



[2012] JMSC Civ. 47

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 05965

IN THE MATTER OF THE
SECURITIES ACT

AND

IN THE MATTER of sections
25, 68 and 74 of the
Securities Act and to all
other powers thereunto
enabling

BETWEEN	LASCELLES, de MERCADO & COMPANY LIMITED	APPELLANT
A N D	FINANCIAL SERVICES COMMISSION	1ST RESPONDENT
A N D	BLACK SAND ACQUISITION INC.	2ND RESPONDENT

Allan Wood Q.C. and Mr. Miguel Williams instructed by Livingston Alexander Levy for Appellant.

Mrs. Simone Mayhew for 1st Respondent.

Hugh Small Q.C. and Ms. Annalesa Lindsay and Miss Peta-Gaye Manderson for 2nd Respondent.

**WHETHER SECTION 51 OF SECURITIES ACT CREATES A STATUTORY TORT –
WHETHER COMMERCIAL AND CIVIL COURT SHOULD EXERCISE ITS
DISCRETION TO MAKE A DECLARATION WHERE THE STATUTORY PROVISION
CREATES A CRIMINAL OFFENCE**

Heard: 16th, 19th & 20th April, 2012

SINCLAIR-HAYNES J

[1] On the 12th October 2011, Lascelles de Mercado, (claimant/appellant) by way of Amended Fixed Date Claim Form sought the court's ruling on a number of issues which arose out of the issuance of a take-over bid by Black Sand Acquisition Inc. (second respondent). The Financial Services Commission (first defendant), was made a party to the action because of its failure to take action against Black Sand. On the 30 November 2011, Mangatal J delivered judgment in favour of the claimant but deferred consideration of the following issues sought by the claimant in its Amended Fixed Date Claim Form.

- (a) A declaration that the Take-Over Bid Circular issued by Black Sand Acquisition Inc. to acquire and purchase the shares of Lascelles de Mercado and Company Ltd. the claimant/appellant, is in breach of sections 50 and 51 of the Securities Act.
- (b) An order that the 2nd respondent, its directors, officers, servants and/or agents be restrained for a period of twelve months from June 30th 2011 from pursuing any take-over bid or acquisition of shares in respect of the appellant.
- (c) The claimant also seeks a declaration that the Take-Over Bid Circular issued by Black Sand (2nd respondent) to acquire and purchase the shares of the appellant is in breach of Sections 50 and 51 of the Securities Act.

[2] Black Sand raised the following deferred issues as preliminary points at the Case Management Conference and urged their determination prior to the hearing of those issues:

- (a) Whether or not Section 51 of the Securities Act creates a statutory tort or provides for civil liability in the circumstances; and
- (b) Whether or not the commercial and/or civil court has the jurisdiction to make a declaration in a civil claim in circumstances where the statutory provision in question creates a criminal offence.

[3] The second question was abandoned by the Black Sand at the hearing of the preliminary points as it conceded that the court was possessed of the requisite jurisdiction.

SUBMISSIONS BY HUGH SMALL QC ON BEHALF OF BLACK SAND

[4] Hugh Small QC submits that insider dealing or trading is neither a tort at common law nor a criminal offence at common law. It is a creature of statute. He submits that section 51 creates no right of redress for a person who has suffered adversely as a result of the unfair advantage that may have been derived by another person who benefitted from having possession of information that is not generally available and is price sensitive. A right of redress is available subsequent to the criminal conviction of a person for an offence committed under the Part V of the Securities Act. He cites and relies on the dicta of Mangatal J in a matter between the parties for an interim injunction in which she said at paragraphs 39 and 40 of her judgment:

“... However in my view, there are a number of serious issues to be tried, in this case, including, perhaps preliminary, the difficult legal question of whether the triable matters and the injunctive and declaratory relief sought in these civil proceedings involve the danger of usurping the criminal court’s jurisdiction given that section 52 of the Act proclaims that any person or company that contravenes section 51 shall be guilty of a criminal offence. ... Thus in my view, even though LdM has the right to appeal a decision of the FSC under section 74 of the Act, and has a direct right to come to the Court to enforce the JSE

business rules, the next question would be whether or how the court's civil jurisdiction in respect of such applications should be exercised in light of the criminal nature of the offence of insider dealing. ... These are matters to be dealt with at the trial. ...

