COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law Division
2011/COM/com/00025

IN THE MATTER of the Administration of the Securities Industries Act, Chapter 363 and the Securities Industry Regulations 2000

AND

IN THE MATTER of Proceedings pursuant to section 33 of the Securities Industries Act, Chapter 363 and Part XVII of the Securities Regulations 2000

BETWEEN

THE EXECUTIVE DIRECTOR OF THE SECURITIES COMMISSION OF THE BAHAMAS
Plaintiff/Respondents

And

(1) ACCUVEST FUNDS SECURITIES LIMITED
First Defendant/Appellant

And

(2) SOUTH AMERICAN INVESTMENT FUND LIMITED
Second Defendant/Respondent

Before: The Hon Mrs Justice Hepburn

Appearances: Mr Michael Scott for the Appellant
Mr Gawaine Ward for the Respondent

Hearing: 18 and 19 July 2011

JUDGMENT

HEPBURN, J

This is an appeal by the First Defendant/Appellant, Accuvest Funds Services Limited ("Accuvest") and the Second Defendant/Appellant, South American Investment Fund Limited ("SAIF") (together "the Appellants") by notice of motion filed 28 April 2011 ("the Motion") from the Decision ("the Decision") given by the Hearing Panel ("the Panel") on 29 March 2011 and communicated to the Appellants on 31 March 2011. The Panel found the Appellants guilty of certain breaches of the Securities Industries Act (the "SIA"), the Investment Funds Act, 2003 (the "IFA") and the Investment Funds Regulations (the "Regulations") and fined the Appellants a total of $81,000.00. This appeal is against the entirety of the Ruling of the Panel, that is to say, the finding of guilt and the impositions of fines.

The Statutory Regime

2. The Securities Commission of The Bahamas ("the Commission") is a statutory body established by section 3 of the SIA. The Commission's functions are set out in section 4(1) of the SIA, viz:.

> **4. (1) The functions of the Commission shall be —**
> **(a) to formulate principles to regulate and govern mutual funds, securities and capital markets;**
> **(b) to maintain surveillance over mutual funds, securities and capital markets ensuring orderly, fair and equitable dealings;**
> **(c) to create and promote conditions to ensure the orderly growth and development of the capital markets;**
> **(b) to advise the Minister generally regarding mutual funds, securities and capital markets; and to do such other things as may be prescribed by this Act or by any other written law.**

3. By section 4(2) of the SIA, the Commission is empowered "to do anything which is calculated to facilitate or is incidental or conductive to the proper discharge of its functions under subsection (1).

4. The Commission also has certain regulatory functions under Part V of the IFA.

> **46. (1) It shall be the duty of the Commission –**
> **(a) to maintain a general review of the operations of investment funds and parties related to investment funds in The Bahamas.**
> **(b) to monitor, by way of receipt of regular reports or in such other manner as it thinks necessary the affairs or business of any investment fund or party related to an investment fund in The Bahamas**
> **(2) The Commission may make ruled providing for such matters as may be necessary or expedient for giving effect to its duties.**

> **47. (1) The Commission shall have the authority to regulate the investment fund industry and the operations and duties of investment funds and parties related to the investment fund.**
> **(2) Without prejudice to the generality of the foregoing the Commission shall have the authority to establish by rules the standards or educational criteria, if any, which govern the suitability of a party related to an investment fund or contracted to provide any of the services of a party related to an investment fund.**

> **48. In the exercise of its functions under this Act the Commission shall satisfy itself that the provisions of the Financial Transactions Reporting Act are being complied with.**

5. The Disciplinary Committee of the Securities Commission of The Bahamas ("the Disciplinary Committee") is a statutory body established under section 34(3) of the SIA Act:

> **34. (3) To assist the Commission and the Executive Director in carrying out the functions hereby required, the Commission shall establish a Disciplinary Committee comprising five persons including not more than two persons who are members of the Commission.**

6. The composition of the Disciplinary Committee are set out in SIA Regulation 120:

> **120. (1) Pursuant to section 34(3) of the Act, the Disciplinary Committee shall be a standing body comprised of five individuals which may include not more than two persons who are members of the Commission, appointed by the commission to serve for terms of two or three years.**
> **(2) The non-Commission members of the Disciplinary Committee shall be citizens of The Bahamas, who are of the highest reputation and character and who have a background in law, banking, government, accountancy or economics**

and they shall not be connected directly with the securities industry in The Bahamas.

