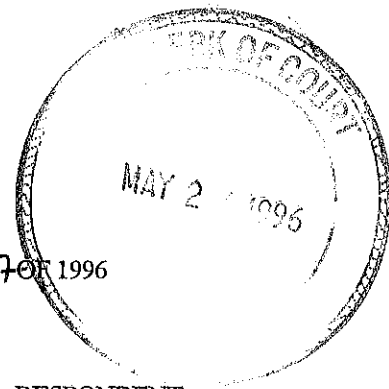


Application for Leave to Apply for Judicial Review (O.53, r.3)



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 267 OF 1996

BETWEEN:

REGINA  
AND

THE IMMIGRATION BOARD

RESPONDENT

AND:

Ex parte KIRK FREEPORT PLAZA LTD.

APPLICANT

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	Kirk Freeport Plaza Ltd., P.O Box 893GT, Grand Cayman, Cayman Islands, British West Indies; a duty free and duty paid retail company.
Judgment, order, decision or other proceeding in respect of which relief is sought	The decision of the Immigration Board and/or its Chairman, evidenced by a letter dated 17 <sup>th</sup> May 1996 written to the Applicant's attorneys-at-law by the Secretary to the Immigration Board at the direction of the said Chairman, to consider on Wednesday, 29 <sup>th</sup> May 1996 an application by Islands Companies Ltd. for a Local Companies (Control) Licence.
<u>Relief Sought</u>	
<ol style="list-style-type: none"> <li>1. An order pursuant to order 53 rule 3(10) that the grant of leave to apply for judicial review shall operate as a stay of the proceedings to which this application relates until the determination of the substantive application for judicial review.</li> <li>2. An order of prohibition.</li> <li>3. Such further and/or other relief as to the Court seems just.</li> </ol>	
Name and address of Applicant's attorneys, or, if no attorneys acting, the address for service of the applicant.	Orren Merren & Company, Attorneys-at-Law, Kirk House, Third Floor, Albert Pantou Street, P.O Box 481G, Grand Cayman, Cayman Islands, Attorneys-at-Law for the Applicant.

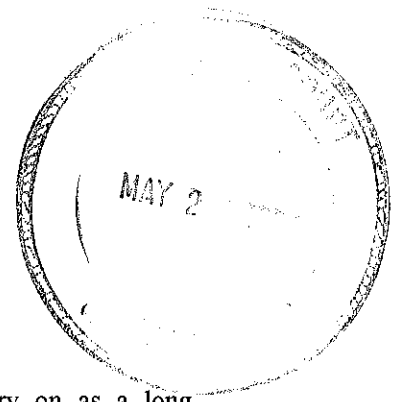
*Orren Merren & Company*

*24<sup>th</sup> May 1996*

GROUND ON WHICH RELIEF IS SOUGHT

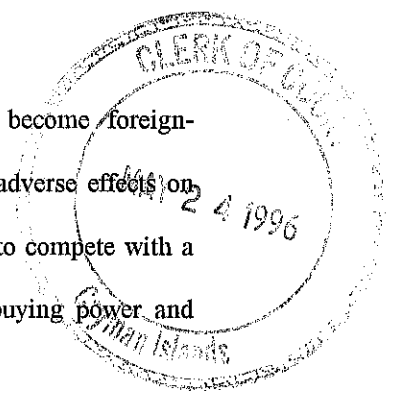
(If there has been any delay, include reasons here)

Note - Grounds must be supported by an affidavit which verifies the facts relied on.



**The Factual Background**

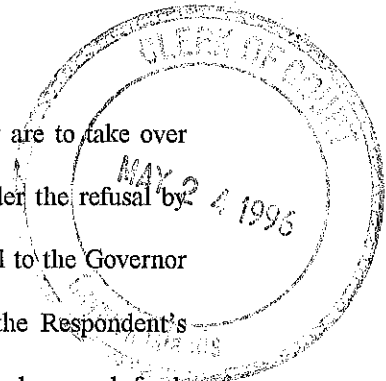
1. The Applicant is a Caymanian controlled company that continues to carry on as a long established duty free and retail business in Grand Cayman and Cayman Brac. Island Companies Ltd. ("ICL") carries on a competing business and wishes to obtain a Local Companies Control Licence ("LCCL") under the Local Companies (Control) Law (1995 Revision) ("Law") to enable majority control to pass from Caymanians to non-Caymanians by registering the transfer of 51% of the shares to Swiss retailer, Nuance Trading AG, that is a subsidiary of Swiss Air, with an option for that foreign company to acquire an even greater controlling interest.
  