It also appears to me, that given the wording of the relevant sections, LdM may have to establish that they really in fact have a civil cause of action as presently formulated, or locus standi under section 51 of the Act. The scheme of the Act seems to be to protect the parties to transactions, the buyers and sellers. Indeed, in so far as the Act spells out any kind of civil liability it specifically does so in section 53. But that section only expressly addresses the purchaser or seller of the shares who suffer at the hands of the insider. ... It may well be argued that if the Act had contemplated protecting against any wrong done to the company as a result of insider dealing, it would have dealt with that issue as well. ..."

[5] Section 51, he submits, neither creates a statutory tort nor provides for civil liability. Section 51 and 52 when read together create criminal offences. He further submits that unlike certain other jurisdictions, the Jamaican statute does not provide for both criminal and civil liability resulting from insider trading. He relies on the view expressed by Donaldson J, (as he then was) in **Corocraft Ltd. v Pan American Airways Inc.** [1969] 1 QB 616 that judges are not legislators but rather "finishers and polishers". He also relies on the dicta made by made by Lord Templeman in which he cites with approval Upjohn's LJ in **Attorney General's Reference** (No. 1 of 1988) that the court's task is to examine the mischief Parliament aimed at in order to determine the meaning of the words.

[6] It is his submission that the words contained in section 52 of the Securities Act are clear and admit of no necessity for particular interpretation by the Court. That section specifically states that "**a person who contravenes any provisions of sections ... 51 shall be guilty of an offence and shall be liable on conviction**

before a Judge of the Supreme Court sitting without a jury...” to a fine or imprisonment if an individual, or a fine alone if a company. Implicit in this section is the fact that section 51 of the Act would have set out the circumstances of the particular offence, in this case being insider dealing. According to him, his interpretation is buttressed by section 51(10), which sets out a defence for a person charged for entering into a transaction in contravention of that section.

[7] He submits that the Jamaican statutory provision is similar to that in other jurisdictions where legislation of similar subject matter, creates criminal offences and at the same time, does not make provision for civil liability. There are also those jurisdictions in which the legislators make provision for both criminal and civil liability resulting from insider dealing or trading.

[8] Section 53 provides for a civil right of redress only subsequent to the criminal conviction of a person for an offence committed under that part of the Securities Act, being Part V, which includes section 51. It is his view that Mangatal J acknowledged that fact in her judgment, by the statements she made in an application for an interim injunction herein, of December 20, 2011. He also relies on the view expressed by the learned author Francis Bennion that:

“Sanctions for disobedience of a statute may be criminal or civil or both. Where there is clearly no civil sanction, the inference is stronger that a penal sanction is intended.”

[9] It is his further submission that the mischief that section 51 deals with is to prevent a person from being in a position that is unfairly advantageous to him by virtue of his having possession of information that is not generally available and price sensitive, which he uses in his dealing with the shares of a company. He submits further that the Claimant is not a proper party to seek such a declaration as the legislation is silent as to any right that the company may have in the context of insider dealing.

[10] He contends that the allegation that Black Sand has acted in contravention of section 51 of the Securities Act, essentially is that the 2nd Respondent is guilty of an

offence. The claimant/appellant has however failed and/or refused to comply with the FSC's request to submit information regarding the alleged offence. Instead it has sought the court's intervention. The appellant is therefore not in a position to ask this court to exercise its discretion to make the declaration prayed.

[11] The appellant has not shown any special circumstances in which the commercial and/or civil court in this instance, ought to usurp the jurisdiction of the criminal court, which is specifically provided for in the Securities Act.

[12] Mr. Small also contends that the appellant/claimant lacks the *locus standi* to seek such a declaration because of the wording of sections 51 and 52 and the mischief that the sections were enacted to prevent. He relies on the observations of Mangatal J, in her judgment in the matter of an application for an interim injunction dated December 20, 2011.

[13] He submits that the acts complained of by the appellant/claimant and on which it is seeking the declaration are all acts that have already been committed. The possibility of a criminal prosecution being commenced has not been ruled out. It is the Appellant who will decide whether that will be pursued as it is the appellant that asserts that it has the information to substantiate its allegations. He contends that no special circumstances exist that would support the commercial and/or civil court in this context, exercising its discretion to make a declaration concerning criminal conduct, especially in circumstances where the relevant Act has expressly provided for that jurisdiction to be exercised by the criminal court.