(3) Two or three members of the Disciplinary Committee may be appointed by the chairman of the Commission for any investigation being conducted by the Executive Director; the chairman or the deputy chairman of the Commission shall serve as the chairman of the Disciplinary Committee.

7. The manner in which the hearing of a disciplinary matter is to be conducted is set out in SIA Regulation 121. SIA Regulations 121(1) and 121(6) are set out below:

121. (1) Any hearing in a disciplinary matter shall be presided over by a hearing panel of the Commission which shall be comprised of any number of members of the Commission who are not already on the Disciplinary Committee, but not less than three, who have been appointed by the chairman; the chairman shall also appoint a member to serve as the chairman of the hearing panel.

(2) ...
(3) ...
(4) ...
(5) ...
(6) Generally, the hearing may be conducted as follows –

- **(a) after each party has made its opening statement, the Executive Director shall present his case, followed by the defendant presenting his;**
- **(b) both sides may submit exhibits and call witnesses, including experts, to testify;**
- **(c) thay shall not be bound by the formal rules of evidence;**
- **(d) each party may cross-examine the others' witnesses;**
- **(e) the commission hearing panel may question either party at any time during the proceedings;**
- **(f) the Executive Director shall have the burden of proof.**

The Appeal

8. By their Motion, the Appellants seek an order that:

"WITH REGARD TO THE FIRST APPELLANT

1. Although the First Defendant was licensed in 2004 as a restricted fund administrator there were special circumstances that explain its failure to comply with the regulatory regime of the Investment Fund Act during the years 2005, 2006 and 2007. In any event, the First Appellant's purpose was to administer finds licensed and regulated by the Securities Commission. Further, [Accuvest] was not active in the funds administration business, during the period 2004 thru 2007.

2. There were extreme special circumstances that justified and explained any failure by the Appellant to communicate properly with the Respondent in any way;
3. The penalties imposed upon the Appellant are completely disproportionate to the breaches complained of;
4. That the original order be stayed pending the hearing of this Notice and all mention of the decision be removed from the record and the website of the Securities Commission until the outcome of this appeal.

WITH REGARD TO THE SECOND APPELLANT

5. South American Investment Fund Limited ("SAIF") are not liable to the Respondent as it is not in reality a fund;
6. SAIF was in reality an IBC and should have been regulated under the relevant Act and not the Act applied by the Disciplinary Committee of the Respondent;
7. The Second Appellant was not in reality a fund capable of being regulated by the Respondents; rather it was a purely private vehicle that at no stage involved any risk to public investors. The Appellant never traded any shares and its underlying structure was essentially static with any income being dividends on the underlying operation;
8. That the original order by stayed pending the hearing of this Notice and all mention of the decision be removed from the record and the website of the Securities Commission until the outcome of this appeal."

9. The grounds of the Appeal as set out in the Motion are:

"Introduction

1. The Respondent has made a number of factual errors in its finding and has wrongly imposed penalties upon the First and Second Appellants. In any event, if any penalty is warranted the one imposed is unnecessarily harsh and disproportionate. The Appellants and in particular SAIF, is a private vehicle and not a public fund. Both the Appellant are creatures created to serve the financial needs of a private family and its business. No member of the public or any outside investor was ever able to invest in it and therefore, was never put at risk.

First Appellant

2. Although it became licensed in 2004, during the financial years 2005, 2006 and 2007 the First Appellant was not carrying out administration services and as a consequence no audited financial reports were produced nor were any produced for he year.
3. The Respondent has erred in fact by finding that administration activities had commenced at the time of inspection in 2007. They had not. Any evidence that such activities had commended is merely evidence of holdings by a third party financial consultant, Weston B. Charles & Co.
4. Although the communications between the First Defendant and the Respondent may have been able to have been criticised and although the First Defendant may have failed to file its annual statement as fund

administrator this has been explained by the "special circumstances" that the individual involved was operating under at the time and highlights why the penalties imposed by the Respondent are disproportionate and unfairly harsh.