2. Early in 1996 ICL applied to the Respondent for an LCCL without advertising locally as required and the Respondent required ICL to advertise before its application could be heard, consequent upon which ICL made at least one advertisement in the *Caymanian Compass* to which the Applicant responded through its attorneys. On 29<sup>th</sup> March 1996, the Applicant's attorneys wrote to ICL's attorneys advising them that the Applicant would record its strong objection to the Respondent granting ICL's application on the basis that to do so would not be in the public interest in light of the relevant criteria under section 11(3) of the Law. On the 1<sup>st</sup> April 1996, the Applicant's attorneys formally objected to ICL's application by letter to the Respondent setting out the following grounds:
  - (a) The economic situation of our Islands does not require foreign investment in the area of duty free and other retail businesses, especially in light of the need for due protection of Caymanian owned and controlled businesses already engaged in such local businesses;
  
  - (b) The nature and previous conduct of ICL and its present shareholders and directors leave much to be desired, especially as concerns fair and ethical business practices, and the Applicant considers the US\$8,262,000.00 sale price to be so unrealistically high as effectively to discourage genuine Caymanian participation;



- (c) Many disadvantages would likely result from allowing ICL to become foreign-controlled, including the likelihood of far-reaching detrimental and adverse effects on Caymanians already engaged in such businesses by virtue of having to compete with a major foreign retailer like Nuance Trading AG with its superior buying power and connections;
- (d) The desirability of retaining in the control of Caymanians the economic resources of our Islands is patently obvious, especially in the area of local duty free and retail businesses which were pioneered and developed by reputable Caymanian business people without foreign investment; and
- (e) The true ownership and control of ICL as presently structured needs to be thoroughly examined by governmental authorities to determine whether it has been satisfactorily established.

The objection was supported with substantial documentation, including letters of objection from other local Caymanian-controlled businesses that would be adversely affected should ICL's application be granted. The Respondent considered the application and the objections and reached its decision to refuse ICL's application on or about the 8<sup>th</sup> April 1996 and subsequently communicated such decision to ICL and to the Applicant.

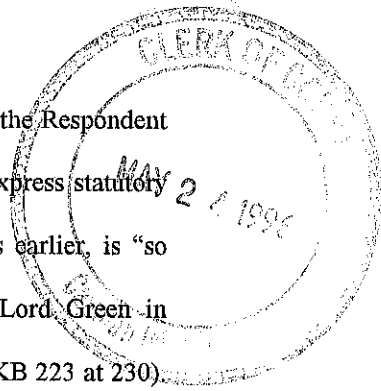
3. Shortly after refusing the application, the Respondent purported to reverse its decision after affording a representative of ICL an opportunity to be heard in person before the Respondent, without informing the Applicant or any other objectors of its intention so to do and without affording any like opportunity to the Applicant or other objectors. When the Applicant's attorneys learned of this, the Applicant's attorneys wrote to the Respondent on 23<sup>rd</sup> April 1996 requesting an opportunity to be heard or face proceedings for judicial review. Shortly thereafter the Respondent (purportedly acting on the advice of the Legal Department) decided to allow the original decision refusing ICL's application to stand, on the basis that the Respondent lacked power to reconsider their decision refusing ICL's application for an LCCL.



4. Swiss Air subsidiary, Nuance Trading AG, have announced publicly that they are to take over majority control of ICL and ICL is pressing the Respondent again to reconsider the refusal by hearing a fresh application, rather than exercising their statutory right of appeal to the Governor in Council pursuant to section 11(1) of the Law. On the 7<sup>th</sup> May 1996, the Respondent's Chairman advised the Applicant's attorneys that the Respondent had decided to hear such fresh application with regard to the same subject matter as was considered at the original hearing without saying precisely when such hearing was to take place. On the 9<sup>th</sup> May 1996, the Respondent's Chairman advised the Applicant's attorneys that the hearing of such fresh application was to take place on the 13<sup>th</sup> May 1996. Then on the 10<sup>th</sup> May 1996, the Respondent's Chairman advised the Applicant's attorneys that the hearing of such fresh application was probably to be held seven days after notice had been given to both ICL and the Applicant. On the 16<sup>th</sup> May 1996, the Respondent's Chairman advised that such hearing was to be scheduled for 29<sup>th</sup> May 1996 and this was subsequently confirmed by the Secretary to the Respondent by letter dated the 17<sup>th</sup> May 1996.

