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28-11-97

IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C.I.C.A. NO. 8 OF 1996 & M9 OF 1996

BEFORE: THE RT. HON. MR. JUSTICE EDWARD ZACCA, P.C. PRESIDENT
HON. MR. JUSTICE KERR, J.A.
HON. MR. JUSTICE COLLETT, J.A.

BETWEEN:		THE QUEEN	
AND:		THE IMMIGRATION BOARD	FIRST RESPONDENT
AND:	[1]	KIRK FREEPORT PLAZA LIMITED	APPELLANT
	[2]	ISLAND COMPANY LIMITED	SECOND RESPONDENT

MR. JEFFEREY JOWELL, Q.C., and MR. ADRIAN TAYLOR FOR THE APPELLANT

MR. RAMON ALBERGA, Q.C. and MR. SHAUN McCANN FOR SECOND RESPONDENT

MR. IVOR ARCHIE, SOLICITOR GENERAL FOR THE FIRST RESPONDENT

HEARD AUGUST 6, 7, 8, 11, 12, 13, 14, NOVEMBER 28, 1997

ZACCA, PRESIDENT:

This is an appeal against the Judgment of Smellie, J. given in consolidated applications for judicial review brought by Kirk Freeport Plaza Limited ["KFL"] and Island Companies Limited ["ICL"], against decisions of the Immigration Board ["the Board"] relating to ICL's application for the Board's consent to the transfer of 51% of ICL's shares to a non-Caymanian Company known as Nuance International Holding Limited ["Nuance"].

On 12th March, 1996, ICL made an application to the Board under the Local Companies [Control] Law for their consent to transfer fifty-one per cent of the shares in ICL to NUANCE and for a licence if the share transfer was approved. It appears that ICL considered its application as falling within both a consent order and the granting of a licence.

The application was advertised and on April 1, 1996 an objection was sent to the Board on behalf of KFL. In their objections to the grant of the application, reference was made to the previous conduct of ICL and its shareholders and Directors and also questioned ICL's fair and ethical business practices.

ICL's application came to be considered by the Board on April 10, 1996. ICL and its representatives were not informed by the Board of the objections lodged on behalf of KFL nor were they given an opportunity to comment or respond to the allegations made on behalf of KFL. The application was refused.

After hearing that the application had been refused, Mr. F. Renard Moxam, a director and shareholder of ICL contacted the Chairman of the Board. He met with her on the 12th April, 1996 and complained that ICL was not given an opportunity to respond to the objections lodged by KFL.

It was agreed that there would be a further hearing of the Board and that Mr. Moxam would be given an opportunity to address the Board on April 17, 1996. The objectors were not heard at this meeting. After hearing from Mr. Moxam, the Board voted to grant approval of ICL's application. Mr. Moxam was orally informed of the decision of the Board.

In a letter dated April 23, 1996, Mr. Orren Merren, complained about the reversal of the Board's decision. He expressed the view that he should have been given an opportunity to make oral representations on behalf of KFL on April 17, 1996.

The Board met on April 24, 1996 and the contents of Mr. Merrens's letter were discussed. The minutes of the meeting of April 17, 1996 were also on the agenda for confirmation. In order to get a full understanding of what took place at the meeting of the 24th April, 1996, it is appropriate to refer to the affidavit of Lorna Hampson, Chairman of the Board.

In her affidavit she states at paragraphs 15 – 16:

> 15. "The contents of that letter were discussed at the Board's meeting on April 24, 1996 at which time the minutes of the meeting of April 17, 1996 were on the agenda for confirmation. After some discussion the meeting was suspended. I had a conversation with a member of the Legal Department,. That conversation was in relation to the power of the Board in the absence of any fresh application, to reverse a decision on an application for a licence under the Law. No reference was made in that conversation to Section 8 of the Law. After discussing the gist of that conversation, the

Board decided that the decision of April 10, 1996 should stand because the Board felt that there was no power to reconsider its original decision and no new application had been made".

16. "On April 25, 1996 the Secretary of the Board wrote to the representatives of ICL informing them of the decision not to grant 'approval in principle' [exhibit "D"]. This was the first time any decision had been communicated in writing to ICL and it was also the first time that the reasons for the Board's decision were communicated."

After some discussion the Board decided to hear a fresh application on behalf of ICL on May 17, 1996. Notices were sent to the applicant and to Orren Merren and Company inviting them to attend and make representations before the Board on May 29, 1996.

Subsequent to this decision, KFL applied for and were granted leave to bring judicial review proceedings for an order of prohibition to prevent the Board from any further hearing of the application. A stay was granted until the determination of the judicial review proceedings and no hearing took place on May 29, 1996.

On 27th June, 1996 ICL made an application for leave to apply for judicial review for an order of Certiorari to quash the decisions of the 10th and 24th April, 1996 and for a declaration that the decision of the 17th April, 1996 was valid and legal. Leave was granted and the Court ordered that the judicial review proceedings brought by KFL and ICL should be consolidated and heard together.

The proceedings were consolidated and heard by Smellie, J. in the Grand Court and the following Order made:

1. It is ordered that the decision of the Respondent made on the 10th April 1996 refusing the second applicant's application under Section 8[2] of the Local Companies [Control] Law ["LCL"] was unlawful and be removed to the Grand Court and thereupon be quashed.

2. And it is declared that the decision of the Respondent made on the 17th April, 1996 granting the second applicant's application under Section 8[2] of the LCCL is lawful and valid.

3. And it is further declared that the said decision of the 17th April, 1996 will, barring a change of circumstances or of policy, in the ordinary course of ratification and administration, emanate from the Respondent.

