[2010] JMCA Civ 44

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 6/2008

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE HARRISON JA
THE HON MR JUSTICE DUKHARAN JA

BETWEEN	**OLINT CORP. LIMITED**	**1ST APPELLANT**
AND	**DAVID SMITH**	**2ND APPELLANT**
AND	**FINANCIAL SERVICES COMMISSION**	**RESPONDENT**

Lord Anthony Gifford QC and Huntley Watson instructed by Watson & Watson for the appellants

Mrs Nicole Foster-Pusey and Jerome Spencer for the respondent

9, 10, 11, 12 February 2009 and 13 December 2010

PANTON, P

I have read the reasons for judgment written by my learned brother Harrison, JA. I agree with the reasoning and decision, and have nothing to add.

HARRISON, JA

Introduction

[1] This appeal arises out of a decision by Norma McIntosh J pursuant to sections 68 and 74 of the Securities Act (the Act) whereby she held inter alia, that there was sufficient evidence to satisfy the Financial Services Commission (the respondent) that the appellants were acting in breach of the Act in issuing and dealing in investment contracts and certificates of participation in a profit sharing agreement and engagement in the business of investment advice.

The Issues

[2] In my view, seven issues arise for consideration in this appeal. They are:

(i) Whether the appellants were dealing in securities and were thereby required to hold a dealer's licence under the Securities Act?

(ii) Whether the appellants were engaged in the business of investment advice?

(iii) Whether the respondent had acted unlawfully and ultra vires in issuing the Cease and Desist Order?

(iv) Whether the respondent acted in breach of the principles of natural justice by not giving the appellants the opportunity to be heard?

(v) Whether the Cease and Desist Orders interfered with the appellants right of freedom of association?

(vi) Whether correct procedures were followed before the Cease and Desist orders were issued? and

(vii) Whether the respondent acted as judge and investigator in its own cause and/or in breach of the doctrine of separation of powers?

The Background to the Appeal

[3] The material facts are summarized as follows. The 1st appellant carried on business as a company which provided customer services to members of a club. It operated at offices situated at Shops 23 and 25A, 30 Dominica Drive, Kingston 5. The relationship of the members to the club was set out in a Private Club Member Agreement made between each member and Overseas Locket International Corp., a Panamanian company involved in the currency exchange market. Under this agreement Overseas Locket agreed to use funds invested by members as a margin for taking leverage speculative currency positions which involved a high degree of risk.

[4] The 2nd appellant was the director of and principal shareholder in the 1st appellant, and played the leading part in the foreign currency trading. The club started with his family and friends in about January 2004. Because of the success of the venture, the club grew considerably over the following two years. Each new member was required to be personally known to and vouched for by an existing member. The facts do not indicate that the club had advertised to the general public. It did not hold a securities dealer's licence or an investment adviser's licence.

[5] On 3 March 2006, the company's premises at Dominica Drive were raided by officers of the respondent, accompanied by police officers from the Financial Investigation Division. They produced warrants issued under section 8A of the Act. The warrant had been issued following informations laid by Janice Holness on behalf of the respondent. These officers seized large quantities of documents, records, computer

equipment, cheque books and some cash from Shop 25A. On 6 March 2006, the officers removed quantities of similar articles from Shop 23, including a Bloomberg machine which was used in the appellants' foreign trading activity.

[6] On 24 March 2006, the respondent made Cease and Desist Orders (a) against "Olint Corp/David Smith et al" and (b) against "Overseas Locket International Corp./David Smith et al", requiring them to cease and desist from carrying out securities business and investment advice business within the meaning of the Securities Act, or holding themselves out as carrying on such business, or from soliciting or taking on any new business.

[7] On 28 March 2006, the appellants applied to the respondent for a stay of execution of the orders against them. This application was supported by an affidavit of the 2nd appellant. On 30 March 2006, the respondent refused a stay.

[8] By notice of appeal and fixed date claim form, both filed on 7 April 2006, the appellants appealed against the Cease and Desist Orders.

[9] On 9 November 2006, Mangatal, J. granted a stay of execution on condition that there should be no increase in the number of members of the Club.

[10] Pursuant to section 74 of the Act, the appellants exercised their statutory right of appeal to a judge in chambers. On 27-28 March 2007, and 4-7 June 2007, the appeal was heard by Norma McIntosh J, who delivered judgment on 24 December 2007, dismissing their appeal. In view of their further right under the Act, the appellants

lodged a notice of appeal against the order of McIntosh J in the Registry of the Court of Appeal. On 5 February 2008, the Court of Appeal granted a stay of execution of the order made by McIntosh, J.

