IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
APPEAL BEFORE A JUDGE IN CHAMBERS
PURSUANT TO SECTION 68(1C) AND/OR SECTION 74 OF THE SECURITIES ACT

[1] APPEAL NO. HCV 2006/01365

IN THE MATTER OF
Olint Corp Limited and David Smith

AND

IN THE MATTER OF
a Cease and Desist Order under the Securities Act

AND

IN THE MATTER OF
the Financial Services Commission Act

AND

IN THE MATTER OF
Chapter III of the Constitution of Jamaica.

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

Lord Anthony Gifford, Q.C., Mr. Christopher Dunkley and Mr. Huntley Watson, for the Appellants, instructed by Messrs. Watson & Watson, Attorneys-at-Law,

Mrs. Nicole Foster-Pusey and Miss Kalaycia Clarke for the Respondent, instructed by the Director of State Proceedings.

Heard: March 27 and 28; June 4 -7 and December 24, 2007.

A N D

[2] APPEAL NO. HCV 2006/01357

PURSUANT TO SECTION 68 AND/OR SECTION 74 OF THE SECURITIES ACT

BETWEEN	**NEIL LEWIS and JANICE LEWIS (t/a LEWFAM INVESTMENTS)**	**APPELLANTS**
AND	**THE FINANCIAL SERVICES COMMISSION**	**RESPONDENT**

Mr. R. Braham and Miss D. Gentles for the Appellants,instructed by Messrs. Livingston Alexander & Levy, Attorneys-at-Law.

Mrs. Nicole Foster-Pusey and Miss Kalaycia Clarke for the Respondent, instructed by the Director of State Proceedings.

Heard: March 29 and 30; June 7, 8, 11, 12 and December 24, 2007.

N. E. McINTOSH, J.

The parties in the above entitled appeals made several appearances in the Supreme Court in connection with some related issues and during the course of those appearances it was determined that the two appeals should be heard together, having regard to the issues common to both. So it was that the hearing commenced with submissions on behalf of the Appellants in [1] above followed by submissions on behalf of the Appellants in [2], after which came the Respondent's submissions, first in relation to appeal [1] and then to appeal [2]. The replies were heard in a similar vein.

For the purposes of this decision, I will refer to them as the **"Olint Appeal"** and the **"Lewfam Appeal".**

THE OLINT APPEAL

By Notice dated April 7, 2006, the Appellants appealed pursuant to sections 68 and 74 of the Securities Act against the Respondent's Order dated 24th March, 2006 by which the Respondent purported to **"order the Appellants, their servants, agents and representatives including directors,**

officers and employees to immediately CEASE AND DESIST (unless and until the relevant licence is acquired):

(a) from carrying on securities business and investment advice business within the meaning of the Securities Act;

(b) from holding themselves out as carrying on securities business and investment advice business;

And without limitation to the foregoing

(c) from soliciting any new securities business and investment advice business within the meaning of the Securities Act; and

(d) from taking on any new securities business and investment advice business within the meaning of the Securities Act."

This Order was issued at the conclusion of certain investigations carried out by the Respondent's Financial Investigations Division which included the execution of search warrants under the Securities Act authorizing a search of the offices of the Appellants and seizure of documents and records relating to their activities. According to the affidavit of Janice Holness, Attorney-at-Law and Chief Investigator in the Respondent's Investigation and Enforcement Department, the investigations were triggered by certain information and complaints received by the Department and a report was thereafter prepared

and presented to the Commission. This report was considered at a meeting of the Commission held on March 22, 2006 and, as reflected in the affidavit evidence of Brian Wynter, its Executive Director, it formed certain views about the activities of the Appellants.

The Preamble to the Order gave the basis for the investigations into their activities as arising from the Commission's suspicion that, in breach of the Securities Act, the Appellants were:

> **"1. On a day to day basis and without a securities dealer's licence, carrying on securities business in contravention of section 7 (1)(a) of the Act.**
>
> **2. On a day to day basis and without a securities dealer's licence, holding yourself out as carrying out securities business in contravention of section 7 (1)(b) of the Act.**
>
> **3. On a day to day basis and without an investment advisor's licence, carrying on investment advice business in contravention of section 8 (1)(a) of the Act**
>
> **4. On a day to day basis and without an investment advisor's licence, holding yourself out as carrying on investment advice business in contravention of section 8 (1)(b) of the Act"**

Section 7 provides that:

(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.

Section 8 provides that:

(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 advisor's licence granted under this Act.

Subsection 2 provides certain exceptions which are not relevant to this case and in **section 2 (1)** the following definitions are provided

" securities business - a business of dealing in securities";

"investment advice

business ---- the business of advising persons as to the investing in or the buying or selling of securities;"

The Respondent expressed in the said Order that, in the circumstances, it was satisfied that the Cease and Desist Order should be made because it believed that the Appellants:

> **"dealt in securities and through their operations, engaged in the participation of a profit sharing agreement in relation to foreign currency trading activities;"**

that they:

> **"issued investment contracts in relation to foreign currency trading activities;"**

and that they:

> **"provided investment advice to potential investors in relation to foreign currency trading activities."**

The Order went on to state that inasmuch as the Appellants were not licenced to carry out those activities, the said activities were therefore unlawful.

In short, the Order required the Appellants to cease and desist the activities of carrying out securities business and investment advice business, of holding themselves out as carrying on securities or investment advice business or from taking on any new securities and investment advice business, within the meaning of the Securities Act, "unless and until they acquired a licence." It

is the Respondent's position that if the Appellants intend to engage in these activities, offering these services to the public, they must obtain a licence.

However, Lord Gifford for the Appellants has argued that they have not breached the Securities Act (hereafter referred to as the SA) as their activities did not involve securities and there was therefore no basis for the issuance of the Cease and Desist Order. He emphasized that their activities were concerned with foreign currency trading and foreign currency is not a security as defined in section 2 of the SA.

That section defines "securities" as follows:

"2 -- (1) In this Act unless the context otherwise requires ------

---

"securities" means -----

(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, preorganization 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."

All the questioned activities in the Cease and Desist Order touch on the definition of securities, argued Lord Gifford and foreign currency is not included in that definition. If an item is not contained in (a) to (f) of the section it is not a security. The Appellants were entitled to look at the law to note that it does not extend to their activities and then to associate as they did in carrying out a lawful activity.

It is against this background that the Appellants challenge the action of the Commission in the following ten (10) grounds of appeal:

1. The Commission acted in breach of the principles of natural justice in that it took a decision which has prejudiced the Appellants' right to associate with fellow citizens in pursuit of a regularly organized and legitimate activity, in the absence of the Appellants and without first giving to the Appellants the opportunity to be fairly heard in defence of their rights of association and/or property.

2. The action taken against the Applicants was null and void *ab initio* in that:

   (a) the investigating officer in contravention of the statutory protection of an investigated person to have the *prima facie* evidence placed before an independent justice of the peace, laid the information before a justice of the peace whose substantive employment was with the Financial Investigation Division whose servants or agents formed part of the investigating team.

3. The Commission erred in determining that the activities of the Appellants constitute dealing in Securities, offering investment advice in relation to Securities or otherwise holding themselves out to be carrying out these activities within the meaning ascribed to these activities in the Securities Act.

4. The Commission erred in that it purported to act on the basis of a belief (and not a finding) that the Applicants had carried out unlawful activities and thereby the Commission failed to meet the criteria established under the provisions of the Securities Act for making a Cease and Desist order.

5. The Commission acted outside its lawful powers and remit, in that the Appellants are not " **Prescribed Financial Institutions"** within the meaning of the Financial Service Commission Act nor do they offer financial services in Securities as defined under the said Act.

6. The Commission further acted in breach of recognized principles of natural justice and/or of the separation of powers in that (a) it provided the information which led to the commencement of an investigation, (b) thereafter, through its servants or agents it procured and acted upon a warrant for the search and entry of the Appellants' premises, (c) thereafter it acted as investigator and prosecutor and (d) finally it purported to act as the adjudicating body on the same issues which it had investigated.

7. The nature of the operations of the Appellant is such that it would place the assets of the several club members of the private investment club at

considerable risk of depreciation. This ought to have been manifest to the Commission which ought to have recognized that the nature of the international currency markets is such that a position taken in any single currency must be capable of being reversed at any time and that this process would be hindered by an order for the Appellants to cease and desist trading. Further, the Commission has acted in contravention of its remit in exposing funds belonging to third parties to significant depreciation recognizing that the Appellants need to be able to trade amongst currencies in order to preserve the value of these funds.

8. The Commission has erred in that the particulars of the breaches of the Securities Act which it avers to have established are vague and are incapable of informing the Applicants of the precise one or more of their activities which are alleged to require licensing under the Securities Act.

9. The Commission has erred in that it failed to proceed in accordance with section 8 and the Third Schedule of the Financial Services Commission Act by which, *(inter alia)* notice should be given containing a statement of the facts constituting any alleged contravention of any relevant Act

10. The Commission has acted arbitrarily and unreasonably in the process of investigation and adjudication over the activities of the Appellants.

It should be noted here that the Appellants had sought a stay of execution of the Commission's Cease and Desist order which was denied by the Commission but granted on application in the Supreme Court before Mangatal J. on November 3, 2006.

The Business Operations of the Appellants.

Describing himself as the Principal Member of a Private Members Club, pursuant to a Private Members Club Agreement, as well as a Director in and a Principal shareholder of:

(i) **Olint Corp Limited** (which offers customer service liaison services to club members) and

(ii) **Overseas Locket International Corporation**, (a Panamanian company, situated in Panama, trading in foreign currencies on an international platform, on behalf of club Members),

the second Appellant, Mr. David Smith, outlined the principal objects of the first Appellant "**customer service company.**" Those objects are as follows:

> **" (a) providing a facility whereby club members funds may be used to engage in the practice of hedging margins in currency trading using on-line facilities;**

(b) provide a facility via which club members can access the information in their accounts held overseas."

He further stated that:

"All club members are required to be personally known to and vouched for by at least one of the principal members who must recommend them for membership" and that ***participation in the club is a closed membership with all of the members readily identifiable as being known to other members".***

Mr. Smith said this private members club had been in existence for over two years up to March 2006 and during that time it had expanded exponentially, requiring increased office space. Their activities had however remained exclusively centered around trading in foreign currencies on an international internet trading platform. (See his affidavit sworn on April 7, 2006).

There is no dispute that the document entitled "Customer Agreement" which appears to have been renamed "Private Club Member Agreement" formed the basis of the relationship between the Appellants and their customers. This was among the bundle of documents which were removed from the offices of the Appellants and, in so far as is material, the terms of the Agreement read as follows:

"Whereas

The Company is in the business of taking currency positions in the currency exchange market

And whereas both the Company and the Customer are desirous of entering into a relationship which will be provided on the terms and conditions set forth:

IT IS HEREBY AGREED AND DECLARED AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATIONS

In this Agreement unless the context otherwise requires:-

1.1 Margin shall mean any investment given to the Company at any time;

1.2 Services shall mean taking margin leverage speculative currency positions;

1.3 to 1.6 .....

2. CONTRACTUAL RELATIONSHIP

2.1 In connection with opening an account the Customer acknowledges that Customer has been advised and understands the following factors concerning the services offered pursuant to this contract;

2.2 The services provided pursuant to this Agreement carry a high degree of risk. The Customer will be entirely responsible for the risk associated with the provision of Services;

2.3 All sums invested pursuant to this Agreement will be used as a margin for taking margin leverage speculative currency positions via the Company. All gains on trades will be added to this margin and all losses subtracted. Further, losses will arise as a result of fluctuations in the exchange rates which will in turn affect currency prices;

2.4 Margins will be invested two working days after receipt of same. Eighty percent of the margin is guaranteed.....

2.5 The Company reserves the right to change the margin leverage at any time.

3. AUTHORISATION TO TRANSFER FUNDS

.....

4. WARRANTIES AND GUARANTEES

5. COMMUNICATION

Statements will be provided on a monthly basis regarding the Customer's account.....

6 – 10 .....

The Customer represents that he/she has read and understands his/her obligations under this Agreement and agrees and acknowledges that the Agreement will control the Customer's relationship with the Company."

Lord Gifford sums up the Agreement in this way:

It "reflects what is now a clear picture that members of the club do invest money and the members use that money to trade in foreign currency and the club communicates to members as to gains or losses. No promises are made to members apart from a guarantee of eighty percent".