Second Appellant

5. **The Appellants did not elect to be regulated by the Respondent and therefore cannot be subject to any penalties imposed by it. SAIF is a closed end fund and can elect to be registered and regulated under the Respondent. This is supported by Section 7 of the Investment Funds Act. At no stage prior to 2008 did SAIF elect to be registered and the Respondent did/has not produced an evidence to show that SAIF had so elected until it was licensed by the Commission on its election which did not begin until 2008. Thus anything prior to 2008 cannot come under the jurisdiction of the Commission.**
6. **SAIF was not licensed until 2008 and it is from that period that is became subject to the Investment Funds Act. Again the Respondent has not shown any reason why it believes the Second Appellant was subject to this Act before 2008. It follows that the penalties imposed by the Respondent for alleged breached prior to 2008 must be overruled.**
7. **To be clear, the Appellant was under no obligation to be registered and licensed unless and until it elected to do so. The Appellant did not elect to do so until 2008. Any alleged breaches of the Act prior to the date are unsubstantiated and the Appellant was/is under no obligation to answer them as the Respondent had no jurisdiction over the Appellant.**
8. **Although the Second Appellant may have failed to communicate with the Respondent in a timely fashion, this has been explained by the "special circumstance" that the individual involved was operating under at the time and highlights why the penalties imposed by the Respondent are disproportionate and unfairly harsh."**

10. The Motion is supported by the Affidavit of Sean Nottage ("Mr Nottage") a Director and General Counsel of Accuvest, and a Director of SAIF, dated 28 April 2011. Philip Stubbs ("Mr Stubbs" or the "Respondent"), is the Acting Executive Director of the Commission. His affidavit in response was sworn on 5 July 2011 and filed on 7 July 2011. The Record ("the Record") for the hearing of the Appeal was filed on 26 May 2011. The documentary evidence relied upon by the parties in the hearing before the Panel on 28 January 2011 and the transcript ("the transcript") of that hearing were included in the Record.

11. The Appeal is brought pursuant to section 42(1) of the SIA, which provides as follows:

42. (1) Any person aggrieved by a decision, refusal, ruling or order of the Commission may appeal to the Supreme Court in accordance with rules of court.

12. The Appeal is also brought pursuant to Rules of the Supreme Court ("RSC") Order 55, which provides as follows:

O.55 r.1

1. (1) Subject to paragraphs (2) and (3), this order shall apply to every appeal which by or under any enactment lies to the Supreme Court from any court, tribunal or person.

(2) This Order shall not apply to an appeal by case stated.

(3) The following rules of this Order shall, in relation to an appeal to which this Order applies, have effect subject to any provision made in relation to that appeal by any other provision of these Rules or by or under any enactment.

(4) In this Order references to a tribunal shall be construed as references to any tribunal constituted by or under any enactment other than any of the ordinary courts of law.

O.55 r.2

2. An appeal to which this Order applies may be heard and determined by a single judge.

O.55 r.3

3. (1) An appeal to which this Order applies shall be by way of rehearing and must be brought by originating motion.

(2) Every notice of the motion by which such an appeal is brought must state the grounds of the appeal and, if the appeal is against a judgment, order or other decision of a court, must state whether the appeal is against the whole or a part of that decision and, if against a part only, must specify the part.

(3) The bringing of such an appeal shall not operate as a stay of proceedings on the judgment, determination or other decision against which the appeal is brought unless the court by which the appeal is to be heard or the court, tribunal or person by which or by whom the decision was given so orders.

O. 55 r.4

4. (1) The persons to be served with notice of the motion by which an appeal to which this Order applies is brought are the following –

(a) ...

(b) ...

(2) ....

(3) ....

(4) In the case of an appeal against an order, determination, award or other decision of a tribunal, Minister, government department or other person, the period specified in paragraph (2) shall be calculated from the date on which notice of the decision was given to the appellant by the person who made the decision or by a person authorised in that behalf to do so.

