

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
CLAIM NO. 2006 HCV 3763

IN THE MATTER OF THE  
SECURITIES ACT

AND

IN THE MATTER OF THE  
FINANCIAL SERVICES  
COMMISSION ACT

BETWEEN	THE FINANCIAL SERVICES COMMISSION	CLAIMANT
AND	OLINT CORPORATION	FIRST DEFENDANT
AND	DAVID SMITH	SECOND DEFENDANT
AND	OVERSEAS LOCKETT INTERNATIONAL CORPORATION	THIRD DEFENDANT

IN CHAMBERS

Symone Mayhew and Kalaysia Clarke instructed by the Director of State Proceedings for the claimant  
Miss Ingrid Pusey for the claimant  
Huntley Watson and Christopher Dunkley instructed by Watson and Watson for the first and second defendants

February 7, 8 and 13, 2007

APPLICATION FOR CONSOLIDATION, WHETHER DECLARATION SHOULD BE JOINED TO AN APPEAL, RULE 26.1(2) (b) and (h) AND PART 60 OF THE CIVIL PROCEDURE RULES, DEFINITION OF CLAIM, APPEAL AND DECLARATION

SYKES J.

1. This is the latest skirmish between the Financial Services Commission ("FSC"), the claimant, and Olint Corporation ("Olint") and David Smith, the first and second defendants respectively. Overseas Locket International Corporation ("OLIC"), the third defendant has not participated in any of the proceedings to date. This application was precipitated by a fixed date claim form dated October 24, 2006, in which the FSC is seeking the following orders (Claim No. 2006 HCV 03763 *FSC v Olint Corporation Limited and others*) :

- a. a declaration that on a day to day basis up to March 24, 2006, the defendants issued securities in the form of certificates of interest or participation in profit sharing agreements and/or investment contracts.
  - b. a declaration that over the same period as in paragraph (a) the defendants:
    - i. carried on a securities business by dealing in securities in the form of investment contracts without a licence under section 7 (1) (a) of the Securities Act;
    - ii. carried on a securities business by dealing in securities in the form of profit sharing agreements without a licence under section 7 (1) (a) of the Securities Act;
    - iii. held themselves out as carrying on a securities business without a licence under section 7 (1) (b) of the Securities Act to do so;
    - iv. carried on an investment advice business by providing investment advice in relation to securities without a (sic) investment advisor's licence under section 8 (1) (a) of the Securities Act;
    - v. held themselves out as carrying on investment advice business without an investment advisor's licence under section 8 (1) (a) of the Securities Act.
2. The present application is by way of a notice for application for court orders dated January 9, 2007, in which the FSC is asking for:
- a. this claim be consolidated with Claim No. 2006 HCV 1365 *Olint Corporation & David Smith v Financial Services Commission*;
  - b. in the alternative to (a), that the claim be set down for hearing with Claim No. 2006 HCV 1365 *Olint Corporation & David Smith v Financial Services Commission* on March 26, 2007 for five days.
  - c. any affidavits filed in Claim No. 2006 HCV 1365 *Olint Corporation & David Smith v Financial Services Commission* stand as affidavits filed in this claim.
3. Mrs. Mayhew submitted that under rule 26.1 (2) (b) and (h) of the Civil Procedure Rules ("CPR") I have the power to order that the proceedings be consolidated (26.1 (2) (b)) or order that they be heard together (26.1 (2) (h)). She added that there are common issues of law in both claims and further that the facts are substantially the same. According to her, having both matters heard together would save judicial time and reduce costs. Mr. Watson has opposed this application. I agree with the defendants and I decline to make the orders asked for by the FSC.
4. I shall give such facts as are necessary to understand the application and my decision.