The Scope of the Appeal

The case of **Century National Merchant Bank Ltd. v. Davies** [1998] 52 WIR 361 is accepted as authority on the scope of the statutory appeal and it is agreed that by virtue of the provisions of the SA the Appellants may challenge the actions of the Commission on both procedural and substantive grounds, (see sections 68 (1C) and 74 (1) and (6) of the SA), though it is Mrs. Foster-Pusey's position that any procedural challenge must be confined to the issue of the Cease and Desist Order.

The Appellants grouped their grounds of appeal accordingly and presented their arguments under three main heads, namely;

A. The Ultra Vires Action of the Commission

The Appellants submit that they were not prescribed financial institutions and therefore not subject to the regulatory powers of the Financial Services Commission (the Commission) as established under the Financial

Services Commission Act (the "FSCA") with the result that the Commission had no power to issue the Cease and Desist Order against them (Ground 5).

Further, power to issue such Orders is governed by Section 8 and the Third Schedule of the FSCA which requires that notice be given before the Order is made and in purporting to act under the SA instead of the FSCA the action of the Commission was ultra vires. (Ground 9).

In addition to the above, the Commission had acted in breach of the rules of Natural Justice and/or the principle of Separation of Powers in that it had acted as investigator and adjudicator in the matter. (Ground 6).

B. The Unlawful Procedure Adopted by the Commission

The Appellants further argued that even if the Commission had power to issue the Cease and Desist Orders, the procedures adopted were unlawful in that

(i) they breached the rules of natural justice (Ground 1) and

(ii) acted on a warrant not issued by an independent or impartial judicial officer. (Ground 2).

C. The Unjustified Action of the Commission

It is the contention of the Appellants that the Commission has not shown any basis for the issuance of a Cease and Desist Order against them as the evidence has not established that they were dealing in securities or engaged in any other unlawful activity (Ground 3).

Further, the purported infringements as outlined in the Order do not suffice as offences under the SA as the Order speaks for instance of engaging in the participation of a profit sharing agreement while the offence under the SA is dealing in such certificates and the Order also refers to issuing as opposed to the offence of dealing in investment contracts (but, Mrs. Foster-Pusey's response was that from the Commission's perspective, for the purposes of the Order it was unnecessary to use the precise wording of the Act. It was sufficient that the Order contained the substance of the activities).

Another basis for the challenge under this head was that the actions of the Commission prejudiced the interests of Third Parties when neither they nor the public generally needed the protection of the Commission. (Ground 7).

Lord Gifford expressed the view that the procedural challenges should be heard ***in limine*** as, if the challenges were successful, the Appellants would be entitled to have the Cease and Desist Orders declared null and void. They should therefore be considered before the court heard arguments on the merits of the Orders themselves.

However, Mrs. Foster-Pusey's view was that the real starting point should be whether or not the Appellants were engaged in the activities outlined in the Cease and Desist Order because if they were not so engaged then the Commission would have had no authority to issue the Order either under the

FSCA or the SA. Nor would there be a need to discuss natural justice and procedural fairness because the Commission would have had no jurisdiction to pursue the matter.

I am in agreement with the latter view and will accordingly deal first with the third challenge identified by the Appellants - (C above).

Were the Appellants:

a) **dealing in securities and through their operations engaging in the participation of a profit sharing agreement?**

b) **issuing investment contracts?**

c) **providing investment advice to potential investors?**

In seeking to find the answers to these questions the court must first look at the meaning of "securities" as provided in the SA and make a determination as to whether the activities of the Appellants are covered within the scope of that definition. In this exercise I share the view, expressed in several of the authorities referred to in the course of this hearing, concerning the interpretation of securities legislation, to the effect that the statute must be read in the context of the economic realities to which it is addressed and that substance not form is to be the governing factor.

ANALYSIS AND CONCLUSIONS

Mrs. Foster-Pusey gave an in depth analysis of the activities of the Appellants in order to show that they fall within the definition of securities with particular reference to the inclusion of "investment contracts" and "certificates of interest or participation in any profit sharing agreement".

Her arguments had as their main focus the "Customer Agreement/Private Club Member Agreement" which she said was to be regarded as the investment contract. She developed that argument by reference to authorities which will be reviewed shortly. Counsel made the point that the fact that the Appellant's describe their establishment as a "private members club" does not mean that it falls outside the Commission's regulatory remit. Nor does the fact that they trade in foreign currency necessarily have that result. The important consideration is the nature and extent of the activity being carried out.

When one examines the substance of their activities it becomes clear that it is the Appellants' method of operation that may transform what is made to appear as trading in foreign currency into much more than that and bring it within the definition of securities under the SA, more specifically, within the scope of the investment contract and/or the certificate of participation in a profit sharing agreement.

Now, the term investment contract is not defined in the SA and the court must therefore endeavour to find its meaning. As Lord Gifford commented in what he referred to as his "Speaking Notes" this is new ground in our jurisdiction and there are no authorities on the interpretation of the statute. I must therefore seek to take guidance where guidance can be found, taking care to scrutinize the statutes of those jurisdictions to which the court looks for such guidance in an effort to determine whether and if so how much assistance they are able to offer.

Mrs. Foster-Pusey with commendable industry has provided several authorities and decisions from other jurisdictions, mainly from the United States and Canada, for the guidance of the court. It is Lord Gifford's view that the definitions of securities to be found in the Canadian and United States statutes are much wider in scope than the definition in the Jamaica legislation and pointed out areas of difference which in his opinion would render decisions from those jurisdictions of little or no weight in seeking to interpret our statute. It seems to me, however, that areas of difference in the wording of the relevant statutes do not render those decisions useless and that there still may be enough common features to be of assistance to the court in answering the questions raised in this appeal.

The position in which the court finds itself is not unique by any means. Indeed the term "investment contract" is similarly undefined in the U. S. and the Ontario Securities Acts and, in this regard, I am drawn to the words of De Grandpre, J in the Canadian case of **Re Pacific Coast Coin Exchange** [1978] Vol 2 S.C.R. 112., quoted below:

> **"The expression "investment contract" is not defined in the Act. In their search for its meaning, the Courts below have been guided by the leading U. S. authorities and counsel have invited us to follow the same path. I agree. While the statute under consideration does not read word for word like its U. S. counterpart the expression investment contract is found in both. In addition, the policy behind the legislation in the two countries is exactly the same, so that considering the dearth of Canadian authorities, it is a wise course to look at the decisions reached by the U. S. Courts."**

In this case, however, Counsel for the Appellants has not extended any such invitation to the court.

I have closely examined the definition sections in the U.S. and the Ontario statutes and have observed sufficient similarities with our own statute as to make cases and texts dealing with the question of what is a security, of much guidance in seeking to answer the very same question in this jurisdiction.

In the United States Securities Act, for instance, securities is defined as meaning, *inter alia:*

> **stocks, bonds, debentures, certificate of interest or participation in any profit sharing agreement** (item (e) in the Jamaica SA); **collateral trust certificate; preorganization certificate or subscription, transferable share, investment contract, voting trust certificate, certificate of deposit for a security** (the complete listing in item (f) of the Jamaica SA) and "**any interest or instrument commonly known as a security**" while in the Jamaica SA the wording is "documents or writings commonly known as securities.

In the Ontario Securities Act, the term "security" is stated to "include" (the word used in the United States and the Jamaica statutes is "means") **"any document, instrument or writing commonly known as a security"** (bearing similarity to item (c) in the Jamaica SA), **"any participation certificate, certificate of share or interest, any profit sharing agreement or certificate, preorganization certificate or subscription"** (with an exception relating to contracts of insurance), **"any collateral trust certificate and any investment contract"**, all features of the Jamaica SA, although differently expressed.

Lord Gifford has pointed out that this statute is far wider in scope than the Jamaica SA. The use of the word "include" for instance would lead to the

inference that there could be other items in addition to the sixteen items listed in the definition. He also mentioned that in the Ontario statute the item relating to investment contracts was the subject of a separate listing and not included in a list of items with its suggestion of a limited meaning. For my part, the real question is whether to all intents and purposes, however differently worded or expressed the definitions in these statutes are from the local statute, especially as it relates to the particular items highlighted in the case at bar, their meaning is different.

In my view, the similarities in the two statutes reviewed provide enough bases for a Jamaican court to be guided by decisions from courts in those jurisdictions.

Two authorities were found to be particularly useful in this quest for guidance, namely, the United States case of **Securities and Exchange Commission v W. J. Howey Co. et al** [1946] 328 U.S. 293, 66 S. Ct. 100 and the Canadian case of **Re Pacific Coast Coin Exchange** referred to earlier. In both cases there was a dissenting judgment which Lord Gifford preferred but I do not find those judgments helpful in the particular circumstances of this case. Instead, I found much guidance in the majority decisions as they relate to the meaning and scope of the term "investment contract" with which we are particularly concerned.

In the **Howey** case an investment contract was defined by the court 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 "sole effort test" has been refined in subsequent cases and it has been held to be sufficient if the profits are mainly from the efforts of others.

The court reasoned that it was immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise. This approach was held to embody a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.

The later case of **Haddad v Rav Bahamas, Ltd.** [2006] WL132 1418 (S.D.Fla), applying the **Howey** definition held that it requires courts to examine the economic substance of the transaction. The court recognized that the federal securities law was not intended to provide a remedy for all frauds or misconduct arising out of a commercial transaction. "Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served and the factual setting as a whole."

The court determined that whether an investor depends upon the efforts of others turns on the degree of control the investor retains under the operative instrument and the economic realities of the parties' business relationship.

It is within the context of the **Howey** definition, commonly referred to as the **Howey** test, that the Commission has placed the activities of the Appellants within the realms of investment contracts and Mrs. Foster-Pusey summed up of those activities which she argued placed them squarely within that definition as follows:

> ***i) they make and facilitate the making of agreements whereby the money of customers/ "members" is acquired;***
>
> ***ii) the customers expect to gain a profit over and above what they invest;***
>
> ***iii) there is a degree of risk in the investment;***
>
> ***iv) the customers do not control the manner in which the foreign exchange dealing takes place. Although some of the members are taught the skills of foreign exchange trading, they do not exercise this skill in relation to the monies under the management of the Appellants. It is the expertise of David Smith upon which reliance is placed.***

In the **Pacific Coast Coin Exchange** case on appeal from the Court of Appeal for Ontario the facts of the case were examined in the sole light of the United States cases of **Howey** and **State of Hawaii v Hawaii Marker Center, Inc.** 485 P. 2d 105, and the court followed those decisions expressing the view that under the Ontario Statute, a broader approach could have been taken. De Grandpre, J in delivering the majority decision of the court said that the policy behind the Ontario statute is clearly the protection of the public and that is also the policy behind the Jamaica legislation. Further, it needs to be said here that this protection is afforded to the public in general and not just to a section of the public, in light of the arguments advanced on behalf of the Appellants that members of the club said they were not in need of protection from the regulatory body as they were well aware of the risk involved and chose to take it.

Lord Gifford did not agree with Mrs. Foster-Pusey's analysis of the activities of the Appellants or with the reliance on the Howey test. He argued that what the customers enter into is a personal contract whereby they entrust funds to the company for the purpose of foreign currency trading and none of the documents taken from the Appellants offices and relied on by the Respondent detracts in any way from the position of the Appellants, namely,

that they are engaged in providing a facility whereby club members' funds may be used in foreign currency trading through the hedging of margins.

In developing his arguments that the court ought to place a limited interpretation on the meaning of the term investment contracts he invited the court to follow the definition of an investment contract to be found in the Investment Contracts Act of Newfoundland, namely:

> ***"a contract, agreement, certificate instrument or writing containing an undertaking by an issuer to pay to the holder or to his or her assignee or personal representative a stated or determinable maturity value in case or its equivalent on a fixed or determinable date and containing optional settlement, cash surrender or loan values before or after maturity, the consideration for which consists of payments made or to be made to the issuer in installments or periodically or a single sum, according to a plan fixed by the contract, whether or not the holder is or may be entitled to share in the profits or earnings of, or to receive additional credits or sums from, the issuer, but does not include a policy of insurance to which the Insurance Companies Act applies."***

He found support for a limited interpretation of the term in the position in which the legislators placed it in the list of securities in item (f) of the definition and saw this as an indication that the Jamaican Legislators must have

had a document such as defined in the Newfoundland Act in their contemplation. That argument is unconvincing. The court must seek to find the meaning looking at the substance of the transaction and examining it in the context of our economic realities.