4. And it is further ordered that the decision of the Respondent made on the 24th April, 1996 purporting to set aside its earlier decision of the 17th April, 1996 granting the second applicant's said application under Section 8[2] of the LCCL and restoring the said decision of the 10th April, 1996 was unlawful and be removed to the Grand Court and thereupon be quashed.

5. Following registration of a transfer of shares pursuant to Section 8[2] of the LCCL, consent in writing having emanated from the Board, a further application under Section 10 of the LCCL will be required by the second applicant.

6. That the first applicant's application for an Order of prohibition is not appropriate or necessary in the circumstances and is refused.

7. And it is further ordered that the carrying into effect of this Order be stayed pending the determination of the appeal, unless and until NUANCE International Holding Ltd. files the undertaking as set out in the form of the schedule annexed hereto.

8. The costs of these proceedings be reserved and are to be subject to a separate ruling of this Honourable Court.

The undertaking mentioned in the Order was given by NUANCE. Smellie, J. held that the application by ICL was an application under S. 8[2] of the Local Companies [Control] Law. The Board although constituted under the Immigration Law is vested with administrative authority under the Local Companies [Control] Law.

Section 8, subsection 2 of the LCCL provides:

> "[2] The directors and officers of a local company shall decline to register any transfer of shares in the Company if such transfer will, to the knowledge or belief of the Directors, or any of them, result in the number of shares beneficially owned by persons who are not Caymanians exceeding forty per cent of the total number of the shares issued by the Company unless prior consent is given by the Board in writing".

If the consent of the Board is obtained under Section 8, the Law provides in Section 10 that the Company may then apply to the Board for a licence to carry on business in the Islands. The law therefore envisages two stages:

[1] an application under Section 8[2] for consent to the transfer of shares; and

[2] an application under Section 10, if prior consent, to the transfer of the shares has been obtained under Section 8[2], for the grant of a licence to carry on business in the Island.

Section 10 provides:

'[1] Any Company, other than a Company to which paragraph [a] of Section 4[1] applies [i.e. a local Company)] may apply to the Board for a licence to carry on business in the Islands.

[2] An application for a licence shall be made to the Board in such form and in such manner as may be specified by the Board, and shall be accompanied by a copy of the Memorandum and Articles of Association of the Company, or the bye-law thereof, as the case may be, a statement setting out the nature of the business of the Company is carrying on and proposes to carry on and such other information as the Board may require."

In considering whether the Board should grant a licence under Section 10, the Board must have regard to Section 11 of the Law which provides:

"[1] Subject to this law, the Board may, in its discretion, grant a licence in respect of which application has been made under section 10, but, if the Board is of the opinion that it would not be in the public interest to grant a licence, it may refuse to grant one without giving reason for so refusing, but an appeal shall lie from such refusal to the Governor in Council, and the Board shall inform the applicant of its right of appeal.

[2] A licence issued shall be for such duration, not being less than twelve 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, form time to time, extend the scope of such licence.

[3] 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;
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> [b] the nature and previous conduct of the company and the persons having an interest in that company whether as directors, shareholders or otherwise;
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> [c] the advantage or disadvantage which may result from that company carrying on business in the Islands;
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> [d] the desirability of retaining in the control of Caymanians the economic resources of the Islands;
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> [e] the efforts made by the company to obtain Caymanian participation;
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> [f] the number of additional people from outside the Islands who would be required to reside in the Islands were the application to be granted;
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> [g] whether the company, its directors and employees have and

9. "Any person aggrieved by, or dissatisfied with any decision of the Board [other than a decision under Section 9] may, within twenty-one days of the communication of the decision to him or such longer period as the Governor may, for good cause shown allow, appeal therefrom to the Governor whose decision shall be final and binding upon the applicant. Provided that for the purposes of this section the decision shall, if notice thereof is sent to him by post, be deemed to have been communicated to him at the time it would have been received in the ordinary course of post."

Smellie, J. held that there was a right of appeal vested only in the applicant from a refusal of consent under s.8 of the LCCL. This right of appeal is conceded and so is not an issue on this appeal.

For the appellant, Mr. Jowell submitted that the grounds of appeal fall to be considered under six broad heads:

[1] Alternative remedy;

[2] Procedural fairness of the decision of the 10th April, 1996;

[3] Legitimate expectation arising from the decision of 17th April, 1996;

[4] The lawfulness of the decision of 24th April, 1996;

[5] The lawfulness of the decision to rehear on 17th May, 1996;

[6] Proper and appropriate relief.

[iii] The particular complexity of the layers of decisions or purported decisions of the Board to be taken up in the challenge would itself give rise to the issue of just what decision or decisions would be the subject of appeal and thus uncertainty in the appellate process.

[iv] To the extent that an aspect of ICL's challenge- as to the decision of the 10th April – is that it is null and void for being tainted with illegality, or procedural impropriety, there would be an issue whether the appeal procedure could begin to operate from such a decision [per Lord Templeman in **Ex. P., Preston**] (supra) – at page 862 letter F.

This I consider to be so notwithstanding Mr. Jowell's view that the appeal would be **de novo** and therefore capable of remedying all complaints. Absent is any express statutory provision that an appeal might include one which challenges a decision for being a nullity [see **Harley Development Inc. v Comm. of Inland Revenue** (supra)]

[v] KFL's complaint is such as to be appropriately dealt with only by way of judicial review, as they seek to do by applying for prohibition. That was acknowledged by all counsel and there is no dispute that in principle KFL has a sufficient interest – [see for example **Ex parte Peachey Property Corporation. Ltd.** supra – at page 401 letter A-C and **R v Ex. P. Liverpool Taxi Assoc. [1972] 2 Q.B. 299]** – even if it is not to be regarded as an "aggrieved person" for the purposes of the statutory appeal. As shown above, the issues taken up in KFL's complaint were inextricably linked with those raised in ICL's. That being so I would regard the requirement that ICL first pursues its statutory remedy as being nowhere "so convenient, beneficial or effectual" as having the matters dealt with together by way of judicial review[**Ex Parte Peachey** supra – p. 400 – letter C].