[14] According to him, section 51 creates a criminal offence and that only. Its provisions, given its context within the Securities Act and given the express provisions of section 51 of the Securities Act, admit of no other interpretation. As a result the court ought to find that section 51 of the Securities Act does not create a statutory tort and it does not provide for civil liability in the circumstances of this case. He also submits that given the circumstances of this case, and the fact that the relevant sections of the Securities Act create criminal offences, it would be

improper for the commercial and/or civil court to make a declaration as so invited to do by the Claimant.

SUBMISSIONS BY MRS. SYMONE MAYHEW ON BEHALF OF THE FSC

[15] Mrs. Mayhew, like Mr. Small, submits that Section 52 provides that the contravention of section 51 (as other sections) is a criminal offence. Section 53 of the Act establishes the liability of the person convicted to pay compensation where loss has been suffered.

[16] She too submits that not every breach of a statutory duty will give rise to civil liability. There is a presumption against conferring a common law action for breach of statutory duty where a statute imposes a duty and provides an adequate remedy for its breach, or some other means of enforcement. Section 52 prescribes the criminal penalties and section 53 the civil remedies for a breach of section 51 (and other relevant sections of Part V of the Act). The scheme of the Act is that there must be a conviction before compensation can be obtained by the person who has suffered a loss.

[17] She submits that on a proper construction of section 51-53, civil liability arises only after a conviction has been obtained unless there is liability under any other law. She relies on the wording of section 53(4). She submits that the claimant has not prayed in aid of any other law, therefore the liability for insider trading in this context is contingent on a breach of section 51.

SUBMISSIONS BY ALLAN WOOD QC ON BEHALF OF THE CLAIMANT

[18] Mr. Wood submits that the Act makes no distinction between the criminal sanctions which are attached to insider trading in breach of section 51 and the breach of the take-over regulations which contravenes section 50 and the making of false and misleading statements in the bid which contravenes section 46. The issue

of criminal sanctions is wholly irrelevant in this action which relates to the validity of the take-over bid and whether Black Sand is qualified to pursue same.

[19] It is his further submission that although the Act provides for criminal sanction, a civil remedy is not barred. He pointed out that a contravention of section 46 of the Securities Act is prescribed by section 52 of the Act as being a criminal offence. He submits that a complaint that the respondents acted in breach of section 46 was adjudicated upon by Mangatal J. who found that the bid contained misleading information. He further submits that Mangatal J already found that the court has the jurisdiction under sections 25 and 74 of the Act. It follows implicitly, he submits, that the court has the jurisdiction to entertain the issue of whether section 51 has also been breached. He submits that in the circumstances, the objection is *res judicata*.

[20] Mr. Wood also submits that although section 51 provides for a criminal sanction, the claimant can seek civil remedies. He relies on the work of **Craies on Legislation** 8th Edition London, Sweet & Maxwell 2004 at page 472 paragraphs 12.6.7, which cites as authority the statement of Lord Browne-Wilkinson in the case of **X (Minor) v Bedfordshire County Council** [1995] 2AC 663 on the issue of a statute giving a private right of action. He also relies on the case of **Groves v Lord Wimborne** [1895 – 99] All ER Rep 147.

[21] He submits that the appellant is a company with shares listed and publicly traded on the Jamaican Stock Exchange (JSE) which is a market for shares. The conduct of persons who wish to participate in the market is regulated by the Securities Act, the JSE Rules and Regulations. He submits that the provision of section 51 sets out the conduct which is not permitted by directors and agents. Agents and persons associated with them are disqualified from dealing in the relevant securities. The JSE Rules provide additional guidelines regarding directors dealing in securities. It is his submission that section 51 is incorporated into the JSE Rules and is therefore enforceable pursuant to section 25 of the Securities Act. He cites and relies on Appendix 7 of the JSE Rules.

[22] It is his submission that in interpreting the Securities Act in order to determine whether the provisions of the Act have conferred the jurisdiction in civil proceedings, the relevant considerations/questions are:

- (a) What is the general purpose of the Securities Act and specifically the provisions relating to dealing in securities?
- (b) Does the provision by section 53 for compensation preclude an aggrieved person from seeking other reliefs?

[23] He submits that it is now recognized that a proper regulation of a market which deals in shares, requires sophisticated enforcement mechanisms that are not limited to criminal sanctions but must extend to civil and administrative enforcement measures. Administrative enforcement measures are to be found at section 68 of the Securities Act which gives the Financial Services Commission the jurisdiction to make cease and desist orders. Section 25 of the Act permits an application to be made to the court in circumstances where the FSC fails to enforce the Rules and Regulations governing the Stock Exchange.

