THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

BRITISH VIRGIN ISLANDS

COMMERCIAL DIVISION

CLAIM NO. BVIHCV 318 OF 2012

In the matter of THE FINANCIAL SERVICES COMMISSION ACT 2001 (AS AMENDED)

And in the matter of AN APPLICATION FOR A PROTECTION ORDER UNDER SECTION 39 OF THE FINANCIAL SERVICES COMMISSION ACT 2001 (AS AMENDED)

Alternatively in the matter of AN APPLICATION FOR A DECLARATION OF TRUST

BETWEEN:

THE FINANCIAL SERVICES COMMISSION

Applicant/Respondent

AND

A COMPANY
(Gibraltar: No 96577)

Respondent/Applicant

Appearances: Miss Victoria Lord for the Applicant
Miss Dawn Smith with Mr Nelson Samuel for the Respondent

2013; 24, 31 January

(Transfer of proceedings from High Court to commercial list – whether High Court proceedings involving commercial claims - CPR Part 69A.1(2) considered – whether purely regulatory application arising out of the transaction of trade and commerce – whether regulator bringing proprietary claims to be treated as making purely regulatory application – whether non-commercial claim may be transferred to commercial list under CPR 68A.4(4) - principles upon which transfer to be ordered considered – whether transfer would better serve the overriding objective)

[1] **Bannister J [Ag]:** This is an application by a Gibraltarian Company (which I am going to refer to as 'the Company' in order to avoid causing problems with any requirements of confidentiality which may be thought desirable in the circumstances of this case) for an

order pursuant to CPR Part 69A.4 (4) that this matter, which is currently proceeding in the High Court, be placed on the commercial list.

Background

[2] The Company was incorporated on 14 June 2006 under the laws of Gibraltar. It was licensed by the Gibraltarian Financial Services Commission to carry on insurance business. On 8 December 2009 the Company was registered in the Territory as a foreign company under section 187(d) of the Business Companies Act, 2004. On 20 May 2011 it was granted a Category B license under the Insurance Act, 2008 ('the Act') to carry on general insurance business, including domestic business, in the classes of Property Insurance and Liability Insurance in the Virgin Islands.

[3] The events leading up to and following the grant of that license are set out in an affidavit sworn in the High Court proceedings by Mr Stanley A Dawson Snr ('Mr Dawson'). Mr Dawson has since May of last year been the Acting Director of the Insurance Division of the BVI Financial Services Commission ('the FSC'). He says that the Company's application to carry on general insurance business as a domestic insurer in the Territory was approved on 19 August 2009. On the following day the FSC wrote to the Company telling it that approval had been granted. That approval was made subject to conditions, which included confirmation that the Company had established assets 'vested in trust' in a BVI licensed bank in an initial sum of US$500,000, to be increased to US$1.5 million within eight months of the Company's commencing business here.

[4] The initial US$500,000 was deposited with a licensed bank in the Territory ('the Bank') in early 2011 and, as I have said, the license was issued in May of that year. On 4 May 2012 the Company, through its local agent, confirmed that the deposit at the Bank had been increased to the required US$1.5 million. No written trust deed or declaration of trust has been provided to the FSC by the Company.

[5] On 2 August 2012 it came to the attention of the FSC that the Gibraltarian Regulator had withdrawn the Company's authorization to write business, on the grounds that it was insolvent. On or about 24 August 2012, the Bank informed the FSC that the Company's account retained a credit balance of a little over US$1.5 million. On 3 September 2012 Mr Dawson wrote to the Bank seeking an assurance (the exact terms of which are not before me) that this balance was held on behalf of the FSC to satisfy what is described as 'the Domestic Trust Condition' (which I understand to have been intended as a reference to the terms of section 15 of the Act and regulation 13 of the Insurance Regulations, 2009 ('section 15', regulation 13')). That assurance was not forthcoming. Instead, the Bank replied that it did not have such instructions, while forwarding what is described as a 'Profile of business relationship' form, which apparently refers to the deposit as 'Deposit Account required by the [FSC].' In mid to late September 2012 the account was frozen as the result of an instruction from the Gibraltarian Regulator.