### **The context**

5. The FSC was established by the Financial Service Commission Act and is responsible for administering the Securities Act ("the Act"). Under section 7 (1) of the Act no one is to carry on a securities business or hold himself out as carrying on a securities business unless he has a dealer's licence permitting him to do either of these activities. A person convicted before a Resident Magistrate for a breach of this provision may be subject to very stiff penalties. On conviction, the Resident Magistrate may impose a fine of up to two million dollars, or a term of imprisonment not exceeding three years, or to both such fine and imprisonment.
6. Section 8 (1) prohibits the carrying on of an investment advice business or to hold one's self out as carrying on an investment advice business unless such a person holds an investment adviser's licence. The conduct here is also criminalised and the penalties are identical to those for breach of section 7 (1).
7. Mr. David Smith has identified himself as the principal member of a private members club which operates from premises located at 30 Dominica Drive, Kingston 5. He is also director and principal shareholder Olint which is described as offering "customer service liaison services to club member" (see para. 2 of affidavit of David Smith dated April 7, 2006). OLIC is a company registered in Panama and it trades in foreign currencies.
8. According to Mr. Smith the club provides opportunity for club members "to engage in the practice of hedging margins in currency trading using on-line facilities" and the club permits member to "access information in their accounts held overseas" (see para. 5 of Smith's affidavit dated April 7, 2006). Mr. Smith says that the club is a closed membership and not open to the general public. In fact he said that no solicitation to the public was ever made.

### **The appeal (Claim No. 2006 HCV 1365 Olint Corporation & David Smith v Financial Services Commission)**

9. The activities described above attracted the attention of the FSC. On March 3, and 6, 2006, the FSC, backed by armed police officers entered the premises where the club is located. Mr. Smith alleges that a number of items including computer equipment, cheques, private member club forms, encashment slips and other documents were taken from his office. On March 24, 2006, the FSC issued a cease and desist order because it believed that Olint and Mr. Smith were carrying on a securities business by dealing in securities and giving investment advice contrary to section 7 (1) and 8 (1) of the Act. The power to issue a cease and desist order is found in section 68 (1B) (a) of the Act.
10. The subject of a cease and desist order may ask the FSC to stay execution of the order. This was done in this case but the FSC declined to do so. Under

section 74 (1) of the Act, the subject may appeal to Judge in Chamber from any decision of the FSC. By April 7, 2006, Olint and Mr. Smith applied for relief under section 74 of the Act. This is Claim No. 2006 HCV 1365 *Olint Corporation & David Smith v Financial Services Commission*. This is the matter to be heard on March 26, 2007.

11. Between March 24, 2006, and November 3, 2006, a period of at least six months, without any judicial determination of the lawfulness of the action of the FSC or even whether Mr. Smith breached the law Olint and Mr. Smith were deprived of the opportunity of conducting their business. Mangatal J. in her judgment restored some measure of balance between the parties (see judgment of Mangatal J. on interim application in Claim no. 2006 HCV 01365 *Olint Corporation Limited & David Smith v FSC* (delivered November 3, 2006)). In coming to her decision Mangatal J. noted, at paragraph 46 of her judgment, that the issues joined between the parties have raised complex matters of law which need full ventilation. I too have heard a bit of the nature of the arguments involved in the application for a declaration and I too concur that on the facts and law as they are, it is by no means a foregone conclusion that either side in this contest has an unassailable case. The FSC's case seems to be built on the idea that there was an investment contract between the club members and OLIC. An investment contract falls within the definition of securities in section 2 (1) of the Act and therefore a security which means that whomever is dealing in these contracts needs a licence. However, the definition of an investment contract is not free from difficulty. The defendants, on the other hand, say that the what they are doing is not illegal and does not fall within the statutory definition of security.
12. The FSC wishes to use the appeal as an opportunity to have the court make the declarations mentioned at the beginning of this judgment.

#### **The resolution**

13. As stated already, the appeal has been set down for hearing on March 26, 2007, over a year after the FSC's raid on the club property. I understand that the parties have already completed their documents and the bundles are to be filed. That matter, as I understand it, should proceed on March 26, 2007, barring unforeseen developments.
14. The declaration has not yet had a first hearing. No orders have been made indicating how the matter should proceed. If the declaration were to be consolidated with or heard at the same time as the appeal, there may be the need for further affidavits to be filed with the consequential risk that the hearing date of the appeal may not be met. Any delay could not possibly prejudice the FSC. The only persons who are likely to be prejudiced are Olint and Mr. Smith.