[24] The claimant, he submits, has a legitimate concern as to how its securities are dealt with since inappropriate treatment may undermine confidence and have an adverse effect on the price of securities in the market. Further, he submits that if the confidential information of the appellant is used by the second respondent, the market will be abused and the result will be a fraud on the market. He relies on the work **Market Abuse and Insider Dealing** 2nd edition para 4.1 page 71. He submits that fraud on the market includes deception of both the fiduciary company and the public. He also relies on the case of **Fyffes PLC v DCC Plc** [2007] 1 CSC 36 in support of his contention.

[25] It is his firm submission regarding section 53 of the Act that whether there has been a conviction is irrelevant to the application as it is not seeking damages. It seeks a declaratory relief as to whether the second respondent is qualified to make the bid. The application will protect the market by ensuring that the second

respondent will be unable to deal in securities for the period that is specified in section 51(1). Should a court find that there is no access to the court for civil remedies prior to the imposition of a criminal sanction, a serious deficiency in the orderly enforcement of the statutory rules that govern dealing in publicly traded securities would exist?

[26] It is his submission that the objective of Parliament in enacting the Securities Act was that the market for securities should be properly regulated through criminal, administrative and civil enforcement mechanisms. Consequently, a target company in a hostile take-over has a right to seek the court's assistance to enforce the rules that govern dealings and the court has the jurisdiction to ensure that the administrative and enforcement mechanisms have been properly exercised.

[27] Further, he submits that a criminal conviction is not a condition precedent to the institution of civil or administrative proceedings. This is an application for preventative measures to be taken in circumstances where a breach has occurred. Section 53 stipulates the conditions precedent to the recovery of damages by the person who has purchased or sold shares in the course of a transaction involving the commission of a section 52 offence.

[28] Section 53 is not meant to prevent any right of action against someone who fails to comply with the prohibitions set out in the Act. The drafters ensured that an action for damages was not the only remedy available. Legislators can only remove the right to civil remedies that may be awarded by the court by the use of expressed language or necessary implication. The Securities Act has not removed other remedies that may be awarded by the court. It expressly recognizes the fact that other remedies exist based on the wording of section 53(4).

[29] Section 53 does not affect the right of a target company to seek the court's intervention in enforcing the Securities Act, the Regulations and the JSE Rules. He relies on the cases of **Fyffes Plc v DCC Plc**; **Spector v Ageda [1973] 1 Ch 30**;

Honiball and anor. V Alele (1993) 43 WIR 314; **Financial Services Commission v Olint V Corp and David Smith and Overseas Locket International Corp Chase Manhattan Equities Ltd v Goodman and others** [1991] BCC 308 and Claim No. 2006 and **Royal College of Nursing of UK v Department of Health and Social Security** [1981] ALL ER 545.

RULING

DOES THE APPELLANT HAVE LOCUS STANDI?

[30] Section 25 empowers an aggrieved person to apply to the court for orders directing the offender to comply or orders enforcing the rules. For clarity it is useful to quote section 25 of the Act.

‘Where a person who is under an obligation to comply with or enforce the business rules or listing rules of a recognized stock exchange fails to comply with or enforce any of those business rules or listing rules, as the case may be, a judge of the Supreme Court may act in accordance with subsection (2).

(2) For the purposes of section (1) the judge may, on the application of the Commission, the recognized stock exchange or a person aggrieved by the failure and after giving to the person aggrieved by failure and the person against whom the order is sought an opportunity of being heard, make an order giving directions to the last mentioned person concerning compliance with or enforcement of those business rules or listing rules.”

[31] Does section 51 of the Securities Act create a statutory tort or provide for civil liability? Specifically, is the claimant able to pursue and obtain the civil remedy in the forms of a declaration and an injunction?

An examination of sections 51, 52 and 53 of the Act is required. Section 51 proscribes the dealing in securities by person who acquired information (by virtue of their association with an issuer of securities twelve months prior to the dealing in the securities) which is not generally available but if such information were available

generally, it would materially affect the price of those securities. Section 51 therefore creates the impugned conduct while section 52 states the penalties for breach of section 51. Section 53 allows an aggrieved person to obtain compensation from a convicted person under this Part.

[32] Careful scrutiny of the relevant areas of section 51 is critical.

