THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

ANGUILLA

Claim Number: **AXAHCV2017/0066**

Between

BENJAMINE COMPANY SERVICES LTD

Applicant

and

ANGUILLA FINANCIAL SERVICES COMMISSION

Respondent

Appearances;

Ms. Jacinth Jeffers for the Applicant

Ms. Yanique Stewart and Ms. Eustella Fontaine for the Respondent

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2018: February 9th, 16th; 22nd

JUDGMENT

[1] **MATHURIN J:** The Applicant filed a Notice of Application for Leave to Apply for Judicial review pursuant to Part 56.3 of the CPR2000. The Court set down the matter in open court and at that hearing permitted the Applicant to amend the application to include certain factors referred to in Part 56.3. The application was amended and filed on the 13th February 2018 and set down for further hearing on the 16th February 2018. At the hearing Counsel for the Applicant Ms. Jeffers advised the Court that the application was in respect only of the penalty of EC$50,000.

Background

[2] The Applicant is a company licensed by the Anguilla Financial Services Commission (the FSC) to carry on company management business in Anguilla. Ms Cora Benjamin, representative of the Applicant states in her affidavit in support of the Application that in September 2016 it received an application from GM Marketing Group Limited (GM) requesting its services to be employed as GM's Registered Agent. GM had previously been struck off the company register in February 2016. On the 4th January 2017, GM was restored to the company register with the Applicant as its registered agent/registered office.

[3] The Applicant states that in April 2017, it became aware of a complaint against GM and shortly thereafter lodged a Suspicious Activity Report with the FSC against GM. Ms Benjamin further states that the Applicant made enquiries of GM but that GM failed to respond and as such the Applicant resigned as Registered Agent for GM as evidenced by letter dated May 12th 2017(**BCS2)**.

[4] The Applicant states that a meeting was scheduled to discuss GM by the FSC and that at that meeting on May 15th 2017, it was explained to FSC that the Applicant had resigned as Registered Agent for GM as GM failed to respond to emails requesting information.

[5] On June 14th 2017 the Applicant states that it received from FSC a Notice of Intention to impose a penalty on the Applicant in the sum of EC$50,000.00 for failure to comply with various sections of the Anti-Money Laundering and Terrorist Financing Regulations in relation to GM. The breaches, the Applicant states, comprised of failure to conduct customer due diligence, failure to enquire of the former Registered Agent as to why it resigned from GM, failing to be aware of the Investor Alert issued against GM and failing to categorize GM as high risk.**(BCS4)**

[6] The Applicant states that it responded to the FSC by letter dated July 6th 2017 **(BCS5)** objecting to the contents of Notice of Intention as it states that it was not aware of the Investor Alert issued against GM as they were not the Registered Agent for GM at the time the alert was issued and it was only after a complaint was received against GM that they became aware of it. The letter states that the Applicant received the documents from the former Registered Agent and whilst it did

not enquire as to the reason for resigning as GM's Registered Agent, the former agent had a duty to transfer that information to the Applicant.

[7] The Applicant denied that the due diligence applied by it was rudimentary and remarked on the documents, including police records that it had obtained through due diligence. The Applicant also explained in response that the enhanced due diligence requirements were not pursued because although GM was not present for identification purposes, GM was not a new customer to this jurisdiction and as such was rated as medium risk.

[8] The Applicant concluded stating *"Alternatively, if the Commission proceeds to impose a penalty we are requesting that the Commission also consider the aforementioned circumstances and significantly reduce the penalty as Benjamine is not in any financial position to pay EC$50,000. Attached is a copy of the annual audited financial statements for ease of reference."*

[9] By letter of 4th August 2017 the FSC stated that the written representations were considered and it was of the view that the representations did not provide sufficient reason for a variation of its original position in the Notice of Intention on June 14th 2017 and that it was minded to recommend to the Board of the Commission that the Applicant be fined EC$50,000.

