IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANIGUILLA
(CIVIL)
A.D. 2018

CLAIM NO. AXAHCV 2017/0067

IN THE MATTER OF PART 60 of The Civil Procedure Rules 2000 and Eastern Caribbean Supreme Court

AND

IN THE MATTER OF The Insurance Act R.S.A. c116

AND

IN THE MATTER OF Section 60 of the Financial Services Act, R.S.A. c F28

AND

IN THE MATTER OF the Administrative Penalties Regulations, R.S.A. c. F28-2

BETWEEN:

COTSWOLD INSURANCE LIMITED

Appellant

AND

ANGUILLA FINANCIAL SERVICES COMMISSION

Respondent

Appearances:

Mr. Roger Forde QC and Mr. Alex Richardson instructed by Alex Richardson & Associates for the Appellant

Ms. Eustella Fontaine and Ms. Yanique Stewart instructed by Fontaine & Associates for the Respondent

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2018: March 22; April 25;
September 28.

JUDGMENT

[1] RAMDHANI, J.: (Ag.) This is an appeal made pursuant to section 60 of the Financial Services Commission Act ('the FSC Act'), against a decision of the respondent, the Financial Services Commission made and contained in two notices dated the 7th November 2017 and the 30th November 2017 by the Financial Services Commission. Having considered the matter, the appeal is allowed, the decision is hereby quashed for the reasons set out and the matter is remitted to the Commission with directions. The reasons for this order are now set out.

Brief Overview of Events Leading to the Appeal

[2] The respondent, the Financial Services Commission (the respondent) is the statutory body in Anguilla tasked primarily with the regulation of financial institutions in Anguilla. The focus of the respondent is to maintain and promote the integrity of the financial sector. Among its key functions in keeping with its mandate is the licensing, supervision and regulation of financial institution to ensure that they operate within the confines of the terms and conditions of their licences and that they comply with various anti-money laundering and terrorism prevention laws.

[3] The appellant is one such financial entity which in or about 2005, applied to the respondent to be licensed under the Insurance Act, R.S.A. c.I16 to carry on insurance business in or from within Anguilla. Details of the application were submitted, and a 'Cotswold Business Plan' was also submitted.

[4] On the 22nd December 2005 the respondent granted a Class 'B' licence, permitting the appellant, a foreign insurer to carry on any foreign insurance business, including long term, foreign insurance business, subject to the provisions of section 3(1)(b) of the Insurance Act.

[5] In or about 2017, as part of its supervisions and regulatory functions, and pursuant to section 21 of the Act, the respondent demanded that the appellant provide information on certain specified matters. In response to the Section 21 demand notice, Mr. Todd Callender, the Executive Director

of the appellant attended the office of the respondent and provided information. It appeared that the respondent having received this information formed the view that the appellant was carrying on business which was outside the scope of its business plan upon which the respondent had acted to grant the licence. As the respondent stated: it was 'discovered that not only was the appellant involved in the structuring of third party loans, i.e. loans to unrelated persons, as represented by the loan made to Makalu, but was also involved in the business of making guarantees to third parties in the form of sureties issued by the appellant to guarantee repayment of deposits held by third parties contrary to Cotswold Business Plan.'

[6] On the 7th of November 2017, the respondent acting under section 46 of the FSC Act, issued a Notice which on its face stated that it was a 'Notice of Intent to suspend the appellant's Licence and a Notice of Intent to impose an administrative penalty' for 'failing to obtain approval from the respondent for changes in the nature of its business as required under section 8(4) of the Insurance Act.

[7] On the 20th November 2017, the Appellant responded to the Notice and provided written representations only on the penalty which were considered by the respondent. In these representations, the appellant denied being or being knowingly in breach of its licence. It also *inter alia* notified the respondent that it had ceased operations and was in the process of surrendering its licence.

[8] On the 30th November 2017, the respondent gave the appellant notice that it intended to take disciplinary action against the appellant pursuant to section 47(1) of the FSC Act, by imposing an administrative penalty in the amount of EC$12,500.00 for what it deemed to be the appellant's failure to obtain the approval of the respondent for changes to the appellant's business plan as required by section 8(4) of the Insurance Act.

[9] That has led to these proceedings. The appellant sought and was granted leave to appeal the respondent's decision pursuant to section 60 of the FSC Act.

The Appeal

[10] The appellant appeal was filed by early 2018. The reliefs which are set out in the Amended Fixed Date Claim dated the 8th February 2018, are as follows:

1. *An Order setting aside the determination/decision of the Respondent contained in the said letter dated November 7, 2017 which stated that [the Appellant] had made changes to its business plan without being granted prior approval of [the Respondent] as required pursuant to section 8(4) of the Insurance Act R.S.A.; and in particular that [the Appellant] had engaged in business of making guarantees and structuring loans to third parties, which business activities have not yet been approved by [the Respondent].*

2. *An Order setting aside the decision of the Respondent whereby it imposed on the [Appellant] an administrative penalty in the amount of EC$12,500.00 which purported to be in accordance with Administrative Penalties Regulations, R.R.A. c. F28-2 for the alleged breach of section 8(4) of the Insurance Act.*

3. *An order that the Respondent shall bear the costs occasioned by this appeal.*

[11] In support of its appeal, the appellant relied on a number of grounds. First, as a matter of law, the appellant contended that there was no evidence upon which the respondent could have arrived at its decision.

[12] As other substantive grounds the appellant contended:-

(a) That prior to making the decision contained in the letter dated 7th November 2017, the respondent failed to give the appellant the opportunity to be heard on the issues.

