BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV2008/0051
BETWEEN:

COMMONWEALTH TRUST LIMITED

Claimant

AND

FINANCIAL SERVICES COMMISSION

Defendant

Appearances:

John Lewis Powel Q.C., Garvin Simonette of Simonette Lewis for the Claimant
Michael J. Beloff Q.C, Jacqueline Wilson, Nelson Samuel for the Defendant

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2008: April 21st, 22nd and August 6th

JUDGMENT

(Administrative law –judicial review- Financial Services Commission, a regulatory body issuing directive to claimant to cease new business until full compliance with earlier directive - whether Claimant can seek judicial review where appellate body established by statute but non-functioning- whether directive is unreasonable or irrational - whether BVI law recognizes the doctrine of proportionality as free-standing ground for review. **)**

[1] **JOSEPH-OLIVETTI, J.:- The** Financial Services Commission ('the FSC") is a statutory body tasked with regulating the financial services industry in the British Virgin Islands. The Claimant, Commonwealth Trust Limited,("CTL") provides financial services by way of trust and company management business. The FSC issued a directive to CTL in February 2008 requiring it to cease from entering into any new contracts until it had complied with an earlier directive to the satisfaction of the FSC. CTL was aggrieved by this directive and seeks to challenge it by way of judicial

review on the primary basis that the FSC had not given it prior notice of its intention to issue the directive and/or that the FSC's decision was irrational or disproportionate. The FSC says that CTL is not entitled to come by way of judicial review as an alternative statutory remedy is available to it, that in any event it had no duty to give prior notice and that its decision was not irrational or disproportionate even if the principle of proportionality existed in BVI law which it did not.

[2] This court heard the application on the 21st and 22nd April and at the end of the hearing dismissed the application giving brief oral reasons and reserved on costs. We were able to do so with the aid of the comprehensive written submissions of counsel which were filed in ample time to allow the court to read them at leisure and the extreme clarity of the oral presentations for which we commend both counsel. However, having regard to the importance of the matter to the parties and maybe to the industry as a whole, we undertook to give full written reasons and a decision on costs as soon as possible and we now do so. The court regrets the delay which is due to several factors not least being necessary leave of absence in the interim.

Issues Arising

[3] The main issues were succinctly stated (and in my view correctly so) by Mr. Beloff Q.C. appearing on behalf of the FSC and not surprisingly, Mr. Powell Q.C., appearing on behalf of CTL had no quarrel with same. They are as follows:-

Whether CTL is entitled to judicial review in the light of the alternative statutory remedy of an appeal to the Financial Services Appeals Board available to it.

Whether the FSC was obliged to give prior notice to CTL of its intention to issue the second directive and in particular whether the FSC had a legitimate expectation that such notice would be given.

Whether the FSC is bound by its Guidelines contained in its Industry circular No.3 of 2008, published 10th April 2008.

Whether the second directive is unreasonable or irrational and as an adjunct whether proportionality forms part of the law of the British Virgin Islands.

What is the appropriate costs order, if any?

The Facts

[4] A brief look at the facts will serve to put this application in context. CTL is a limited liability company duly incorporated in the BVI in 1994 under the name of Commonwealth Management Ltd. It is duly licensed [1] to carry on and carries on trust business and company management business. It has engaged in such business in the BVI for almost 14 years. CTL employs approximately 25 persons and has approximately 600 client companies for which it provides services.

[5] CTL is subject to the regulatory regime of the FSC which is a body established by the Financial Services Commission Act 2001 as amended

[1] under the provisions of the Banks and Trust Companies Act 1990

('the Act'). The FSC is responsible for the regulation, licensing, supervision and inspection of all financial services business carried on in and from within the BVI. (It is a notorious fact that the offshore financial services industry is one of the twin pillars of the BVI economy).