The Law

[11] I now turn to the relevant provisions of the Securities Act. Section 4 provides that the respondent is responsible for the general administration of the Act. Reference to the Commission in section 4 means the "Financial Services Commission established under section 3 of the Financial Services Commission Act" (see section 2). Section 4(3) provides inter alia:

> "4(3) - For the purposes of this Act the Commission shall:
>
> (a) carry out such investigations and examinations in relation to the securities industry -
>
> (i) as it considers necessary for the purpose of ascertaining whether the provisions of this Act are being complied with..."

[12] There is provision in the law for hearing persons affected by way of an investigation under the Securities Act and section 4(4) of that Act provides:

> "4(4) - The Commission may hear orally any person who, in its opinion, will be affected by an investigation under this Act, and shall so hear the person if a written request for a hearing has been made by the person showing that he is an interested party likely to be affected by the result of the investigation."

[13] Section 7(1) deals with carrying on of a securities business and provides as follows:

> "7. (1) A person shall not
>
> (a) carry on a securities business; or
>
> (b) hold himself out as carrying on a securities business,
>
> unless he is in possession of a dealer's licence to do so granted under this Act.
>
> (2) Subsection (1) shall not apply to –
>
> (a) a person who is an exempt dealer within the meaning of subsection (3) of section 2; or
>
> (b) a transaction on a particular occasion by a person who does not hold himself out as dealing in securities on a day to day basis.
>
> (3) A person who contravenes subsection (1) shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding two million dollars or to imprisonment for a term not exceeding three years or to both such fine and imprisonment."

[14] It is therefore an offence under section 7 of the Act for a person to: (a) carry on a securities business; or (b) hold himself out as carrying on a securities business, without a dealer's licence. Section 8(1) then provides as follows:

> "8 (1) - Subject to subsection (2), a person shall not -
>
> (a) carry on an investment advice business; or
>
> (b) hold himself out as carrying on an investment advice business,

unless he is the holder of an investment adviser's licence granted under this Act."

[15] A "securities business" is defined in section 2 as "a business of dealing in securities". "Investment advice business" means "the business of advising persons as to the investing in or the buying or selling of securities".

[16] The word "securities" is also defined in section 2 of the Securities Act to mean –

> "(a) debentures, stocks or bonds issued or proposed to be issued by a government;
>
> (b) debentures, stocks, shares, bonds or promissory notes issued or proposed to be issued by a company or unincorporated body;
>
> (c) documents or writings commonly known as securities or as the Minister may prescribe from time to time by order;
>
> (d) rights or options in respect of securities;
>
> (e) certificates of interest or participation in any profit sharing agreement;
>
> (f) collateral trust certificates, preorganisation certificates, or subscriptions, transferable shares, investment contracts, voting trust certificates or certificates of deposit for securities,
>
> but does not include -
>
> (g) stocks or shares of private companies,
>
> (h) futures contracts that are governed by any written law regulating trading in futures contracts;
>
> (i) bills of exchange;

(j) certificates of deposit issued by banks licensed under the Banking Act, or financial institutions licensed under the Financial Institutions Act; or

(k) securities issued by the Bank of Jamaica."

[17] The term "investment contract" is not defined in the Securities Act so this is one of the major issues which will have to be determined in this appeal. I shall now turn to the respective issues.

Issues Nos. 1 and 2

Dealing in Securities, Investment Contracts and Investment Advice

Grounds 1, 2 and 3

(1) The learned judge erred in law in holding that the Appellants dealt in securities and thereby were required to hold a dealer's licence under the Securities Act; since there was no evidence (a) that the appellant's activities amounted to dealing as defined by that Act; or (b) that they dealt in investment contracts or certificates of participation in a profit-sharing agreement or in any other document comprised within the definition of "securities" under that Act; or (c) that they held themselves out as carrying on a securities business as so defined.

(2) The learned judge erred in law in holding that the Appellants carried on an investment advice business and thereby were required to hold an investment adviser's licence; since there was no evidence (a) that the Appellants advised persons as to the investing in or buying or selling of securities; or (b) held themselves out as carrying on an investment advice business as defined by the Act.

(3) The learned judge failed to have regard to the principle that penal statutes should be strictly construed so that the citizen may be clearly aware of what conduct on his part may lead to penal consequences.

[18] Issues 1 and 2 can be conveniently dealt with together. McIntosh J found that features of the appellants' activities showed participation in profit-sharing agreements. The learned judge held inter alia at page 34 of her judgment:

> "The investment contract is … the agreement between the parties that David Smith will use his foreign exchange trading skills to make profit for a customer and I agree that the trading of foreign exchange was the way in which profits were gained in the same way that profits could have been gained by investment in real property or on the stock market or through commercial papers or other instruments."