[10] On August 29th 2017 the Applicant responded asking for a hearing with the Board to present its case. The FSC replied by letter on 1st September as follows:

> *"The Commission is of the view that there is no legislative authority for the Commission to consider your request for an oral hearing with the Board as sections 46 and 47(3) of the FSC Act only provided for the opportunity to make written representations to the Board as Benjamine has done in its response of 6th July 2017. However, if Benjamine would like to provide further written representations to the Commission on or before 15th September 2017, the executive will forward these to the Board along with Benjamine's representations of 6th July 2017."*

[11] On the 29th September 2017, the Applicant responded reiterating the points raised in its representations of the 6th July 2017. Further, the Applicant reminded the FSC of the passing of Hurricane Irma stating that it caused the Applicant significant damages. The Applicant requested that the Board waive or reduce the penalty.

[12] On the 16th October 2017, the FSC agreed to consider the ability of the Applicant to pay the penalty in accordance with Section 3 of the Administrative Penalty Regulations 2013. FSC stated that it had considered the financial statements as of December 2016 and was providing the Applicant with the opportunity to make a submission detailing any material change to the financial circumstances of the Applicant since 31st December 2016. The Applicant was required to provide all relevant details, "*including if applicable any estimates by a third party and any other supporting documentation that detail the quantum of any damages from the hurricane and any portion of the damages that is uninsured."*

[13] On the 20th October 2017, the Applicant wrote to the FSC thanking them for the opportunity to provide a report on the cost of damage suffered by the Applicant. Attached to this letterwas a document called a property valuation which stated as a finding that the Applicant's property had depreciated by 8% (US$87,571.20)

[14] On the 15th November 2017 the FSC responded detailing the violations of the Applicant, and further stated that based on the review of the Applicant's most recently filed audited financial statements, the Applicant had the ability to pay the penalty imposed. The Commission was of the view that the written representations provided no reason to find that "*Benjamine had not committed the alleged disciplinary violations or to justify the imposition of a lower penalty."*

[15] The Commission stated as follows;

> *"In determining the appropriate amount of the administrative penalty to impose, the Commission has been mindful of the range outlined in Schedule 1, item 6 of the Administrative Penalties Regulations, RRA F28-2 (Administrative Penalties Regulations) which authorizes the Commission to impose a penalty in a range of EC$15,000.00 to EC$100,000.00 for the contravention of any AML/CFT obligation.*
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> *The Commission also considered the factors listed in section 3 of the Administrative Penalties Regulations. In particular, the Commission determined that:*
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> *…*

Based of the Commission's review of Benjamine's most recently filed audited financial statements, Benjamine has the ability to pay the penalty imposed."

[16] These are the facts relied on by the Applicant in support of the grounds upon which relief is being sought which are stated as follows;

(a) The Respondent erred in refusing the Applicant the opportunity to be heard at the hearing;

(b) Further or alternatively the Respondent misdirected itself in law in refusing the Applicant to be heard at the hearing;

(c) The Respondent failed to properly consider the factors set out in Regulation 3 of the Administrative Penalties Regulations;

(d) Further or alternatively the Respondent erred in concluding that the Applicant has the ability to pay;

(e) Further or alternatively the Respondent misdirected itself in law and the penalty imposed by the Respondent is disproportionate to the circumstances of the case;

(f) Further or alternatively the Respondent was unreasonable in imposing a fine of EC$50,000 in considering all the circumstances.

[17] The gravamen of the Applicant's claim is that the FSC failed to afford the Applicant the opportunity of a fair hearing as is required by principles of natural justice before the imposition of the penalty of EC$50,000. The Applicant also claims that the penalty was disproportionate to the infractions and that the FSC was unreasonable in imposing the fine of EC$50,000 in the circumstances.