[6] The FSC enjoys wide powers of which the main ones are as set out in s. 4(1). Among those is the power under section 37 to take enforcement action against a licensee in a range of circumstances including where a licensee has failed to comply with a directive given to it by the FSC. When the FSC is entitled to take enforcement action it is further empowered to exercise one or more of several powers, including to issue a directive under section 37(2)(d). A directive so issued may impose, "a prohibition, restriction or limitation on the financial services business that may be undertaken by a licensee including…(ii) that the licensee shall not enter into any new contracts in the class or type of business".

[7] Section 44 gives any person who is aggrieved by any decision of the FSC a right of appeal to the Financial Services Appeal Board which is created by section 42**.** During the course of these proceedings it was established that when this dispute arose the Appeal Board was not properly constituted and so was unable to function.

[8] In March 2003 the FSC gave notice to CTL as it was obliged to do by the Act that it intended to carry out a compliance inspection consequent on CTL's application to include a Mauritius company, Sealight Trust, in its licence as one of its subsidiaries. (The predecessor to the FSC had raised prior concerns in 2001 about CTL having established a subsidiary in Mauritius without the prior approval of the Governor under s.18 of the Banks and Trust Companies Act which CTL admitted doing in ignorance). Thus CTL had a history which is detailed in the first affidavit of Mr.

Kenneth Baker, Deputy Managing director, Regulations, of the FSC. The inspection was duly done on 25th March, 2003 and a formal report compiled and published, the 2003 Report.

[9] The 2003 Report identified certain weaknesses in CTL's due diligence procedures such as breach of the customer identification and record keeping requirements of the Anti-Money Laundering Code 1999 ("the AML Code") and the FSC required CTL to take corrective action .CTL had to update its due diligence procedures in respect of Professional Service Clients (PSCs") and End User Clients ("EUCs") and to supply quarterly progress reports from 30th June 2003. Permission was granted to it to include Starlight on the licence.

[10] CTL submitted eight progress reports between the periods June 2003 to January 2006. These indicated that there was incomplete due diligence on the EUCs.

[11] Prior to the last progress report the FSC gave notice in 30th Dec.2005 that it intended to carry out a compliance inspection from 30th January 2006 to 3rd February 2006 .This was duly done with CTL's full cooperation and the FSC provided CTL with a copy of the report on 26th January 2007 although the FSC had discussed some of its findings with CTL at the conclusion of the inspection. And the FSC had written to CTL about some these on the 20th Feb. 2006.

[12] The inspection revealed several areas of non-compliance with the AML Code and the Banks and Trust Companies Act as elaborated on by Mr. Baker at para.70 of his first affidavit and it was the FSC's view that the 2006 inspection showed little improvement in CTL's anti-money laundering procedures since the 2003 inspection .Further, the FSC formed

the view that CTL had provided false and misleading information in its progress reports and had contravened the AML Code.

[13] The FSC had ongoing dialogue with the CTL. However, on 30 Jan. 2007 the FSC took enforcement action. It issued a directive (the 2007 Directive) to CTL and its subsidiaries to correct existing deficiencies in its customer identification records within sixty days of the directive. It required CTL to take certain measures as identified in the directive including, engaging an independent consultant to review the companies including their structure and regulatory compliance needs. Again, FSC engaged in dialogue with CTL about the report and the 2007 Directive. CTL sought and obtained an extension to 31 March 2007 to comply with the corrective action required and also sought a suspension of the 2007 Directive which was not granted.

[14] Pursuant to the 2007 Directive CTL provided a consultant's report dated 5 July 2007.This report acknowledged CTL's serious compliance deficiencies and attributed them to the absence of a general manager. CTL did not have a general manager since February 2006. (It is noted that no application to approve the appointment of a general manger was made until January 2008 and that this was withdrawn in February but since these proceedings the post has been filled.)

[15] The CTL provided the FSC with updates on steps taken to comply with the 2007 Directive. However, in June 2007 the FSC gave notice of a regulatory compliance inspection which was carried out from 9th to 13 July 2007.