[19] The learned judge examined section 2 of the Securities Act and found that the definition of the word "securities" has substantial similarity with the definition found in the United States Securities Act of 1933. Section 2(1) of that Act states:

> "When used in this title, unless the context otherwise requires-
>
> "(1) The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

[20] In coming to her decision, McIntosh, J. had relied on the case of **SEC v W.J. Howey Co** (1946) 328 US 293 decided by the United States Supreme Court. The case held that an investment contract was defined as "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of others". The court also held that it was immaterial whether the shares in the enterprise were evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.

[21] McIntosh, J. had also referred to the Canadian case of **Re Pacific Coast Coin Exchange** [1978] 2 S.C.R. 112.

[22] Lord Gifford QC for the appellants, argued that since the appellants were dealing in foreign currency trading, this could not be regarded as a security within the terms of paragraphs (a) to (f) inclusive, in section 2 of the Securities Act. He submitted that upon a plain construction of the statute, the appellants neither dealt in securities nor gave advice in relation to the dealing in securities. He argued that they were dealing in money and had given advice in relation to that portfolio.

[23] Lord Gifford QC also submitted that McIntosh J, had erred when she relied on United States and Canadian cases in order to make a determination of the term "investment contract". He submitted that the facts of the **Howey** case (supra) are totally different from those in the instant case. Lord Gifford QC submitted that in **Howey** there was:

(a) the offering of shares in the enterprise for sale to the public;

(b) an investment scheme in which the investor would have a defined share; and

(c) the shares were evidenced by contracts and warranty deeds.

He also submitted that in the present case, the appellants:

(a) made no offer to the public;

(b) made personal agreements with members who from time to time deposited money; and

(c) created no deeds or negotiable documents.

[24] Lord Gifford QC further submitted that the learned judge had erred in placing reliance on the Canadian case of **Re Pacific Coast Coin Exchange.** Again that case he submitted is distinguishable for the following reasons:

(1) Customers were solicited by newspaper advertisements, which spoke of the scheme as providing a reliable investment.

(2) The scheme was for the sale of bags of silver coins on margin, by means of commodity account agreements.

(3) The relevant statute was the Ontario Securities Act which is in far wider terms than the Jamaican Act. It provides that " 'security' includes...", and there follows a list of sixteen items including "any investment contract".

[25] Lord Gifford QC submitted that in both the **Howey** and **Re Pacific Coast Coin Exchange** cases, there was a clear pooling of funds invested. In this case each member's fund is separate and what he or she gets by way of interest is the interest on

the trading in his or her money. Learned Queen's Counsel also submitted that if there is any uncertainty in the interpretation of the legislation, it should be construed in favour of the appellants. A statute he said, which provides for penal sanctions for those who are in breach, must be strictly construed. "Those who contend that the penalty may be inflicted must show that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail, if the words are merely equally capable of construction that would, and one that would not, inflict the penalty": **Dickenson v Fletcher** (1873) LR 9 CP 1 at 7. He also submitted that the burden of proving that Parliament had authorized the doing of acts which interfere with private rights rests on those who claim the right to do those acts, and that statutes of this kind must be construed strictly against the parties to whom the authority has been given." - (**Dormer v Newcastle Corporation** [1940] 1 All ER 219 at 225).

[26] Lord Gifford QC asked the court to look at the position in the United Kingdom where there were specific provisions in the Financial Services and Markets Act 2000 relating to the regulation of collective investment schemes. By section 235(1) of that Act:

> "(1) … "collective investment scheme" means any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profit or income.
>
> (2) The arrangements must be such that the persons who are to participate (participants) do not have day-

to-day control over the management of the property, whether or not they have the right to be consulted or to give directions.

(3) The arrangements must also have either or both of the following characteristics:

(a) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled;

(b) the property is managed as a whole by or on behalf of the operator of the scheme."

[27] Lord Gifford QC submitted that a betting scheme has been held to fall within the definition: see **Financial Services Authority v Fradley** [2005] 1 EWCA Civ. 1183. A similar definition he said, was contained in the earlier Financial Services Act 1986, section 75: see **Russell-Cooke Trust Co v Elliott and Others** [2001] All ER 197 (D) (Jul). He therefore submitted that if the Jamaican legislature had wished to regulate schemes similar to that organised by the appellants, there has been a clear precedent to follow. He argued that the appellants have found no direct precedent (outside of the UK) which would directly assist the court as to whether a person who trades in foreign currency on behalf of investors is dealing in securities. He submitted however, that the plain language of the Act tells us that he is not. It may be desirable he said that such a person should be licensed, but if the law does not require him to be, he must not be subject to restraint.

[28] Finally Lord Gifford QC submitted that if there was any uncertainty in the interpretation of the legislation, it should be construed in favour of the appellants. He submitted that where a statute provides for penal sanctions for those who are in breach, it must be strictly construed.