It was also his view that a limited construction was to be placed on the term investment contract as allowance was made in the statute to accommodate changes in the field of investment when it included in the definition of securities ***"documents or writings .....as the Minister may prescribe from time to time by order"*** and no order has been made introducing any new categories of securities but I cannot see this as meaning that this precludes items not specifically listed from falling within the scope of those that are listed. The "context may otherwise require", as the definition states. Additions would only become necessary if the item in question is not covered by any of the items already listed and in this case the operations of the Appellant do not require separate listing.

The Shorter Oxford Dictionary's definition of **"Certificate"** as **a document wherein a fact is clearly stated** formed the basis of his submission that a certificate of participation in a profit sharing agreement would be a formal document representing an interest in or participation in a profit sharing agreement. He felt that Parliament had in mind transactions very different

from those being done by the Appellants when it included certificates of interest or participation in profit sharing agreements in the definition of securities. Participation speaks to an interest in a pool of funds or in other instruments. The activities of the Appellants are quite different and they do not generate certificates which can be negotiated. I must disagree with that assessment of their activities. The evidence disclosed that there are features of their operations that showed participation in profit sharing agreements and it bears repeating that in examining and determining these issues the court must disregard form for substance.

The dissenting judgments in the **Howey** and the **Pacific Coast Coin Exchange** favoured by Lord Gifford were delivered by Frankfurter , and Laskin, CJ, respectively. Frankfurter, J reasoned that "Investment contract is not a term of art, it is a conception dependent upon the circumstances of a particular situation" and indeed the circumstances of the particular situation in the case at bar disclose the features of an investment contract. He placed emphasis on the fact that two other courts had found against the particular scheme being an investment contract and on the need to pay respect to the wise rule of judicial administration under which the court does not upset concurrent findings in the ascertainment of facts and the relevant inferences to be drawn from them and the **Howey** case called for the application of that rule.

It was his Lordship's view that "simply because other arrangements may have the appearances of this transaction but are employed as an evasion of the Securities Act does not mean that the present contracts are evasive". His Lordship felt that there was "nothing in the Securities Act to indicate that Congress meant to bring every innocent transaction within the scope of the Act simply because a perversion of them is covered by the Act". Taking account of the substance of the transactions involved in the instant case, I disagree with Lord Gifford's view that the court should be guided by the reasoning in this dissenting judgment and am inclined to the guidance to be found in the majority decision.

Chief Justice Laskin reasoned that "It is easy when faced with a widely approved statute for the protection of the investing public to give broad undefined terms a broad meaning so as to bring doubtful schemes under the authority of the statute. However, where the Legislature has deliberately chosen not to define such a term which embraces various transactions of which some are innocent there is no reason for courts to be over solicitous in resolving doubt in the enlargement of the scope of statutory control." He approved of the dissenting judgment of Frankfurter, J in the **Howey** case. This in my view is not a doubtful scheme. The activities involved are within the scope of the term investment contract.

His Lordship found that there was no question in the **Pacific Coast Coin Exchange** case of the notion of managerial effort which arose as a controlling factor in the **Howey** case and felt that that case was distinguishable from the case before his court. His judgment would seem to contain no disapproval of the **Howey** test but a finding that the test was not satisfied on the circumstances of the **Pacific Coast Coin Exchange** case. In this case the test is entirely satisfied.

I am persuaded that the Howey test is one which should be adopted in this jurisdiction. The wording in the U.S. Securities Act is not word for word with the Jamaica SA but it is also stated to "mean" items which include the term investment contract in a list of items as does the Jamaica statute so that the argument of Lord Gifford that that indicates a limited meaning would be equally applicable to the U. S. statute and indeed the majority in the **Pacific Coast Coin Exchange** case did express the view that it had a more limited meaning than in the Ontario statute and that they would have taken a broader approach as permitted by their statute but for the request of the parties to view the facts within the context of the **Howey** and the **Hawaii** cases.

When the **Howey** test is applied, it is clear that the activities of the Appellants put their scheme well within the meaning and scope of the term "investment contract" and I do not accept the arguments of Lord Gifford that

the meaning of the term is limited to the extent that it excludes activities of the kind which the evidence disclosed were being carried on by the Appellants.

All the features of the Howey test for the existence of an investment contract were present. The scheme involved the investment of money in a common enterprise with profit to come from the skills and the effort of the first Appellant. The pool of funds was managed by Mr. Smith. The investors had no control over how the funds were handled and applied. The Agreement in its terms specifically reserves the right to the company to change the margin leverage at any time. It admittedly involved a high degree of risk. The investment contract is indeed as contended by the Respondent – 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."

Were the Appellants dealing in securities?

I turn now to the question of whether the Appellants were dealing in securities as alleged by the Respondent in its Cease and Desist Orders. It is the Commission's contention that the Customer Agreement Private Club Member

Agreement as well as other documents found at the offices of the Appellants and the statements made by the 1st Appellant in his affidavits support the conclusion that the activities of the Appellants constitute dealing in securities.

Lord Gifford sought to narrow the meaning of deal under the SA to "buying and selling". However there is no support for that narrow meaning in the statute. Section 2 (1) defines the word **"deal,"** as it relates to securities, to mean:

> ***" acquire, dispose of, subscribe for or underwrite the securities, or make or offer to make, or induce or attempt to induce a person to make or offer to make, an agreement –***
>
> ***(a) for or with respect to acquiring, disposing of, subscribing for or underwriting the securities;***
>
> ***(b) the purpose or purported purpose of which is to secure a profit or gain to a person who acquires, disposes of, subscribes for or underwrites the securities or to any of the parties to the agreement in relation to the securities;***
>
> ***(c) for or with respect to managing investments in securities"***

When one examines that definition it is easy to see how the activities of the Appellants fall within its scope. This presents a much wider range of activities than simply buying and selling. I do not hold to the view that a

certificate of participation need be a formal document (and here I call to mind the court's reasoning in the **Howey** case that it was immaterial whether the shares in the enterprise were evidenced by formal certificates) but even if that were so there is documentation in this case which formalized that arrangement. I accept that the receipt the investors receive when they invest money is a certificate of participation in a profit sharing agreement. It indicates the amount they have invested, the purposes to which the sums will be applied and repeats at the end of the document, that the trader reserves the right to change margin leverage at any time.

On close scrutiny of the Appellants' activities one can see how they fit into the definition particularly as it relates to making or offering to make an agreement for or with respect to acquiring, disposing of; subscribing for or underwriting the security, the purpose of which is to secure a profit or gain to a person who acquires et cetera, the securities or to any of the parties to the agreement in relation to the security; inducing or attempting to induce a person to make or offer to make an agreement for or with respect to acquiring, disposing of, subscribing for or underwriting the security the purpose of which is to secure a profit or gain to a person who acquires (et cetera) the securities or to any of the parties and making or offering to make an agreement for or with respect to managing investments in securities.

I agree with the Respondent's Counsel that when the Appellants encourage persons to enter into the profit making enterprise and issue a document evidencing the fact that the person is a part of the profit sharing agreement, they are dealing in certificates of participation in a profit sharing agreement and that this is reflected by the statements provided when the money is invested.

Lord Gifford has consistently argued that participation speaks to an interest in a pool of funds or in other instruments and that the activities of the Appellants are quite different. They do not generate certificates which can be negotiated. However, in this case there is receipt of profit and the ability to pledge or hypothecate and the Respondent's Attorney is right in her views that this suggests negotiability. Further, it is not true to say that the investment could not be used in a commercial sense as among the documents found at the offices of the Appellants was a letter showing that the investment was being pledged as security for a loan (see letter dated 23/9/05). It is noted that the seal on the letter is Overseas Locket's, that it has a Jamaican address and that it was signed by David Smith. The roles are indeed mixed as Mrs. Foster-Pusey pointed out and, at times, it is difficult to see them as separate entities.

The second Appellant disclosed in his affidavit that the trading is done on the internet but that is not of any consequence here. That is the medium of

effecting the transaction and what is of importance to the court is the substance of the transaction. Mrs. Foster-Pusey pointed out that Olint has made it clear that it exists as a customer service liaison between "club members" and Overseas Locket. If it is the club member and Overseas Locket that sign the Agreement it is Olint that facilitates in Jamaica interested persons entering into the customer service agreement with Overseas Locket. Numerous such Agreements have been entered into by persons in Jamaica (as at November 3, 2006 membership was said to be 3023) and it is Olint's business to facilitate persons entering into these Agreements with Overseas Locket.

The evidence disclosed an admission that Olint acted as agent for Overseas Locket. It was through Olint that persons in Jamaica were assisted to acquire investment contracts and Overseas Locket, through Olint was able to enter into arrangements with persons in Jamaica and would earn a commission on entering into the investment contracts. Persons who wished to terminate the contract or who wished the return of funds would do so through the services provided by Olint. Correspondence received at Olint's offices was on Overseas Locket's letterheads and the company's seal was also found in Olint's offices.

The arrangements clearly included agreement between members and between Olint and Overseas Locket that Olint would manage the members'

investment in the investment contract. This is reflected in the range of services performed by Olint, services such as accepting money, issuing receipts, facilitating the signing of Customer Agreements, facilitating encashments and providing statements of account. There is reference to payment of commission in e-mails to David Smith in relation to customers in Jamaica requesting payment of commission. Consequently the activities of the Appellants would satisfy every subheading of "deal."

Maintaining that a certificate of participation in a profit sharing agreement must be a formal document Lord Gifford submitted that to deal in such a certificate the dealer would be engaged in buying and selling them but that this is not what the Appellants were doing as they did not deal in certificates but in foreign currency. The Customer Agreement, he maintained, is not a certificate which can be traded but a private agreement and even if it were negotiable, that is, capable of being sold between members, the Appellants would not be the dealers.

He submitted that ultimately the question for the court is whether the transactions between the Appellants and their members amount to the Appellants dealing in a negotiable chose in action. In his view the Commission has seized upon the fact that profits are earned for members by the use of the Appellants' skills, have noted that it is a feature of investment contracts that

funds are used for the making of profits by the skill of another and has concluded that the Appellants are involved in the business of investment contracts but in my view, that is not a complete picture of their business operations.

The Respondent's arguments are compelling. They are based on a thorough analysis of the undisputed activities of the Appellants. This is what the Commission had to consider and what informed its decision. Clearly, the Appellants both issued and dealt in securities.

Were the Appellants offering/providing Investment Advice?

The final question for determination on this issue is whether, as alleged in the Cease and Desist Order, the Appellants were providing investment advice to potential investors in relation to foreign currency trading activities? Section 2 subsection (1) of the SA provides a meaning for the term "investment advice business". It reads as follows:

"Investment advice business" means the business of advising persons as to the investing in or the buying or selling of securities"

Subsection (2) provides certain exceptions but none of them are relevant to this case.

The Appellants argue that they have been engaged as agents for a club which takes positions in the foreign currency exchange market. They do not profess to give advice about investing in securities. The only advice they give to their members is as to the high degree of risk involved in their activity and as to other matters set out in paragraph 2 of the Private Club Member Agreement. Lord Gifford submitted that that was not advice as to the investing in or the buying or selling of securities. It was advice as to the buying or selling of foreign exchange and neither Olint or Overseas Locket or David Smith performed any of the actions set out in the definition of the word deal in the Jamaica SA. The highest interpretation most favourable on the facts is that Overseas Locket and the customer entered into an investment contract but they did not acquire investment contract or dispose of it or subscribe for it or underwrite it.

In her response to this submission, Mrs. Foster-Pusey drew the court's attention to a definition of "adviser" taken from the case of **Re Donas** [1995] B.C. S. C. W. S. 39. The Ontario Securities Commission has applied this definition and it was referred to before this court as involving construction of relevant legislation and examination of case law that touch and concern the issues in the instant case. There was some objection on behalf of the Appellants to this reference on the basis that this was not a decision of a judicial body and

could not be used even as persuasive authority. In a passage from that decision, the court's attention was drawn to the meaning of "advice" taken from the concise Oxford Dictionary of Current English (1990 ed.) namely, "words given or offered as an opinion or recommendation about future action or behaviour. I would regard that as a meaning of general application.

My examination of the definition in the Ontario Securities Act of the term "adviser" and of the terms "investment advice business" and "investment adviser" in the Jamaica SA reveals language that is similar and hence the court may look to the treatment of the issue in that case for such assistance as it has to offer in the following passage:

> ***"As indicated by the definition of "advice" the nature of the information given or offered by a person is the key factor in determining whether that person is advising with respect to investment in or the purchase or sale of securities. A person who does nothing more than provide factual information about an issuer and its business activities is not advising in securities. A person who recommends an investment in an issuer or the purchase or sale of an issuer's securities is advising in securities or who distributes or offers an opinion on the investment merits of an issuer or an issuer's securities is advising in securities. If a person advising in securities is distributing or offering the advice in***

a manner that reflects a business purpose the person is required to be registered under the Act."

