

**IN THE SUPREME COURT OF BELIZE, A.D. 2010**

**CLAIM NO. 590 of 2009**

**JIMMY QUINTO  
ERNILDA QUINTO  
LOUIS S. SYLVESTRE  
MARIA ELENA SYLVESTRE  
ALLANA M. GILLET  
SIMON REARDON SMITH  
LAUREN REARDON SMITH  
DR. LEROY HEUSNER  
YVONNE HEUSNER**

**CLAIMANTS**

**AND**

**DEAN SAMUELS  
KEVIN HERRERA  
EMIL ARGUELLES  
KISHORE BHOJWANI  
MAYOR ZENAIDA MOYA  
As Members of the Belize City Trade Licensing Board**

**DEFENDANTS**

Hearings

2010

19<sup>th</sup> July

6<sup>th</sup> August

17<sup>th</sup> September

Mrs. Ashanti Arthurs-Martin for the Claimants.

Mr. Lionel Welch for the defendants.

LEGALL J.

**JUDGMENT**

1. The Belize City Council is a statutory body established under the Belize City Council Act Chapter 85 of the Laws of Belize. The

Council has powers to administer the town of Belize City. The Council is also a local authority as defined in section 2 of the Trade Licensing Act Chapter 66 (the Act). Section 31 of the Act also states:

“3.-(1) There shall be established in each town in Belize a Trade Licensing Board which shall consist of the members specified in subsection (2) below.

(2) Each Board shall consist of the Mayor or Chairman of the local authority administering the town and four members nominated and appointed by the local authority.

(3) The Mayor or Chairman of the local authority administering the town shall be Chairman of the Board.

(4) A quorum for a meeting of the Board shall be three members.”

2. In January, 2009 the members of the Belize City Trade Licensing Board (the Board) established under section 3 of the Act were Mayor Zenaida Moya, Emil Arguelles, Kevin Herrera, Calbert Quilter and Lila Peyrefitte. Mr. Greg Reyes applied to the Board for a licence to operate a commercial business, named Da Creole Waggans, located at H. Street, Kings Park Area, Belize City. There were objections from residents of the King’s Park Area to the issue of a licence to Mr. Reyes. The basis of the objections was that the area was a residential one, and there were concerns about the amount of businesses being established in a residential area. As a result of the concerns of the

residents, several meetings were held by the Board with a number of the residents of the area, at which meetings, the residents were allowed to voice their concerns and objections to the issuing by the Board of a trade licence to Mr. Reyes. In addition to the meetings, an independent survey or poll by the Belize City Council was conducted to obtain the views of the residents of the area in relation to the granting of a trade licence to Mr. Reyes for his business Da Creole Waggans. Some residents of the area did not oppose the licence, while others, the majority objected, to it.

3. Belize City Council elections were soon to be held, and so the Board delayed the vote as to whether or not to issue the trade licence to Mr. Reyes until after the holding of the City Council elections which were scheduled for 4<sup>th</sup> March, 2009.
4. After the City Council elections, a new Board was appointed consisting of three members of the previous Board, namely the Mayor Zenaida Moya, Emil Arguelles and Kevin Herrera; and two new members, namely Kishore Bhojwani and Dean Samuels, replacing former Board members Calbert Quilter and Lila Peyrefitte. This new Board issued on 1<sup>st</sup> April, 2009 the trade licence to Mr. Reyes to carry on his commercial business Da Creole Waggans at the King's Park Area, without holding, as newly constituted, meetings with the residents, even though there were previous meetings with the residents by the former Board.

5. The claimants, who are all residents of the King's Park area, after learning of the issue of the licence, objected to it on several grounds, as stated in their amended claim form, including that the residents were not heard by the new Board before the issuing of the licence; that they had a legitimate expectation to be heard; and that the new Board was not legally constituted.
  
6. The claimants claimed that the new Board exceeded its jurisdiction when it granted the licence to Mr. Reyes because the members of the Board were not appointed in accordance with section 3(2) of the Act shown above. That section requires that four members of the Board are to be nominated and appointed by the local authority – in this case the Belize City Council. The submission was that the members were not appointed by the Belize City Council, but by the Mayor Zenaida Moya herself, in March, 2009, without the approval of the Council, contrary to section 3(2) of the Act; and therefore the appointment was ultra vires, null and void. It was also urged on behalf of the claimants that the renewal by the Board of Mr. Reyes 2009 licence for the year 2010 was also, for the said reasons, null and void.
  
7. The claimants, in order to prove that the Belize City Council did not appoint the four members of the Board, called an elected member of the Council who testified that the Mayor, in March 2009, took the unilateral decision to appoint the members of the Board. She also said that as an elected member, she attended all meetings of the Belize City Council in March and April 2009 and no decision was taken by the Council in March or April, 2009 to appoint members of the Trade

Licensing Board. She specifically said that in March 2009 the Belize City Council did not appoint any of the said members of the Board.