[vi] Although it is the case that the appellate tribunal has the benefit of comprehensive legal advice, the matters involved are not only complex but also of general public interest and importance. They are such that, in my view, they can only fully and adequately be dealt with by way of the amplitude of judicial review and - if I might be allowed the observation – as has been admirably demonstrated by the industry all of counsel in this case.

Regina v Huntingdon District Council, Ex parte Cowan and another [1984] 1 W.L.R. 501 per Glidewell, J. [As he then was] at page 507 letter F – recognises that the public importance of the matters involved may itself present exceptional circumstances to warrant the recourse to judicial review.

[vii] A final, and in the particular context of this case important consideration, is the question raised whether ICL would have been fully able to canvass an appeal, the factual circumstances which affect its claim of unfairness and procedural impropriety. This particular consideration arose for the first time when, in these proceedings, it came to light that ICL had no knowledge of the substance of KFL's objections and which may have influenced the Board's decision, until the letter containing those objections was disclosed in the affidavit evidence filed in these proceedings.

There is no basis for concluding that that letter would have been made available to ICL before it could have submitted its grounds of appeal to the Governor-in-Council. Thus, the likelihood that the letter would have been sent up from the Board as a part of the appellate record serves in no way to diminish ICL's concerns in that regard. For that reason also I conclude that the statutory appellate route may not have been an equally effective remedy [see **Ex parte Calveley** (supra page 433 letter E)].

In **<u>Reg V Inland Revenue Commissioners Ex Parte Preston [1985]</u>** <u>A.C. 935</u>, Lord Scarman at page 852 said:

> "My fourth proposition is that a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial Review is a collateral challenge: it is not an appeal. Where Parliament has provided by statutes appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision."
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> … … … … … … …
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> "But cases for judicial review can arise even where appeal procedures are provided by Parliament. The present case illustrates the circumstances in which it would be appropriate to subject a decision of the Commissioners to judicial review. I accept that the court cannot, in the absence of special circumstances, decide by way of judicial review to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair."

At page 862, Lord Templeman stated:

> "The only remedy which might be available to the appellant was the remedy of judicial review. Judicial review is available where a decision making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers. Judicial review should not be granted where an alternative remedy is available."

In **Reg. -v- Chief Constable of Merseyside Police, Ex parte Calveley [1986] 1 Q.B. 424**, Sir John Donaldson, M.R. at page 433 said :

> "This, like other judicial pronouncement on the inter-relationship between remedies by way of judicial review on the one hand and appeal procedures on the other, is not to be regarded or construed as a statute. It does not support the proposition that judicial review is not available where there is an alternative remedy by way of appeal. It asserts simply that the Court in the exercise of its discretion, will very rarely make this remedy available in these circumstances.
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> In other cases, Courts have asserted the existence of this discretion, albeit with varying emphasis on the reluctance to grant judicial review. Thus in **Reg -v- Paddington Valuation Officer, Ex parte Peachey Property Corporation Ltd. [1966] 1 Q.B. 380, 400,** Lord Denning, M.R., with the agreement of Danckwerts and Solomon L.J.J., held that Certiorari and Mandamus were available where the alternative statutory remedy was "nowhere near so convenient, beneficial and effectual". In **Reg. vs Hillington London Borough Council, Ex parte Reyco Homes Ltd. [1974] Q.B. 720, 728**, Lord Widgery, C.J. said: "It has always been a principle that Certiorari will go only where there is no other equally effective and convenient remedy". In **Ex parte Waldron [1985] 3 W.L.R. 1090, 1108, Glidwell, L.J**, after referring to this passage, said:
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> > "Whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower, than procedure by way of judicial review; whether the matter depends on some particular or technical knowledge which is more

> readily available to the alternative appellate body; these are amongst the matters which a Court should take into account when deciding whether to grant relief by judicial review when an alternative remedy is available."

In **Reg -v- Birmingham City Council ex parte Ferrero [1993] 1 All E.R. 530,** it was held that the appeal procedure was at least as expeditious, if not more so than judicial review and that it was more suited than judicial review to the resolution of issues of fact. Lord Justice Thyler stated that the decision was a matter of judicial discretion, and that it was well established that the Court should be slow to reverse the discretion of a learned trial judge. In **Harley Development Inc. -v- Commissioner of Inland Revenue [1996] 1 W.L.R. 727** [P.C.] it was held that where a statute laid down a comprehensive appeals procedure for administrative decisions, and such a decision had not been appealed, the Courts would only entertain an application for judicial review in exceptional circumstances, typically where an abuse of power was alleged.

Lord Jauncey of Tullichettle at page 732 said:

> "Indeed for the purposes of judicial review it matters not whether the assessor's decision was wrong. What matters is whether it was so wrong that he could be said to have exceeded his jurisdiction in making it whereby it was a nullity. Mr. Gardiner's argument fails to demonstrate this in as much as a respectable argument can be advanced in support of the Commissioner's submissions. It follows that for this reason also the statutory appeals procedure is a competent method of challenge."