[16] Mr. Baker testified that in the course of this inspection CTL's staff advised the FSC that no due diligence, retroactive or ongoing, had been conducted on EUC files since the 2006 inspection and he deposed that

this was confirmed by a sample of files reviewed by the inspection team some of which had been reviewed during the 2006 inspection and others related to companies incorporated since the 2006 inspection.

[17] Mr. Baker deposed further that the CTL staff advised the inspection team that it was giving priority to the review of its PSC files that the review of PSC files was less than 50% complete and that all the EUC files were to be reviewed and outstanding information requested by year end.

[18] FSC provided CTL with a copy of that report on 6th February 2008 but it appears from the second affidavit of Mrs. Helene Lewis ,director and legal advisor (para.s.67 and 68),that the FSC had submitted a draft of the report to CTL on the 18th December 2007 and that CTL commented on it by letter of 4th Jan.2008.

[19] Mr. Baker testified that whilst the 2008 report showed improvements in CTL's ratings in some areas since the 2007 report the FSC remained concerned with the lack of progress by CTL in complying, both retroactively and on an ongoing basis, with the due diligence requirements of the AML Code. And that as with the 2007 report CTL's client file review received an "unsatisfactory" rating in the 2008 report. See Baker 1 para. 91

[20] On 8th February 2008 the FSC issued a second directive to CTL and its subsidiaries requiring them to forthwith cease and desist from entering into any new contracts for trust business or company management business (" new business") until such time as CTL had complied with paras. 5 and 6 of the 2007 Directive and had completed the corrective action specified in the second report to the satisfaction of the FSC. This is the second directive which is the subject matter of this challenge.

[21] It is noted that CTL sought an amendment to the directive having regard to the alleged adverse impact on its business. The FSC refused same on the ground that the application had been superseded by the court's order suspending the directive on granting leave to institute these proceedings. And further, that in any event the FSC was of the view that the application was unmeritorious in light of CTL's long history of non-compliance with the AML Code and its ongoing failure to comply fully with the corrective measures prescribed by the FSC.

[22] CTL's stated reason for this application is expressed thus: "What motivates the present application is the requirement in the 2008 Directive that CTL and subsidiaries forthwith cease and desist from entering into new business -- as distinct from taking corrective action in respect of what may be called "old business" -- and the fact that this requirement jeopardizes the survival of the business of CTL and its subsidiaries and the employment of the 25 employees". See of para. 11 of the affidavit of Mr. Thomas Ward CTL's director filed 22 February in support of CTL's application for leave to issue these proceedings.

[23] In all this it is significant that Mr Ward accepts and I quote-"We are conscious that there are still some regulatory compliance deficiencies in respect of" old business" conducted by CTL. Since the first report on the 2006 inspection CTL has been actively working to rectify these deficiencies as is demonstrated by the consultant's report." See Ward1 para.13.

[24] Mr. Ward deposes further that it was not until receipt of a draft of the second report on 22 December 2007 that CTL became aware that the FSC was of the view that CTL had not substantially complied with paragraphs 5 and 6 of the 2007 Directive. Mr Ward states that having

regard to the course of correspondence between CTL and FSC following on from the 2007 directive CTL was of the view that as at 20th April 2007, the only outstanding issue was a Client File Review referred to in para.12 of the letter of 20th April 2007 exhibited at TW1-p.123.

Issue 1- Whether CTL is entitled to judicial review in the light of the alternative statutory remedy of an appeal to the Financial Services Appeals Board available to it.

[25] Mr. Belloff Q.C says on behalf of the FSC that s. 44 of the Act gives any person who is aggrieved by any decision of the FSC a right of appeal to the Financial Services Appeal Board which is established by section 42. Accordingly, CTL has an alternative remedy available to it and the court should decline to exercise its discretion in its favour. In other words that CTL should be left to pursue its statutory remedy. Counsel relied in the main on a decision of the English Court of Appeal - **R. v. Birmingham City Council, ex parte Ferrero Ltd** [1993] 1All ER 530 (the well-known case of the chocolate egg with the surprise pink panther toy inside which resulted in the accidental death of an infant consumer).