[29] Mrs Foster-Pusey, for the respondent, submitted that the learned judge was correct in her finding both in law and on the facts that the appellants had:

> (1) dealt in securities and through their operations, engaged in the participation of a profit sharing agreement in relation to foreign currency trading activities;
>
> (2) issued investment contracts in relation to foreign currency trading activities; and
>
> (3) provided investment advice to potential investors in relation to foreign currency trading activities.

[30] She further submitted that there is no need for there to be an offer to the public before an arrangement or agreement can be seen as creating a security or an investment contract. Mrs Foster-Pusey submitted that neither the statute nor the common law support the arguments by the appellants that there has to be an offer to the public before an instrument can be regarded as a security. What she said is relevant is the nature of the agreement with each customer. She argued that although there was no advertisement in the media, the number of persons utilizing the business services of the appellant increased "exponentially" and was established to continue to increase by virtue of a commission paid to existing members to refer additional persons who would also become investors.

[31] Mrs Foster-Pusey also submitted that there was no requirement for a deed or negotiable document to be created in order for the instrument to be regarded as a security. But, in any event, she submitted that the records which the appellants have in their possession show that the interests of customers were in fact negotiable. There was documentary proof she said, of the possibility of invested amounts being "hypothecated".

[32] Mrs Foster-Pusey further submitted that the case of **United States Commodity Futures Trading Commission and State of Oregon ex rel Cory Streisinger v. Orion International Inc. and Russell Cline** (District of Oregon) Case No. 03 CV 603 KI, delivered in the United States District Court, District of Oregon 17 December 2006 is of great assistance in response to the appellants' misconceived claim that they were dealing in "foreign currency" and not in securities and also that they were providing advice in relation to dealing in money. She argued that the appellants' submission reflects a studied misunderstanding of the nature of a security because the Commission was not saying that "currency" or "foreign exchange trading" in and of themselves are securities. She submitted that what the Commission was saying, and what the authorities state, is that what is covered is where an investment of money is made in a venture with the expectation that through the skills of another person a profit will be made and will accrue to the investor.

[33] Mrs Foster-Pusey responded to Lord Gifford's submission that "if the Jamaican legislature had wished to regulate schemes similar to that organized by the appellants

there has been clear precedent to follow" in the English UK Financial Services and Markets Act 2000. She disagreed with those submissions and submitted that the learned judge was correct in adopting the definition of the term "investment contract" as has been accepted not only in the United States, but also in Canada.

The Discussion

[34] In light of the statutory provisions pursuant to which the respondent issued the Cease and Desist Order, the question is whether it was reasonable for the respondent to conclude that the circumstances warranted the issuance of that order. In determining this question the following questions are relevant: (i) whether the appellants were dealing in securities; and (ii) whether there were investment contracts or certificates of participation in the business carried on by the appellants. While section 2 of the Act sets out numerous types of securities, the most common forms are either shares of ownership of a company, usually referred to as a stock, or debt issued by the company, referred to as a bond. Each type of security can potentially earn a return for the investor. The respondent has placed emphasis on section 2 (e) and (f) which state that securities include:

> "(e) certificates of interest or participation in any profit sharing agreement
>
> (f) collateral trust certificates, preorganization certificates, or subscriptions, transferable shares, investment contracts, voting trust certificates or certificates of deposit for securities."

[35] I do agree with McIntosh, J. that there is substantial similarity with the definition of securities in the Jamaican Act with section 2(1) of the United States Securities Act 1933 (supra).

[36] Similarly in Canada, the definition of the term "securities" includes "any investment contract" and "any profit-sharing agreement or certificate".

[37] The term 'Investment Contract' is not defined in the Act but it is my view, that some guidance can be gleaned from cases decided in other jurisdictions. The learned judge in this case had accepted the test outlined in **Howey** (supra) and I see no reason to say that she was in error in referring to that case for assistance.

[38] The facts in the **Howey** case can be briefly summarized. The defendants, W. J. Howey Company and Howey-in-the-Hills Service, Inc., were corporations organized under the laws of the state of Florida. W. J. Howey owned large tracts of citrus groves in Florida. Howey kept half of the groves for its own use, and sold real estate contracts for the other half to finance its future developments. Howey would sell the land for a uniform price per acre (or per fraction of an acre for smaller parcels), and convey to the purchaser a warranty deed upon payment in full of the purchase price. The purchaser of the land would then lease it back to the service company Howey-in-the-Hills via a service contract, who would tend to the land, and harvest, pool, and market the produce. The service contract gave Howey-in-the-Hills "full and complete" possession of the land specified in the contract, leaving no right of entry nor any right to the produce harvested. Purchasers of the land had the option of making other service arrangements,

but W. J. Howey, in its advertising materials, stressed the superiority of Howey-in-the-Hills' service.