Mrs. Foster-Pusey argued that the persons who acquired the investment contracts were told that it was risky and would at least have been told of past returns. In this regard reference was made to some of the documents found at the Appellants' offices –comparison charts, showing for instance comparison with returns of banks; a pamphlet with a draft from an entity called OLIC and there was also an opinion being provided on the investment merits of entering into an investment contract with Overseas Locket - all with a business purpose. The Appellants would need to be registered under the Act to provide these services.

It is the Commission's position that the Customer Agreement/ Private Club Member Agreement is evidence that the Appellants were providing investment advice and were carrying on an investment advice business. The Agreement refers to (a) -services which are defined in the Agreement itself as "taking margin leverage speculative currency positions;" (b) -the advice given to customers in connection with opening the account and (c) -the customer's understanding of factors concerning the services offered pursuant to the contract; (d)- the high degree of risk; (e) -the margin leverage speculative currency position and the guaranteed eighty percent of the margin.

That clearly is the substance of the Appellants' business operations which involved them in the business of giving investment advice. I agree with the Respondent's submission that the contractual relationship between the parties is such that the Appellants acted on behalf of its customers/members in deciding what trading positions to take; customers/members were not consulted and therefore the inescapable conclusion is that the Appellants were providing investment advice on securities as they were in effect advising the customers/members on what action to take in respect of their investment.

The Cease and Desist Order stated that the Commission believed that the Appellants were providing investment advice to potential investors in relation to foreign currency trading activities and there is merit in the argument of the Respondent's Counsel that those potential investors would at least be told of returns in the past. There was documentary evidence that supports such a conclusion. Since the investor had no control over how the funds were applied there is basis for the argument that they would in effect be receiving advice from the Appellants as to how their money was to be invested albeit at the same time that their money was being invested.

Ground 5

Ground 5 raises two issues:-

1. Did the Appellants offer or provide financial services to the public;
2. If they did not, did the Commission have any right to exercise any jurisdiction over them.

Lord Gifford argued that Parliament clearly intended to limit the ambit of the Commission to **Prescribed Financial Institutions**, that is, institutions or persons offering services to the public. The Commission's powers under the SA or **any other law,** particularly in relation to financial services, must be read as being limited by the powers given under the FSCA.

In support of this proposition Lord Gifford relied on such authorities as **Sherwell v Combined Incandescent Mantles Syndicate Limited** [1907] 23 TLR 482 (where one of the issues was whether there was an offer to the public); **Baroness Wenlock and Ors. v River Dee Company** [1885] 10 Appeal Cases 385 (applying the principles which govern limited companies to statutory corporations) and **London and North Eastern Rail Co. v British Trawlers Federation and Ors** [1934] All E. R. Rep. 580 (summing up the principle from the earlier cases). These decisions confirm that one must look to the statute which establishes a statutory body to ascertain the limits of its powers.

Any argument that the definition of securities business under the SA is wide enough to cover businesses which do not offer or provide services to the

public ought not to succeed as the SA cannot give to the Commission a power wider than that given to it by the Act which established it. The FSCA expressly limited the Commission to the regulation of prescribed financial institutions and, inasmuch as "prescribed financial institution" is defined in section 2 of the FSCA as "an institution or person offering or providing financial services to the public" the Commission has no power to supervise or regulate their services which are not offered to the public.

Lord Gifford contended that the cases relied on by the Respondent have the following common features which are not applicable to the case at bar, namely:

a) they are concerned with statutes drafted in broad language;

b) they involve solicitation of the public by advertisement which involve considerations different from cases where people voluntarily join a club in full knowledge of the risks and without solicitation; and

c) concerned the creation of documents which evidence a debt owed to the investor, which can be negotiated or used as collateral. (The definition in the SA does not include documents evidencing a debt).

In shorthand form, Mrs. Foster-Pusey's response with which I entirely agree is to the following effect:

[1] Whether or not the Appellants offered services to the public is not to be determined simply by their statement that persons are members of a private members club and have to be recommended but is a question of fact to be decided by the particular circumstances of the case.

[2] The nature and scope of the services provided and the number of persons involved are relevant factors. A member may not necessarily even represent one person as in the case of Lewfam Investments where although the funds were invested with the Appellants in the name of "Neil Lewis" Lewfam had more than 800 accounts of members.

[3] The method of referral to the "Club" and the admission of the Appellants that membership was open to "friends and family and their friends and family" indicates that there is no numerical limit to the number of persons who could potentially be admitted as members. There was no direct relationship between David Smith and the "friends" of his "friends. Family friends and their family and friends could potentially extend to the entire island, making it difficult to argue that it is a private concern and should not be subject to regulatory requirements.

I note here Mrs. Foster-Pusey's observation that although the Appellants refer to their private member club there is no document in the material before

this court constituting the club itself. There has been no documentary evidence as to how the "club was formed and what the rules are that govern it. Only the Customer Agreement Private Club Member Agreement has been seen. So although the law recognizes private clubs there is only the word of the Appellants as to the formation of this club.

[4] Membership stood at over 3000 up to March, 2006 and expanding exponentially as it is said to have done it would seem to be more than a private club. Further, the payment of a commission meant that the referral of more and more persons to the Appellants formed part of a commercial enterprise as that was an incentive to existing persons to increase their pool of referral by recruiting other members of the public. A commission would be paid for as many persons as were introduced and there was no indication that there was a finite number in contemplation which must be contrasted with a privately run investment where there would be a finite number of persons in contemplation.

There were distinguishing features in the cases relied on by the Appellants from the case at bar. In the **Sherwell** case for instance the Syndicate was for a limited purpose. It was never intended to carry on business and was a one-off situation to be contrasted with Olint where its business was a continuing one and every member, through the payment of a commission, or,

by the encouragement that a commission would be paid, would have a strong incentive to continue to bring in new members. There was no intention seen that at any stage they would stop providing services to new persons or that at some point all the investment contracts would be exhausted.

In **British Trawlers Federation Ltd.** the important finding was that no restriction could be imposed in the absence of some law giving them the power to do what they were seeking to do. They were trying to do what the statute did not allow them to do but in the instant case it is clear that the Commission has clear statutory authority pursuant to the SA.

The **Baroness Wenlock** case was referring to the borrowing rights of the company and does not assist in the case at bar. It emphasized that the corporation must act within the powers granted by the statutes concerning it and this is what the Respondent has done in the instant case.

The Appellants' arguments on this ground cannot succeed for the simple reason that the SA does not refer to prescribed financial institutions offering or providing services to the public. The Commission has acted pursuant to the provisions of the SA, and not the FSCA. It is therefore not necessary for the court to determine whether or not the Appellants are prescribed financial institutions as defined in the FSCA although it is clear to me that the activities of the Appellants were taking place in the public sphere.

The question of whether the Commission was correct in acting pursuant to the SA as opposed to the FSCA was argued in relation to ground nine.

Grounds 7 and 10.

The Appellants also contended that the action of the Commission prejudiced the rights of third parties without there being a need for protection for those third parties or indeed for the protection of the public generally. This argument clearly has no merit as the Commission has been mandated by Parliament to regulate the securities industry and financial institutions (see section 6 of the FSCA). Its duties under the FSCA are for the protection of customers of financial institutions while under the SA it is given the responsibility for the general administration of the SA {see section 4(1)}. As I see it there would indeed be a serious dereliction of duties if the Commission were to become cognizant of activities that ran afoul of the provisions of the SA and failed to act. Those duties are not just to a section of the public and are not to be ignored because some persons say they are not in need of protection. Its duty is to the public at large, to protect the integrity of the securities industry.

It is indeed correct to argue that if the court finds that the activities of the Appellants fell within the regulatory remit of the Commission then it would not

matter that four persons or even one hundred persons say that they are not in need of protection. The Commission has a statutory duty to perform where it deems it necessary as it is mandated to do.

In the court's view regard must be had to the evidence of Brian Wynter of the policy concerns of the Respondent which he expressed in his first affidavit. These are valid concerns. He spoke of the concerns about the negative impact that unregulated entities may have on the securities industry. Unlicenced entities he said represent a threat to customers and potential customers as it is not operated in compliance with safeguards established to protect users of financial services. In this case he felt that urgent action was needed to protect the public for a number of reasons such as the concern that Olint was managing very large sums of money on behalf of individuals; that the interest rate being provided was extraordinarily high at times exceeding ten percent per month; that Olint was not being supervised by any regulatory entity with the result that no one could speak to the soundness of the entity, its principals and its operations in general. He said urgent action was required to protect the public.

The Appellants take issue with this latter averment submitting that nothing in the Respondent's course of action indicated urgency. There was no indication in the Minutes of the Respondent's meeting of any considerations of

urgency. That however, is his evidence before this court and it is noted that in this full appeal, which is in the nature of a rehearing the Appellants could have required Mr. Wynter's attendance for cross-examination on his affidavit evidence but did not do so.

CONCLUSIONS ON THE ARGUMENTS *IN LIMINE*

In determining whether the Commission was justified in its decision to issue the Cease and Desist Order the court must consider not only the evidence but also the statutory framework and the general policy for the regulation of the securities industry. An examination of the issue from this broad perspective makes it clear that the action of the Commission was justified. The Commission was correct in its views, as indicated in the Cease and Desist Orders, that the activities of the Appellants required to be regulated.

I remain unmoved by the arguments of Lord Gifford that the meaning of securities should be limited to the items as listed from (a) to (f) in section 2 of the SA and that the term "investment contract" should be given a restricted meaning because of its position in the definition at (f) and the fact that allowance has been made for additions to the item at (c) of the definition where it is stated that the Minister may by order from time to time add to **"documents or writings..."** In my view this does not mean that if something is not specifically stated in the definition it is not covered. There are other

features of the definition which may cover an item not listed and there would be no need for an addition to the list. In this case the scheme operated by the Appellants and the documents it issued evidencing the members participation in it (particularly, the Customer Agreement Private Club Member Agreement coupled with the receipts issued on the payment of money by the customers) put it within the scope of the term investment contract.

The Appellants were also dealing in securities. They dealt in certificates of participation in a profit sharing agreement when they encouraged persons to enter into the profit making enterprise and issued a document evidencing the fact that the person is a part of the profit sharing agreement. The statements provided when money is invested attested to this.

The documentary evidence supports the conclusion that the Appellants both issued and dealt in securities. As Brian Wynter said in his first affidavit *"Entry into such an arrangement with the individual and the encouraging of persons to enter into such an arrangement are both regulated activities."*

As I see it there was ample justification for the Commission to have come to the conclusions that it did, resulting in the issuance of the Cease and Desist Orders and Ground 3 of this appeal fails.

For the reasons already given Grounds 7 and 10 also fail. The Respondent is mandated to act in the interest of the public generally and not

just a section of the public. It was obliged to take action in the circumstances that faced it and the fact that a few persons say that they are not in need of the protection of the regulatory body does not take the activity outside of the regulatory ambit of the Commission.

The Procedural Challenges

Ground 2.

The complaint in Ground 2 was dealt with on an objection by the Respondent's Counsel who argued that the appeal ought to be concerned with the complaints relating to the Cease and Desist Order itself; that any issue relating to the warrants that were executed at the offices of the Appellants was appropriate for a judicial review and not for these proceedings. That objection was upheld and that ground was not argued.

Ground 1.

Lord Gifford contended that the Appellants should have had a hearing either because the statute required it and/or in the alternative because the rules of natural justice required it. By hearing the Appellants mean an opportunity to know the allegations being made against them and to make representations in

their own defence. That principle, the *audi alteram partem* rule, is fundamental to fair administration in a free society.

He cited the case of **Hoffmann La Roche v Secretary of State for Trade and Industry** where the Respondent had a duty to give the Appellants an opportunity to put forward facts and arguments in justification of their conduct before reaching a conclusion which may affect them adversely. There the proper opportunity had been provided but this is totally lacking in the instant case.

Lord Gifford contended that section 4 (4) of the SA provided for such an opportunity to be given to the Appellants and the Commission was under a duty to provide them with that opportunity. However, Mrs. Foster-Pusey argued that the section is irrelevant to this appeal as it relates to the investigations of the Commission prior to the issue of the Cease and Desist Orders and not to the issue of the Cease and Desist Orders themselves. The statute provides that the Commission may hear orally any person who will be affected by an investigation. It has the discretion whether to hear such persons or not.