Lord Jauncey at page 735 refers to Lord Scarman's fourth proposition in **Reg. v Inland Revenue Commissioners, ex parte Preston** and then said:

> "This proposition was elaborated in Inland Revenue Commissioners vs Aken [1990] 1 W.L.R. 1374, 1380 by Fox, L.J. in the following passage:
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> > '**In Re Vanderwell's Trusts [1971] A.C. 912, 933**, Viscount Dilhorne said: 'but where the correctness of an assessment, and so the liability to pay income tax or surtax, is challenged, that can only in my opinion, be decided by the special or general Commissioners.' I refer also to the speech of Lord Diplock in that case, at p. 944. That then is the true principle applicable in these cases, namely, that the statutory machinery is exclusive machinery for an appeal from a notice of assessment. There is normally no other. However, I do not say there are no cases in which, exceptionally, a challenge by way of judicial review or otherwise to a decision of the revenue would be possible. There may be cases where, for example, there has been some abuse of power or unfairness, which would justify the intervention of the Court: see for example **Reg vs Inland Revenue Commissioners Ex parte Preston [1985] A.C. 835**. But that is exceptional. Normally the statutory machinery under the Taxes Management Act 1970 is the exclusive machinery for challenge to an assessment by a taxpayer. In my judgment there is nothing in the present case which comes near to

> such impropriety by the revenue to justify departure from the normal procedure."

There are other dicta of high authority to the same effect. Their Lordships consider that:

> "Where a statute lays down a comprehensive system of appeals procedure against administrative decisions, it will only be in exceptional circumstances, typically of abuse of power, that the Courts will entertain an application for judicial review of a decision which has not been appealed. The two decisions in these appeals involve no unfairness and hence no abuse of power."

Mr. Alberga for ICL submitted that the cumulative effect of the reasons stated by Smellie, J. for exercising his discretion in his conclusion that this was an exceptional case cannot be faulted. He argued that there was no absolute rule of law to the effect that a person must exhaust a statutory right of appeal before seeking judicial review. The Court was referred to the 7th Edition of Sir William Wade's Administrative Law.

At page 721, the author states:

> "An administrative appeal on the merits of the case is something quite different from judicial determination of the legality of the whole matter."

After looking at some of the decisions of previous cases, the author at page 722 states:

> "These decisions confirm what was said on one of the classic cases: "A party is not concluded by not appealing against a nullity. If the order is one which the applicant is entitled for any reason to have quashed

> as a matter of law, it is pointless to require him first to pursue an administrative appeal on the merits."

Page 723:

> "Recently the case law has produced a copy of judicial statements which conflict with the rule just explained. It had been said that, where there is some right of appeal, judicial review will not be granted 'save in the most exceptional circumstances'; and that the normal rule is that the applicant 'should first exhaust whatever other rights he has by way of appeal'. This novel attitude, which does not appear to be based on authority, may be due to the increasing pressure of applications for judicial review, which are now so numerous. It has not, as yet, in practice led to denial of judicial review, where eligible grounds for it are shown, merely because a right of appeal has not been exercised. But that may occur before long if these formidable dicta are taken at face value."

Reference was also made to VI Halsbury's Laws of England, fourth edition [reissue] at paragraph 61-

> "The Courts in their discretion will not normally make the remedy of judicial review available where there is an alternative remedy by way of appeal. However, judicial review may be granted where the alternative statutory remedy is 'nowhere near so convenient, beneficial and effectual' or 'where there is no other equally effective and convenient remedy'. This is particularly so where the decision in question is liable to be upset as a matter of law because it is clearly made without jurisdiction or in consequence or an error of law."

In **<u>RICHARD GORDONS CROWN OFFICE PROCEEDINGS</u>** paragraph C4-082 states:

> "The existence of an alternative remedy is not by itself, a ground for refusing relief. Such remedy may not be designed to achieve the same ends as judicial review. The right of appeal, for example, frequently relates to merits rather that legality."

C4-084 states:

> "It is hard to detect consistency in the Court's approach to alternative remedy as a basis for refusing substantive relief or judicial review. In Ex parte Waldron, Glidewell, L.J. observed that the choice of remedy ought to depend upon whether an alternative statutory remedy would resolve the question fully, whether it would be quicker and whether it demanded special knowledge. Other cases have emphasised that where there is an alternative remedy, judicial review will only be granted exceptionally. In reality, however, it has rightly been observed that 'when genuine grounds for judicial review are alleged, it is the refusal rather than the grant of relief which is the exceptional course.' "

In **REG V. HUNTINGDON, D.C. EX PARTE COWAN** [1984] 1 W.L.R. 501, Glidewell, J. At page 507 said:

"As I have said, the relief sought is discretionary. Where there is an alternative remedy available but judicial review is sought, then in my judgment the Court should always ask itself whether the remedy that is sought in the Court, or the alternative remedy which is available to the applicant by way of appeal, is the most effective and convenient, in other words, which of them will prove to be the most effective and convenient in all the circumstances, not merely for the applicant, but in the public interest. In exercising discretion as to whether or not to grant relief, that is a major factor to be taken into account."

IN **R V DEVON COUNTY COUNCIL** [1995] 1 ALL ER 73, Simon Brown, L.J. at page 92 said:

> "Which of two available remedies, or perhaps more accurately, avenues of redress, is to be preferred will depend ultimately upon which is the more convenient, expeditious and effective. Where Ministers have default powers, application to them will generally be the better remedy, particularly where as so often, the central complaint is in reality about the substantive merits of the decision. The Minister brings his department's expertise to bear upon the problem. He has the means to conduct an appropriate factual inquiry. Unlike the Court, moreover he can direct a solution rather than merely leave the authority to redetermine the question. Where on the other hand, as here, what is required is the authoritative resolution of a legal issue, issue No. 1, then in common with Dillon, L.J. I would regard judicial review as the more convenient alternative remedy."

Having reviewed the cases, it would appear that there is a strong view that judicial review should not be granted where there is an alternative remedy of appeal, except in exceptional circumstances. However, the cases suggest that in certain circumstances, judicial review may be granted where there is an alternative remedy of appeal. There is a discretion in the Judge to decide the appropriate remedy.