O.55 r.5

5. Unless the Court otherwise directs, an appeal to which this Order applies shall not be heard sooner than 21 days after service of notice of the motion by which the appeal is brought.

O.55 r.6

6. (1) The notice of the motion by which an appeal to which this Order applies is brought may be amended by the appellant, without leave, by supplementary notice served not less than 7 days before the day appointed for the hearing of the appeal, on each of the persons on whom the notice to be amended was served.

(2) Within 2 days after service of a supplementary notice under paragraph (1) the appellant must lodge two copies of the notice in the Registry.

(3) Except with the leave of the Court, no grounds other than those stated in the notice of the motion by which the appeal is brought or any supplementary notice under paragraph (1) may be relied upon by the appellant at the hearing; but that Court may amend the grounds so stated or make any other order, on such terms as it thinks just, to ensure the determination on the merits of the real question in controversy between the parties.

(4) The foregoing provisions of this rule are without prejudice to the powers of the Court under Order 20.

O.55 r.7

7. (1) In addition to the power conferred by rule 6(3), the Court hearing an appeal to which this Order applies shall have the powers conferred by the following provisions of this rule.

(2) The Court shall have power to receive further evidence on question of fact, and the evidence may be given in such manner as the Court may direct either by oral examination in court, by affidavit, by deposition taken before an examiner or in some other manner.

(3) The Court shall have power to draw any inferences of fact which might have been drawn in the proceedings out of which the appeal arose.

(4) It shall be the duty of the appellant to apply to the judge or other person presiding at the proceedings in which the decision appealed against was given for a signed copy of any note made by him of the proceedings and to furnish that copy for the use of the Court; and in default of production of such a note, or, if such note is incomplete, in addition to such note, the Court may hear and determine the appeal on any other evidence or statement of what occurred in those proceedings as appears to the Court to be sufficient. Except where the Court otherwise directs, an affidavit or note by a person present at the proceedings shall

not be used in evidence under this paragraph unless it was previously submitted to the person presiding at the proceedings for his comments.

(5) The Court may give any judgment or decision or make any order which ought to have been given or made by the court, tribunal or person and make such further or other order as the case may require or may remit the matter with the opinion of the Court for rehearing and determination by him or it.

(6) The Court may, in special circumstances, order that such security shall be given for the costs of the appeal as may be just.

(7) The Court shall not be bound to allow the appeal on the ground merely of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned.

The nature of an appeal under RSC Order 55

13. The observations of May LJ in the English Court of Appeal, Civil, case of **El Du Pont De Nemours & Co v ST Dupont** [2003] EWCA Civ 1368 on the nature of an appeal under RSC O. 55 at paragraphs 85, 88, 89 and 90 accurately reflect the role of the court hearing an appeal under O. 55 in The Bahamas, notwithstanding that case concerned an appeal brought pursuant to the English CPR 52.11:

85. In considering the nature of an appeal, certain questions intrinsically arise. Will the appeal court start all over again as if the lower court had never made a decision? Will the appeal court hear the evidence again? What weight is to be given to the decision of the lower court? Will the appeal court admit fresh evidence and, if so, upon what principles? To what extent and upon what principles will the appeal court interfere with the decision of the lower court? These and related questions are not answered simply by labelling the appeal process as a review or a rehearing.

...

88. Order 55, which applied generally to statutory appeals to the High Court, provided in rule 3(1) that an appeal to which that order applied should be by way of rehearing. By rule 7(2), the court hearing the appeal had power to receive further evidence on questions of fact, but without the restriction in Order 59 rule 10(2)[1]. The court again had power to draw inferences of fact...