[39] Howey marketed the land through a resort hotel it owned in the area, promising significant profits in the sales pitch it provided to those parties who expressed interest in the groves. Most of the purchasers of the land were not Florida residents, nor were they farmers. Rather, they were business and professional people who were inexperienced in agriculture and lacked the skill or equipment to tend to the land by themselves. Howey had not filed any registration statement with the Securities and Exchange Commission (SEC). The SEC filed suit to obtain an injunction forbidding the defendants from using the mails and instrumentalities of interstate commerce in the offer and sale of unregistered and nonexempt securities in violation of 5(a) of the Securities Act of 1933. The United States District Court for the Southern District of Florida denied the injunction, and the United States Court of Appeals for the Fifth Circuit affirmed that decision. The U.S. Supreme Court then granted certiorari.

[40] Justice Murphy, writing for the majority in the U.S. Supreme Court, identified the major legal issue in that case as whether or not the contracts Howey was selling (which in substance were basically leaseback agreements) constituted an "investment contract" within the meaning of section 2(a)(1) of the Securities Act of 1933. Justice Murphy reasoned that while the term "investment contract" was left undefined by the Act, it had been used to cover a broad array of contracts and other schemes to raise capital in a way to secure some income or profit from the use thereof.

[41] Justice Murphy had formulated one of the U.S. Supreme Court's earliest tests to determine whether an instrument qualifies as an "investment contract" for the purposes of the Securities Act (which later came to be referred to as the Howey test) as follows:

1. investment of money due to
2. an expectation of profits arising from
3. a common enterprise
4. which depends solely on the efforts of a promoter or third party.

[42] An investment contract thus came to mean a contract or scheme for "the placing of capital or laying out of money in a way intended to secure income or profit from its employment" - see **State v Gopher Tire & Rubber Co***.,* 146 Minn. 52, 56, 177 N.W. 937, 938. This definition was uniformly applied by state courts to a variety of situations where individuals were led to invest money in a common enterprise with the expectation that they would earn a profit solely through the efforts of the promoter or of some one other than themselves - see ***State v Evans,*** 154 Minn. 95, 191 N.W. 425; ***Klatt v Guaranteed Bond Co.,*** 213 Wis. 12, 250 N.W. 825; ***State v Health,*** 199 N.C. 135, 153 S.E. 855; ***Prohaska v Hemmer-Miller Development Co.,*** 256 Ill. App. 331; ***People v White,*** 124 Cal.App. 548, 12 P. 2d 1078; and ***Stevens v Liberty Packing Corp.,*** 111 N.J.Eq. 61, 161 A.193. *See also* ***Moore v Stella,*** 52 Cal.App.2d 766, 127 P.2d 300.

[43] In my judgment, there is merit in the submissions of Mrs Foster-Pusey when she submitted that the agreements between the parties had met all prongs of the **Howey**

test. I also agree with her that the "common enterprise" element was also satisfied by the mere fact that the investor advanced the money and the "promoter" had control over the success of the enterprise.

[44] In **Haddad v Ray Bahamas Limited** 2006 WL 1321418 (S.D. Fla) the court held that an investor's joint venture agreement with a developer to develop land in the Bahamas did not constitute a security within the scope of the federal securities laws. The **Howey** test was also applied but the court reiterated the criteria set out in **Howey** for determining whether a scheme is an investment contract and found that the parties' joint venture agreement failed the "expectation of profits" prong of the **Howey** test.

[45] In my judgment, the test of whether there is an "investment contract" under the Securities Act is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. If that test is satisfied, it is immaterial whether the enterprise is speculative or non-speculative, or whether there was no offer made to the public. The fact that the appellants had termed the organization a "members club" is also irrelevant. What is relevant is the nature of the agreement with each customer.

[46] Upon the facts of this case, the respondent had acted properly in my view, in issuing the Cease and Desist Orders. The nature of the agreement entered into with investors, the large sums of money being managed, the extraordinarily high interest rate being provided (at times exceeding 10% per month), and the operations of the appellants in general, amounted to an offering of an "investment contract" within the

meaning of that term in section 2(f) of the Act which defines "securities" as including any "investment contract". In my judgment, the operations carried on by the appellants were therefore subject to the registration requirements of the Act.

[47] It is further my view that the Act was passed by Parliament in order to protect the investing public by imposing criminal sanctions on those who, as principals or agents, engage in the business of dealing in securities without being duly licensed. Parliament clearly intended to provide the investing public with the safeguard of the approval and licensing of professional dealers by the respondent.

[48] Grounds 1, 2 and 3 therefore fail.