In the instant case, the matter to be decided was whether any one of the decisions of the Board was a valid decision and legally binding. It involves the question of procedural fairness and also the issue as to what is to be regarded as exceptional circumstances. KFL had also been granted leave for judicial review of the Board's decision to rehear the application on May 29, 1996. In such an application the Board may well have been faced with arguments as to the previous decisions. ICL had been granted leave for judicial review of the decisions of the Board. There was therefore a link between the two applications for judicial review. From the arguments presented to the Court, there are legal issues to be resolved.

The learned trial Judge exercised his discretion in holding that there were exceptional circumstances in this case and that judicial review was the appropriate remedy. We see no reason for holding that the Judge has not properly exercised his discretion.

In our view judicial review is the most effective and convenient remedy for deciding the issues which are involved in this matter.

PROCEDURAL FAIRNESS

Mr. Jowell submitted that the application which was heard on the 10th April, 1996 was a pure "application" case. There was therefore no duty on the Board to make any disclosure to ICL nor to hear ICL on the objections which were before the Board. It was further argued that the mere levelling of charges was not enough for disclosure, and that the true test was whether the refusal of the application expressly or necessarily implied to the outside world that ICL's or its directors or shareholder's characters or previous conduct were in issue or that they had committed some form of wrongdoings. There was no implication of a slur on the character of the applicant.

Reference was made to the case of **McINNES V ONSLOW – FANE [1978] 1 W.L.R. 1520** and relied on by both Mr. Jowell and Mr. Alberga. An application was made to the British Boxing Board for the grant of a boxer's Manager's licence. The applicant asked for an oral hearing and for disclosure of prior information which might militate against a favourable consideration.

The application was refused without having given the applicant an oral hearing and without giving him any reasons for the refusal.

In his judgment Megarry, V.C. at page 1528 said:

> "Second where the Court is entitled to intervene, I think it must be considered what type of decision is in question. I do not suggest that there is any clear or exhaustive classification; but I think that at least three categories may be discerned. First, there are what may be called the forfeiture cases. In these, there is a decision which takes away some existing right or position, as where a member of an organization is expelled or a licence is revoked. Second, at the other extreme there are what may be called the application cases. These are cases where the decision merely refuses to grant the applicant the right or position that he seeks, such as membership of the organization, or a

> licence to do certain acts. Third, there is an intermediate category, which may be called the expectation cases, which differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted.
>
> It seems plain that there is a substantial distinction between the forfeiture cases and the application cases. In the forfeiture cases, there is a threat to take something away for some reason: and in such cases, the right to an unbiased tribunal, the right to notice of the charges and the right to be heard in answer to the charges (which in Ridge v Baldwin [1964] A.C. 40, 132, Lord Hodson said were three features on natural justice which stood out) are plainly apt. In the application cases, on the other hand, nothing is being taken away, and in all normal circumstances there are no charges, and so no requirement of an opportunity of being heard in answer to the charges."

At page 1531:

> "I think it is clear that there is no general obligation to give reasons for a decision. Certainly in an application, where there are no statutory or contractual requirements but a simple discretion in the licencing body, there is no obligation on that body to give their reasons."

Megarry, V.C. then referred to the case of **<u>REG V GAMING BOARD FOR GREAT BRITAIN, EX PARTE BENAIN AND KHAIDA</u> [1970] 2 Q.B.** 417 and stated:

> "In the latter case, the gaming board were under a statutory obligation to have regard only to certain criteria. For this purpose the board were under a statutory obligation to take into consideration in particular "the character, reputation and financial standing" of the applicants (and of certain other

persons) for what in effect was the certificate of fitness that was requisite on application for a licence. The Court of Appeal held that the board were under a duty to act fairly which required the board to give the applicants a sufficient indication of any relevant objections raised against them to enable the applicants to meet them. On the other hand, the board need not reveal the details or the sources of the information, nor when the board came to decide the application need the board give any reasons."

At page 1535, Meggary, V.C. said:

> "Looking at the case as a whole, in my judgment there is no obligation on the board to give the Plaintiff even the gist of the reasons why they refused his application, or proposed to do so. This is not a case in which there has been any suggestion of the board considering any alleged dishonesty or morally culpable conduct of the Plaintiff. A man freed from any moral blemish may nevertheless be wholly unsuitable for a particular type of work. The refusal of the Plaintiff's application by no means necessarily puts any slur on his character, nor does it deprive him of any statutory right."

In the case of **R v Secretary of State for the Home Department ex parte Fayed and Another [1997] 1 All ER 227**, an application was made by the Fayed brothers for naturalization as British Citizens. Their applications were refused without given any reasons.

On appeal, by a majority, the Court of Appeal held that where the decision involved the exercise of a discretion, the Home Secretary was required to exercise that discretion reasonably. The Home Secretary was required to give the applicant sufficient information as to the subject matter of his concern in such terms as to enable him to make such representations as he could. The Home Secretary's decision was quashed.

Lord Wolf, M.R. at page 241 said:

> "I appreciate that there is also anxiety as to the administrative burden involved in giving notice of areas of concern. Administrative convenience cannot justify unfairness but I would emphasize that my remarks are limited to cases where an applicant would be in real difficulty in doing himself justice unless the area of concern is identified by notice. In many cases which are less complex than that of the Fayeds the issues may be obvious. If this is the position, notice may well be superfluous because what the applicant needs to establish will be clear. If this is the position, notice may well not be required. However, in the case of the Fayeds, this is not the position because the extensive range of circumstances which could cause the Secretary of State's concern mean that it is impractical for them to identify the target at which their representation should be aimed."