89. These provisions for a rehearing were not however references to a rehearing "in the fullest sense of the word" as noted by Brooke LJ in paragraph 31

[1] The English Order 59 concerns appeals to the Court of Appeal. Rule 10(2) provides that "in the case of an appeal from a judgment after the trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or earing)shall be admitted except on special grounds".

of his judgment in *Tanfern Limited v. Cameron-MacDonald* [2000] 1 WLR 1311 at 1317. Brooke LJ was there referring to High Court appeals from a Master or Registrar to a Judge in Chambers under Order 58 rule 1. On those appeals, the judge treated the matter as though it came before him for the first time. The parties were able to bring forward fresh evidence which had not been before the Master unconstrained by restrictions applicable to the Court of Appeal. The judge hearing the appeal was able to exercise any discretion afresh. As Lord Atkin said in *Evans v. Bartlam* [1937] A.C. 473 at 478:

> **"I wish to state my conviction that where there is a discretionary jurisdiction given to the Court or a judge the judge in Chambers is in no way fettered by the previous exercise of the Master's discretion. His own discretion is intended by the rules to determine the parties' rights: and he is entitled to exercise it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the Master: but he is in no way bound by it."**

90. Rehearings on appeal under RSC Orders 55 and 59 were well understood not to extend to rehearings in the fullest sense of the word. The court did not hear the case again from the start. It reviewed the decision under appeal giving it the respect appropriate to the nature of the court or tribunal, the subject matter and, importantly, the nature of those parts of the decision making process which were challenged.

14. Thus, unlike appeals from the Registrar to the Judge in Chambers under RSC Order 58 which are brought simply by serving on every other party to the proceedings a notice to attend before the judge on a specified date in the notice without stating the grounds of appeal, appeals under Order 55 are brought by originating motion which must state the grounds of the appeal. The reason for the distinction is that under Order 58, the Judge in chambers exercises a fresh discretion unfettered by the decision of the Registrar although the Registrar's decision is given the weight it deserves. On the other hand, in appeals under Order 55, the court reviews the decision under appeal. In reviewing the Decision, I must give the Decision the respect appropriate to a tribunal which is comprised of persons who are not directly connected with the securities industry in the Bahamas but have a background in law, banking, government, accountancy or economics, the type of breaches which the Panel was considering and the fact that the appeal is against the entirety of the Decision.

Background

15. The Panel had before it, inter alia, the Exhibits at Tab 1 of the Record which formed a part of the Complaint. The following facts are gleaned from the Exhibits at Tab 1 of the Record:

(i) Accuvest was licensed on 15 January 2003 as a Restricted Investment Fund Administrator pursuant to the now repealed Mutual Funds Act ("MFA") and re-licensed on 16 December 2003 as a Restricted Investment Fund Administrator ("RIFA") pursuant to s.34 of the IFA.

(ii) SAIF was incorporated on 23 February 2000 and was administered by Winterbotham Trust Company Limited ("Winterbotham"), an Unrestricted Mutual Fund Administrator under the MFA.

(iii) On 14 December 2004, Winterbotham licensed SAIF as a SMART Fund SFM003 ("SFM003") under the IFA.

(iv) Winterbotham resigned as administrator sometime in 2005 and cancelled the licence of SAIF. By letter dated 14 June 2006 ("PS 3") SAIF advised the Commission that SAIF had appointed Accuvest as its Investment Fund Administrator in succession to administration provided by Winterbotham. The letter was signed by Mr Nottage, who at the time was a Director and General Counsel of Accuvest.

(v) As a RIFA, Accuvest could not licence the funds it administered and had to make application to the Commission to have any funds it administered licenced.

(vi) By letter dated 7 July 2006 ("PS4") the Commission acknowledged receipt of Mr Nottage's letter of 16 June 2006 and advised Mr Nottage that in addition to informing the Commission of the transfer of the administration of SAIF from Winterbotham to Accuvest, SAIF was required to provide the Commission with "the particulars prescribed in Schedule 9 of the Investment Funds Regulations, 2003 "and requested that "the necessary information be submitted in accordance with the legislation".

(vii) Undercover of letter dated 31 January 2007 ("PS 6") Mr Nottage, on behalf of Accuvest forwarded cheque in the amount of $500 representing "the Annual Principal Office fee payable with respect to our providing the principal office to [SAIF]"

(viii) Almost a year later, undercover of letter dated 27 April 2007 ("PS 5") Mr Nottage, on behalf of Accuvest submitted their application for the "re-licencing" of SAIF. That letter is set out in full below.