Issue No. 3

Unlawful and ultra vires actions

Ground 4

> **The Appellants were not offering or providing service to the public and therefore were not a "prescribed financial institution" subject to regulation under the Financial Services Act; so that the Respondent was acting unlawfully and ultra vires in issuing cease and desist orders against them.**

[49] In my view, this issue can be disposed of quite briefly. The basis of this ground is that the first appellant was not a prescribed financial institution and thus could not be subject to regulation by the respondent. The appeal before the learned judge was from a decision made pursuant to a statutory appeal under the Act and it sought to challenge the issuance of Cease and Desist Orders under the Securities Act. It is therefore

abundantly clear that the respondent did not purport to issue the Cease and Desist Orders under the Financial Services Act: it acted pursuant to the Securities Act as it was expressly empowered to do and the learned Judge correctly so found - see page 49 of the Judgment. Ground 4 is therefore misconceived and fails.

Issue No. 4

Natural Justice

Grounds 6 and 9

> **The Respondent in issuing cease and desist orders to the Appellants without giving them the opportunity to be heard acted in breach of the principles of natural justice and the Appellant's right to a fair hearing which is enshrined in section 20 (2) of the Constitution and its orders were thereby unlawful, null and void.**
>
> **The learned judge erred in not holding that the Appellants were further entitled to be heard by reason of the provisions of section 4(4) of the Securities Act before punitive action was taken against them.**

[50] Lord Gifford QC submitted that even if the statute on its proper construction did not require the principles of natural justice to be observed, the common law, as well as the provisions of section 4(4) of the Securities Act (supra) would require it.

[51] Lord Gifford QC referred to the cases of **Board of Education v Rice** [1911-13] All ER Rep. 36 and **Ridge v Baldwin** [1963] 2 All ER 66 in which the principles of natural justice were expressed.

[52] Lord Gifford QC contended that the procedure adopted by the respondent was manifestly not fair. It did not give the appellants an opportunity for them to be heard before the issuing of an order which compelled them to cease operation of their business. He submitted that the discretion given to the respondent should have been exercised in favour of a hearing, even if it was not asked for.

[53] Mrs Foster-Pusey submitted however, that the appellants have had the benefit of a fulsome appeal in the course of which they were able to lead evidence, argue procedural matters, argue legal points and have the judge deal with any matters relevant to the decision made by the respondent. She argued that it is well known that the requirements of fairness are met within a statutory scheme as long as there is provision for the affected person either to have a fulsome appeal or to challenge the decision by way of judicial review. The appellants, she said, have not argued that the hearing before the learned judge was deficient in any way. She therefore submitted that the right to fairness had been fully satisfied and any arguments before this court would be now otiose.

[54] I am of the view that there is merit in the submissions of Mrs Foster-Pusey. The records indicate that there was no request for a hearing in accordance with section 4(4) (supra). I entirely agree with Mrs Foster-Pusey that there is no substance in the argument of the appellants when it was submitted that even if they did not ask for a hearing, one should have been offered. The learned judge was correct in my view, to find that the procedure for the issuing of the Cease and Desist Orders in the Act was

fair and met the requirements of natural justice in view of the appeal mechanism. Grounds 6 and 9 also fail.

Issue No. 5

The Right to Freedom of Association

Ground 8

> **The cease and desist orders issued by the Respondent interfered with the right to freedom of association enjoyed by the Appellants and their club members under section 23 of the Constitution of Jamaica. The provisions of the Securities Act (under which the Respondent purported to act and which did not provide for the Appellants to be heard) were not reasonably required for any purpose stated in section 23(2)(a) and/or were disproportionate; and in the premises the said provisions of the Securities Act are void for inconsistency with the Constitution and the rights of the Appellants under section 23 were violated.**

[55] This issue is covered by ground 8 and is argued in the alternative to grounds 6 and 9. Queen's Counsel argued that the actions of the respondent had evidently interfered with the appellant's right to associate with their club members, and the rights of the members to associate with the appellants. He submitted that there was no reason for an invasive power which "may have catastrophic consequences for the entity affected, to be exercised without prior notice and an opportunity to be heard". Queen's Counsel did not pursue the second aspect of this ground.

[56] It is my view that there is no merit in ground 8. I can see no valid reason for saying that the Cease and Desist Orders had prevented the members of the entity from meeting and continuing to meet in order to discuss how they should trade in their

foreign currency dealings. I fully agree with Mrs Foster-Pusey that the Cease and Desist Orders were not addressed to a club but were addressed to OLINT. These orders were directed only to the business activities because a licence was required to provide such services. This ground therefore fails.