(b) That prior to making the decision the respondent failed to provide the appellant with particular of the guarantees and loans to third parties which it considered to be in breach of section 8(4) of the Insurance Act so that the appellant may respond to the same.

(c) That by representations made by the respondent to the appellant by way of words and/or conduct to the effect that no approval was required for carrying on the business of which the respondent complains, the respondent is estopped from denying that approval was required for carrying on the said business of which the respondent complains.

(d) That by representations made by the respondent to the appellant by way of words and/or conduct to the effect that approval was not required for carrying on business of which the respondent complains, the respondent is estopped from asserting that

approval was not given for the carrying on of the said business of which the respondent complained.

(e) That by representations made by the respondent to the appellant by way of words and/or conduct to the effect that the appellant had been conducting its business in accordance with its licence granted by the respondent prior to November 7, 2017, the respondent is estopped from denying that the appellant so conducted its business.

(f) That the decision granted is against the weight of the evidence

[13] In support of the appeal the appellant filed a 'First Affidavit' of Todd Callender dated the 8th February 2018. An Amended affidavit in support was later filed on the 16th February 2018. The respondent filed and served an 'Affidavit in Reply' by Gerald Halischuck on the 1st March 2018. The appellant then filed a second Affidavit of Todd Callender on the 14th March 2018.

[14] When this appeal came on for hearing there was no written submissions filed by the respondent who eventually agreed that the court could proceed to hear the appellant and the respondent would file written submissions in response. Thereafter the court would provide a written ruling.

[15] The court proceeded to hear the appeal at which the appellant relied on written submissions filed on its behalf on the 15th March 2018 as well as oral arguments made by Mr. Forde QC. The respondent filed its written submissions on the 28th March 2018.

[16] At the hearing of the appeal a question also arose as to whether there was a need for cross examination. This was, in particular related to evidence given by the appellant that it had submitted a 'composite business plan' when it was seeking to be licensed. The respondent on its affidavit denied this. Mr. Forde QC noted that this aspect of the evidence did not matter having regards to the main arguments that he would be relying on. Effectively learned Queen's Counsel stated that he has accepted the Respondent's version of this factual matter; that there had been no composite business plan submitted by the Appellant.

The Contentions of the Parties.

[17] On behalf of the appellant, Learned Queen's Counsel, Mr. Forde relied on two main arguments. First, he argued that the section 46 Notice was bad in law and that there had been a breach of the common rules of natural justice and the statutory right to be heard as contained in section 46. Second, Learned Queen's Counsel contended that the respondent, by its conduct, was estopped from now asserting that the appellant was conducting business in breach of its licence. Third, the argument was made that the respondent had failed to present to this Court, the evidential material which it claimed it had acted on to make findings of breach against the appellant.

[18] The respondent, in reliance of their affidavit evidence and the written submissions of learned counsel submitted that there was no breach of the rules of natural justice and that the section 46 Notice was not bad in law, as there had been no final decision and the appellant was allowed to make representations before such a decision was made. The respondent also submitted that the estoppel point was without merit as there had been no representation by conduct and that further the respondent could not in law waive breaches as that would be ultra vires its powers. The respondent lastly submitted that if the court required any other additional information which had been placed before the respondent, this could be called for.

[19] The arguments of the parties will be set out in more detail below.

The Court's Consideration

[20] On an appeal of this nature the court's role is one of review. The Caribbean Civil Court Practice 2011 at page 397 sets out the applicable principles grounding these statements in the dictum of Lord Diplock in Hadmor Productions Ltd. v Hamilton [1983] 1 AC 191, 220, HL when he stated:

> *"The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which although it was one which might legitimately have been drawn upon the evidence that was before the judge can be demonstrated to be wrong by further evidence by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it."*

[21] I agree with the appellants that this Court sitting on appeal, has no jurisdiction to determine whether there has been a disciplinary violation within the meaning of section 44 of the FSC Act nor to determine the penalty imposed. There can be no doubt that these determinations are solely reserved for the respondent, the Financial Services Commission.

[22] I adopt the appellants' summary that 'the role of the high court, as an appellate court, is to determine (a) Whether the respondent had the jurisdiction to make the decision, (b) whether there was an error of law, (c) whether the respondent acted fairly, (d) whether there was evidence which can support the decision made by the respondent, (e) whether the respondent considered all the relevant facts, and (f) whether there are any other facts or matters which precluded the respondent from making the decision.'

The Natural Justice Point

[23] The appellant has argued through learned Queen's Counsel that the respondent acted in breach of the rules of natural justice, when it sent the section 46 Notice to the appellant. First, the principles of audi alterem partem were breached when the Notice stated on its face that the respondent had made findings that the appellant was in breach of its licence; a hearing should have been held on allegations before such a determination made. Second, the appellant contends that the Notice was deficient by its failure to state clearly the allegations against the appellant so that he could properly provide answers to the allegations.

[24] The respondent has contended that there was no such breach and the section was complied with. Learned Counsel through written submissions contended that the respondent's decision which was set out in the Section 46 Notice was not a final one; that the language of section 46(2) was incorporated into the Notice which spoke to the appellant's right to make representation to deny any alleged violation. Further the respondent could only find a violation if it were satisfied and could only be so satisfied if it were to receive and consider representations from the appellant.

[25] General principles make it clear that at common law it has been made clear that where the exercise of any power has the potential to adversely affect legal rights and interests, such a power

must be exercised fairly. (See Cooper and Wandsworth Board of Works (1863) 14 CB (NS) approved in Ridge v Baldwin [1964] AC 40). Any decision maker making an administrative decision which has the potential to affect rights of any person must be seen as acting quasi judicially and must follow the principles of natural justice. At common law persons whose rights are affected have a right to be heard before decisions are made which may affect their rights and interests. This is indeed the case with section 46 of the FSC Act, a provision which allows the respondent to make decisions and impose penalties on any financial institution under its scope.