"27 April 2007

BY HAND

The Securities Commission of The Bahamas
Authorizations Department
Charlotte House
3rd Floor
Charlotte Street
P. O. Box N-8347
Nassau, Bahamas

Re: South American Investment Fund – Application for Re-Licencing

Dear Sir/Madam:

Enclosed please find our application for the re-licencing of South American Investment Fund Limited (the "Fund").

Herein, we apply for the re-licencing of the Fund following the transfer of the administration of the Fund to Accuvest Fund Services Limited As your records will show, this fund previously held licence #61-SFM003-002, which was issued by The Winterbotham Trust Company Limited, the Fund's

former administrator. This re-application is, however, for the licencing of the Fund as a SMART Fund #5 (SFM005, Rule 3, The Investment Funds (SMART Fund) Rules, 2005).

Apologies are made by the undersigned for the tardy filing of this application. Responsibility for overlooking the need to re-apply, and the delay in doing so, rests solely with the undersigned; the same being caused, in large part, by adverse personal circumstances.

Yours faithfully,

D. Sean Nottage,
Director & General Counsel
The Accuvest Group

Enclosures"

(ix) On 27 May 2007 ("PS 7") the Commission wrote to Mr Nottage as Director and General Counsel of Accuvest, acknowledging receipt of the application for the re-licencing of SAIF and advised him of the additional items which were required before the Commission would review the application.

(x) By letters dated 29 June 2007 ("PS 8") 31 July 2007 ("PS 9"), 2 January 2008 ("PS 10"), 14 March 2008 ("PS 11") 22 April 2008 ("PS 12") and 5 June 2008 ("PS 13") respectively, the Commission requested from Accuvest the outstanding specified items in support of the re-licensing application of SAIF.

(xi) By the letter dated 12 January 2008 ("PS 10") the Commission also advised Accuvest through Mr Nottage that "the Commission is proceeding with disciplinary action for breaches of the Investment Funds Act 2003 in relation to the operation of the listed funds".

(xii) On 25 June 2008 SAIF was licensed as a SMART Fund SFM005 ("SMF005").

16. The Commission conducted a routine inspection of Accuvest form 1 September 2007 to 28 September 2007 and found a number of breaches by Accuvest and SAIF. By letter dated 2 January 2008 ("PS10") the Commission informed Accuvest of its intention to proceed with disciplinary action for those breaches and served notice of a Disciplinary Committee meeting on 20 August 2009.

17. A Formal Complaint and Notice of Hearing dated 8 November 2010 (the "Formal Compliant") were sent to Accuvest under cover of the Commission's letter dated 11 November 2010. The documents referred to in paragraph 15 are exhibited to the Formal Complaint.

18. The alleged breaches together with the evidence on which the Commission relied in support of the allegations were set out in the Formal Complaint as follows.

(i) With respect of Accuvest:

BREACH 1

Accuvest is in breach of Section 42(2) of the [IFA] which states: "an investment fund administrator shall submit its financial statements in respect of the financial year of the administrator to the Commission within four months of the end of that financial year or within such extension of that period as the Commission may reasonably allow."

Evidence:

(a) Accuvest failed to submit its annual financial statements ("AFS") within 4 months of the end of its financial year or at all for the periods ending 31 December 2005, 2006 and 2007 in breach of section 42(2) of IFA.

(b) Accuvest failed to submit an application for an extension of time within which to file its AFS.

(c) The Commission extended the time within which Accuvest was to file its 2008 AFS to 30 June 2009 yet Accuvest did not file its AFS for 2008 until 14 October 2009.

(d) Following the Inspection in September 2007, Accuvest informed the Commission that it had not commenced operations and therefore had no

AFS to file. The Commission however, had evidence of Accuvest's operational activity with respect to at least one fund, namely SAIF.

BREACH 2

Accuvest is in breach of Section 26 of the Act which states: "The administrator of an investment fund shall use reasonable efforts to ensure that the investment fund does not carry on or attempt to carry on business as an investment fund contrary to provisions of this Act."