Issue No. 6

The Procedures carried out in seeking the Cease and Desist Order

Ground 7

> **The Respondent before issuing cease and desist orders was obliged to follow the procedures laid down in Part B of the Third Schedule to the Financial Services Act and failed to do so, but rather purported to follow procedures contained in the Securities Act which were repugnant to those In the former Act and had been impliedly repealed by it; and the said orders were thereby unlawful, null and void.**

[57] Lord Gifford QC submitted that the power of the respondent to issue a cease and desist order is provided for in the Financial Services Commission Act (the FSC Act) and is subject to a number of provisions as to the giving of notice, and the holding of a hearing, which the respondent failed to observe; and that the respondent had no power to issue an order without giving notice, purportedly under the Securities Act where there are no such provisions. He submitted that it is evident that the procedure under the FSC Act was designed to conform to the rules of natural justice. It required in particular (a) that the institution is served with notice of the facts alleged against it, so that it knows the case it has to meet; (b) that a hearing is held within a reasonable time before an order is made to the detriment of the institution's business; and (c) that the

order may not be made until there has been a finding that the contravention has been established. By contrast he submitted that the procedure under the Securities Act (a) provides for no statement of facts or reasons to be given; (b) provides for a hearing only after the order has been made; and (c) allows the institution's business to be halted under a loose criterion that the 'circumstances so warrant'. He therefore submitted that the Securities Act procedure is a licence for arbitrariness.

[58] Lord Gifford QC further submitted that the learned judge had held that the respondent may choose whichever of these procedures it wishes. However, the question which he said arises is, was it the intention of Parliament to provide such a choice? He then examined the legislative history and framework of the two statutes. He concluded that the respondent may only act intra vires the powers given to it by the FSC Act and that any action not authorised by that Act is ultra vires, even if apparently authorised by another Act. The two Acts he submitted were inconsistent with each other, and the powers contained in the Securities Act are subordinate to, and must be read subject to, the powers confirmed in the FSC Act.

[59] As an alternative argument, Lord Gifford QC submitted that the provisions of the FSC Act, which is the later Act, impliedly repealed those provisions of the Securities Act which are plainly repugnant to the FSC Act. He referred to and relied on the authorities of **Kutner v Phillips** [1891] 2 QB 267 at 272 and **Ellen Street Estates v Ministry of Health** [1934] All ER Rep 385 at 389. He submitted that the two different cease and desist order powers are repugnant one to the other and that there was no rational

explanation for Parliament to have retained the earlier power while introducing another one.

[60] Mrs Foster-Pusey submitted in response to the submissions made by Lord Gifford QC that ground 7 is without merit. She dealt first with the arguments raised by Lord Gifford QC that the FSC Act had impliedly repealed the Securities Act. She submitted that this principle did not arise in the circumstances of this case. She argued that prior to the promulgation of the FSC Act, the respondent was the regulatory body concerned with securities, while there were other bodies regulating the provision of other financial services such as insurance. With the promulgation of the FSC Act, she submitted that Parliament had created a single body, the Commission, that would supervise the provision of the various financial services. The powers of the respondent were then transferred to the Commission. In developing her arguments, Mrs Foster-Pusey submitted that both Acts were really companion legislations.

[61] Mrs Foster-Pusey further submitted that it was clear that both statutes operated independent of each other and that the FSC Act did not impliedly repeal the Securities Act. The learned judge, she said, was therefore correct when she concluded that the power to issue Cease and Desist Orders under both statutes could stand together. She submitted that the procedure in the FSC Act was more workable in respect of a licensed institution in order to oversee its operation.

[62] Counsel finally submitted that if in fact the power to issue the Cease and Desist Order under the Securities Act was impliedly repealed the appropriate challenge would

have been to seek judicial review to quash the Cease and Desist Order on the basis that the respondent did not have the power under the Act as it claimed to. She submitted that this was not done and that what is before this court is the final tier of the appeal process.

[63] In my judgment, there is merit in the submissions of Mrs Foster-Pusey. The learned judge was correct to have found that the power to issue Cease and Desist Orders under both the Securities Act and the FSC Act could stand together. In my view, both Acts provided different procedural frameworks for the grant of such orders. It is further my view that the question of implied repeal of the power to issue Cease and Desist Orders under the Securities Act did not arise and neither did the FSC Act impliedly repeal the Securities Act. Ground 7 accordingly fails.

Issue No 7

Whether the Respondent Acted as Judge and Investigator in its Own Cause and/or in Breach of the Doctrine of Separation of Powers?