[26] It is useful to set out section 46. It reads in full:-

> 46. (1) Where it intends to take disciplinary action against a licensee, other than by imposing a late payment penalty on the licensee, the Commission shall send a notice of its intention to the licensee—
>
> (a) specifying—
> (i) the alleged disciplinary violation and the relevant facts surrounding the violation, and
> (ii) the amount of the penalty that it intends to impose; and
>
> (b) advising the licensee of his right to make written representations to the Commission in accordance with subsection (2).
>
> (2) A licensee who receives a notice under subsection (1) may, within 28 days of the date upon which he receives the notice, send written representations to the Commission-
>
> (a) denying that he has committed the alleged disciplinary violation or disputing the facts of the alleged disciplinary violation; or
>
> (b) providing reasons that he considers justify the imposition of a lower penalty.

[27] Section 46 of the Act has codified the common law principle of natural justice. Whilst under section 46 there is no need for any traditional hearing, there can be no doubt that the respondent Commission must allow the licensee against whom an allegation of a violation is being made and who is denying such an allegation, to make representations in writing. Such representations must be considered by the respondent Commission before any finding adverse is made. The respondent Commission is required to act fairly in complying with the section.

[28] Having regards to the evidence (in particular the correspondence) led and the opposing arguments several questions may be posed. First, can a section 46 Notice be sent after a determination or

finding that there has been a violation? Second, where a finding was made that a violation was committed before the Notice was sent, would that void the Notice? Third, can the section 21 review process be used to carry out hearings into section 46 allegations? The answers to these questions must be considered with reference to the circumstances that led to the section 46 Notice in this case.

[29] Much of the narrative is to be gleaned from the affidavit of Mr. G.E. Haliscuk dated the 23rd February 2018. Some of this is set out above.

[30] The long and short of it is that when the respondent saw the appellant's audited returns for 2016 and compared it to its audited return for 2015, it discovered that while there had been equity investment of US$186,000 reported for 2015 for 2016, the assets side of the audited statement shows a 'Note Receivable' of US$14.5 million (the 'Note Receivable') and 'Investments' with a fair market value of approximately US$72.64 million ('the Investments') representing equities with an acquisition costs of approximately Us$86.8 million and a loss of approximately US$10.2 million'. Further in the 2015 audited statement there was no record of any 'loan' and the general reserves totaled US$160,000. Whilst in the 2016 statement it was reported that on the 'Liabilities' side of the Statement of Financial Position a 'Loan' in the amount of approximately US$14.594 million and under 'Shareholders' equity' an entry for 'General reserves' in the amount of approximately $70.26 million.'

[31] It seemed that the respondent became concerned about whether the appellant was acting in accordance with its licence. It then employed its investigatory powers under the FSC Act and prayed in aid section 21 which empowered it to demand information, failure to provide requested information leading to penalty of sanction. It issued a section 21 Notice dated the 13th April 2017 requesting that the appellant provide information on matters including 'the Note Receivable, the Loan and Investment.' It is now set out:

> *Dear Sirs:*
>
> *RE: REQUIREMENT TO PROVIDE INFORMATION AND PRODUCE DOCUMENTS UNDER SECTION 21 (1) OF THE FINANCIAL SERVICES COMMISSION ACT, R.S.A. C.* ***F28 (THE "FSC ACT") –*** *COTSWOLD INSURANCE LIMITED*

Pursuant to section 21 (1) of the FSC Act, the Anguilla Financial Services Commission (the "Commission") requires that Cotswold Insurance Limited ("Cotswold") provide the following information and produce the following documents to the Commission by 28 July 2017:

1. *A list of all persons holding variable universal life contracts with Cotswold as at 31 December 2016, including the full name, address, passport copy, annual premium amount and value of contract for each contract holder;*

2. *For each contract holder in the list to be provided in paragraph #1, a breakdown of the segregated assets disclosed in the audited accounts of Cotswold as at 31 December 2016 by contract holder, including the number, type, value and name of the issuer of the securities held, the market (if any) on which the securities are traded and the full name and address of any person holding the securities for or under the name of the contract holder as at 31 December 2016;*

3. *Copies of the investment account statement(s) as at 31 December 2016 that include the information provided in paragraphs #2 and #6(iv) for each contract holder;*

4. *A copy of the due diligence obtained for each person listed in paragraph #1 that evidences the source of the funds used to pay for the variable universal life insurance policy premiums in 2016, including a copy of the records evidencing the method of payment used, the amount paid, the sender and the payment intermediaries as applicable, e.g. wire transfer, cash, cheque, etc.;*

5. *In relation to Makalu Capital Ltd' ("Makalu"): (i) a copy of the surety issued in 2016 to Makalu; (ii) a copy of the promissory note regarding the loan made in 2016 to Makalu: (iii) a copy of the due diligence conducted on Makalu and (iv) the reason and business purpose for issuing the surety and making the loan to Makalu;*

6. *In relation to the invested funds totaling $72,642,001 referred to in Note 3 to Cotswold's audited accounts for the year ended 31 December 2016; (i) a copy of records evidencing the source(s) of the invested funds; (ii) a copy of the due diligence conducted on the source (s); (iii) the reason and business purpose for the receipt of these funds; and (iv) the list of the securities held, including the number, type, value and name of the issuer of the securities held, the market (if any) on which the securities are traded and the full name and address of any person holding the securities as at 31 December 2016;*