At page 242:

> "It is true that until the areas of concern are identified so that it can be ascertained whether the Fayeds would be in a position to make further representations, it will not be possible to say whether an injustice has occurred. However, justice must not only be done but be seen to be done and it has not been seen to be done in relation to the application of the Fayeds. They have not had the fairness to which they are entitled and the rule of law must be upheld."

Lord Justice Phillips at page 251 said:

> "In the light of these authorities I am satisfied that, in the absence of s.44, an applicant under s.6 would be entitled to be informed of the nature of matters adverse to his application so as to be afforded a reasonable opportunity to deal with them. An applicant for citizenship has not at risk any vested right. In that

> respect this case differs from **A.G. V Ryan**. The right for which he applies is, however, a right of great importance.-----
>
> There is another side of the coin. The refusal of British nationality to one who has, apparently, satisfied all the technical requirements of s.6 is likely to carry the natural implication, both in this Country and abroad, that he has attributes of background, character or conduct that are disreputable.
>
> I consider that these factors give the applicants stronger grounds for urging a duty of disclosure than existed in the Gaming Board case. The refusal of the benefits of naturalisation and the adverse inferences that will be drawn from such refusal are so serious that, as a matter of natural justice, an applicant should not be visited with them without a fair chance to meet the adverse case that threatens this result."

Mr. Jowell submits that even if the Fayeds' application was a true application case, the ratio of the decision is that fairness only required disclosure in the present case if the refusal of ICL's application would cast a slur upon it's Directors or shareholders. In the present case there could not be any implication of a slur on the character of the applicant.

The Court was informed that an appeal to the House of Lords is yet to be heard in the Fayeds case.

KFL also relies on two Jamaican cases, **Clough v Supt. Greyson et al S.C.C.A. 24/88** and **Aston Kane v Minister of Home Affairs and Justice [1975] 23 W.I.R. 416.**

Clough's case concerned the revocation of a firearm's licence. The Firearm's Act made provisions for such a revocation. It also provides for an appeal to the Minister of National Security and for the appropriate authority [the Police] to submit to the Minister the reasons for the revocation. The Court of Appeal held that there was no right to be heard before the revocation of the licence but that the licence holder has a right to be heard on appeal to the Minister. Carey, J.A. stated that the requirement that reasons should be submitted to the Minister is an indication that there is no requirement for the licence holder to be heard in the proceedings before the appropriate authority.

Mr. Alberga submitted that Clough's case did not involve a consideration of the question of whether the Commissioner of Police had acted unfairly in not bringing to the attention of Clough any charges or allegations which had been made against him and had led to the revocation of the firearm's licence.

In Kane's case, there was a revocation of Kane's firearm's licence by the appropriate authority. Mr. Kane appealed to the Minister who turned down his appeal. He was not given an opportunity to be heard before the Minister. A summons for extension of time within which to apply for an Order of Certiorari was filed.

The summons was dismissed by the Chief Justice. On appeal, it was held that the failure of the Minister to give the appellant an opportunity to be heard at the hearing of his appeal against the order for revocation of his licence was in the particular circumstances, a breach of the rules of natural justice. However, Certiorari was a discretionary remedy and the applicant's inexcusable delay would not entitle him to redress.

These two cases were clearly not application cases and did not involve the issue of objections being made in relation to the application as in the present case. They can therefore be distinguished from the present case.

In **Regina v Huntingdon District Council ex Parte Cowan and Another [1984] 1 W.L.R. 501**, an application was made to the local authority for an entertainment licence. The application was refused by the local authority, having received observations from the police, fire authority and a petition from members of the public. The applicant was neither informed that any objections had been received nor given an opportunity to comment or put their case.

The applicants sought judicial review which was granted. It was held that in exercising its function, the rules of natural justice applied. That there was a duty on the local authority to inform the applicant of the substance of any objections or representations made and to give the applicants an opportunity to reply.

Glidewell, J. At page 508 said:

> "Accordingly, in my judgment, a local authority is under a duty, when dealing with entertainment licences, first, to inform the applicant of the substance of any objection or of any representation in the nature of any objection [not necessarily to give him the whole of it, nor to say necessarily who has made it, but to give him the substance of it]; and secondly to give him an opportunity to make representations in reply."

What then are the facts in the present case? On 12th March, 1996 ICL made an application to the Board for the grant in principle of a Local Companies [Control] Law Licence. The application was before the Board on March 13, 1996 but the Board deferred consideration for four weeks in order to give more time for response to advertisements which had been placed in the local newspaper inviting local participation in the proposed sale of shares.

The Board received a letter dated April 1, 1996 from Orren Merren and Company on behalf of KFL objecting to the grant of ICL's application. One of the grounds of objection was to the following effect:

> [b] "The nature and previous conduct of the applicant Company and its present shareholders and directors leave much to be desired, especially as concerns fair and ethical business practices, and our client considers the U.S. $8,262,000.00 sale price to be so unrealistically high as effectively to discourage genuine Cayman participation."

The application was placed before the Board on April 10, 1996. ICL and its representatives were not informed by the Board of the objections lodged by Orren Merren and Company nor were they given an opportunity to comment or respond to the several allegations contained in the letter of April 1, 1996. There is some evidence that there were other objectors to the application.

The Board, after considering ICL's application voted not to grant 'approval in principle'. Whilst there is no specific evidence that the Board took into account the objections in refusing the application, the inescapable reasonable inference must be that the objections were considered.

On April 12, 1996, the decision of the Board was verbally communicated to Mr. Moxam who requested an opportunity to make representations to the Board. It was agreed by the Board to give Mr. Moxam an opportunity to address them.

The Board met on April 17, 1996 and after hearing Mr. Moxam, the Board voted to grant approval in principle. The objectors were not heard at this meeting. Up to April 17, 1996, no communication in writing had been sent to the applicant.