[26] It is not disputed that the Act gives an aggrieved person a statutory right of appeal to the Appeal Board. However, as already note during the course of these proceedings it was established that when this dispute arose the Appeal Board was not properly constituted and so was unable to function neither was it up and running when this case was heard. The question then is whether the mere existence of this right without more is sufficient to be regarded as an available alternative remedy such as to weigh against granting relief to CTL.

[27] The law is well-established. Judicial review is a **discretionary remedy** and cannot be pursued without a claimant first obtaining leave of the court. In determining whether or not to grant leave one of the factors the court is called upon to consider is whether or not the claimant has an alternative form of redress and if so why judicial review is more appropriate or why the alternative has not been pursued. See CPR 56.3(3)(e**).** And, on considering whether or not to grant the actual application this is also one of the factors the court will bear in mind but it does not follow that because there is an alternative remedy the court will automatically refuse the application. If the court is satisfied that the alternative remedy exists and is suitable in the particular case then it would deny the application. This approach is borne out by **ex parte Ferrero** and the Court of Appeal in Civil Appeal No. 14 of 2003 – **(The Attorney General of St. Lucia (2) Comptroller of Customs v. Vance Chitolie.**

[28] One must first determine whether the alternative remedy is in fact available in the sense that a claimant can actually obtain redress in the manner prescribed by the statute**.** True, s.42 makes provision for an appeal to the Appeal Board but the fact remains that this tribunal is not functioning. If the law makes provision for an alternative remedy but the remedy in fact cannot be accessed through no fault of the claimant's how then can one say that it is truly available, that it is capable of being used which is the ordinary sense of " available"? Accordingly, having regard to the fact that the Appeals Board is not functioning (the reason is not relevant for these purposes) it cannot be said that an alternative remedy

exists. It follows then that CTL is entitled to pursue this application for judicial review as it would be unjust to require it to wait until such time as the Appeal Board is up and running. I note Mrs. Lewis' third affidavit which speaks to the difficulties encountered in trying to ascertain when that body will meet.

Issue 2 - Whether the FSC was obliged to give prior notice to CTL of its intention to issue the second directive and in particular whether the FSC had a legitimate expectation that such notice would be given.

[29] Mr. Powell on behalf of CTL readily and honourably conceded at the outset that the FSC had not made any express representations or promises to CTL that it would give CTL prior notice of its intention to issue a second directive. However, says Mr. Powell, a legitimate expectation arose having regard to the course of dealings between the parties in that they had been in dialogue since the issue of the first directive and that this of itself gave rise to a legitimate expectation that the FSC would notify CTL prior to the issue of a second directive.

[30] The law on legitimate expectation is now well settled. Simply put, CTL must show a course of conduct or a promise made by the FSC on which it relied to his or her prejudice. This was re-visited relatively recently by the Privy Council in **the Cabinet of Antigua v. HMB Holdings.** Lord Hope of Craighhead stated at para.31:-

"Then there is legitimate expectation as an additional ground of review. As Lord Fraser of Tullybelton explained in *Attorney General for Hong Kong v Ng Yuen Shin* [1983] 2 AC 629, 636E-F, the concept of legitimate expectation is capable of including expectations created by something that falls short of an enforceable legal right, provided they have some reasonable basis. **But if the**

public body has done nothing or said nothing which can legitimately have generated the expectation that is contended for, the case must end there: *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237, para 21. The action complained of cannot be said to have been contrary to what the public body could reasonably have been expected to do in the circumstances". Emphasis added.