Section 51 of the Securities Act reads:

(1) **51.** – A person who is, or at any time in the preceding twelve months has been, or associated with an issuer shall not deal in any securities of that issuer if by reason of his so being, or having been, an associated person, he is in possession of information that is not generally available but, if it were, would be likely materially to effect the price of those securities.

(2) A person who is, or at any time in the preceding twelve months has been, or associated with an issuer shall not deal in any securities of any issuer if by reason of his so being, or having been, or associated with the first mentioned issuer he is in possession of information that –

- (a) is not generally available but, if it were, would be likely materially to affect the price of those securities; and
- (b) relates to any transaction (actual or expected) involving both those issuers or involving one of them and securities of the other.

(3) Where a person is in possession of any such information as is mentioned in subsection (1) or (2) that if generally available would be likely materially to affect the price of securities but is not precluded by either of those subsections from dealing in those securities, he shall not deal in those securities if –

- (a) he has obtained the information, directly or indirectly from another person and is aware, or ought reasonably to be aware, of facts or circumstances by virtue of which that other person is

then himself precluded by subsection (1) or (2) from dealing in those securities; and

- (b) when the information was so obtained, he was associated with that other person and had with him an arrangement for the communication of information of a kind to which those subsections apply with a view to dealing in securities by either or both of them.

(4) A person shall not, at any time when he is precluded by subsection (1), (2) or (3) from dealing in any securities, cause or procure any other person to deal in those securities.

(5) A person shall not, at any time when he is precluded by subsection (1), (2) or (3) from dealing in any securities by reason of his being in possession of any information, communicate that information to any other person if –

- (a) trading in those securities is permitted on a recognized stock exchange whether within or outside Jamaica; and
- (b) he knows, or ought reasonably to know, that the other person will make use of the information for the purpose of dealing or causing or procuring another person to deal in those securities.

(6) Without prejudice to subsection (3) but subject to subsections (7) and (8), a company shall not deal in any securities at a time when any officer of that company is precluded by subsection (1), (2) or (3) from dealing in those securities.

(7) ...

(8) ...

(9) ...

(10) Where a prosecution is instituted against a person for an offence by reason that the person was in possession of certain information and entered

into a transaction in contravention of this section, it is a defence if the person satisfies the court that the other party to the transaction knew, or ought reasonably to have known, of the information before entering into the transaction.

Section 52 states:

[33] A person who contravenes any of the provisions of section 44, 45, 46, 47, 48, 49, 50 or 51 shall be guilty of an offence and shall be liable on conviction before a Judge of the Supreme Court sitting without a jury –

- (a) in the case of an individual, to a fine or to imprisonment for a term not exceeding ten years; or
- (b) in the case of a company; to a fine.

[34] The oft cited dicta of Lord Brown-Wilkinson in the case of **X (Minor) v Bedfordshire County Council** [1995] 2AC 633 is illuminating. Indeed the celebrated author **Craies on Legislation** 8th edition at page 472 paragraph regarded the said statement as “A test for determining whether a statutory duty gives rise to a private right of action...”

At page 731 of the report, Lord Browne-Wilkinson said:

“The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there

*are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: **Cutler v Wandsworth Stadium Limited; Lonrho Ltd v Shell Petroleum Co. Ltd.** (No. 2). However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for breach: **Groves v Wimborne** (Lord).’*

[35] Although the basic principle, espoused by Lord Browne-Wilkinson in his judgment, is that a breach of statutory duty, in an ordinary case, does not give rise to civil action, is conservative and constricted, he nonetheless recognized that such a right exists in certain circumstances. In light of his pronouncements regarding the circumstances under which such a right of action is created, an examination of the construction of the Securities Act is necessary in order to determine whether a statutory duty was imposed for the protection of a limited class of the public and that the intention of Parliament was that that limited class of the public was to be allowed to bring private action for breach of the statutory duty.

[36] Is the claimant a member of any such identifiable class? Examination of the construction of the Securities Act leads to the ineluctable conclusion that it was Parliament’s intention to protect persons with shares listed and who publicly trade on the JSE. Indeed the numerous proscriptions contained therein, including section 50 make it evident. The appellant /claimant’s shares are listed and are publicly traded

on the JSE. Undoubtedly, the appellant/claimant falls within that limited class of persons that section 51 of the Securities Act intended to protect.