**Propositions of Law**

5. The Respondent should not be permitted to consider a renewed application made by ICL. The Respondent is under a duty not to frustrate the purposes of the Law, to promote the policy and objectives of this legislation, including the procedures its creates, and to refrain from acting contrary to the intentions of the legislature: see *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] Ac 997. Section 10 and 11 of the Law provide a clear statutory framework for determining applications, including express right of appeal to the Governor in Council against refusal. By exercising its discretion to consider and determine a renewed application by ICL, when ICL has not exercised its statutory right of appeal, the Respondent is unlawfully frustrating the procedural regime specifically created by the legislature. The Respondent is, in effect, attempting to act as an appellate body (against its own prior decisions), in circumstances where the legislation clearly envisages that appellate functions are to be carried out by the Governor in Council.



6. Further, the decision of the Respondent and/or its Chairman for and on behalf of the Respondent to consider a renewed application by ICL, when ICL has failed to exercise an express statutory right of appeal against a refusal of a similar application less than eight weeks earlier, is "so unreasonable that no reasonable authority could ever have come to it" (per Lord Green in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223 at 230).

The Respondent's action is unduly oppressive: the Applicant and other businesses opposed to the grant of a licence to ICL have been, and will be, put to the trouble and considerable expense of preparing submissions to the Respondent again. The Respondent's decision is also unreasonable, because (were it allowed simply to rehear a renewed application every time an application was refused) it could be inundated with such renewed applications, thereby causing Board members increased likelihood of being lobbied and put under unacceptable pressures, the system to slow down, and ultimately the proper functions of the Board to be seriously impeded.

7. Further, the principle of *res judicata* prevents the Respondent from considering the renewed application by ICL. The Respondent is a "judicial authority" (see *R. v. McCafferty* [1994-95 CILR N1) which, in determining and refusing ICL's earlier application, has made express and/or implied findings of law and/or fact by which it is now bound: see *Thrasyvoulou v. Secretary of State for the Environment* [1990] 2 AC 273. The principle of *res judicata* applies in this situation to give finality to those determinations. In particular, since the Respondent was under a duty under section 11(3) of the Law to make a number of factual findings, it should be implied that these findings were properly made under the presumption *omnia praesumuntur rite esse acta*. In such a case, the findings should not, under the doctrine of *res judicata*, be reopened after such a short period of time.

8. The Applicant has a "sufficient interest" in this matter as required by Order 53 rule 3(7) of the Grand Court Rules in that:

- (a) The Applicant was and is an objector to ICL's application.
- (b) To allow a massive corporate entity the size of Nuance Trading to come into the Cayman Islands market would create economic conditions that would injure and

undermine the Caymanian-controlled providers of local duty free goods and other retail businesses, including the Applicant.

- (c) Many disadvantages would likely result from allowing ICL to become foreign-controlled, including the likelihood of far-reaching detrimental and adverse effects on Caymanians already engaged in such businesses, including the Applicant, by virtue of having to compete with a major foreign retailer like Nuance Trading with its superior buying power and connections.
- (d) It is desirable to retain in the control of Caymanians the economic resources of the Cayman Islands, especially in the area of local duty free and retail businesses which were pioneered and developed (without foreign investment) by reputable Caymanian business people, including the Applicant.
- (e) The Applicant's sales are almost certainly to be adversely affected and the Applicant could be forced out of business, leaving its creditors unpaid and thereby potentially having a knock-on effect on other local businesses that supply the Applicant and others in this area of business.
- (f) The Applicant is a person, the due protection of which is required to be considered by the Respondent in accordance with section 11(3) of the Law.

The same considerations also apply to other Caymanian controlled businesses who have objected.

9. Accordingly, the Applicant hereby requests a hearing in chambers of this application pursuant to order 53 rule 3(3) of the Grand Court Rules.