[31] Here, CTL can point to no promise or undertaking given to it by the FSC that it would not issue a directive without notice to it. And CTL cannot point to any course of dealings with the FSC from which the inference could be drawn that FSC would not issue a directive without notice to CTL. The fact that the FSC was in communication with CTL about the measures CTL was taking consequent on the first directive cannot raise any reasonable basis for saying that this gave rise to a legitimate expectation that the FSC would notify CTL of its intention to issue a second directive. If we were to hold otherwise it would mean that the mere fact that the FSC was in communication with a company about compliance issues would curtail the FSC's rights to act in accordance with its mandate. Ironically, the FSC has been criticized for not responding to letters yet the fact that it responded to some is held up as a ground for saying that by so doing it led CTL to expect that it would be notified if the FSC decided to issue a second directive. If this is allowed it would be putting the FSC in a bind, between the devil and the deep blue sea, so to speak.

[32] Now the second limb of this challenge is whether the FSC was obliged in law to give notice to CTL before it issued the second directive. A directive is a creature of the Act. S. 40(1) provides that the FSC must be entitled to

take enforcement action under section 37(1) before it can issue a directive but the Act makes no provision for prior notice to be given. That the FSC is entitled to take enforcement action is not disputed by CTL as CTL admitted that it failed to comply with the first directive and one of the grounds for entitlement to take enforcement action is that a licensee has failed to comply with a directive under section 37(1) (v).

[33] Parliament did not provide for notice to be given and when one looks at the scheme of the Act it would defeat the purpose if the court were to graft onto that a requirement that the FSC has to give prior notice to a licensee of its intention to issue a directive. This challenge must therefore fail.

Issue 3- Whether in this case the FSC is bound by its Guidelines contained in its Industry circular No.3 of 2008, published 10th April 2008.

[34] The argument put forward by Mr Powell is that the FSC was bound to follow the 2008 Guidelines in their dealings with CTL even though they were published on 10th April 2008, **after** the events giving rise to this case, as the Guidelines reflect the common law.

[35] In my judgment, this contention cannot be upheld. First, the 2008 Guidelines were issued by the FSC under s.17(1) the Act and relate to the operating procedures of the enforcement committee of the FSC. The Guidelines state in the introduction on page 6 –"**these guidelines and operating procedures are designed to chart a simple and user-friendly process with respect to the workings of the committee"** and in the final paragraph it states **–"Accordingly the processes and procedures outlined herein must be viewed as setting minimum standards and the Enforcement Committee is entitled to adopt such**

other measures as it considers appropriate in the circumstances of the particular case".

[36] Clearly the Guidelines reflect FSC's own construction of the powers given to the enforcement committee under the Act and they are not definitive as the court has the final say on the interpretation of the Act. In any event the Guidelines were not in existence during the relevant period and therefore the FSC was not bound to follow them in its dealing with CTL. And, in my view it is therefore not necessary to necessary to determine whether or not the 2008 guidelines reflect the common law as the point on prior notice has been dealt with. The issue of irrationality and/ or proportionality follows.

Issue 4- Whether the second directive is unreasonable or irrational and as an adjunct whether proportionality forms part of the law of the British the BVI.

[37] Mr. Powell says that the decision to issue a directive is discretionary and that the discretion must be properly exercised and that the FSC's action in issuing the directive and later in refusing to amend it was irrational and/or disproportionate having regard to the evidence. Counsel also submitted that the FSC was not entitled to take into account the events occurring prior to the issue of the first directive in arriving at its decision. Counsel relied on the well established principles on which administrative actions are subject to review by the courts and to a wealth of authorities including Lord Diplock's summary of those grounds in **Council of Civil Services Unions v. Minister for the Civil Service** [1985] AC 374 at 410 -illegality, irrationality and procedural impropriety. He contended in addition that the FSC had a duty to act fairly proportionately and not irrationally and that

that although proportionality is not a free-standing ground of review it is an aspect of review on grounds of irrationality. That proportionality requires that the decision be proportionate to the aim that it seeks to achieve and that a penalty is proportionate to the wrong to which it relates- **R.v. Barnsley Metropolitan Borough Council ex parte Hook** [1976] 3 All ER 452 esp. at 457. Here the gist of the argument is that the directive was disproportionate as it had the effect of putting CTL out of business for a breach which could not justify such a penalty.