[37] Lord Browne Wilkinson pointed out that there was no general rule to assist in deciding whether a statute creates a civil right of action. In the absence of a general rule to guide my deliberations, I will be guided by the indicators noted above by him. Firstly, does the Securities Act provide any other remedy and has Parliament demonstrated its intention to protect companies/persons that are listed and are publicly traded on the stock market? Section 53 provides:

53. –(1) A person who is convicted of an offence under this Part shall be liable to pay compensation to any person who, in a transaction for the purchase or sale of securities, entered into with the first-mentioned person or with a person acting for or on his behalf, suffers loss by reason of the difference between the price at which the securities were dealt in, in that transaction and the price at which they would have been likely to have been dealt in, in such transaction at the time when the first-mentioned transaction took place if the contravention had not occurred.

(2) The amount of compensation for which a person is liable under subsection (1) is the amount of the loss sustained by the person claiming the compensation.

(3) An action under this section for the recovery of a loss shall not be commenced after the expiration of three years after the date of completion of the transaction in which the loss occurred.

(4) Nothing in subsection (1) affects any liability that a person may incur under any other laws.

[38] Section 53 does not provide for any civil remedy for a litigant who suffers as a consequence of any breach of section 51 prior to the conviction of the offender. Provision is only made for the institution of civil proceedings for compensation after conviction of the offender. The appellant is not seeking damages/compensation.

What is being sought in the instant case, are a declaration and an injunction. There is no expressed provision for any remedy to prevent or stop the occurrence of a breach. Nor is there any provision for any remedy by way of a declaration or an injunction.

[39] The construction of the Act makes it manifest that the intention of the legislators is to protect persons within the category in which the appellant falls, that is, persons with shares listed and traded on the stock exchange. An examination of the purview of the Act reveals that it is certainly not the intention of parliament, to cause such persons to be left exposed, without remedy and impotent in the face of an imminent breach of the section. This scenario fits snugly within the first indicator enunciated by Lord Browne-Wilkinson. Moreover section 53 does not provide any other means of enforcing the duty prior to conviction. Consequently the circumstances of this case also fall outside of Lord Browne-Wilkinson's second indicator. In the absence of a specific statutory remedy which shows that Parliament intended to substitute for the applications sought by the appellant, it appears, following the guidance provided by Browne Wilkinson's indicators that the appellant is able to pursue the remedies sought.

[40] The approach taken by Vaughn Williams LJ in **Groves v Wimborne** [1895 - 99] ALL ER Rep 147 in determining whether a statutory remedy was intended by the legislator to be the only remedy available in cases of breach of the statutory duty is in my opinion more robust than that taken by Lord Browne-Wilkinson LJ. Lord Browne-Wilkinson opined that an ordinary case of statutory breach does not *per se* give rise to civil action. Vaughn Williams LJ however declares that unless something to the contrary exists, an action lies. Further, in his judgment, the fact that the statute provides a remedy is not conclusive that it was intended to be the only remedy. In fact, he opined, that it was not the only matter to be considered. At pages 152-153 of the judgment he said:

"I think it cannot even be doubted that, when a statute provides for the performance by a certain person of a particular duty, and someone for whose protection the statute was passed is injured by a failure to

*perform that statutory duty, then, there being nothing more to the contrary, an action will lie by the person so injured against the person who has failed to perform the duty. I have equally no doubt that when in a statute of this sort a remedy is provided in cases of non-performance of the statutory duty, that is a matter to be taken into consideration in determining the question whether or not the remedy provided by the statute was intended by the legislature to be the only remedy available in cases of breach of the statutory duty. But that is by no means conclusive, nor the only matter to be taken into consideration. If the remedy given by the statute is to inure for the benefit of the person injured is not conclusive of the matter; and, although it may be a cogent and weighty factor, other things have also to be considered. As was said by Lord Cairns in **Atkinson v Newcastle Waterworks Co.** (4) one must look at the general scope of the Act and the nature of the duty imposed by the statute. One must look also at the nature of the injuries likely to be caused by a breach of the statutory duties, the amount of the penalty to be imposed, and the person on whom it is imposed, before any proper determination can be arrived at whether the remedy provided by the statute was intended to be the only remedy available in case of a breach of the statutory duties."*

[41] Assuming the claimant's allegations are justified, should Black Sand be allowed to flagrantly disregard the law while the claimant is left bereft of the ability to take action in the face of its breaches? It certainly was not the legislator's intent to render the commercial and/ or civil court powerless in such circumstances. The fact that Parliament has specifically prescribed a civil remedy after conviction does not mean that it intended to deprive aggrieved parties of the right to other remedies. There is no indication by the Act (either expressly or by implication) that the legislators intended that the remedy available to an aggrieved party is limited to what

is outlined in section 53. The claimant, in my view, possesses the inalienable right to make application for declaration and injunctions unless expressly precluded.