8. This evidence stands uncontradicted. Neither the Mayor nor any of the defendants swore to affidavits in this matter. The defendants did not give evidence or call any witnesses to contradict the evidence of this witness. I have no alternative but to accept her evidence that the Belize City Council did not appoint the said members of the Board in April or March 2009, the date the new Board was appointed according to the evidence.
  
9. Since the members of the Board were not appointed in accordance with the Act, their appointment is ultra vires the Act, and the Board therefore was not legally or properly constituted. The decision of the Board granting the licence cannot therefore stand. If authority is needed for this, I think the case of *Reg. v. Inner London Exp. D'Souza* 1970 1 W.L.R. 376 would be enough. In that case, an appeal was heard by a deputy chairman sitting alone, instead of at least two persons, which statute required must be present to constitute a court for appeal purposes. The decision of the deputy chairman was quashed and certiorari issued on the ground that the court was not legally or properly constituted and therefore acted "without jurisdiction." The Board in the case was not properly constituted and acted without jurisdiction and therefore the decision to issue the licence was ultra vires the Act.

10. In the light of my findings that the Board exceeded its jurisdiction, there is no necessity for purposes of this decision, to consider other grounds of attack in relation to the decision of the Board.
11. The most difficult part of this case, as I see it, is whether to issue certiorari. Where a court holds a decision is ultra vires, persons who successfully challenged in court the decision is normally entitled to have it set aside by way of certiorari. But the remedy by way of certiorari is discretionary, and the court may, even though an ultra vires act may have been committed by a statutory body, withhold the remedy, depending on the facts and circumstances of the case. The limits or boundaries of the exercise of the discretion have not been permanently demarcated, and understandably so, because it is almost impossible to anticipate all the facts and circumstances under which the discretion may be exercised.
12. The law however has laid down some examples of the exercise of the discretionary power against granting the relief of certiorari. An applicant for certiorari, even though the act complained of is ultra vires may be debarred from relief, if (1) he acquiesced in the invalidity or waived it; if he failed to act with due diligence to set aside the decision; if his conduct was disgraceful and he in fact suffered no injustice; if the decision affected many other persons beside him; if the court felt that, on the facts of the case, that the litigation should never have started; or if the ultra vires act of the authority was induced by the unlawful act of the claimant himself: see *Hoffmann La Roche v. Secretary of State for Trade and*

*Industry 1975 AC 295 at page 319; and Windsor R.B.C. v. Brandrose Investments Ltd. 1983 W.L.R. 509, and Greenwich Processing Laboratories Ltd. v. Advisory Conciliation and Arbitration Service 1978 1 A.E.R. 338, at p. 364.*

13. In the case of *Cacho v. the Attorney General No. 20 of 2009 (unreported)*, the Supreme Court of Belize, in the exercise of its discretion, refused certiorari because it “would serve no useful purpose ..... and the court does not act in vain.”
14. A further example is *Rex v. Williams Exparte Phillips 1914 1K.B. 608* which was to the effect that if a party to litigation applies to the court for certiorari, “certiorari will not be granted if no objection to the jurisdiction was taken before the court below, unless the party was unaware of the absence of jurisdiction.”
15. In this case before me. the claimants brought the claim, but did not include as a defendant Mr. Reyes, even though they knew that if the court granted certiorari Mr. Reyes trading licence would become invalid. The defendants too did not apply to make Mr. Reyes an additional defendant. No application was made for Mr. Reyes to be an interested party, and the court made no order adding him as a party to these proceedings.
16. Mr. Reyes himself did not violate or acted ultra vires the Act. He complied with all the statutory requirements with respect to the application for the licence. Could this court make an order which

would in effect result in invalidating his licence, which would legally prevent him from operating his business, without hearing him? If the court issues certiorari quashing the decision, the licence would be invalid ab initio, and this may have legal implications for him in relation to his business.

17. In the file there is an affidavit filed on 15<sup>th</sup> July, 2010 by Rafael Gregory Reyes, who it seems is the licensee Mr. Reyes. But he was not made a party to the case, nor was he named as a witness in the proceedings. No application was made to the court on his behalf to authorize him to file the affidavit. It does not appear to have been filed by any attorney-at-law on behalf of Reyes, because no name of any attorney-at-law appears on the document. The maker of an affidavit ought to be a party to the proceedings or a person who anyone of the parties wishes to rely on to support or prove the case. Mr. Reyes was neither made such a party nor was such a person. I have no record of him appearing at the trial, nor did he give evidence.
18. There are only two parties to these proceedings – the claimants and the defendants and the affidavit of Reyes does not state which of the parties on whose behalf the said affidavit was filed. Moreover, the affidavit does not state whether Mr. Reyes is employed by any party to these proceedings.
19. For the above reasons, in my view, the affidavit was not properly filed and cannot be used as evidence in this matter. Even if the affidavit by Mr. Reyes is properly filed, and can be used as evidence in this