7. *In relation to the amount of $2,495,068 represented in Cotswold's audited accounts as at 31 December 2016 to be due to a client: (i) the full name (and copy of passport if not provided pursuant to paragraph #1) of the client to whom the amount was due; (ii) a copy of the agreement with the client concerning the amount due; and (iii) the reason and business purpose for the liability; and*

8. *Copy of the loan agreement for the outstanding loan, as at 31 December 2016, in the amount of $14,594,492 and the reason and business purpose for the loan.*

Pursuant to section 32 of the FSC Act, it is an offense if without reasonable excuse a service provider fails to comply with a notice issued under subsection 21 (1) of the FSC Act that has not been set aside by the Court under subsection 21(9). The penalty for this offence as per schedule 4 of the FSC Act is EC$25,000.

[32] Mr. Halischuk stated in his affidavit that Mr. Callender, the Executive Director of the appellant attended his office on the 20th July 2017, to speak to the Note Receivable, Loan and Investments. Mr. Halischuk deposed as follows:

"41. According to Mr. Callender, in September 2016, the Appellant made a US$14.5 million loan to Makalu under a structure proposed by the then beneficial owner of Makalu (the 'Loan Structure') whereby Credit Suisse AG, Nassau Branch ('Credit Suisse') first loaned the Appellant US$14.5 million in return for collateral in the form of approximately 4.95 million shares in Amaya Gaming Group Inc. ('Amaya'), a company listed on the Toronto Stock Exchange, valued at approximately US$80 million ('the Amaya Shares') that the then beneficial owner of Makalu caused Makalu to transfer to Credit Suisse as Collateral for a loan to Credit Suisse to the Appellant and the subsequent loan of the US$14.5 million by the Appellant to Makalu. Mr. Callender represented to the Respondent that Credit Suisse would not make the loan to Makalu unless structured to pass through the Appellant as a licensed insurance company.'

"42. Mr. Callender also represented to the Respondent at the meeting on the 20th July 2017 that the Appellant suspected that the Amaya Shares were obtained by Makalu pursuant to a hypothecation scheme but did not ask for evidence of Makalu's legal right to transfer the shares to the Appellant. Mr. Callender explained that Makalu was in the business of making loans to the principal shareholders of listed companies, usually newly listed, in an amount that represented a small percentage of the value of the shares in the company held by the principal, on repayment terms that included the transfer to Makalu of some or all the shares of the principal to be held by Makalu as collateral for the loan. Further, in the said meeting Mr. Callender informed the Respondent that the Appellant did not know the reason for the loan when it made the loan but suspected that it was in relation to a hypothecation transaction as Makalu was in the business of making loans to principals of listed companies on terms that included collateral deposited with Makalu in the form of large number of shares in the listed companies.'

"43. Mr. Callender further represented to the Respondent at the meeting on the 20th July 2017 that the Appellant was unaware at the time it made the loan to Makalu that the ultimate beneficiary of the loaned funds was intended to be the controlling shareholder of Amaya. A google search conducted by the Respondent subsequent to the meeting with Mr. Callender revealed that the ultimate beneficiary had been publicly reported in March

2016 as having been charged that month by the securities regulatory authority in Quebec, Canada with insider trading in relation to Amaya.'

[33] Speaking to the meeting with Mr. Halischuk, Mr. Callender is his second affidavit deposed to the following at paragraph 5:

> *"In respect of paragraphs 41, 42 and 43 of [Halischuk affidavit], I did represent to the Respondent that the ultimate beneficiary of the transaction was Wade and that the Appellant had no contractual relationship with the ultimate borrower who Mr. Halischuk alleges was charged by the securities Regulatory Authory in Canada. Mr. Halischuk does not state whether the said person was convicted. The loan was made to Wade and Wade was entitled to disburse the proceeds as he deemed fit. In fact, Wade borrowed $14.5 million and only on-lent $7.5 million to his client. The transaction was nothing more than credit enhancement, whereby the lender is provided with assurances that the corporate borrower will honour its obligations through additional collateral, insurance or third party guarantee. In the instant case, the credit enhancement was done by way of an insurance contract. Sureties, Sovereign Risk, Performance Bonds and other such insurance instruments are most commonly used as credit enhancement products because they mitigate risks associated with lending. Notably, the Appellant had been issuing Sovereign Risk insurance contracts since 2009 under its Amended Business Plan which was filed with the Respondent. These products were being sold to clients of the Andean Pact Nations since March 2009 without comment by or specific approval from the Respondent."*

[34] What happened subsequent to the meeting comes from the affidavit of Mr. Halischuk. He stated at paragraph 44 and 45 as follows:-

> *"44. On the 14th August 2017 the Respondent received the information from the Appellant in response to the Respondent's section 21 demand of 13th July 2017.*
>
> *45. Upon review of the information submitted, the Respondent discovered that not only was the appellant involved in the structuring of third party loans, i.e. loans to unrelated parties, as represented by the loan made to Makulu, but was also involved in the business of making guarantees to third parties in the form of sureties…"*

[35] It appeared to the respondent that section 46 of the FSC Act had to be prayed in aid of its regulatory powers under the FSC Act. The respondent sent to the appellant, a Notice dated the 7th November 2017 which on its face purported to be a 'Notice of Intent to Suspend and Notice of Intent to Impose an Administrative Penalty.'