[42] The pronouncement of Viscount Simmonds in the House of Lords decision of **Pyx Granite Company Ltd v Ministry of Housing and Local Government** [1960] AC 260 leaves no room for doubt. At page 286 he said:

*“The question is whether the statutory remedy is the only remedy and the right of the subject to have recourse to the courts of law is excluded. Obviously it cannot altogether be excluded;...It is a principle not by any means to be whittled down that the subject’s recourse to her Majesty’s court for the determination of his rights is not excluded except by clear words. That is as Mc Nair J called it in **Francis v Yiewsley and West Drayton Urban District Council**, a “fundamental rule” from which I would not for my part sanction a departure.”*

[43] In the House of Lords case of **London Borough of Ealing v Race Relations** [1972] 1 ALL ER 105, a housing authority, which refused to include a Polish national on a housing list because of his nationality, was found by the Race Relations Board to have unlawfully discriminated against the Polish national. The housing authority instituted proceedings in which it sought a declaration against the Board. It was contended by the Race Relations Board that it had no jurisdiction to grant the declarations sought. The reasons advanced by the Board was that proceedings under the Act ‘other than in accordance with section 19(1) of the Act were expressly forbidden by section 19(10) and the provisions of the Act laid down a complete and exclusive code for such proceedings.’

Lord Donovan, in holding against the Board, reiterated the view expressed in **Pyx**. At page 108 he said;

“...clear words are necessary to oust the jurisdiction of the High Court and there are none in the Act of 1968. Nor can any necessary implication to that effect be drawn from its language.”

[44] In the instant case, Black Sand has conceded that the court has an inherent right to grant declarations and injunctions except in the limited circumstances outlined in the Privy Council decision of **Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong** [1970] AC 1136 in which it lacks the jurisdiction. The circumstances of the instant case are not affected by those exceptional circumstances.

[45] It is helpful to state the causes which would deprive a properly constituted court of its jurisdiction.

In delivering the decision of the Board, Lord Diplock said:

“... ‘Jurisdiction’ is the right of the court to enter upon the inquiry as to whether or not a cause of action exists in the plaintiff and, if a cause of action does exist, to grant or, if the relief is discretionary, to withhold the relief applied for. Conversely, lack of jurisdiction is absence of any right in the court to enter upon such an inquiry at all.

A properly constituted court may lack jurisdiction on four grounds: (1) Because a condition precedent to its entering upon the inquiry has not been fulfilled, e.g., a requirement such as existed in some British Colonies that notice be given to the government before starting an action against it. (2) Because of the status of one of the parties to the action, e.g., an action brought against a foreign sovereign or ambassador who has not consented to the jurisdiction or an action brought by an alien enemy. (3) Because of the subject-matter of the dispute in respect of which the relief is sought, e.g., a dispute involving the title to foreign land. (4) Because of the nature of the relief sought, e.g., dissolution of marriage before the Matrimonial Causes Act, 1857, or an injunction against the Crown.

Lack of jurisdiction may be due to a combination of two or more of these grounds, e.g., an injunction against the Crown is a combination of grounds (2) and (4). Where the reason of public policy for excluding

the jurisdiction of the court is the protection of a particular class of persons a defendant who belongs to that class can, by waiving his immunity, confer jurisdiction on the court; but, with this exception, no agreement between the parties can give to the court jurisdiction which it would otherwise lack.”

[46] Undoubtedly, section 53 (4) reserves the right of the affected party to pursue **some** other remedy which is available to it, against Black Sand. A declaration is one such remedy.

IS THIS AN APPROPRIATE CASE FOR THE EXERCISE OF THE COURT’S DISCRETION?

[47] Inasmuch as Mr. Small has conceded that this court has the jurisdiction to grant declaratory relief where the statutory provision creates a criminal offence, I am mindful that the discretion to grant a declaration in such circumstances ought to be exercised only in appropriate cases. *Ex abundanti cautela* I will examine the law on the matter.