I am unable to agree that the section is irrelevant. It reads:

"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"

The Cease and Desist Order is one of the results that the investigations may have and would undoubtedly be involved in the process. What the section appears to contemplate is a hearing before the investigations are completed and the Order made. It suggests an investigation in progress otherwise how would the person know of it. The Commission **may** hear the person orally when knowledge comes to that person of the investigation but **shall** hear the person if a request is made in writing. So for instance when knowledge of this investigation came to light on the visit to the offices of the Appellants an oral request could have been made. There is no evidence that one was made.

Subsequently letters were written by Attorneys-at-Law for the Appellants requesting information and Mrs. Foster-Pusey argued that if these letters were being regarded as requests to be heard at least one was received after the investigations concluded. Counsel submitted that a written request for a hearing should be specific and ought not to require interpretation. It should clearly state what is being requested. I am of the view, applying the same 'substance over form' approach to the letters, that if their contents revealed

even inferentially that an audience was being sought to clarify areas of uncertainty in the Commission's actions that should have sufficed.

The letter that was received on the 21st of March, 2006 would have been in time for the March 22nd meeting and it is arguable that this should have sufficed as a request for a hearing. However, the section seems to contemplate a request being made to the Commission and this letter was addressed to the Attorney General's Chambers. It did not disclose whether it was copied to the Commission. For that reason it seems that could not properly be regarded as complying with the section. The next step in the statutory regime was to seek a stay of execution of the orders and that was done.

Counsel submitted that when one looks at section 68 (1B) of the SA, Parliament provided for a hearing in particular circumstances so it was clearly not intended for such a hearing to take place in relation to the issuance of a warning or a Cease and Desist Order under the Act. It seems to me that if there was a hearing, the Commission may nevertheless take any action outlined here. These must be the results likely to affect the interested party referred to in section 4 (4). In the sense that the investigation could result in the issuance of a Cease and Desist Order these considerations would no doubt arise.

The authorities cited by the parties dealing with the principle of natural justice contain clear statements of the law which are not in dispute. They speak

to a requirement for fairness and the need to provide an opportunity to be heard sometimes even where a statute may not contain such a provision. The cases cited included the **Century National Merchant Bank** case (supra); **Board of Education v Rice** [1911-13] All ER Report 36; **Ridge v Baldwin** [1963] 2 All ER Reports 66 and **Wiseman v Borneman** [1969] [1969] 3 All ER 275.

The Appellants contend that had they been given the opportunity of a hearing before the Cease and Desist Order was issued they may have been able to persuade the Commission that their activities were not in breach of the SA. The procedure adopted by the Commission was manifestly unfair. However, in light of the positions still maintained by each side, that seems to be highly unlikely. The Commission is firmly of the view that the activities of the Appellant require to be regulated and they hold equally firmly to the view that the Commission has no jurisdiction over them as their activities do not fall to be regulated. It seems to me that nothing short of a pronouncement by the court would resolve the issues between the parties.

The Privy Council in **Century National Merchant Bank** recognized that problems could result from prior notice to a party and a similar sentiment was expressed in the case of **Suisse Security & Trust Ltd. v Governor of the Central Bank of the Bahamas** [2006] UKPC 11. In the **Wiseman** case it was

said that the courts may imply a right to be heard where the statute does not expressly provide for it but Lord Reid noted that

> **" Before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."**

It is crucial to construe the relevant provisions of the legislation to determine whether the statutory framework makes adequate provisions for fairness. In **R (Dr) v Head Teacher of St. Georges Catholic School and Ors.** [2002] EWCA CIV 1822 it was held in that " the court's task in cases like the present is to examine and construe the statutory scheme as a whole to discern from it Parliament's intention."

In **Lloyd and Ors. v. McMahon** [1987] 1 All E.R. 1118 Lord Bridge stated that " the so-called rules of natural justice are not engraved on tables of stone." He preferred the "better expression" of the "requirements of fairness" and said that demanded that when any body, domestic, administrative or judicial has to make a decision which will affect the rights of others it depended on the character of the decision making body, the kind of decision it has to make and the statutory or other framework in which it operates. The

House of Lords held that the appeal process was sufficient to enable the Appellants to make representation and there was no unfairness.

The case of **Narsham Insurance (Barbados Ltd. v Supervisor of Insurance and Anor**[1999] 56 WIR cited by the Appellants is distinguishable from the instant case in that **Narsham** concerned judicial review powers and a statute which Jamaica does not have. Further, that case did not present the Court of Appeal with the right to hear the case on the merits.

In this case, by virtue of the provisions of section 68 (1C) of the SA with a a Judge of the Supreme Court hearing the appeal has wide powers. The section provides that the judge :

"may make such order as he thinks fit."

Section 74(6) indicates the orders that the Judge may think fit to make, namely, he ***"may confirm, reverse or vary any decision, refusal, ruling or order made or given by the Commission."***

By this procedure any perceived unfairness may be addressed.

I am satisfied that the legislative scheme provides a mechanism where fairness is preserved and there is no breach of the principles of natural justice. The SA provides for an application to be made for a stay of execution of the order so that the activities of the aggrieved party need not be unduly affected. If the application is not successful at the Commission level there is recourse to

a Judge of the Supreme Court and then an appeal. The principles of natural justice are well preserved within such a legislative scheme and there is strong support for the view that the principle is not breached even if there is no hearing in the first instance as there is still an opportunity to make representations (See **Lloyd and Ors v McMahon** - supra). This appeal is a full appeal providing the Appellants with the opportunity to adduce any evidence they regard as relevant to a determination of the issues.

Ground 9.

Lord Gifford regarded this Ground as an alternative to ground one to be pursued only if ground one fails. It is therefore necessary to look now at this Ground.

Here the Appellants contend that in issuing the Cease and Desist Order the Commission acted unlawfully as it should have acted in accordance with the provisions of the FSCA and not the SA. This is because the provisions of the SA that relate to the issuance of the Cease and Desist Orders were impliedly repealed by the provisions of the FSCA.

Lord Gifford submitted that this ground falls into two parts:

1) On a true constructions of the provisions of the FSCA the Respondent was obliged to proceed in accordance with Part B of the

Third Schedule before it could lawfully make a Cease and Desist Order;

2) If they are repugnant to each other then the provisions of the FSCA must prevail as it is the later Act.

The later Act by introducing a new and different cease and desist order has impliedly repealed the provisions of the earlier Act which contains a different procedure. In **Kutner v Phillips** [1891] QBD 267 Smith J said

"Unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time a repeal will not be implied and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation or unless there is a necessary inconsistency in the two Acts standing together"

and in **Ellen Street Estates v Ministry of Health** [1934]All ER Rep 385 Scrutton LJ said that Parliament can alter an Act by repealing it or by enacting a provision which is clearly inconsistent with the previous Act.

In reliance upon these authorities Lord Gifford argued that the FSCA has impliedly repealed the provisions in the SA relating to the procedure for the issuance of a Cease and Desist Order since the two are inconsistent and cannot stand together. In the FSCA, Parliament legislated for a new procedure with new safeguards in place of the old and it may have been an oversight that the

old cease and desist order provisions were not expressly repealed. Thus, in purporting to act under the SA the Commission acted unlawfully in issuing the Cease and Desist Order without giving notice and holding a hearing in accordance with the provisions of Part B of the Third Schedule to the FSCA.

As the law stands there are indeed two separate pieces of legislation by virtue of which the Commission may issue cease and desist orders. Section 8 (1) of the FSCA gives the Commission the power to issue such orders in accordance with Part B of the Third Schedule of the Act if it believes that any of the conditions in paragraphs 1, 2 or 3 of Part A of the Third Schedule exists in relation to a prescribed financial institution.

The Commission also has power to issue a Cease and Desist Order pursuant to section 68 (1B) of the SA. It is the Commission's position that these provisions have not been impliedly repealed by the FSCA. In enacting the FSCA Parliament created a body that would supervise the provision of various financial services. Mrs. Foster-Pusey pointed out that Legislation concerning financial services was reviewed resulting in amendments to various pieces of legislation including the SA, and in amending the SA and passing the FSCA it is clear that Parliament altered the SA where it intended to do so by virtue of the passage of the FSCA. The very section referring to the issuance of the cease and desist order was amended in 2001. There is therefore no reason

to believe that the retention of this provision was an oversight. On the contrary, it was a deliberate retention.

In **Attorney General of Antigua and Barbuda and Anor v Lewis** [1995] 51 WIR, cited by the Respondent's Counsel Chief Justice Floissac refers to an extract from 44 Halsbury's Laws of England (4th Ed.), paragraphs 966 and 969 as lucidly expressing the principle concerning implied repeal. Paragraph 966 states that repeal by implication is not favoured by the courts for it is to be presumed that Parliament would not intend to effect so important a matter as the repeal of a law without expressing its intention to do so.

> **"The rule is that one provision repeals another if but only if it is so inconsistent with or so repugnant to that other that the two are incapable of standing together. If it is reasonably possible so to construe the provisions as to give effect to both that must be done and their reconciliation must in particular be attempted if..... the repeals expressly effected by the later statute are so detailed that failure to include the earlier provisions among them must be regarded as such an indication.**

Mrs. Foster-Pusey, sees the case at bar as one such case where efforts to reconcile must succeed. She argued that there is no grave inconsistency or repugnancy between the FSCA and the SA as the two means of acquiring

Cease and Desist orders are different procedures. The effect and operation of the provisions are not precisely the same. The powers are exercised at different times and on different bases. Lord Gifford does accept that the provisions are different but regards the new procedures as replacing the old.

The extract continues in paragraph 969 to speak of the situation where the continued application of provisions in a general enactment is inconsistent with a subsequent special provisions. Then the general would be over-ridden by the special as it is to be taken that the effect of the special provision is to exempt the case from the operation of the general provision.

In the instant case it is the SA that contains the special provisions while the FSCA contains the general provisions. The latter concerns a number of bodies offering financial services including securities but does not constitute a complete code for the regulation of securities while the former concerns securities only. The FSCA then is the general Act and would not amend the special act without expressly stating so. Both Acts are not mutually contradictory. They can and are standing together.

The rule is that where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general

one. Accordingly the earlier specific one is not treated as impliedly repealed. Further, the principle may apply where two Acts operating independently of each other are in question and the facts fall literally within the two legislative schemes. (See Bennion's Statutory Interpretation – A Code Fourth Edition pages 255 and 256). This is the ***"generalia specialibus non derogant"*** which the Privy Council applied in the case of **R. v Ramasamy** [1965] A.C. 1 cited by the Respondent.

There is no gainsaying that the Commission acted under and by virtue of the provisions of the SA. It was entitled so to do. This was a matter concerning the securities industry and did not involve the provisions of the FSCA. The SA was the relevant Act empowering it to take the action that it did.

Ground 6.

The final Ground for consideration is Ground 6 in which the Appellants contend that the Cease and Desist Orders should be set aside as the Commission acted as investigator and adjudicator in the same matter in breach of the doctrine of the separation of powers. Lord Gifford cited the case of **Jamaica Stock Exchange v Fair Trading Commission** [2001], SCCA 92/97, with particular reference to the judgment of Forte, P who referred to the case of **Hinds v The Queen** [1976] 1 All ER 353 and to the words of Lord Diplock to

the effect that legislative, executive and judicial powers are exercisable exclusively by the legislature, by the executive and by the judicature, respectively.

The Privy Council held in **Hinds** that a review Board set up by the Gun Court Act to advise the Governor General as to the discharge of persons sentenced to detention during the Governor General's pleasure was not comprised of persons qualified by the Constitution to exercise judicial power. This case was followed by the Privy Council in **DPP v Mollison** [2003] 62 WIR 268 which struck down the provision in the Juveniles Act concerning the detention of juveniles at the Governor General's pleasure as being incompatible with the constitutional principle that judicial functions such as sentencing must be exercised by the judiciary and not by the executive. These decisions make the point that a public officer should not exercise judicial functions.

Lord Gifford acknowledged that the opinions expressed by Forte, P were *obiter* but argued that it was well grounded in law and should be followed. After reviewing the powers of investigating, holding hearings and making findings Forte, P concluded that "these provisions do not clearly define the distinction between the function of investigation and the function of adjudicating upon matters which are the subject of complaints." In that case he

held that because the Fair Trading Commission (the FTC) was not exercising judicial powers there was no breach of the doctrine.