[36] The Notice which was sent to the appellant's Board of Directors is not set out in full:

Dear Sirs:

Re: ***Cotswold Insurance Limited ("Cotswold") –*** *Notice of Intent to Suspend and Notice of Intent to Impose Administrative Penalty*

It recently has been brought to the attention of the Anguilla Financial Services Commission (the "Commission") that Cotswold has made changes to its business plan without being granted prior approval of the Commission as required pursuant to section 8(4) of the Insurance Act, R.S.A. c. 116 (the "Insurance Act"). In particular, Cotswold has engaged in the business of guarantees and structuring loans to third parties, which business activities have not been approved by the Commission.

Notice of Intent to Suspend

In accordance with subparagraph 35(1) (a) (i) and paragraph 36(1) (a) of The Financial Services Commission Act, R.S.A. c. F28 (the "FSC Act"), the Commission is entitled to take enforcement action against Cotswold for its failure to obtain the prior, or any, approval of the Commission for changes to its business plan, as required under section 8 (4) of the Insurance Act. The Commission intends to suspend Cotswold's licence on 21 November 2017 unless, on or before that date, Cotswold has discontinued the business activities for which it has not obtained the Commission's approval and, by written notice filed with the Commission, shows good reason why its licence should not be suspended.

In accordance with paragraph 41 (1) (b) of the FSC Act, the Commission may issue a public statement disclosing the suspension.

Notice of Intent to Impose Administrative Penalty

Pursuant to section 46 of the FSC Act, the Executive of the Commission is notifying Cotswold of its intention to impose on Cotswold an administrative penalty in the amount of XCD$12,500 in accordance with Schedule 1, section 3 of the Administrative Penalties Regulations, R.R.A. F 28-2 (the "Administrative Penalties Regulations") for failing to obtain approval from the Commission for its changes in business plan as required under section 8 (4) of the Insurance Act.

In determining the amount of the administrative penalty to impose, the Executive considered the factors listed in section 3 of the Administrative Penalties Regulations.

Please be advised that Cotswold has 28 days from the date of this letter to make written representations to the Commission in accordance with section 46 (2) of the FSC Act:

(a) denying that it has committed the alleged disciplinary violation or disputing the facts of the alleged disciplinary violation; or

(b) providing reasons that it considers justify the imposition of a lower penalty.

Before taking the intended enforcement action, the Commission will consider written representations received from Cotswold and, where it receives such representations, will provide reasons for the action it takes.

[37] The appellant did provide written representations by a letter dated 20th November 2017. This is now set out:

Dear Mr. Halischuck,

Re: Cotswold Insurance Limited ("the Company" or "Cotswold") - Notice of Intent to Suspend and Notice of Intent to Impose an Administrative Penalty

We refer to a letter from your office dated November 7, 2017 where it was communicated that the Company was in violation of its obligation to receive approval of the Commission to amend its business plan pursuant to Section 8(4) of the Insurance Act.

Prior to the receipt of the aforementioned letter, the Company had already commenced the process of surrendering all of the policies to the contract owners along with the cancellation of all reinsurance agreements between the subject companies. We can therefore confirm that the Company does not underwrite insurance risks as at the date of this letter.

It has never been the intention of the Company whether directly or through ourselves as insurance manager to proceed with any line of business without considering approval from the commission. In relation to the surety bond line, our office would have provided a Business Plan in support of a change in ownership in the related entity, Vision Re Limited ("Vision"). The plan was a composite business plan that identified the products that the Company would underwrite and Vision would reinsure. In this plan, the sureties were to be underwritten by the Company, with vision focusing primarily on the reinsurance of these policies. Copies of the proposed policies to be underwritten by the Company were provided with the composite Cotswold/Vision business plan. It was noted that the primary insurer would take on 10% or more of the underwriting risk that would be offset by the Company's provision of capital reserves and investment of premiums where necessary. There was therefore a disclosure of all the products associated with the Company and its related entities. Indeed, the Commission reviewed the plan without comment on the products, but with a requirement of additional capital for the reinsurer.

We note that on October 25, 2017 and prior to the previously referenced correspondence, the Company informed the Commission of its intent to surrender its license along with that of its sibling company, Windsor Re Limited ("Windsor"). The company has received this approval from the Commission and our office will continue to assist in the facilitation of this process.

Ultimately, we are satisfied that the Company either did not, or did not intentionally, contravene either the statute or the regulation under which it was formed and license issued and has since made all reasonable steps to return to good standing, having ceased

operations already and refunded all unused premiums to its policy holders. Likewise, Windsor has ceased all operations and cancelled all reinsurance contracts including the transfer of all reinsurance reserves to the primary insurers. Accordingly, in our view the Company should not be subject to either the suspension of its license or the imposition of an administrative penalty.

We also wish to notify you that the Company, along with Windsor Insurance Ltd, has instructed their registered agent in Anguilla to commence the process of liquidation of both companies.

If you have any questions or concern in relation to the foregoing, our office is both ready and available to engage the Commission in an effort to have a meaningful and productive dialogue and outcome on these matters surrounding the Company.

[38] Then came the respondent's letter of the 30th November 2017 in which a penalty was imposed.

Dear Sirs:

Re: Cotswold Insurance Limited ("Cotswold") – *Notice of Intent to Suspend and Notice of Intent to Impose an Administrative Penalty*

Reference is made to your letter of 20 November 2017 submitted in response to the referenced Notices issued to Cotswold by the Anguilla Financial Services Commission (the "Commission") on 7 November 2017.