[18] Counsel for the Applicant Ms Jeffers has submitted that the FSC failed to afford the Applicant the opportunity of a fair hearing as is required by principles of natural justice. Counsel relied on the case of **R v Hull Prison Board of Visitors** to support her contention that FSC ought to have permitted an oral hearing given the nature of the decision and the penalty that could be imposed. Counsel failed to explain the analogy between the restrictions on liberties and privileges in prison and paying a fine pursuant to several violations of the Anti-Money Laundering and Terror Financing Act but states where the FSC could impose fines in the range of EC$50,000 to EC$100,000 it was necessary to give the applicant an opportunity to be heard. In the **Hull** matter the Prison Rules

gave a person charged with a disciplinary offence under the Rules the right to a fair hearing. The Court in that matter was of the view that the Prison Board was in breach of the statutory obligations which were declaratory of one of the basic rules of natural justice, namely that every party to the controversy has a right to a fair hearing. Lord Justice Lane described it thus;

> *"He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them"*

[19] Counsel also submits that as it were the FSC making the representations to the Board and that given the stance of the FSC that the fine would remain at EC$50,000 despite the audited financial statements, the hearing would not have been objective and impartial as the Board would only be privy to the Commission's interpretation of the audited records. Counsel submits that in the circumstances the FSC should have afforded the Applicant the opportunity to address the Board on the penalty. It was also submitted at the hearing that the Applicant only became aware of the reasons that FSC did not accept the evidence of the Applicant's financial statements which indicate it was operating more or less at a loss when the affidavit of Gerald Edward Halischuk, Director of the FSC on the 31st January 2018 **(paragraph 41)**. Counsel for the Applicant submits that the affidavit raises inferences of mismanagement which is even the more reason the Applicant should have been afforded the opportunity to address the Board.

The FSC

[20] Counsel for the Respondent, Ms Stewart submits that the Commission acted at all times pursuant to the FSC Act and the provisions therein. The letter of 4th June 2017 was issued pursuant to section 35(1) of the FSC Act which provides that the Commission may take enforcement action against a licensee if in the opinion of the Commission the licensee is in breach of the FSC Act , financial services enactment or Regulatory Code and if the licensee fails to comply with an AML/CFT obligation. One of the primary functions of the Commission is to monitor and enforce compliance by licensees and externally regulated service providers with their AML/CFT obligations;

[21] Counsel submits that the violations were for noncompliance with sections 10 and 12 of the AML/CFT referring to the failure to apply customer due diligence measures and to adequately assess that the business of GM was a potential high risk money laundering activity in light of overwhelming evidence including Investor Alerts issued by the FSC. The letter provided a detailed

summary of the FSC's findings including factors taken into consideration, when determining that it intended to impose an Administrative penalty.

[22] In the letter of the 14th June 2017 to the Applicant, the FSC stated that it considered the factors listed in Section 3 of the Administrative Penalties Regulations. The FSC considered in particular;

"(a) the nature and seriousness of the disciplinary violation committed by Benjamine;

(b) whether Benjamine has previously committed a disciplinary violation and, if so, the number and seriousness of Benjamine's previous disciplinary violations ;

(c) whether the disciplinary violation was deliberate or reckless or caused by the negligence of Benjamine

(d) whether any loss or damage has been sustained by third parties as a result of the disciplinary violation;

(e) whether there has been any gain to Benjamine as a result of the disciplinary violation; and

(f) the ability of Benjamine to pay the penalty."

[23] Counsel for the FSC submits that the Applicant had the opportunity to provide written representations in relation to its ability to pay and more importantly after the passage of hurricane Irma, gave the Applicant another opportunity to address how the hurricane would have impacted its ability to pay.

[24] Counsel further submits that there is no mechanism in the FSC Act that provides for a hearing but that there is provision for an aggrieved party to make written representations in relation to the penalty and that in fact the Applicant had several opportunities to make written representations subsequent to the Notice of Intent. Counsel also submits that the Applicant had ample opportunity to present a case to the FSC along with any mitigating factors which it did and in the circumstances cannot be heard to say that it did not have a fair hearing in accordance with the rules of natural justice.

[25] Counsel reminded the Court that the ability to pay the fine was only one of the factors that the Commission had to consider when imposing a fine but that in any event, all of the written

representations by the Applicant were considered in its determination. In the letter of 15th November 2017 the FSC stated that "*Based on the Commission's review of Benjamine's most recently filed audited financial statements, Benjamine has the ability to pay the penalty imposed."*

[26] Counsel submits that the Applicant has failed to show that the process was tainted by any illegality, irrationality or procedural unfairness and that the Applicant has failed to prove that there is any arguable ground for judicial review having a realistic prospect of success and as such is asking that the Application for leave be refused with attendant costs to be paid by the Applicant.