Under S.8[2] of the Law, for the decision of the Board, granting the application, to be effective, it must be communicated in writing. This was not done.

The meeting of the Board on April 17, 1996 must be seen in the light of a review of the decision of April 10, 1996. The Board was entitled to adopt this course if they felt that Mr. Moxam ought to have been given an opportunity to make representations as to the objections. (See **DeVerteuil v Knaggs and Another [1918] A.C. 557)**

Assuming that there was procedural unfairness at the meeting of April 10, 1996, this would have been cured as a result of the meeting on April 17, 1996. If the Board had communicated its decision of April 17, 1996 in writing to the applicant, this would have been an end of the matter.

However, this was not to be. It appears that KFL and Orren Merren and Company learnt of the decision of April 17, 1996 and wrote a letter dated April

23, 1996, to the Board expressing its disapproval of the Board reversing its decision made on April 10, 1996, without giving KFL an opportunity to be heard.

Next followed a meeting of the Board on April 24, 1996 when the letter from Mr. Merren was discussed. Also on the agenda were the minutes of the meeting of April 17,1 996 for confirmation.

In order to ascertain what happened at this latest meeting, I will set out what Mrs. Lorna Hampson, the Chairman of the Board, stated in her affidavit at paragraphs 15 and 16:

> 15. "The contents of that letter were discussed at the Board's meeting on April 24, 1996 at which time the minutes of the meeting of April 17, 1996 were on the agenda for confirmation. After some discussion the meeting was suspended. I had a conversation with a member of the Legal Department. That conversation was in relation to the power of the Board, in the absence of any fresh application, to reverse a decision on an application for a licence under the Law. No reference was made in that conversation to Section 8 of the Law. After discussing the gist of that conversation, the Board decided that the decision of April 10, 1996 should stand because the Board felt that there was no power to reconsider its original decision and no new application had been made.
>
> 16. On April 25, 1996 the Secretary of the Board wrote to the representatives of ICL informing them of the decision not to grant 'approval in principle' [exhibit "D"]. This was the first time

> any decision had been communicated in writing to ICL and it was also the first time that the reasons for the Board's decision was communicated."

In that letter, the Secretary of the Board wrote in part:

> "This application was reviewed by the Immigration Board, at a recent meeting and was declined in accordance with the provisions of Section 11[1] of the Local Companies Law 1995 [Revised]".

We are not here now concerned with whether the legal advice given to the Board was correct. The fact is that the Board after receiving that advice reviewed the decision of April 17, 1996. This they were entitled to do. The Board decided that the decision of April 10, 1996 should stand.

The decision of the Board on April 24, 1996 therefore superseded the decision of April 17, 1996.

What then is the effect of the decision of April 24, 1996? It is that on that date only one decision, that of April 10, 1996 existed. This decision was taken without any further consideration of the merits of the application. It means therefore that the April 10, 1996 decision must now be looked at without any consideration of the meeting of April 17 and April 24, 1996.

The effect of the April 10, 1996 decision is that it was taken without any opportunity given to either ICL or KFL to make representations. Serious allegations of misconduct had been made against the applicant by KFL. There were also other objections.

The rule of natural justice or as it has been termed, Procedural Fairness, placed a duty on the Board to inform the applicant of the substance of the objections, and to give the applicants an opportunity to make representations whether in writing or orally. This the Board failed to do. An Order of Certiorari would therefore be granted to quash the decision of April 10, 1996.

In view of the decision reached, it is unnecessary to consider the issue of Legitimate Expectation. It is to be observed, however, that Mr. Alberga abandoned his support of the Judge's findings on this aspect of the matter.

I have had the opportunity of reading the judgement of Kerr, J.A. who has expressed an opinion on this issue. I merely wish to state that I agree with his reasons and conclusions.

The effect of this decision is that the Board should now rehear the application under Section 8[2], observing procedural fairness.

The Order made by Smellie, J. is vacated and the following Order is substituted:

[1] Order of Certiorari is granted to quash the decision of the 10th April, 1996;

[2] Order of Prohibition is refused;

[3] The decision of the Board made on 17th April, 1996, granting I.C.L.'s application under S.8[2] of L.C.C.L. is not a valid decision;

[4] The Board should now rehear the application of I.C.L. under S.8[2] observing procedural fairness.

On the question of costs, I would make no Order for costs here and in the court below for the following reasons:

(i) The vacillation of the Board is the real basis for the institution of these complex proceedings.

(ii) This vacillation was induced:

(a) mainly by a series of contentious representations on behalf of both KFL and ICL; and
(b) supplementarily by the erroneous legal advice that the Board had no jurisdiction to entertain a hearing from or on behalf of ICL in response to the objections.

KERR, J.A. :

I have had the benefit of reading the draft Judgment of the Right Honourable President, in which he has diligently adverted to the relevant statutory provisions, quoted or referred to the reasons and conclusions of the learned trial Judge, Smellie, J., referred to dicta from the numerous cases cited, and summarised and considered the arguments of Counsel. Rather than indulging in an endeavour that would be both an unnecessary and ardous task, I shall with gratitude and appreciation of his efforts take advantage of his so doing and concisely express my concurrence in the following conclusions and the reasons upon which they rested:-

I. That as Smellie, J, held: Judicial review was the most effective and convenient remedy because of the exceptional circumstances of the case – **R v Devon County Council [1995] 1 ALL ER 73**. That these exceptional circumstances included the question of inherent invalidity in anyone of the decisions of the Board and there was, therefore, a link between the two applications for judicial review.