matter, the further question arises, whether the affidavit amounts to a proper hearing on his part. He did not get an opportunity to testify in court on his own behalf, nor an opportunity to reply or correct or contradict evidence tendered on behalf of the claimants, nor to cross-examine the witness who testified on behalf of the claimants. The right to be heard includes the right to know the case made against the person concerned, who is entitled to know what evidence has been given, and what statements have been made affecting him, and then he must be given a fair opportunity to correct or contradict the evidence or statement. I am not satisfied on the evidence that Mr. Reyes had that opportunity.

20. The court, in my view, on the facts of this case should not grant certiorari without Mr. Reyes exercising his right to be heard why his licence should not be invalidated and why certiorari should not be issued to quash his licence.
  
21. Mr. Reyes present licence is for the year 2010, which is a renewal of the 2009 licence. The claimants application is to quash the decisions of the Board granting the 2009 licence which is already expired; and the renewal licence for 2010. The licences are issued annually, and are renewable by application to the Board every January of each year. No useful purpose would be served to issue certiorari with respect to the 2009 licence, because it is expired, and is not operational or effective. In relation to the 2010 renewal licence, it is for one year and will expire in January 2011.

22. A properly constituted Board has the statutory authority on application to renew a trade licence. Though section 13(2) of the Act states that upon receipt of an application for the renewal of a licence the “Board shall grant a renewal of the licence,” a court may hold that the power is discretionary, and subject to judicial review, when the Act as a whole is considered, especially section 8 which deals with criteria for licences. Section 8 states that, on an application, the Board may take into account the need for such trade in the town, the need for control of the trade and such other matters as the Board deems fit.
23. Of major significance to this question of discretion under section 13(2) of the Act, is section 5 of the Act which states that the Board shall have power to hear and determine all applications for the issue of licences and for the renewal or transfer thereof; and that the Board may forfeit a licence if the licence holder is convicted of certain offences. These powers given to the Board clearly suggest to me, that the power of renewal of a licence under section 13(2) may not be automatic or mandatory, but discretionary. Suppose a licence holder applies for a renewal of his licence, and the Board is in possession of evidence that he was convicted of an offence, the Board has the power to forfeit the licence, but certainly before doing that the Board would have to hear him. It could not, therefore, be the intention of section 13(2) that the renewal is automatic or mandatory – that the Board must in all situations, and ignoring section 8 of the Act, renew the licence. Parliament in enacting section 13(2) could not have intended that a licence shall, in all situations and circumstances, even situations showing illegal conduct on the part of the licensee, be renewed; and

that the Board had no discretion in the matter. In my view, the claimants therefore are not prohibited from making objections to the Board with respect to an application by Mr. Reyes to renew his licence for the year 2011; and the Board, on proper consideration of the objection, can, in the exercise of its discretion, make a decision for or against renewal.

24. It must be remembered that “arbitrary power and unfettered discretion are what the courts refuse to countenance” see Wade Administrative Law 8<sup>th</sup> Edition at page 345. I think it would not be correct to assume that once a person is issued with a licence under the Act, it must be renewed on payment of the required fees, regardless of the circumstances.
25. The claimants also apply for an order of mandamus to “oblige the Belize City Trade Licensing Board to reconsider the issue of the trade licence after public consultation with the claimants.” Since certiorari is not granted, and therefore the licence is intact, I do not think that mandamus ought to be granted to reconsider the issue of the licence.

### **Conclusion**

26. The Board was not properly constituted when it made the decision to grant and renew the licence of Mr. Reyes. The decision therefore was ultra vires the Act. Though certiorari is usually issued to quash ultra vires acts, the court has a discretion in appropriate cases to withhold or refuse certiorari. In this case, the Board granted the licence to Mr. Reyes who was not made a party in these proceedings.

If certiorari is issued it would invalidate Mr. Reyes licence without a proper hearing granted to him; and in those circumstances the court, in the exercise of its discretion, refuses to issue certiorari to quash the decision of the Board.

27. I therefore make the following orders:

- (1) A declaration is granted that the Belize City Trade Licensing Board when it issued a trade licence to Mr. Reyes on 1<sup>st</sup> April, 2009, and renewed the licence for the year 2010, was not properly constituted in accordance with section 3(2) of the Trade Licencing Act Chapter 66 of the Laws of Belize.
- (2) In the exercise of the discretion of the court, the application for the Order of Certiorari is refused.
- (3) The application for the Order of Mandamus is refused.
- (4) There is no order as to costs.

Oswell Legall  
JUDGE OF THE SUPREME COURT  
17<sup>th</sup> September, 2010