On 25th October 2017, Commission staff attended a conference call with Mr. Todd Callender of Cotswold, a representative from its insurance manager, JLT Towner Management (Anguilla) Limited ("JLT") and legal counsel for Cotswold, Mr. Alex Richardson. During the call Mr. Callender informed the Commission of the principals' desire to surrender the license of Cotswold and Windsor Re Limited ("Windsor Re"). He stated the intention of Cotswold and Windsor Re to transfer all of their in force policies to a licensed insurance company and surrender and cancel their licenses issued by the Commission. Commission staff reminded Mr. Callender that before the Commission could consider applications to surrender and cancel the licenses of Cotswold and Windsor Re, both licensees should have responded satisfactorily to the section 21 demands dated 13 July 2017 and 7 November 2017 (revised) and be in good standing with the Commission. The Commission sent an email to Mr. Callender shortly after the call on that same day listing the documents and information necessary to make an application to transfer the insurance business to another insurer and to surrender and cancel the licenses.

The Commission notes the representation in your letter of 20 November 2017 that Cotswold has ceased all operations, including the surrender of all outstanding policies to the contract owners and the cancellation of reinsurance agreements. The Commission also notes that, since the date of the conference call and up until receiving your letter dated 20 November 2017, the Commission was not notified of each of Cotswold's and

Windsor Re's intention to surrender all of its policies and cancel its reinsurance contracts as opposed to transferring the policies to another insurer. Although the prior approval of the Commission was not required, the Commission should have been notified in advance of this material event pursuant to the Commission's letter to licensees re material changes.

The Commission notes the comments made in your letter of 20 November 2017 concerning Vision Re Limited ("Vision Re"). A review of the Commissions records indicated that two separate business plans were submitted in the original application packages for Cotswold and Vision Re. While both business plans mention engaging in business with the other insurer and other insurers under the Britannia Consulting Group, there was no mention of surety bonds and structuring loans to third parties as lines of business in the business plans for either of Cotswold or Vision Re. Up until the date of the Commission's letter dated 4 April 2011 of no objection to Vision Re re-domiciling to Barbados, the Commission received no application or request for changes to Vison Re's original business plan. Likewise, no application has been filed with the Commission for changes to Cotswold's original plan to date.

In your letter of 20 November 2017 you stated that Cotswold informed the Commission of its intent to surrender the licence of Cotswold and of Windsor Re. You also stated that "the Company [Cotswold] has received this approval from the Commission and our office will continue to assist in the facilitation of this process". Please note that the Commission had not as of the date of your letter received any application to surrender the licenses of Cotswold and Windsor Re and no approval has been granted by the Commission for the surrender and cancellation of the licenses. As stated above, Cotswold and Windsor Re must be in good standing with the Commission and must have provided all of the information to satisfy the Commission's section 21 demands before the Commission will consider applications to surrender and cancel their licenses.

Finally, the Commission notes the representation in your letter of 20 November 2017 that instructions have been given to the registered agent in Anguilla for each of Cotswold and Windsor Insurance Limited (sic) to commence the process for the liquidation of the companies. Please be advised that the Commission does not consider it to be fit and proper conduct on the part of a licensee to file, or instruct its registered agent to file, a notice of intent to dissolve with the Commercial Registry prior to receiving notice from the Commission that the Commission has approved the surrender of, and cancelled, its licence.

Notice of Intent to Suspend

The Commission stated in its Notice of Intent to Suspend Cotswold's licence dated 7 November 2017 that it intended to suspend the licence due to Cotswold not having obtained the prior, or any, approval of the Commission for changes to its business plan, unless the business for which approval had not been obtained was discontinued. The Commission has reviewed the representations made in your letter of 20 November 2017 and, based on your representation that Cotswold has ceased operations, will not proceed to suspend Cotswold's licence pursuant to its Notice dated 7 November 2017.

Notice of Imposition of Administrative Penalty

The Commission's Notice of Intent to Impose an Administrative Penalty dated 7 November 2017 gave Cotswold the opportunity to make written representations either denying that Cotswold has committed the alleged disciplinary violation of failing to seek the Commission's approval for changes to its business plan, or disputing the facts of the alleged disciplinary violation or providing reasons that it considers justify the imposition of a lower penalty. Such representations were to be made to the Commission within 28 days of the Notice dated 7 November 2017. Cotswold has made written representations in response to the Notice in its letter of 20 November 2017.

The representations submitted by Cotswold do not provide evidence to show that Cotswold did not commit the alleged disciplinary violation or to evidence that the facts of the alleged disciplinary violation were inaccurately stated. The Commission refers you in particular to the Commission's representations above made in response to the representations made in the third paragraph of your letter of 20 November 2017 concerning Vision Re Limited.

The representations submitted by Cotswold also do not provide reasons that justify the imposition of a lower penalty. The Commission refers you again to the Commission's representations above made in response to the representations made in the third paragraph of your letter dated 20 November 2017 concerning Vision Re Limited. The Commission also does not consider Cotswold's decision to discontinue carrying on insurance business in or from within Anguilla to be either relevant or mitigating in relation to the disciplinary violation of failing to obtain the prior approval of the Commission for changes to its business plan as described in the Commission's Notices of Intent to Impose an Administrative Penalty dated 7 November 2017.

Please note that the administrative penalty is to be paid by 29 December 2017. Failure to do so, or to exercise the rights to appeal under section 60 of the FSC Act, on or before 29 December 2017, will result in Cotswold being considered to have committed the violation and being liable for the penalty set out in this notice.

Pursuant to section 41 (1) of the FSC Act, the Commission intends to issue, after the imposition of the administrative penalty has become final in accordance with section 44(3) of the FSC Act, a public statement to disclose that the Commission has imposed an administrative penalty against Cotswold for its failure to obtain the Commission's prior approval for changes made to its business plan as required by section 8(4) of the Insurance Act, in particular approval to engage in the business of making guarantees and structuring loans to third parties.