15. During the hearing, I was directed to part 3.1.10 of *Civil Procedure* Vol. 1 (2003) (Sweet and Maxwell) at page 73. It reads in the sixth paragraph: *The court must be alert to the fact that, at bottom, the application may be an attempt by certain parties (resisted by others) to control the conduct of the several proceedings in which they are embroiled.* This passage is an important one since it emphasises that the court has to be alert to the possibility that one or more litigants may control the conduct of the others. This is what would happen here were I to order consolidation or to have the matters tried together. Olin and Mr. Smith would be forced to march to the beat of the FSC's drum. This possibility is heightened by the third order sought in this application, namely, that the affidavits in the appeal stand as evidence in the declaration claim. The very terms of the order suggests that the FSC has presumed that the defendants would necessarily wish to use all or most of the evidence in the appeal in the declaration hearing. It would mean that the defendants would now be forced to meet the FSC's timetable without much consideration of the ability of the defendants to meet this schedule. The FSC has already laid out its stall in the declaration hearing by filing its evidence and so by this application it is saying, "I am ready to contest both matters. I think that it is convenient for me to have both heard so I wish to have the matter heard together or consolidated and you had better get your evidence together in the short time, failing that, use the evidence you already have." The defendant may wish to adduce further evidence. If this is so, then the third order sought in this application seems an inappropriate order to make at this point because it presupposes that a judge has sufficient knowledge of a party's case and how he intends to deploy his evidence such that the judge can legitimately order, against the party's consent, that the evidence deployed in one matter is to be used in another. Not much consideration was given by the FSC to whether the defendants would wish to adduce additional evidence at the declaration hearing. If they wish to do so, they would now have just over five weeks to procure additional evidence with the attendant sudden increase in costs in a relatively short time. The FSC may wish to respond to the additional evidence. These are reasons pointing against the exercise of the power, assuming I had it.

16. Mrs. Mayhew submitted that an affidavit has been filed in response to the fixed date claim form seeking the declarations. However, as Mr. Watson pointed out, the defendants had to respond because the CPR sets out a timetable which must be met, but that did not mean that the affidavit filed was necessarily their only response. Mr. Watson pointed out that what has happened here is that the appeal date has been set and the filing of the fixed date claim form introduced another timetable which engages the resources, legal and financial, and time of the defendants. He added that at present the defendants' efforts are focussed on the appeal in six weeks and they should not be diverted from that endeavour by also preparing to meet the declaration hearing.

17. I now turn to some basic definitions. A claim is the aggregate of operative facts giving rise to a claim enforceable by a court (see *Black's Law Dictionary* (7<sup>th</sup> ed) 1999 (West Group)). An appeal is a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority for review and possibly reversal (see *Blacks Law Dictionary*). Appeals are conferred by statute and do not exist as of right. It is not a claim. An appeal is not a cause of action. An appeal presupposes that some decision has been made which has left one party dissatisfied. A declaration is an action or to use the modern language a claim in which the litigant requests the court's assistance in declaring the rights of persons. From these basic definitions it becomes immediately apparent why tacking on some other matter for determination is to be discouraged.

18. Consolidation may only be ordered if there is a close connection between more than one claim such that they can be tried together. Similarly, matters may be heard together, although not consolidated, if there are common questions of law and fact between a number of parties, who are not necessarily part of the circumstances that give rise to the various claims between the respective litigants. However these powers apply only to claims. It could not have been the intention of the legislature that the citizen in pursuing his right of appeal should be subject to dealing with satellite litigation that is piggy backing on his right of appeal.

19. Having regard to the nature of an appeal and a claim, I am not convinced that both matters can be consolidated or even heard at the same time. The two procedures are quite different and directed to different purposes. The fact that the CPR in part 60 regulates appeals from tribunals to the Supreme Court is not a sufficient reason for me to conclude that a declaration can be consolidated with an appeal. The fact that the appeal and the declaration are initiated by a fixed date claim form is purely an accident of civil procedure and cannot be used to extrapolate from that to say that since both are begun by fixed date claim forms then both can be consolidated or heard at the same time.

#### **Conclusion**

20. Application dismissed with costs of \$40,000.00 to the defendants to be paid not later than February 28, 2007. In order to expedite this matter the parties are directed to secure a date for hearing from the Registrar of the Supreme Court. After such a date is secured, the parties are to agree a timetable when the appropriate steps are to be taken and submit the draft for approval.