[6] On 28 September 2012 the Company was put into liquidation by the Supreme Court of Gibraltar. Mr Frederick White, of Grant Thornton (Gibraltar), was appointed its provisional liquidator ('the Liquidator'). That appointment was approved on 28 September 2012.

The Liquidator has told the FSC that there is a real risk that the Company does not have sufficient funds to meet its insurance liabilities in full and that payment of claims is suspended.

[7] On 22 November 2012 the FSC issued an ordinary application in the High Court Registry here in the BVI ('the application'). A fee of US$1.20 was paid on issue. The Company is named as the Respondent to the application, which claims against the Company

(a) an order under section 39(2)(a) of the Financial Services Commission Act, 2001 ('section 39(2)(a)'), restraining the Company from dealing with the deposit; and
(b) an order enabling the FSC to resort to the funds at the Bank in order to discharge liabilities of the Company, including return premiums and outstanding claims; or, in the alternative
(c) a declaration that the funds at the Bank are held in trust for the purposes of complying with section 15 and regulation 13.

[8] On 28 November 2012 the FSC moved the application *ex parte* before Ellis J. The Judge made an order in the terms of (a) above[1] until 13 December 2012 and directed service on the Liquidator. He did not receive the documents until 17 December 2012, although it is clear that by 6 December 2012 Grant Thornton was aware, through its BVI office, which had also been notified, of the need to respond on the return date. As a result of a number of misunderstandings (none of which, it may be said, are to be laid at the door of the Company or of those acting for it) the return date hearing went ahead in the absence of the Company. Ellis J continued her earlier order until 'determination of the matter.' She further directed that the Liquidator respond within 14 days of service of the order and stood the matter over until 28 February 2012. My attention was not drawn to the terms of any such response and I assume that there has yet to be one.

The transfer application

[9] The Company's application is made under CPR 69A.4 (4) and (5):

> (4) At any time before the first case management conference, a party may apply to the commercial division judge to have a matter placed on the commercial list.
>
> (5) An application under paragraph (4) must be supported by an affidavit.

[10] Miss Lord, who has appeared for the Company on this application, submits, first, that the FSC's application is a commercial claim within the meaning of CPR 69A.1 (2), which is in the following terms:

[1] that is my understanding, although I was not shown a copy of the order itself

> Subject to paragraph (3), in this Part and its practice direction, "commercial claim" means any claim or application arising out of the transaction of trade and commerce and includes any claim relating to –
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> a) the law of business contracts and companies;
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> b) partnerships;
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> c) the law of insolvency;
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> d) the law of trusts;
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> e) the carriage of goods by sea, air or pipeline;
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> f) the exploitation of oil and gas reserves;
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> g) the insurance and re-insurance;
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> h) banking and financial services;
>
> i) collective investment schemes;
>
> j) the operation of markets and exchanges;
>
> k) mercantile agency and usages;
>
> l) arbitration

[11] There is a question whether the FSC's application is properly to be described as a claim at all, since it was not originated by any method sanctioned by CPR Part 8, but I do not think that that is critical to the application, since 'commercial claim' is defined in CPR 69A.1(2) to include applications.

[12] Miss Smith, for the FSC, submitted at the hearing that the application is not a commercial claim because it does not arise out of a[2] transaction of trade and commerce. She submits that the FSC's application is no more than an example of an exercise by the FSC of its statutory powers and does not arise out of a trading or commercial transaction. I think that that submission, as so put, is too narrow. The statutory language does not require that a commercial claim must have arisen out of a past or present commercial or trading relationship between the parties to the claim, although that will often be the case. Indeed, the subsection does not refer to 'a' transaction of trade and commerce. It refers to a claim or application arising out of '*the* transaction of trade and commerce' – i.e. the conduct generally of mercantile affairs. If the transaction of trade and commerce gives rise to a claim or application, that claim or application, it seems to me, is properly to be regarded as having arisen out of the transaction of trade and commerce.