The Appellants complain that by virtue of the provisions of the SA the Commission acted as investigator, prosecutor and judge and that it exercised judicial powers in making orders which required them to cease their activities on payment of heavy penalties if they refuse.

Further, the cease and desist order is akin to a perpetual injunction, stopping the citizen from carrying on an activity which no court has declared to be unlawful. The court has no power to intervene until after the order has been made so the court is limited to an appellate role. The investigative, executive and judicial functions of the Commission were so inextricably intertwined that there was a clear breach of the doctrine of the separation of powers.

The Appellants say that the Commission's interference with their activities was either unlawful upon one or more of the various grounds outlined above or if not unlawful was wholly unjustified.

It is entirely correct that the Cease and Desist Order is akin to an injunction. But that is not remarkable. That is in the nature of what Administrative bodies are empowered to do – that is, to make orders which may, for instance, require persons to cease carrying out certain activities. In this case however the doctrine of the separation of powers is preserved as

enforcement of the orders of the Commission rests with the court so that the Commission is not the final arbiter. Mrs. Foster-Pusey likened the Commission's order to a ruling which would be given effect or otherwise by the court.

She pointed out that the **Jamaica Stock Exchange** case has been misconstrued by the Appellants as they seem to suggest that this case is supportive of their contention that because the Commission's Cease and Desist order is akin to an injunction the SA and its provisions are breaching the doctrine of the separation of powers. That is not the reasoning to be extracted from the judgment of Forte, P.

His Lordship was referring to an injunction as a means of enforcing a direction of the FTC and not as an original ruling. Further, in his judgment Forte, P had looked at several judicial definitions of judicial powers and summarized the term as meaning:

> ***"the power to settle disputes between parties, applying the necessary law to the determined facts and arriving at conclusions and issuing consequential orders which are binding on the parties. Even where these features or a combination of them exist it may yet fail to establish that a body is exercising such power if, as a common characteristic of so called administrative tribunals the ultimate decision may be***

determined not merely by the application of legal principles to ascertain facts but by considerations of policy also."

He was of the view that the Fair Trading Commission (the FTC) in arriving at its decisions was not only guided by the law but also by policy and therefore was not a body exercising judicial functions as contemplated by the Constitution. By parity of reasoning a similar conclusion would have to be arrived at in relation to the Respondent in the case at bar. The enactment of the SA and the FSCA are to fulfill the policies of the government to regulate financial institutions generally (the FSCA) and more specific to this case the securities industry and the persons and entities involved in investment advice business (the SA). In issuing the Cease and Desist Order the Commission, although guided by legal principles would no doubt also have had to have policy considerations in mind.

In his first affidavit referred to earlier, Brian Wynter set out several policy considerations behind the requirement for licensing of entities such as Olint. It therefore seems clear that like the Fair Trading Commission the Respondent in issuing the Cease and Desist Orders and showing features of judicial functions also exercised administrative functions which take it out of the realm of the judiciary as contemplated by the Constitution.

Mrs. Foster-Pusey pointed out that in the **Jamaica Stock Exchange** case the relevant Act had provided for a right of appeal to a Judge in Chambers and gave the court the power to stay the directions of the FTC, provisions similar to those in the SA. Forte, P recognized that these provisions meant that the decision of the FTC was not final as "it was the court that is empowered to have the final word in relation to complaints investigated and the consequent directions or orders made by the Commission". In the circumstances Forte, P was of the view that there was no breach of the principle of separation of powers. That reasoning is clearly to be applied in the instant.

Forte, P had gone on to express the view that a merger of investigative and judicial functions of the FTC was likely to lead to a breach of the principle of natural justice. However, it does not appear that consideration was given to the effect of the appeal mechanism in the Act which provided for the court to be the final arbiter and therefore with the wide powers given to the court in the Act there was fairness when the entire scheme was looked at as a whole. It is Mrs. Foster-Pusey's view that had this been urged upon Forte, P. he would have concluded that there was not likely to be a breach of the principle of natural justice in any perceived merger of the investigative prosecutorial and adjudicatory functions. I share that view.

Support for the reasoning that the legislative scheme can sufficiently preserve the principles of natural justice is to be found in the case of **Porter v McGill** [2002] 1All ER 465 where Lord Hope noted at paragraph 92 of his judgment that in that case the auditor was required to act not only as investigator but also as prosecutor and as judge

> **"but the problem has been recognized and dealt with in section 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 provided for a complete rehearing and the court can exercise afresh all the powers which were given to the auditor."**

Likewise, in this case as in **Porter v McGill** the appeal mechanism gives to the court wide powers to deal with the complaints. A complete rehearing with the court being able to exercise afresh all the powers given to the Commission does provide a solution to any perceived breach of the doctrine of separation of powers as well as any perceived breach of the principles of natural justice..

This final Ground also fails.

THE LEWFAM APPEAL

This is also an appeal against a Cease and Desist Order issued by the Respondent pursuant to section 68 (1) of the Securities Act (the SA). It was issued against the Appellants Neil and Janice Lewis trading as Lewfam Investments (hereafter referred to as Lewfam) and was effective from March 26, 2006. They seek an order to reverse the Commission's decision and set aside that Cease and Desist Order.

The Order was directed to **LewFam Investments and Trading/LewFam Investments Club/Neil Lewis et al** and was stated to have been the result of investigations carried out into the activities of the Appellants by the investigative arm of the Commission. It was in terms identical to that issued against the Appellants in the Olint appeal save and except that it included a belief that the Appellants were performing the functions of a dealer's representative or investment adviser's representative in contravention of section 10 of the Securities Act as well as the Commission's suspicion that on a day to day basis and without being registered to do so the Appellants were performing the function of a representative in contravention of section 10 of the Securities Act.

Section 10 of the Securities Act reads as follows:

(1) A person shall not perform functions as a dealer's representative or

investment adviser's representative unless he is registered for that purpose by the Commission under this Act.

Section 2 (1) of the Act provides definitions for the terms "dealer's representative" and "investment adviser's representative." The former is defined as:

"a person employed by, acting for or by arrangement with, a dealer, who performs for that dealer, any of the dealer's functions (other than work ordinarily performed by accountants, clerks or cashiers) whether paid by way of salary, wages commission or otherwise"

and the latter as:

"a person employed by, acting for or by arrangement with, an investment adviser, who performs for such investment adviser, any of the functions of an investment adviser (other than work ordinarily performed by accountants, clerks or cashiers) whether paid by way of salary, wages, commission or otherwise, and includes a manager or office of a company who performs any of those functions for the company whether or not he is paid as aforesaid."

During the investigations, documents were removed from the office of the Appellants and reliance was placed on them in support of the Commission's decision to issue the Cease and Desist Order. These documents

were exhibited to the affidavit of Brian Wynter, the Commission's Executive Director.

In his affidavit, Mr. Wynter spoke to the policy requiring the regulation of bodies and persons providing financial services as he did in the Olint case but it bears repeating here. Unregulated entities, he said, present a threat to customers, potential customers and the general public because their existence undermines the rule of law by encouraging other persons to disregard statutory requirements. As there is no way to ensure that they adhere to appropriate standards of operational conduct, they can undermine the integrity of financial markets and have an adverse systemic impact on the economy in general. There were also concerns expressed about money laundering and the financing of terrorism in relation to which the Commission also has some responsibilities.

He exhibited correspondence between the Commission and the Appellants' Attorney-at-Law indicating that the Appellants were made aware of the Commission's position with regard to their activities, prior to the visit to their offices. A substantial amount of money was involved and the Commission felt the need to act swiftly (urgently was the word used in relation to the Olint appeal) as delay could result in further exposure of members of entities. There were concerns that inviting entities to meetings could compromise the

investigations and it was felt that in view of the knowledge of this particular entity of the Commission's position and its continued activity nonetheless, a persuasive approach was not appropriate and immediate enforcement was required.

Mr. Braham, in referring to the reasons advanced by Mr. Wynter for the Commission's course of action commented that the Minutes of its meeting did not reflect the concerns raised in his affidavit but Mrs. Foster-Pusey pointed out that it is not to be expected that everything said in a meeting will be reflected in the Minutes of that meeting and Mr. Wynter's evidence of the Commissions' concerns before this court ought to be accepted.

The complaints contained in the seventeen grounds of appeal filed by these Appellants raised substantially the same issues as in the Olint Appeal (hence the order that they be heard together) namely:

1. that the Cease and Desist Order was unlawful, void and of no effect having been issued contrary to and/or in breach of section 8 of the FSCA and the Third Schedule thereto (Ground 3.1);

2. that the Respondent' actions were ultra vires as the Appellants' business did not involve and/or relate to securities, they were not dealers representatives, were not carrying on the business of dealing in securities, are

not a prescribed financial institution and do not offer financial services in securities; (Grounds 3.2 to 3.8 and 3.14)

3. that the Commission erred in its conclusion that the Appellants were carrying on an investment advice business in contravention of section 8 (1) of the Securities Act; (Ground 3.9 and 3.10);

4. that the Cease and Desist Order was unlawful in that the Commission purported to act under the Securities Act. In so doing it breached the principles of natural justice by acting unfairly in not giving them the opportunity to be heard before issuing the Order and breached section 20 (2) of the Constitution and section 8 of the FSCA and the Third schedule thereto as the FSCA had impliedly repealed the provisions relating to the issuance of a Cease and Desist Order under the Securities Act, leaving the provisions under the FSCA to govern the issue of the Order; (Grounds 3.1, 3.12, 3.13 and 3.17);

5. The Commission breached the doctrine of the separation of powers acting as investigator, prosecutor and judge in the matter; (Ground 3.15)

Grounds 3.11 and 3.16 are peculiar to this appeal. In these grounds the Appellants complain that the Commission was incorrect to conclude that their activities were those of a dealer's representative or an investment advisor's

representative (Ground 3.11) and that the Commission infringed their right of association provided under section 23 of the Constitution.

Mr. Braham for the Appellants structured his arguments on two broad issues:

[i] that on a true construction of the FSCA and the SA the Commission had no jurisdiction over the Appellants particularly because the Appellants business has nothing to do with securities. Even if the business has to do with securities there is no evidence that they are trading in securities.

[ii] that the Cease and Desist Order was issued contrary to the procedure set out in the FSCA and as a consequence is void.

Alternatively, it is void because the Commission failed to comply with the principles of natural justice and section 23 of the Constitution dealing with rights of association.

He adopted the submissions of Lord Gifford in the Olint appeal as it related to the way in which the allegations were framed in the Order, making the point that they do not contemplate the offences as stated in the Act. Mrs. Foster-Pusey's response to Lord Gifford's submission that for the purposes of the Cease and Desist Order the Commission was not obliged to use the precise

wording of the act holds good here also. What was important was that the Order should contain the substance of the infringement.

THE ARGUMENTS

The Required Standard of Proof for the Issuance of the Order

Mr. Braham argued that before the Commission is entitled to issue a cease and desist order or any action set out in section 68 (1B), the breach must reach to a very high standard and it is his view that the use of the word **satisfied** in the Act seems to equate to the criminal standard of feeling sure. The Commission is not required to suspect or feel but to be satisfied. If it is not to the criminal standard then it should be to the very highest level of the civil standard.

On the other hand it is Mrs. Foster-Pusey's view that the standard of proof required of the Commission in coming to the determination that they were so entitled and that a Cease and Desist Order was warranted, was the civil standard of a balance of probabilities and not the criminal standard as the Commission was not exercising a criminal jurisdiction. Nor was it the highest level of the civil standard as contended by Mr. Braham since this matter did not involve allegations of fraud or misconduct.

I do not share Mr. Braham's views and hold that the applicable standard of proof for the purposes of the Commission is the ordinary civil standard.

THE FIRST ISSUE

The complaint here is that the Commission lacked jurisdiction over their affairs as their business has nothing to do with securities and even if the business has to do with securities there is no evidence that they are trading in securities. This would first require a determination of what is a security.

Notwithstanding that this has already been answered in relation to the Olint appeal it is necessary to revisit the issue in terms of the arguments advanced in this case and to address the differences, if any, in the circumstances of these Appellants from the Appellants in the Olint appeal.

Mr. Braham also urged a limited interpretation on the court in seeking to find the answer to the question, arguing that in defining securities as set out in section 2(1) of the Securities Act (the SA) Parliament clearly had in mind the same concept of securities being paper instruments which are tradable as has always been understood by commercial men and women. It is for that reason that all the items, with the exception of the general provisions at (c) refer to paper instruments which are tradable – items such as debenture, stocks, bonds,

promissory notes. Nothing in the Appellants' business operations put them within that definition.