Evidence:

The Commission relied upon the correspondence passing between itself and SAIF and Accuvest set out at paragraph 15 hereof as evidence of Breach 2.

BREACH 3

Accuvest is in breach of Regulation 17(1)(g) of the Regulations, which states: "An investment fund administrator shall - ...

(g) Take all reasonable steps to ensure that operators are meeting their obligations and are complying with the [IFA] and these Regulations."

Evidence:

The Commission confirmed the operation of an unlicensed fund in non compliance with the provisions of the IFA and relied upon the correspondence passing between itself and SAIF and Accuvest set out at paragraph 15 hereof as evidence of Breach 3.

BREACH 4

Accuvest is in breach of Regulation 53 of the Regulations, which states: "The annual declaration made by an investment fund administrator pursuant to section 36(4) of the [IFA] shall be in Form B in Schedule 11 and shall be submitted to the Commission at the time of payment of the prescribed annual fee for the administrator."

Evidence:

The Commission asserted that Accuvest was legally obligated to submit annual declarations to the Commission pursuant to Regulation 53 of the Regulations and the Commission had not received any declaration from Accuvest to the date of the Complaint.

(ii) With respect to SAIF :

BREACH 1

SAIF was unlicensed yet operational and therefore breached Section 3 of the [IFA] which states: "An investment fund shall not carry on or attempt to carry on business unless–

(a) It is licensed as –

(i.) A professional fund;

(ii.) A SMART fund; or

(iii.) A standard fund; or

(b) It is registered as a recognised foreign fund."

Evidence:

The Commission relied upon the correspondence passing between itself and SAIF and Accuvest set out at paragraph 15 above as evidence of Breach 1.

BREACH 2

Alternatively, SAIF is in breach of Section 5(1) of the [IFA] which states: "Notwithstanding section 3, a SMART fund shall not carry on or attempt to carry on business unless –

(a) It complies with any written rule of the Commission establishing the parameters or requirements in respect of the category, class or type of investment fund; and

(b) The prescribed fees have been paid in respect of the investment fund."

Evidence:

The Commission relied upon the correspondence passing between itself and SAIF and Accuvest set out at paragraph 15 above as evidence of Breach 2.

BREACH 3

While operating as a SMART fund model SFM003 as outlined above, SAIF is in breach of Regulation 52 of the Regulations, which states: "The annual declaration made by an investment fund under section 27(1)(a) of the [IFA] shall be in Form A in Schedule 11 and shall be submitted to the Commission at the time of payment of the prescribed annual license or registration fee."

Evidence:

The Commission asserted that SAIF was legally obligated to submit annual declarations to the Commission pursuant to Regulation 52 and the Commission had not received any declaration to the date of the Complaint.

19. The Appellants written Answer to the Complaint dated 13 December 2010 is at Tab 2 of the Record. At the hearing of the Complaint, the Appellants were represented at all material times by Mr Nottage, Director and General Counsel of Accuvest and Director of SAIF, and Robert P Jensen, Director of Accuvest and SAIF, respectively. The Respondent was represented by Mr Ward.

20. Mr Nottage made the following admissions and "qualified admissions" before the Panel, which mirrored closely the Appellants response to the allegations set out in the Answer.

21. As regards to Breach 1 against Accuvest, Mr Nottage made a qualified admission. He stated that for the periods ending 31 December 2005, 2006 and 2007 no administration services were being carried out by Accuvest and therefore no AFS were produced. He also stated that letter PS3 was merely the formal notification that administration services would be taken over by Accuvest once re-licencing of SAIF was completed and that the re-licencing process was not completed until the financial year 2008. As to the filing of the AFS for the financial year ended 31 December 2008, Mr Nottage admitted that the filing had not taken place because of unavoidable delays in the completion of the AFS. (See transcript at Flag 7 of the record, at page 7 line 16 to page 8 line 9)

22. Mr Nottage, by way of explanation, told the Panel that the assertion by the Disciplinary Committee that at the time of the inspection in September 2007 it had discovered evidence of Accuvest's operational activity in connection with SAIF was most likely a reference to the evidence that SAIF's holding were kept by Accuvest's third party consultant, Western B Charles & Co., and that "the administrative records had not commenced within Accuvest itself". (See transcript at Flag 7 of the record, at page 8 lines 10 to 19.)