[38] The law as cited by Mr. Powell is not in dispute save insofar as whether proportionality can give rise to a distinct ground for review. On that aspect the court was referred to dicta from several English cases indicating the current trend in English law. However, I am of the view that proportionality is not a free standing ground of review in the BVI but an adjunct to the issue of irrationality.

[39] CTL says that the decision is irrational as (i) it was made six months after the 2007 inspection in July 2007 without regard to the position that existed as at the date of its issue;(2) it was made without consideration of CTL's letter of 16th of March 2007;(3) no advance notice was given (that has already being ruled upon) and (4) without assessing the directive's effect on CTL. CTL claims that the effect was to put it out of business. On this last aspect I do not accept that having regard to the scope and nature of CTL's business that this would be the effect of the 2008 directive. Accordingly, it follows that the penalty imposed by the FSC in the 2008 Directive was not disproportionate to the aim that the FSC was seeking to achieve. We note that had the FSC wanted to put CTL out of business it had the power to do so under section 6 of the Act by revoking its licence. It did not do so.

[40] Further, CTL argues that in assessing whether the decision was unreasonable the court should limit itself to considerations only of the circumstances immediately prior to the issue of the 2008 directive as the FSC was not entitled to take earlier matters into account in determining whether or not to issue the 2008 directive. In my judgment, this approach does not take into account the FSC's regulatory role and the fact that the FSC is not required to act in a vacuum. The FSC, according to Mr .Baker, took account of the entire history of its dealings with CTL before it came to its decision and this to my mind cannot be viewed as unreasonable or irrational as all those matters shed light on the manner in which CTL was conducting its business and its ability to live up to its promises to make good. Thus, it took account of all the circumstances.

[41] The reality is that CTL had a history of being non -compliant since 2005 and that despite several opportunities given to it by the FSC to set matters right it failed to do so to the satisfaction of the FSC. CTL has not challenged the standards of compliance set by FSC as being unrealistic or in any way unfair. In my judgment the FSC was perfectly entitled to take into account the unsatisfactory course of dealings with CTL as regards compliance issues with the AML Code.

[42] On the whole of the evidence before the court the court cannot conclude that the decision of the FSC was irrational. It gave careful consideration to all the circumstances. Clearly, CTL was in breach of the 2007 directive and the FSC felt constrained to resort to more drastic enforcement action having regard to the importance of ensuring compliance with the AML Code. CTL had sight of the draft report in December 2007 which detailed its continuing deficiencies and cannot properly complain that it was not given any time to remedy the situation. When one looks at the matter as a

whole one cannot come to the conclusion that the FSC acted irrationally or unreasonably in the **Wednesbury** sense.

[43] The court is mindful that the court is not called upon to substitute its own judgment for that of the FSC and must guard against doing that and likewise must give sufficient regard to the FSC's expertise as regulator established by statute.

[44] In **Administrative law** Wade and Forsyth 9th edn. at p157 the learned authors put the matter thus :- **"But the Court of Appeal has held that in reviewing a regulatory body the court should allow a margin of appreciation and intervene only in case of a manifest breach of principle. It has been recognised that the judicial review courts can play a role in overseeing the decision-making process of regulators from the perspective of rationality and legality and ensuring that decisions are made which are not simply pandering to special interests at the expense of wider public policy goals. It may be expected however that the courts will recognise the expertise of the regulators and be cautious before quashing their decisions, and that they will view sympathetically the dilemmas faced by regulators such the FSA who may destroy a valuable business if they intervene too soon but my hasten disaster if they delay. Challenges based upon the irrationality of regulators' decisions have generally failed".**

Issue 5- Costs

[45] The court invited the parties to make oral submissions on costs as they had omitted to address that issue in their written submissions and during the course of their oral arguments. Mr. Beloff submitted that the general

rule should apply and that FSC as the successful party should be awarded costs. Mr Powell argued that the court should order that FSC pay costs on the basis that FSC or the Government had omitted to ensure that the Appeals Board was functioning thus making it necessary for the CTL to resort to the court. Alternatively, that the Government be ordered to pay CTL's costs as it had an obligation to ensure the proper functioning of the Appeal Board and had failed to do so.