Inasmuch as the court sought guidance from other jurisdictions to find the answer, Counsel submitted that in looking at legislation from other countries the court must determine whether those Acts operate in the same way as the Jamaica legislation and whether those legislations also require that securities ought to be tradable documents. He was of the view that all the U.S. cases support the contention that a security must be an instrument with a tradable quality and cited the U.S. case of **Marine Bank v Samuel Weaver** [1982] 455 U.S. 551,102 S.Ct. 1220 as supportive of this contention. In that case the court held that while the definition of "security" was quite broad Congress did not intend to provide a broad federal remedy for all frauds; a certificate of deposit was not a security within the meaning of the Act. Neither was a guaranty agreement, even if it gave the guarantors a share of the corporation's profit in exchange for the guaranty.

Mr. Braham argued that the Appellants in the instant case cannot be said to be trading in any document. They give receipts but there is no trade in receipts. The business could well be carried out without issuing any receipts. The cases relied on by the Respondent deal with considerations of whether the instrument is marketable to the public at large. In this case there is no evidence

that the documents - receipts - were either negotiable, traded or capable of hypothecation.

When the court comes to analyze those cases, the court should bear in mind:

i) the wider ambit of their legislation;

ii) that on a careful perusal they tend to support the Appellants position that to amount to a security, the Commission must show that there is a trading in an instrument and that instrument ought to have some negotiable value not necessarily on the stock exchange but there must be a sale and a purchase and a distribution of that instrument between some body.

Following her arguments in the Olint Appeal, Counsel for the Respondent repeated her reference to the definition section of the SA with particular reference to the items at **(e) certificates of interest or participation in any profit sharing agreement** and (f) where **investment contracts** are included, as being the particular features of the definition also relied in this case.

The same approach was urged upon the court in relation to the substantial similarity in the definition of securities in the Jamaica statute with the definition in the United States Securities Act of 1933 and the Securities Act of Ontario, Canada and she repeated her view that this court may find cases

from the U.S. and Canada of use in making the determinations in the case at bar.

In these arguments several authorities were relied on by Mr. Braham on the principles of statutory interpretation –**Pinner v Everrett** [1969] 3 All ER 257; **Columbia Encyclopedia**, 6th Edition; **Stroud's Judicial Dictionary** (5th Edition) Volume 5; **Attorney General's Reference (No. 1 of 1985)** [1986] 2 All ER 219; **Halsbury's Laws of England,** Volume 44(1); **Mullins v Collins** [1874] LR 9 QB 292).

Mr. Braham also urged the court to seek assistance from the linguistic canons of construction and the *ejusdem generis* principle in arriving at an interpretation of the statute arguing that to the extent that the term investment contract appears to be general and on the face of it could mean any contract entered into by the parties, these words should be limited to the class of tradable documents to be found in items (a) to (f) of the definition in the SA, accepting that the words are limited by their associates.

The principles are all correctly stated and it certainly is correct that the court is not bound by interpretations given to what appears to be similar

provisions in other legislations. However, I share the views of De Grandpre, J, in the case of **Re Pacific Coast Coin Exchange** [1978] Vol 2S.C.R. 112 that in a situation where the statute does not provide a definition of particular terms, it is a wise course to look at decisions reached in other courts where the issues have been addressed for guidance. Neither the expression "investment contract" nor the expression "participation in any profit sharing agreement" is defined in the SA.

Extensive case law has developed over the years and the court would have to examine these cases very closely before arriving at any conclusion which is inconsistent with the development of the law to be found in those decisions. Further, in light of that extensive case law I agree with Mrs. Foster-Pusey's submission that there is, at this point, no need to resort to definitions in legal dictionaries or to go back to first principles.

The case of **Bellah v First National Bank** [1974] 495 F. 2d 1109 is relied on by the Appellants as authority from the U. S. Appeal Court stating that currency is not a security. This case was really concerned with whether a note that was issued was commercial paper or investment paper and whether a certificate of deposit was a security. The court held that it was not investment paper and that the certificate of deposit was not a security. In applying the cases generally applicable to determining whether an instrument is a security

and focusing on the investment nature of the instrument the court further held that there was no indication that the bank sought to profit from the successful operation of the enterprise and found the note not to have the investment nature The note was commercial paper. This case really did nothing to advance the arguments of the Appellants.

After reviewing the legislations from the other jurisdictions, specifically from the United States and the Ontario Securities Act, together with the cases cited both by the Appellants and the Respondent and the texts which offered useful reviews of the case law, such as **Lowenfels and Bromberg's** work entitled **"What is a Security"**and the Canadian text entitled **Essentials of Canadian Law Securities Law** by **MacIntosh and Nicholls**. I have found in the arguments on behalf of the Appellants no basis for arriving at a conclusion different from that in the Olint appeal as to what constitutes a security particularly an investment contract and certificates of participation in a profit sharing agreement.

I rely particularly on the test formulated in the United States case of **Securities and Exchange Commission v W. J. Howey Co. et al** [1946] 328 U.S. 293, 66 S. Ct. 100 - **Howey** test - where 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" and repeat the reasoning of the court that it was immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise. This approach was held to embody a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits. Substance not form must guide the court and regard must be had to the nature and extent of the activity being carried out.

It is now necessary to examine the activities of these Appellants to determine if they are covered by the definition which the court has accepted.

The Evidence of the Appellants

On the evidence, the activities of the Appellants are not really in dispute. According to the affidavit of Neil Lewis, LewFam Investments evolved as "a sort of private members club" whose members pool funds together and then place the funds with David Smith for currency trading. Membership commenced with family and friends and new members were accepted on referral from existing members and then introduced to either of the Appellants or to his sister Aprylle Dawn Lewis-Haye and other core members.

Once accepted the member was given a "Member Profile" a copy of which was exhibited to his affidavit showing a section for "Names for

Certificate". Members were then briefed on the history of the activities of LewFam Investments, currency trading was explained and the member was told about the risk involved. A document called an investment receipt would be issued on the payment of funds - a cheque made payable either to LewFam Investments or Olint Corp, a service company owned by the trader David Smith - and the funds are then pooled together and sent to Olint Corp. This receipt of investment he said was referred to as a certificate which acknowledges that the person is a member of the LewFam Investments Club having deposited an initial investment of whatever the amount is. Copies of both documents were exhibited to his affidavit.

Mr. Braham argued that these two documents are merely receipts of the investments given in acknowledgement of their agreement – mere evidence of payment. He said they are not securities because they are not transferable to anyone. However, they have greater significance than submitted by Mr. Braham.

Mr. Lewis continued by averring that a monthly report is sent to LewFam Investments by Olint Corp (and it is interesting to note that no receipt was found at their offices in the name of LewFam Investments, only in the name of Neil Lewis). David Smith advised him and he so believed that the funds were placed in a trading account which he has with Oanda which is a

currency trading division of a U.S. Bank. (There was evidence suggesting that this was without foundation).

What this evidence shows is that the activities of these Appellants put them within the scope of the definition of an investment contract in that:

1. they make and facilitate the making of agreements whereby the money of members is acquired;

2. the members expect to gain a profit over and above what they invest;

3. there is a degree of risk in the investment

4. the members do not control the manner in which the investment in foreign exchange dealing takes place. It is the expertise of OLint Corp and in particular, of David Smith upon which reliance is made.

This satisfies all the features of an investment contract. Further the evidence of the documents issued by these Appellants shows that they were involved in certificates of participation in a profit sharing agreement. The members are issued a certificate and a receipt expressly stating that repayment is only guaranteed in relation to 80% of the sums pooled and the money is going to be pooled for a speculative venture. This supports the Commission's view that a security has been created and the authorities establish that a security need not be ordinarily transferable.

The certificate of investment referred to by Mr. Lewis has trading dates. This seems to suggest that when the money is given and accepted and the certificate issued LewFam considers that trading is taking place. When persons enter into a relationship with LewFam they are in fact buying a security and when they cash it in they are selling it. In any event the definition of deal in the SA refers to acquire and dispose not buy and sell. Mrs Foster-Pusey argued that there is no need to show that an investor in LewFam could sell to a third party and there is nothing to suggest that the certificate could not be pledged. By virtue of the guarantee the certificate could always be said to value at least 80% of the sum invested. The only factor which would limit it being used as a pledge is the degree of confidence a third party had in LewFam's business.

The case of **State of Oregon ex rel Cory Streisinger v Orion International Inc and Russell Cline (District of Oregon)** [2006] Case No. 03 CV 603 K1 was cited in both appeals as a case in which the court found that the investments in the Orion Fund offered and sold to members of the public involved persons investing money in a common enterprise with other investors and with the investors expecting profits on their investments to be made through the management and control of the promoter. The Defendants had represented that the monies in the Orion Fund were being used to trade foreign

currencies and it clear that in this case it was not foreign currency trading itself that was seen as a security.

These Appellants' argue that to interpret "securities," especially as it relates to certificates of participation in any profit sharing agreement and/or an investment contract, would be to enlarge the definition to capture currencies which is the investment or speculative venture behind the certificate and or the contract, but, it this shows a misunderstanding of the nature of a security. What the Commission contends, as supported by the authorities, is that the security arises 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.

In this case as in the case of Olint it is the Appellant's method of operation that transforms what is made to appear as trading in foreign currency into an investment contract. These Appellants, by virtue of their pooling of investor payments and then investing such sums in their own name, transferred the risk of their operation to the investors who thereby became partners in a common enterprise with them.

When one examines the definition of "deal" in the SA it is clear that any one of the activities of the Appellants would constitute dealing. For instance,, inducing persons to invest in Olint and with David Smith constitutes dealing in

securities. Advising them of the returns to be made and the great opportunity presented constitutes dealing in securities. In sum, the activities of the Appellants and the documentation in the evidence clearly show that LewFam was dealing in securities. The Principals induced persons to invest, facilitated the investment, pooled the funds received and handed them over to Olint and/or David Smith.

These Appellants, unlike the Appellants in the Olint appeal, do not have another corporate entity interposed between themselves and the investor. LewFam itself entered into the arrangement with the investor and dispose of the investment when the investor so requests. Whenever the person so invests and is issued a receipt and a certificate of investment, both LewFam and the investor are acquiring an investment contract and a certificate of interest or participation in a profit sharing agreement.

Mrs. Foster-Pusey argued that the Appellants induced persons to invest with them; that the Appellants also offered to manage and indeed managed the money invested as they also invested otherwise apart from in Olint/Overseas Locket That is certainly supported by the document headed **LewFam Investments and Trading** where it states at paragraph 3:

> ***"In addition to he currency trading we also have access to special short term trading operations in the major North American and***

European Banks which become available from time to time that result in a higher return for short periods without risking even the 20%"

What this shows is that there is no intention to necessarily focus on one area only but to invest the money in other areas. This would involve some areas of managing the funds in which decisions taken would not involve the investor. The activities of LewFam therefore fall squarely within the definition of dealing in securities.

Investment Advice

In the case of these Appellants, the Commission's position was on even firmer ground. Their documents entitled "**MAXIMIZE YOUR INVESTMENT** with LewFam Investments and Trading" and **"LEWFAM INVESTMENT AND TRADING"** clearly show the provision of investment advice. LewFam recommended the investment and this was being done in a manner that reflected a business purpose.

Dealer's Representative

Mr. Braham's understanding of " representative" is a person who is promoting the affairs of another or operating on behalf of another and he submitted there is no evidence in this case that LewFam is acting on behalf of another in terms of a dealer or dealer's representative. The evidence does not

suggest that the Lewises were acting on behalf of Olint. LewFam was obviously acting on its own.

In looking at the documentation in this case one can see how the Commission arrived at the conclusion that these Appellants were acting as and holding themselves out as dealer's representatives. When one looks at the business card of Mr. Harbijan and his e-mail address they are indications that he is an agent for LewFam. An examination of the document entitled MAXIMIZE YOUR INVESTMENT shows who the representatives are. The persons named to be contacted are Neil Lewis, Aprylle-Dawn Lewis-Haye or Mr. Anthony Harbijan (Investment Manager).

There was basis for the Commission's conclusions that these Appellants were engaged in activities which required them to be licenced.

