1960s, the Plaintiff was granted 2 Licences without restrictions on its business as Building and Civil Engineering Contractors and since 1986 has operated on the understanding that the Board had made a decision on the issue now being raised again and that it had conceded that the Plaintiff's Licence should have no restrictions as to the dollar value of any project in which it is engaged.
33. As a consequence, the Plaintiff has (inter alia) introduced a trades training programme: this comprises a three week introductory course, followed by one year of full-time study at the Community College of the Cayman Islands, which is followed by a three year on-site training programme. This programme has an intake of two or more Caymanian students per year. In addition to the trades training programme, the Plaintiff is currently sponsoring a Caymanian student for a BSc in Construction Management at Florida International University.
34. The Plaintiff has relied on this representation in continuing the lengthy tendering and negotiating processes that are part of its business over the course of the Licence application procedure conducted by Messrs. Ritch & Conolly on its behalf. As a consequence, the Immigration Board is now estopped from seeking to impose a dollar value restriction on the grant of the Plaintiff's Licence.

Conclusion

35. In the premises, the Governor-in-Council misdirected himself in law in upholding the decision of the Immigration Board and his decision ought to be quashed. The Plaintiff will further

contend that, inasmuch as the Governor-in-Council took account of a statement of those projects in which the Plaintiff was currently involved which were outside the terms of the conditions purportedly imposed, he took into account irrelevant considerations in coming to his decision.

Interim Relief

36. Where leave to apply for judicial review is granted and the relief sought is an order of certiorari, the Court has jurisdiction by virtue of GCR O.53 r.3(10)(a) to impose a stay on the proceedings to which the application relates until the determination of that application or further order, and thus to preclude the imposition of any restrictions on the grant of the Plaintiff's Licence.
37. It is further the Plaintiff's contention that the Court has inherent jurisdiction to grant a stay where it is necessary to ensure that the application for judicial review is not preempted by implementation of the Board's decision and the interests of justice defeated. See the analogous authority of R -v- Home Secretary, ex p. Turkoglu [1987] 2 All ER 283.
38. While the decision of the Governor-in-Council was that the Plaintiff may complete 9 current projects at a price of less than CI\$1.5 million, the Plaintiff will show that it has lost certain opportunities to tender for other development projects as a result of the restriction and has as a result suffered significant prejudice to its business.
39. In these circumstances, the Plaintiff seeks the imposition of a stay on the operation of the restriction imposed by the Immigration Board, to allow it to continue to negotiate and tender for construction projects at a price of less than CI\$1.5 million, pending determination of the Plaintiff's application for Judicial Review.
40. Further or alternatively the Plaintiff seeks interim relief in the form of an injunction, pending determination of the Plaintiff's Application for Judicial Review, restraining the Immigration Board from revoking the Plaintiff's Local Companies (Control) Licence for any contravention of the condition subject to which the said Licence was purportedly granted, namely for tendering for, entering into, executing or carrying out construction development projects at or less than CI\$1.5 million.

Delay


41. Inasmuch as it may be considered by the Court that the Plaintiff has delayed in making this application for leave to apply for judicial review of the decision of the Immigration Board, the Plaintiff will contend that it was required first to exhaust its alternative remedy of appeal to the Governor-in-Council.

Oral hearing

42. The Plaintiff has retained Queen's Counsel to represent it in this matter and in consequence

requests an oral application for leave in support of the foregoing grounds of appeal, and in view of the interim relief sought.

DATED this 24th day of December 1997



RITCH & CONOLLY
Attorneys-at-Law for the Plaintiff

THIS Application for leave to apply for Judicial Review was issued by Messrs. Ritch & Conolly, Attorneys-at-Law for and on behalf of the Plaintiff herein whose address for service is P.O. Box 1994, 3rd Floor Royal Bank Building, George Town, Grand Cayman, B.W.I.