[39] Speaking of the Section 46 Notice, Mr. Callender stated in his affidavit that:

"…I am sure that at no date prior to November 7, 2017, did the Respondent advise the Appellant that it was investigating a potential breach of Section 8(4) of the Insurance Act and had made the finding that the Appellant had committed a breach of the said Section 8(4) of the Insurance Act, nor did the Respondent provide the Appellant with the opportunity to respond to the said finding. Moreover, the Notice dated November 7, 2017 did not contain the particulars as required by section 46(1)(a)(i) of the FSC Act in circumstances where the Respondent had conducted an investigation under the pretext of an accounting exercise and would have obtained relevant facts."

[40] Mr. Halischuk on the other hand deposes that:

> *"51. On 7th November 2017 the Commission issued (i) a Notice of Intent to suspend the Appellant's licence in accordance with section 46 of the FSC Act and a Notice of Intent to Impose an Administrative Penalty… for failing to obtain approval from the Commission for changes in the nature of its business as required under section 8(4) of the Insurance Act…"*
>
> *52. The 7th November 2017 Notice of Intent specifically noted that the Appellant had engaged in the business of making guarantees and structuring loans to third parties, which business activities have not been approved by the Respondent."*

[41] It is easy to see how the appellant's complaint of a breach of natural justice is well founded. The respondent had clearly made up its mind well before the section 46 Notice was sent out. If there could be any doubt from the face of the section 46 Notice, Mr. Halischuk removed such doubt. The gratuitous insertion that the appellant had 28 days to 'deny the alleged violation' was merely paying lip service to the provisions of the Act. The respondent had clearly made up its mind on the issue of breach. I disagree with the respondent's submissions on this point. This is not a case where the notice was sent out relating to an alleged disciplinary violation.[1] In fact I am startled by the submission made that 'the legislation made no provision for the appellant to be given an opportunity prior to the Notice being issued in relation to a disciplinary violation.' Surely, an alleged violation and a violation are two separate things.

[42] In approaching this issue, I am well reminded that the respondent performs the unique and peculiar role of a regulator in the financial sector. Learned counsel has pointed me for persuasive force the learning of Justice Joseph-Olivetti in BVI case of Commonwealth Trust Limited v Financial Services Commission BVIHCV2008/0051 which made the point that the court must give due regard to the regulator's expertise in performing it functions. That court drew upon the learning in **Wade & Forsyth's Administrative Law** in the authors 9th edition of their work where the approach was set out as follows:

> *"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 cases of a manifest breach of principle. It has been recognized that the judicial review courts can play a role in*

[1] Noting paragraphs 28 and 29 of submissions filed on behalf of the respondent and dated the 28th March 2018.

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 the wider public and be cautious before quashing their decisions, and they will view sympathetically the dilemmas faced by regulators such as the FSC who may destroy a valuable business if they intervene too soon but may hasten disaster if they delay."

[43] This court appreciates the dilemmas faced by the respondent. This court also appreciates and gives due regard to the regulators' expertise in these areas. But this court is concerned about matters of legality and procedural fairness. That the court must view sympathetically the regulator's role is no reason to allow the regulator to ignore fundamental principles of natural justice which are clearly incorporated in the FSC Act. The FSC Act is clearly structured to give the respondent wide and considerable powers to carry out investigations. Section 21 is one of those provisions in this scheme and it empowers the respondent to demand that any licensed entity provide information; a failure to provide information carries the penalty of law. But while this provision must work in synergy with the rest of the FSC Act and in particular with Section 46, it does not provide the respondent with the statutory authority to make formal allegations of violations and conduct a hearing into such allegations. The section 21 process is not only triggered on suspicion of breach; it may be triggered simply to bear scrutiny and to review actions and ensure compliance. No doubt, it may well be in practical terms that very often the section 21 information which is provided reveals evidence of breach, but the FSC Act does not allow the respondent under section 21 to make findings of breach on which it would be allowed to act on to impose disciplinary sanctions. Even where the licensee admits of a breach during the section 21 process, and I am unable to find that there was such an admission in this case, I do not see such any 'Section 21 admission' as a waiver of the statutory safeguards inherent in section 46. From a practical standpoint, where such Section 21 admissions are made, the section 46 process would be shortened and a Notice having clearly set out the allegations ought to make reference to such admissions as were made. It would do well for the respondent to have such admissions in writing before incorporating them in a section 46 Notice. Where, in the section 21 process, there has been no such admission and the respondent is merely relying on information that leads it to a conclusion or finding on an alleged violation, then the full scope of section 46 must be complied with.

[44] Therefore, in my view, a section 46 Notice cannot be a statement that a breach was committed as a fait accompli; the commission must have an open mind on the alleged violation. The section 21 process allows the respondent to demand information. An entity receiving such a Section 21 Notice is not put on notice that it may have committed a breach, and so its response may be quite different from when it is advised that it is being investigated for an alleged violation. Some entities receiving a section 21 Notice may well believe that the respondent is merely concerned about certain accounting issues and is seeking clarity.[2]

[45] Section 46 incorporates the common law principles of natural justice and requires that a reasonable opportunity to be heard be provided to the licensee against whom allegations of breach are being made. It is at this point, that such a licensee will be formally notified of the allegation and of possible consequences. There is a mandatory requirement that the allegation should be clearly set out and particulars given. These particulars must be sufficient for the licensee to know what is being alleged against him. In complying with this provision, there must be substantial fairness.