II. That it was the inescapable inference that the decision of the Board of the 10th April, 1996, in refusing ICL's application was influenced by allegations in the objections of KFL and that there were
certain allegations (referred to in the Judgment) that procedural fairness required giving the ICL an opportunity to be heard and the Board in granting such an application was "entitled to adopt that course" – **De Verteuil v Knaggs et al [1918] A.C. 557.**

III. That the favourable decision of the Board on April 17, after the hearing on behalf of ICL was not perfected for want of written communication to ICL. Consent of the Board in writing had not been sent to ICL as required by section 8 (2) of the Local Companies (Control) Law.

IV. That the decision of April 24, 1996, was taken without further consideration and was to the effect that the decision of April 10, should stand.

V. "The effect of the April 10, 1996, decision is that it was taken without any opportunity given to either ICL or KFL to make representations. Serious allegations of misconduct had been made against the applicant by KFL. There were also other objections.

The rules of natural justice or as it has been termed, Procedural Fairness, placed a duty on the Board to inform the applicant of the substance of the objections, and to give the applicants an opportunity to make representations whether in writing or orally. This the Board failed to do. An Order of Certiorari would, therefore, be granted to quash the decision of April 10, 1996."

LEGITIMATE EXPECTATION

On Mr. Alberga frankly abandoning his support for the Judge's finding, Zacca, P, because of the decision to which he eventually came, considered it unnecessary to deal with this question. However, implicit in his decision is the overruling and setting aside the following declarations of Smellie, J:

> "2. **.....declared** that the decision of the Respondent made on the 17th April 1996 granting the second applicant's application under section 8 (2) of the LCCL is lawful and valid.
>
> 3. **.....further declared** that the said decision of the 17th April 1996 will, barring a change of circumstances or of policy in the ordinary course of ratification and administration, emanate from the Respondent."

However, as a finding of legitimate expectation was one of the plinths upon which Smellie, J. rested his judgment and as the submissions that the learned trial Judge erred in so doing was the spearhead of Mr. Jowell's attack upon the validity of the 17th April decision of the Board, I am moved to positively deal with this question.

Mr. Jowell submitted that while Smellie, J, was correct in accepting the submission that until written consent was given by the Board to ICL in accordance with section 8 of the Local Companies (Control) Law, there was no effective decision nevertheless, he erred in law in holding that there was legal effect in the form of "at best a legimitate expectation that if written confirmation of the decision of the Board were not to emanate from the Board then any further deliberations by the Board would have to observe the requirements of procedural fairness". The factual basis for this was the oral communication of the decision of the 17th April to ICL. Mr. Jowell argued that the learned trial Judge erred when he held that this created a legitimate expectation and that "written confirmation will in the ordinary course of ratification and administration emanate from the Board". In support of his argument that the oral communication was insufficient to give legal effect to that decision of the Board he referred to a number of cases including **<u>Cooperative Retail Services Limited v Taff-Ely Borough Council [1980] P & CR 223 (CA)</u>** and House of Lords version of approval in **<u>Attorney-General ex rel.</u> <u>Co-operative Retail Services Ltd v. Taff-Ely Borough Council and Another</u> [1981] 42 42 P & CR 1 HL**; also **<u>R. v. West Oxfordshire D.C. ex p. Pearce Homes</u> Ltd. [1986] JPL 522**. Further in any event, a legitimate expectation arises only where a person has been permitted in the past to enjoy or when he has received an assurance of a hearing before being deprived of an existing benefit – but not a mere hope of a future benefit – **<u>Council of Civil Service Unions v. Minister for the Civil Service</u> [1985] 1 AC 374 at 408 (F-H)**; and **<u>Attorney-General for New South Wales v. Quin</u> [1992] LRC (Const) 751** and, accordingly, the facts of the case did not support the finding of a legitimate expectation by the Judge.

While from its very nature there can be no definite unassailable limitations to the concept of legitimate expectation, having regard to the submission of Counsel for KFL, I am of the view that it would be an unwarranted extension of the principle of legitimate expectation to meet the circumstances of the instant case.

The finding that the decision of the 17th April in the absence of written communication had no legal effect does not in any way affect the finding that the decision of the 24th April was a nullity for the reasons set out in the

Judgement of Zacca, P; therefore, the written communication to the Board could not cure its fundamental invalidity.

Now while a particular reason for a decision is certainly relevant in considering whether or not that decision should be affirmed, the appeal is not from the reasons but from the decision. Accordingly, it is open to an Appellate Court to consider whether there are other bases upon which the decision can be properly founded.

Now the Order of Smellie, J., for the Board to perfect the decision of the 17th April by giving the necessary notice is only explicable on a finding that:

(i) that decision, based as it was on the merits was the only valid decision;

(ii) the subsequent decision of the 24th April was inherently invalid and incapable of affecting that of the 17th; and

(iii) he was ordering the Board to do what ought to have been done.

Attractive though that interpretation of the Judgement may be, it is not now tenable because the matter did not end there. Notwithstanding the invalidity of the decision of the 24th April, the omission to communicate in writing the decision of the 17th April, not only rendered it devoid of legal effect but also inconclusive. In the circumstances, it was open to the Board to entertain further representations and that was exactly what the Board did, resulting in the decision of the 17th May to have a hearing de novo. Such a hearing was prevented by KFL's application for judicial review seeking thereby an Order for prohibition.

In the end, there was no valid final decision by the vacillating Board and in the circumstances an Order remitting the matter for such a hearing by the Board would be the just and only appropriate remedy. For these reasons, I concur with the Order of Zacca, P, as set out in his judgment.

COLLETT, J.A.

I have had the opportunity of reading in draft form the Judgements of the President and of Mr. Justice Kerr herein. I agree with the reasoning and conclusions of both and there is nothing which I can usefully add except to concur in the terms of the order proposed.