Ground 3.14

Prescribed Financial Institutions and Offers to the Public

This ground though differently expressed is the same as the ground argued in the Olint appeal that the Commission acted outside its lawful powers in that the Appellants are not a prescribed financial institution within the meaning of the FSCA. To the extent that prescribed financial institutions are defined as offering services to the public, Mr. Braham submitted that none of the documents removed from the Appellants' offices have been shown to be for distribution to the public. Documents ought not simply to be

looked at and a determination made that they are being disseminated to the public. The document upon which the Commission concluded that the Appellants were offering to the public was not such as could have satisfied the Commission that this was the case. Mr. Braham asks the court to find that the Appellants were not operating as a prescribed financial institution having regard to the fact that they are not offering services to the public.

Touching briefly on the Appellants' submission that they are not prescribed financial institutions, Mrs. Foster-Pusey argued that an examination of the SA and the FSCA make it clear that a person may offer financial services without being a prescribed financial institution but this is not an issue since the Commission acted pursuant to the provisions under the SA and that statute does not contain a reference to prescribed financial institution.

Mrs. Foster–Pusey submitted that throughout the submissions on behalf of the Appellants, LewFam has referred to the persons participating in the investment venture as members. This, she argued, is meant to suggest that it is not the public that is participating in the venture. The documentation exhibited however show that they were not directed to a particular person but to anyone who may be interested.

She quoted from the judgment of Justice Kitto in the Australian case of **Lee v Evans** [1964] 112 CLR 276 in which he said:-

"I am not intending to hold that the size of the immediate audience is necessarily conclusive of the question whether the invitation is an invitation to the public. That is a question of the true scope of the invitation. While it may be answered conclusively in one case by the terms in which the invitation was expressed, it may require in another case a consideration both of the words in which they were used. I see no reason to doubt that the statement of an invitation even to person only may be seen , when considered in the light of all the circumstances to be part of though only the first step in the communication of the invitation to the public generally, so that if the lone hearer were to tell some stranger of it the stranger would be right in treating it as open to acceptance by him no less than by the hearer. But .....I think it is going too far to say that proof of an invitation given to a person as a member of the public is proof of an invitation to the public."

In considering the question of whether an invitation is to the public his Lordship said that the distinction must not be overlooked between the case of an invitation which itself is open to acceptance by any member of the public who may be interested and the case of an invitation which itself is open to acceptance by a specific individual only but if declined by him is likely to be

followed by similar invitations to other specific individuals in succession until an acceptor is found. His Lordship said the first is an invitation to the public but the second was not.

Clearly, the invitation to join LewFam does not end when one person accepts. There is no stated limit to the number of persons who may choose to join and pool their funds with other persons. Their membership had stood at over 800 in March 2006 and the funds pooled exceeded three million United States dollars. In addition, the operation included the payment of a commission for "referees". This means that the referral of more and more persons was part of a commercial enterprise and the commission was an incentive to increase their pool of referrals by recruiting other members of the public.

The Respondent repeated the submissions made in the Olint appeal on the need to look beyond the assertions that persons in the club have to be referred and to focus on the nature and scope of the services being provided.

When the context in which their activities take place is taken into account, the large number of persons involved the potential breadth of the membership the regulatory concerns, it is clear that the activities were taking place in the public sphere. The Respondent's Counsel made the further point that the fact that a person needs to be recommended does not mean that

participation is not open to the public. This of course is quite correct. Banks and other bodies offering financial services require recommendation and that does not mean that they are not offering services to the public.

The conclusions on this ground are the same as in the Olint appeal.

THE SECOND ISSUE - The Procedural Grounds

The Doctrine of Implied Repeal

The arguments advanced by Mr. Braham on the procedural grounds are substantially those argued in the Olint appeal.

Mr. Braham outlined the principle of implied repeal as follows:

i) where the later legislation is repugnant to or inconsistent with the earlier legislation, the later legislation must prevail; and

ii) if the earlier legislation can be regarded as a general legislation and the later inconsistent legislation a specific legislation then the second legislation must also prevail having impliedly repealed the first.

He argued that the FSCA was the special Act and the SA the general Act but this argument cannot succeed. I can do no better than to repeat the submission's made on behalf of the Respondent in this regard namely that to support such a contention the Appellants would have to show that the FSCA

constitutes a complete and comprehensive code for the governing of securities and the issuing of Cease and Desist Orders in matters concerning securities.

That is not possible in this case because the FSCA cannot operate without reference to the SA where the matter concerns the securities industry but the SA can operate without reference to the provisions of the FSCA. The SA is what is considered to be the complete code so the special Act is the SA and it preceded the general Act The implied repeal rule is therefore inapplicable.

Mr. Braham cited a number of authorities some of which have already been dealt with in the Olint appeal but there were some additional cases - **Pattinson and Anor v Finningley Internal Drainage Board** [1970] 1 All ER 790 and **O"Byrne v Secretary of State for the Environment Transport and the Regions and Anor** [2001] EWCA Civ 499 but they fared no better than those dealt with in the Olint appeal to convince the court that the doctrine has any application to the circumstances of this case. These two pieces of legislation stand and are operating together. The one is neither repugnant to nor inconsistent with the other.

In the **Pattinson** case, an extract was quoted from Halsbury's Laws of England (3rd Edition) to the effect that **"if it appears from a consideration of the general enactment in light of admissible circumstances that Parliament's true intention**

was to establish thereby a rule of universal application, then the special provision must give way thereto."

In the case at bar there is no indication that Parliament by its provision for certain general powers to be exercised by the Commission under the FSCA intended to establish a rule of universal application so as to do away with the special provisions in the SA. In the **Pattinson** case both statutes were dealing with general powers of Drainage Boards. That contrasts with the instant case where the SA is a special Act and the FSCA is the general Act.

The Principle of Natural Justice

Again the complaint here is as to a breach of the principle of natural justice in not affording to these Appellants an opportunity to be heard before issuing the Cease and Desist Order and the arguments are similar to those of the Appellants in the Olint appeal. Mr. Braham emphasized however that in circumstances where the result of the Commission's decision would be that the Appellants would have to close down their operations or face serious consequences, may even face criminal prosecution and would be subject to adverse publicity in the issuance of the Cease and Desist order it was incumbent upon the Commission to hear the Appellants before taking action.

It was Mr.Braham's contention that looking at the scheme of the SA and the provision for natural justice in more than one part it may be felt that any defect in one part may be cured in the other. However it is not in every circumstance that the defect

in a previous part can be cured by the later part. If the previous part had a detrimental or prejudicial effect then natural justice ought to have been provided.

Indeed in his affidavit, Mr. Lewis had complained that since the Cease and Desist Order, members have requested the return of funds and have lost confidence in them so that in effect there were detrimental effects. (This is akin to a concern that the Commission expressed that unregulated entities had the potential of causing a loss of confidence in the financial sector and damaging the economy. In this case it was pointed out that funds placed with Olint by LewFam are in the name of Neil Lewis, that that is who Olint knows as a customer. This opens up a number of possibilities concerning withdrawal of funds which could impact negatively on other persons interests without their knowledge. The indications from Mr. Wynter in his affidavit are that there is a higher risk of misappropriation of funds where unregulated entities are concerned).

Counsel cited the case of **Evan Rees v Crane** [1994] 2 A.C. 173 a case from Trinidad and Tobago where it was held *inter alia* that although in preliminary or initiating proceedings the person concerned generally had no right to be heard, particularly if he was entitled to be heard at a later stage, that was not a rigid rule and although the procedure involved here had different stages, the Commission had a duty to act fairly in deciding whether a complaint had prima facie sufficient basis in fact and was serious enough to warrant the action taken and in view of the seriousness of the allegations the Commission had not acted fairly in not affording the Respondent to reply

to them. This principle, Mr. Braham argued was even more applicable to the instant case.

Further, some of the documents that were seized by the Commission from the offices of the Appellant were hand written and in draft form (though there was no affidavit stating that any of the documents were in draft form) and the Commission asked no questions about the documents but seeks to interpret them itself saying that the documents show efforts to conceal. A hearing would have afforded an opportunity to make enquiries for an explanation. Enquiries ought to have been made and explanations sought before the Commission acted.

There certainly is provision for a hearing by virtue of section 4(4) of the SA and the w those provisions are activated. In this case there is no suggestion that these Appellants made either an oral or written request for a hearing. They were well aware of the Commissions views on their activities and continued their activities nonetheless. It could be inferred from their conduct after the Order was issued, in not even applying for a stay of its execution that they were content to rely on the opportunity to be heard in the appeal process provided for by the statute. In any event, it does not appear that a hearing would have served any useful purpose in these circumstances where it seems that the Appellants were not prepared to accept the Commissions views and the matter would have had to be resolved at court level.

The principles of natural justice were not breached by the Commission as the legislative scheme was sufficient to preserve fairness to the Appellants who have now availed themselves of its provisions.

The Doctrine of the Separation of Powers

The case of **Jamaica Stock Exchange v Fair Trading Commission** was also relied on by these Appellants in support of the ground that this doctrine was breached but the result must be the same as in the Olint case. That court's reasoning in finding that the doctrine was not breached in relation to the FTC applies with equal force to the Respondent in this case and there is no need to repeat the reasoning here.

Freedom of Association

Finally, in reliance on section 23 of the Constitution, Mr. Braham argued that to the extent that the Commission is entitled to issue a Cease and Desist Order it is obstructive of the Appellants ability to associate with persons of their choice in business and for that reason also the Cease and Desist Order ought to be set aside.

Section 23 (1) reads as follows:

"**Except with his own consent, no person shall be hindered in the enjoyment of his freedom of peaceful assembly and association, that is to say, his right peacefully to assemble freely and associate with other persons and in particular to form or belong to trade**

unions or other associations for the protection of his interests."

This right remains unaffected by the Commission's Cease and Desist Order and this ground therefore has no merit.

FINAL ANALYSIS AND CONCLUSIONS

1. The evidence was sufficient to satisfy the Commission that the Appellants in both appeals were engaged in the activities described in the Cease and Desist Orders including the issuing and dealing in investment contracts and certificates of participation in a profit sharing agreement and engaging in the business of investment advice

2. The doctrine of implied repeal bore no relevance to these cases and the provisions of the SA remain in full force and effect;

3. The Commission acts in relation to the securities industry under the SA and properly acted in pursuance of the powers granted to it under that statute in issuing the Cease and Desist Orders;

4. Following the reasoning in the authorities, particularly in the Jamaica Stock Exchange case, relied on by all the Appellants, the doctrine of the Separation of Powers has not been breached as the Commission is not the final arbiter;

5. While it may have been desirable for the Appellants to be notified of the course of action in the contemplation of the Commission, the legislative

scheme allowed the Appellants to apply for a stay of the execution of the Commission's decision both to the Commission and to the Supreme Court – a provision which the Appellants in the Olint appeal utilized at both levels (but which the Appellants in the LewFam appeal did not) and following upon that provision also provided a right of appeal to a Judge of the Supreme Court. The principles of natural justice were therefore not breached;

6. Neither was there a breach of section 23 of the Constitution as contended by the Appellants in the LewFam Appeal. The Cease and Desist Order did not prevent them from associating with their members or whomever they pleased.

7. As it relates to the Appellants in the LewFam appeal, the evidence shows that their Principals were acting as and holding themselves out as dealer's representatives. The documentary evidence supports this conclusion;

8. The Commission did not have to consider whether the Appellants were offering or providing their services to the public. If indeed it was a relevant consideration, the evidence would support such a finding for the reasons previously discussed.

At the end of the day, the arguments pressed upon the court in support of these grounds of appeal particularly with respect to the interpretation to be put

upon the definition of securities and the meaning to be ascribed to the expressions "investment contracts" and "certificates of participation in a profit sharing agreement", were inefficacious. The reasoning articulated by the Respondent was compelling not only in relation to the interpretation of the terms with which the court was concerned but in relation to all the other grounds of appeal.

There was more than sufficient justification for the issuance of the Cease and Desist Orders by the Commission. These appeals are accordingly dismissed with costs to the Respondent and the Commission's Cease and Desist Orders are confirmed.

ADDENDUM:

On handing down this decision Lord Gifford made an application that the stay of execution which was granted to the Appellants in the Olint Appeal on November 3, 2006 and which continued to today, be extended. The application is granted and the stay of execution is now extended for a period of six (6) weeks with effect from December 24, 2007.

The status quo regarding membership in the business operations of the Appellants is to remain as it was at the commencement of these proceedings.

Further, on the application of Counsel for the Respondent, special costs are granted to the Respondent pursuant to the Civil Procedure Rules.

One final addition. I wish to express my gratitude to Counsel in both appeals for the depth of their research which produced a wealth of authorities for the assistance of the court. It was my intention to do so before concluding the judgment and, having found that it was omitted, I consider it important to add it here.