The Law

[27] The parties agree that the appropriate test to be applied by the Court is the test as stated by the Privy Council in the case of **Sharma v Antoine et al (Privy Council Appeal No.75 of 2006)**

> "*The ordinary rule now is that the Court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or alternative remedy."*

[28] Having considered the application and evidence together with the written and oral submissions of Counsel, it is the view of the Court that the failure of FSC to afford an opportunity to be heard on the reasons it found that the Applicant was able to pay the Administrative Penalty in the face of audited financial statements saying otherwise, is a matter that raises a reasonable prospect of success at trial as it raises the issue of procedural unfairness. As such the Court is satisfied that there is an arguable ground for judicial review having a realistic prospect of success.

Alternative Form of Redress

[29] Permission may be granted where there are exceptional circumstances or where the alternative remedy is not adequate or there is some other reason which makes judicial review particularly appropriate. Counsel for the Applicant submits that judicial review is appropriate in circumstances where the Applicant is disputing as to whether the FSC's decision making process conforms to the statutory or common law powers conferred on it.

[30] The Applicant also states that *"Further, section 60(4) of the FSCA limits the Court to dismiss the appeal or remit the matter back to the Respondent for further considerations with such directions as it considers fit. Hence the Applicant could find itself on another occasion still being aggrieved by the Respondent's decision and expending more costs and time to apply for leave repeatedly. Thus the Applicant avers that judicial review is a more practical and cost effective remedy for the Applicant in these circumstances"*

[31] There is a presumption against judicial review where an alternative remedy exists and the Court may not grant leave where the Court forms the view that some other form of legal proceedings or avenue of challenge is available. The most obvious type of substitute remedy is an avenue of appeal or review created by statute. It is therefore for the Applicant to show some exceptional reason why the avenue of judicial review was pursued instead of the statutory appeal avenue in section 60 of the FSC Act which states that;

> *"(1) Subject to subsection (2), a person who is aggrieved by a decision of the Commission made under this Act, a financial service enactment or any other enactment may, within 28 days of the decision, apply to the Court for leave to appeal against the decision.*
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> *…*
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> *(4) Upon hearing an appeal under this section, the Court may-*
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> *(a) dismiss the appeal; or*
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> *(b) remit the matter back to the Commission for further consideration with such directions as it considers fit."*

[32] In my view, the reasons proffered by Counsel for pursuing judicial review as opposed to appealing under the statutory regime do not overcome the discretionary bar. There is no reason why issues related to the penalty could not have been heard on appeal and it has not been shown that the substitute of appeal for judicial review would not adequately protect the rights and interests of the Applicant.

[33] The submission of Counsel for the Applicant that the Applicant could find itself on another occasion still being aggrieved by the Respondent's decision and expending more costs and time to apply for leave repeatedly is one that, in my view, is unsustainable. To agree with this would in effect license applicants to achieve judicial review by simply relying on the inconvenience, cost and delay of the statutory procedure and would risk subverting the Legislature's intention in creating such appeals.

[34] The Court notes the date of the filing of this application was in fact before the time for the filing of an application for leave to appeal and that now that time has passed. The fact that the remedy is no longer available is the choice of the Applicant. If it were to be a material consideration, an applicant could obtain permission to seek judicial review in a case in which an alternative remedy existed which was perfectly good but not what he would choose, simply by waiting until the time limits for that remedy expired and then launching his judicial review claim. This would destroy the important principle that judicial review is a remedy of last resort where no alternative remedies are available to the claimant.

[35] The circumstances of this case are not, in my judgment, exceptional in such a way as to justify me exercising my discretion to grant permission for judicial review when that original remedy would have been available to the Applicant had he made different choices.

[36] This Court accordingly declines to grant leave to the Applicant to apply for judicial review of the decision of the FSC dated the 15th November 2017.

[37] Each party to these proceedings shall bear its own costs.

Cheryl Mathurin

High Court Judge

By the Court

Registrar