[46] No doubt in seeking to exercise powers under section 46, the Commission intends to act to ensure the continued integrity of the financial sector in Anguilla. There is no doubt in the court's mind that such was the Commission's intention in this case. But it is in regard to this very intention that the Commission must take care that it complies with the FSC Act. The powers which are to be exercised under section 46 can literally destroy a financial institution. Other financial institutions are guided by such actions and it is crucial to the security of the financial sector and in the interests of doing good business that the Commission acts properly and fairly.

[47] I therefore agree with learned Queen's Counsel to some extent. By the Commission's own admission, it had made up its mind during the section 21 process that the appellant had acted in breach of its license. The expressed language of the instant section 46 Notice confirms this. Even though there was an express reference to what representation may be made in relation to 'alleged violation,' this Notice was no more than a statement that 'violations had been committed' and effectively the appellant was to speak in mitigation of punishment. In all of this, the respondent had

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[2] I noted paragraph 31 of Mr. Forde's submission dated the 15th March 2018.

failed in its duty to comply with section 46 and to act in a substantially fair manner towards the appellant.

[48] I have deemed that this Notice is bad in law, but for this court this is not the end of the matter. This court is well aware of its powers under the Act, and it is cognizant of the crucial functions being performed by the regulatory authority. This role of the authority, while it comes under the court's scrutiny on such appeals, must not be undermined. There appears to have been considerable evidence of breach of the licence which was granted to the appellant. I will give directions to the respondent under section 62 of the Act which will ensure that this process is not derailed entirely. But before this court gets there, there are a few matters which needs to be addressed.

Composite Business Plan or Not

[49] The first point relates to whether there was a composite plan submitted by the appellant as much was made about this in the evidence and the written submissions. Mr. Forde conceded that the appellant had conceded that it had not submitted any composite business plan.[3]

[50] I must also say that an examination of the appellant's application and the various business plans leave me to the provision view that there was no such composite business plan. The appellant would have been bound by his 2005 Cotswold Business. That would have only allowed it to conduct insurance business within the terms of its licence. Whether indeed there was the conduct of business outside the scope of the licence will first have to be determined during the course of a proper section 46 process.

The Estoppel Point

[51] The second point relates to estoppel. The appellant's argument relies on his audited statements which were submitted on an annual basis to the respondent. The appellant states that those statements contained a certification from its own independent auditor to the effect that the business of the appellant was being carried on in accordance with its licence. Prior to the section 46 Notice, there has never been any complaint by the respondent that the appellant had breached its licence.

[3] See pages 8 to 13 of the transcripts.

The appellant's argument is that this must mean that the respondent has thereby made a representation that the appellant's business was being carried on in accordance with its licence.

[52] I find this a startling argument. What the appellant appears to be contending is that there was representation by conduct. In this regard I agree entirely with the submissions in answer from the respondent on this point. In my view, the respondent could not have at all, intended to make any representation by its conduct that the appellant should act on. There is nothing to show that the appellant acted on reliance on the non-objection of the respondent to conduct any type of business. (See Rosilee Herbert v Attorney General (BVIHCV) 2010/0294; Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank; Moorgate Mercantile Co. Ltd. Twitchins)

[53] Regulatory authorities in the financial sector such as these bodies perform a crucial function which is to ensure the safety of the financial sector and protect all those who deal with these entities. It is 'generally accepted that in public law the most obvious limitation on the doctrine of estoppel is that it cannot be invoked so as to give an authority powers which it does not in law possess. In other words, no estoppel can legitimate an action which is ultra vires." (Wade & Forsyth, Administrative Law [7th edition]; Clarendon Press, Oxford 1994, page 270.) The submission on estoppel fails.

The Evidence considered by the Respondent

[54] Having regard to the approach this court has taken and the findings made, the question of whether all the relevant evidence had been placed before the court paled. One of the matters, the appellant must have been pointing to, was referred to by Mr. Halischuk at paragraphs 44 and 45 of his affidavit which is set out above.

[55] This 'information' was not presented to the court and it is difficult to understand the respondent's approach of suggesting to the court that it could be called for. This court sits on review and it is expected that all the material which was considered by the respondent in arriving at its decisions and findings which are under appeal, should be placed before the court. It is not sufficient to file affidavits which contains long narrative as to what the respondent 'apprehended, believed and

discovered'. It is to be expected that in future that the practice would be that an 'appeal bundle' of all relevant material is placed before the appeal court.

Conclusion and Order of the Court

[56] The respondent was entitled to use the section 21 process to carry on regular reviews and investigations. But the section 21 process ought not to be used to conduct hearings into allegations of breach. In the instant case, the respondent acted unfairly by conducting a hearing of sorts into what it suspected were breaches on the part of the appellant. By the time the section 46 Notice was sent out, the Commission had made up its mind and this can be seen by the expressed words of the Notice itself. For these reasons, the court finds that the section 46 Notice is bad in law. It is to be set aside.

[57] The order of the court is as follows that:-

(1) The section 46 Notice dated the 7th November 2017 and issued to the Appellant, Cotswold Insurance Limited is set aside. If the respondent chooses to issue a new section 46 Notice it shall comply with the terms of the FSC Act and detail the allegations with sufficient clarity which are being made against the appellant. It shall of course provide the appellant with an opportunity to make representations. These representations are not to be considered by Mr. Halischuk but shall be considered by a neutral, independent and suitable person within the respondent Commission who has not played a role in this matter before.

(2) In light of this order, the appellant shall have its costs to be assessed if not agreed within 21 days.

[58] The court is grateful to the parties for their submissions and their patience.

Darshan Ramdhani
High Court Judge (Ag.)

By the Court

Registrar