[48] In the case of **Grand Junction Waterworks Company v Hampton Urban District Council** [1898] 2Ch 331, subsequent to the commencement of criminal proceedings in which a fine was imposed, civil proceedings were brought by the defendant for a declaration that the criminal action was unlawful. Stirling J cautioned against the court exercising its discretion to grant an injunction against taking proceedings before a magistrate in circumstances where the Act prescribed such proceedings. He also urged caution against the making of a declaration of right without the grant of consequential relief outside of ‘very special circumstances.’

[49] Viscount Dilhorne in the House of Lords in **Imperial Tobacco Ltd. v Attorney General** [1981] AC 718 said that it would require an exceptional case in which a declaration as to criminal or future criminal conduct can be made by a civil court. He opined that it is not right to grant a declaration, after the commencement of a criminal trial that an accused is innocent. Lord Fraser of Tullybelton also agreed that that case was not an appropriate one for the court to exercise its discretion to

grant a declaration. In his view it amounted to an improper intrusion by the civil court into 'the domain of the criminal court'. He expressed the view that only in 'very special circumstances, is it permissible.

Would a declaration by the court that the take-over bid circular issued by Black Sand is in breach of the Act, amount to a usurpation of the role of the criminal court? Would it amount to an unwarranted intrusion into "the domain of the criminal court?" Are there special circumstances present which would allow the grant of the injunction and a declaration?

[50] In the case of **R (on the application of Haynes) v Stafford BC** [2006] EWHC (Admin) 1366 Walker J stated that:

"The High Court may grant a declaration as to whether a criminal offence has been committed or may be committed in the future only in exceptional circumstances and where there are no extant criminal proceedings. This is more likely to be appropriate if the issue is one of pure law and not fact sensitive, if there is a cogent public or individual interest which could be advanced by the declaration, if it is a clear case, if the declaration is that the conduct is not criminal (such that the High Court judge is performing the function of a judge in a criminal trial stopping a case on a submission of no case to answer). Particular caution should be exercised when the application is not brought by the Attorney-General or involves existing conduct rather than prospective future conduct; account should be taken of any alternative remedy."

[51] In the instant case, no criminal proceeding is pending. For the reasons I expressed earlier, if the claimant's allegations are justified, there would exist special circumstances which would authorize the granting of declaratory and injunctive reliefs to prevent Black Sand from dealing in securities for the relevant period.

[52] Other jurisdictions which have criminalized "insider dealing", have not limited the enforcement of the law to criminal action. The author of the text **Market Abuse**

and Insider Dealing, 2nd ed. Para. 6.4 page 98, in referring to the Financial Services Authority which administers the legislation in the United Kingdom, stated:

“... in pursuing its objectives, the FSA is not confined to utilizing the weapons of the traditional criminal justice system. In addition to its various and many powers relating to prevention and compliance, it is now armed with significant investigative and civil enforcement powers... while the FSA operates a discreet system of enforcement which is not entirely in tune with, for example, the concerns of the police and agencies such as the Serious Organized Crime Agency, remains. On the other hand, it must always be remembered that the FSA has rather wider concerns than the enforcement of criminal and regulatory laws in its overarching responsibility to promote stability.”

[53] In the United States it was observed by the author of **Insider Trading** 3rd edition at page 610 that a person who contravenes the Act is confronted by a number of enforcement agencies which included criminal, civil, Securities and Exchange Commission and Self-Regulatory Organization (SRO).

[54] In **Fyffes Plc v Plc** [2007] 1 CSC 36, a decision from Ireland, the claimant instituted civil proceedings against the defendant pursuant to the Irish Companies Act 1990 Part V which is similar to the Jamaican Securities Act which makes insider trading an offence. No criminal proceedings were brought. It claimed that it was the target company in a take-over bid and it sought declaratory relief that certain share sales were in breach of the Act. The issue was deliberated upon by the civil court without challenge.

[55] In the English case of **Chase Manhattan Equities Ltd v Goodman and others** [1991] BCC (308) delivered 27 July 1990, although a breach of the provisions amounted to criminal offences and criminal action was pending, Knox J heard the civil action and held that the transaction was tainted by insider dealing.

[56] This court is of the view that should the appellant/claimant succeed in justifying its complaint, the circumstances of the instant case, are eminently

appropriate for the exercise of its discretion in the manner sought by the appellant/claimant. The court therefore holds that Section 51 of the Securities Act creates a statutory tort or provides for civil liability in the circumstances.

[57] Cost to the claimant to be agreed or taxed.