[13] It remains the case, however, that for a claim or application to come within the description in CPR 68A.1 (2), it must have 'arisen' out of the transaction of trade and commerce. In my judgment, it is not possible to describe the FSC's application for relief

[2] her skeleton argument says 'the transaction', but that was the way she put it in her oral submissions

under section 39(2)(a) as having arisen out of the transaction of trade and commerce. The FSC's application for that relief has been made because events have occurred which, in the view of the FSC, oblige it to exercise powers and to seek remedies conferred upon it by statute. The section 39(2)(a) claim has arisen not out of the transaction of trade and commerce but as a consequence of the FSC's obligation to carry out its statutory duties. It is true that but for the fact that the Company had transacted trade and commerce the need for the application to Ellis J would never have arisen, but the proper approach to the question whether a claim is a commercial claim does not, in my judgment, involve a 'but for' test, but an overall assessment, carried out in the light of the wording of CPR 69A.1 (2), of the essential character of the claim or application in question. The FSC's application under section 39(2)(a) is not commercial in character. It is purely regulatory.

[14] That is not true, in my view, of the application for permission to resort to the Company's deposit at the Bank to pay return premiums and to meet liabilities incurred here by the Company. By that claim the FSC is seeking to establish a beneficial title over property *prima facie* the property of a third party. It seeks to do that in a quasi-representative capacity rather than on its own account, but that does not alter the underlying nature of the claim, which is proprietary, rather than regulatory, in nature. It does not matter that it is a regulator who is making it. It could equally well have been made by the policy holders. In my judgment, that claim is properly to be described as a commercial claim within the meaning of CPR 69A.1(2). The FSC's claim to be able to resort to the deposit has arisen out of nothing else than the transaction of trade and commerce. That can be shown to be so because in essence it is a claim designed to permit losses and liabilities incurred by the Company while trading in the Territory to be recouped. Whether the claim is soundly based in nothing to the point. It has no statutory foundation. It is clearly a commercial claim.

[15] Exactly the same considerations apply to the alternative claim for a declaration that the fund held by the Bank is subject to the section 15 and regulation 9 trusts.

[16] It seems to me to be highly desirable that these two claims, which the Liquidator clearly intends to challenge, should be transferred to the commercial list. The substance of the matter is a dispute between the FSC on the one hand and the Liquidator on the other as to the entitlement to a fund. Not only issues as to equitable title to the balance at the Bank, but issues arising from the fact that the Company is in liquidation in Gibraltar will need to be resolved. It seems to me that such issues would be more speedily and, as a result, more cheaply resolved in the Commercial Division – not because the Commercial Division has some superior skill or talent, but because it is regularly called upon to resolve questions of competing equitable entitlements to funds and cross border insolvency matters. As party to these proceedings, it seems to me that the Company, by its Liquidator, succeeds in establishing that the overriding objective points to this matter being dealt with in the Commercial Division.

[17] While I have accepted that the FSC's application under section 39(2)(a) is not a commercial claim, it does not follow that it cannot be transferred, along with the proprietary claims, to the commercial list. CPR 69A.4(4) does not use either of the

expressions 'commercial claim' or 'claim', which appear with frequency elsewhere in Part 69A, but refers merely to 'a matter.' I doubt that that was other than deliberate. This language enables the Commercial Court Judge to respond to a set of facts which make it desirable, to have claims which are not commercial claims within the meaning of CPR 69A.1(2)(a) transferred to the commercial list in order to save costs or for some other reason consistent with the overriding objective. The two commercial claims advanced by the FSC are clearly, for the reasons given above, paradigm claims for the commercial list. No prejudice will be felt by the FSC if the regulatory claim under section 39(2)(a) is transferred alongside them. Leaving the regulatory claim in the High Court while transferring the proprietary claims to the Commercial Division would obviously not be in accord with the overriding objective.

Conclusion

[18] For the reasons given above the entirety of the FSC's application under its notice of application **BVIHCV 318 of 2012** is transferred to the commercial list. A claim form must be issued *pro forma* out of the Commercial Court Registry and I will hear the parties when judgment is handed down on the question of directions for statements of case, which will plainly be required before the issues involved can be resolved. The FSC must make up the difference between the fees paid to the High Court Registry to date and the fees that would have been payable had the matter been commenced in the Commercial Division.[3]

Commercial Court Judge
31 January 2013

[3] see **Bobrov v Lenta BVIHC 214/2011** (31 January 2012)