Ground 10

> **The respondent investigated the activities of the appellants, seized the appellant's property, concluded that they were acting unlawfully and issued orders which prevented the carrying on of those activities, and thereby acted as investigator and judge in its own cause, and/or in breach of the doctrine of separation of powers.**

[64] Lord Gifford QC argued that by virtue of section 4 of the FSC Act the Executive Director of the Commission was responsible for the day to day management of the Commission. He was also a member of the Commission and was a member of the

Board which took the decision to issue the cease and desist orders at the meeting of 22 March 2006. He submitted that where the respondent is both investigator and adjudicator and that it adjudicated without a hearing, there was a breach of the rules of natural justice. He further submitted that where the same Commission can both investigate and make final decisions which affect the rights of the subject there was a breach of the doctrine of separation of powers. With respect to the latter submission he referred to **Jamaica Stock Exchange v Fair Trading Commission** SCCA No 92/97 delivered 29 January 2001. Lord Gifford QC argued that in that case the relevant legislation had given power to the Commission to investigate, but the power to make orders which had a penal effect was given to the Supreme Court. In the instant case the legislation he argued, required the Commission to be both investigator and judge so unlike the Fair Trading Commission, the Financial Services Commission had exercised judicial power. He submitted that the learned judge was incorrect when she took the view that the right of appeal to the Judge in Chambers meant that the final decision was in fact taken by the Court, so that there was no usurpation of the judicial power.

[65] Mrs Foster-Pusey submitted on the other hand, that the respondent, like the Fair Trading Commission, does not exercise judicial powers when deciding whether to issue a Cease and Desist Orders, and more so when it is acting under the Securities Act as it did in this case. She therefore submitted that the appellants' reference to the doctrine of the separation of powers is mistaken as the issue raised really concerns natural justice.

[66] Mrs Foster-Pusey also submitted that the learned judge had correctly found that there was neither a breach of the principles of natural justice nor contravention of the doctrine of separation of powers as there was adequate protection conferred by the right of appeal conferred under section 68(1C) of the Securities Act. She further submitted that section 68(1C) enabled a Judge in Chambers to whom an aggrieved person has appealed to make any such order as he thinks fit in this regard. She referred to and relied on the case of **Porter and Another v Magill** [2002] 1 ALL ER 465. The learned judge had also relied on this authority.

[67] In my judgment, there is merit in the submissions of Mrs Foster-Pusey. In the **Porter** case the independence and impartiality of an auditor was challenged as it was said that he acted as investigator, prosecutor and judge and there were allegations of bias. Lord Hope at paragraph 92 of his judgment stated:

> "That being the structure of the procedure laid down by the statute, there is inevitably some force in the criticism that, where accusations of willful misconduct are involved, the auditor is being required to act not only as an investigator but also as prosecutor and as judge. But this problem has been recognized and dealt with in s 20(3). It provides not only that any person aggrieved by his decision may appeal against the decision to the court but also that the court 'may confirm, vary or quash the decision and give any certificate which the auditor could have given'. The solution to the problem which s 20(3) provides is that of a complete rehearing by the Divisional Court. The court can exercise afresh all the powers of the decision which were given to the auditor."

[68] I agree with Mrs Foster-Pusey that the requirement that a person have a hearing before an independent and impartial tribunal is satisfied if the statutory framework

provides either for judicial review or a fulsome hearing on the merits. Section 68 (1C) states as follows:

> "(1C) Any person aggrieved by a decision of the Commission under subsection (1B) (a) or (b) may, within fourteen days after the date of notification of the decision, appeal to a Judge in Chambers who may make such order as he thinks fit."

And subsection (1B) (a) and (b) state:

> "(1B) On the conclusion of any such investigation the Commission may, if it is satisfied that the circumstances so warrant-
>
> (a) issue a written warning or a cease and desist order, as the case may require, to the person concerned;
>
> (b) in accordance with section 9 (6) or section 10 (4), as the case may be, suspend or cancel any licence or registration granted under this Act; …"

[69] It is therefore my view that the appellants having had a full hearing before a judge of the Supreme Court ought not to complain that there was a breach of natural justice. Ground 10 therefore fails.

[70] Ground 5 was not argued so there is really no need to refer to it.

The Counter Notice of Appeal

[71] The respondent filed a counter notice of appeal on 8 February 2008 and appealed against the order of the learned judge "that the appellant's letter dated March

21, 2006 could be a written request for a hearing within section 4 (4) of the Securities Act". I have already dealt with this issue in paragraph 54 of this judgment. For emphasis, I would repeat that the records do not indicate that there was a request for a hearing in accordance with section 4 (4) of the Securities Act.

Conclusion

[72] In my judgment, the appeal ought to be dismissed with costs to the respondent to be taxed if not agreed. The respondent should succeed on its Counter Notice of Appeal with costs to be taxed if not agreed.

DUKHARAN, JA

I too have read the judgment of Harrison, JA and agree with his reasoning and conclusion. There is nothing I wish to add.

PANTON, P

ORDER

Appeal dismissed with costs to the respondent to be taxed if not agreed. Counter notice of appeal allowed with costs to Financial Services Commission to be taxed if not agreed.