[46] No reason was advanced at the hearing why the Appeal Board was not able to sit – the absence of this appellate body being a serious lacuna in such an important area of the financial services industry. However, Mr. Beloff represented on 22nd April that the relevant authorities had been made aware of this unsatisfactory position as the court had termed it and that he had been informed that the matter would be placed on the agenda at the next meeting of Cabinet. He also undertook to provide further information on whether this failing was as a result of the FSC's breach of its statutory obligations to pay the fees of the members of the Appeal Board. The court records that on 28th April, it received, through the Registrar, a letter from the managing director /chief executive officer of the FSC, Mr. Robert Mathavious, addressing these issues. The court notes with approbation the timely way in which this was attended to. This missive ought properly to have been copied to Simonette Lewis but was not and the court directed that a copy be sent by the court to rectify this.

[47] Suffice it to say that having seen this letter the court accepts Mr. Mathavious' representations that the fact that the Appeal Board is not functioning presently is not due to non-payment of fees by the FSC but that the appointment of two members expired in or about January 2008 and that new appointments were not made in a timely manner. The court

is assured that this is being addressed but was dismayed to learn upon inquiry of the legal officers of the FSC that the Appeal Board is still not functioning to date.

[48] In all the circumstances it follows that the FSC did not breach any of its statutory obligations in relation to the Appeal Board and therefore it ought not to be penalized for that body's inability to sit.

[49] Now to the issue of a costs order against the Government. CPR 64.10 is very clear as to the power of the court to order a person who is not a party to litigation to pay costs. Briefly, such an application must be on notice to the person against whom the order is sought and must be supported by affidavit evidence. If the court is considering making an order against the person the court must give notice of the fact that it is minded to make such an order to the person and the notice must state the grounds on which the court is minded to make the order and at least 14 days notice of the hearing must be given. Obviously, CTL has not complied with that provision and having regard to the unusual and punitive nature of the application it is not one in which the court is minded to waive any procedural irregularities as they can be regarded as more than just procedure as likely as they are to affect the rights of a person who has not had an opportunity to be heard or even the slightest inkling or warning that such an order might be sought. Furthermore, such a power I regard as draconian in nature and the court cannot even contemplate exercising it where that person was given no opportunity to be heard. See **St.Lucia Furnishings Ltd. v. St. Lucia Cooperative Bank Ltd.** (Court of Appeal No.15/2003 –St. Lucia.) where the approach was considered by Byron C.J. To my mind the application was a last ditch attempt by CTL to salvage its shipwrecked coracle and no more.

[50] Since the close of the case CTL by letter of 13th May to the Registrar copied to the FSC reminded the court of CPR56.13(6) and submitted an extract from **Zuckerman on Civil Procedure** 2003 pages 688 to 689 para.22.32.

[51] The question of costs was still open at that stage as the court had reserved its decision and I accept that such further representation could properly have been made and that FSC had an opportunity to respond. See also **In Re Barrel Enterprises [1972] 3 All ER.631.**

[52] CPR 56.13(6) provides that the general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application. A claim for judicial review is a claim for an administrative order (CPR 56.1(1) and (2) and therefore the section governs. In all the circumstances, I am of the view that CTL did not act unreasonably in making the application or in the conduct of the application and there is no reason not to apply the general rule and certainly FSC had an opportunity to respond and has not sought to persuade me otherwise and rightly so. Accordingly, the court will make no order as to costs as against CTL.

Conclusion

[53] For the foregoing reasons CTL's application for judicial review is dismissed with no order as to costs.

Rita Joseph-Olivetti
High Court Judge
British Virgin Islands