23. Breach 2 against Accuvest was denied by Mr Nottage, who submitted that at the relevant time SAIF "was either licensed as a SMART Fund or was in the process of re-registering as a SMART Fund once the transfer to Accuvest was announced". He admitted, however, that the time between the announcement of the change in the administrator and the licensing of [SAIF]" was protracted. (See transcript at Flag 7 of the record, at page 9 lines 1-8.)

24. As regards Breach 3 against Accuvest Mr Nottage made a qualified admission. His explanation with respect to Breach 3 pretty much mirrored the explanation given for Breach 2.

25. Mr Nottage neither admitted nor denied Breach 4 against Accuvest. He informed the Panel that at all times Accuvest was under the impression that the annual declarations for all funds administered by Accuvest were fully complaint and that he had not been able to verify if they were all complaint.

26. Breach 1 against SAIF was denied by Mr Nottage. He informed the Panel that SAIF "had an original SMART fund licence when administered by a previous administrator and at the time Accuvest was unaware of the need to re-register SAIF until informed of the fact by the Commission when Accuvest informed the Commission that it would be taking over the administration of SAIF. (See transcript page10 lines 17 to 24). Mr Nottage also informed the Panel that the delay in completing the re-registration process was caused largely by special circumstances.

27. Mr Nottage denied Breach 2 against SAIF. He informed the Panel that at all relevant times SAIF was either a licenced SMART fund while it was administered by a previous administrator (i.e. Winterbotham) or in the process of complying with the requirements and that the protracted time it took to SAIF to comply with the requirements was due to special circumstances.

28. According to Mr Nottage, the reason for the protracted nature of the application for re-registration of SAIF "as well as many of the facts and circumstances stated in the formal complaint are due in very large part to the special circumstances mentioned before". (See transcript at Flag 7 of the record, at page 9 lines 9-14)

29. Mr Nottage neither admitted nor denied breach 3 against SAIF. Mr Nottage informed the Panel that the allegation surprised them as at all relevant times the Accuvest was under the impression that the annual declarations for all funds operated by Accuvest were fully up-to-date. He stated that he had not been able to find evidence to the contrary as stated in the Commission's complaint.

The Ruling of the Panel

30. After considering the evidence before it the Panel found Accuvest and SAIF guilty of all of the breaches in the Complaint and imposed sanctions against Accuvest and SAIF and Accuvest. The Decision of the Panel is at Tab 5 of the Record. The actual Ruling appears at page 5 line 10 through page 7 line 29. The Sanctions imposed by the Panel appear at page 6 line 11 to page 7 line 26. SAIF is referred to as "the Fund" in the Ruling. It is only those parts of the Decision of the Panel that relate to the actual Ruling and the Sanctions imposed by the Panel that are reproduced below :

> **"RULING**
>
> **The Panel, having deliberated on the above matter following the hearing of same, rules as follows:**

Accuvest

The Panel had found Accuvest guilty of the breaches in the Complaint based on the evidence presented, including the correspondence exhibited by the Executive Director which evidence their operations. From the evidence presented, Accuvest was operational and failed to submit its audited annual financial statements for 2005 through 2007, inclusive. They also failed to submit the statutory annual declaration for 2006.

The defendants indicated that special circumstances rendered one of their operators unable to perform his duties, a result of which was the breaches referred to. In making this submission however, Accuvest all but outright acknowledged the breaches referred to. The defendants referred to the special circumstances as being the main reason for the occurrence of the breaches. As indicated on this page at lines 5-7 above, the defendants also told the Panel what was done afterward to prevent a recurrence of these breaches. However, there was no indication as to what, if any, efforts were made at the time in question to prevent the commission of the breaches by Accuvest and the Fund. Generally, while the Panel accepts circumstances may result in hindrances or obstacles to any operation, reasonable efforts must be made to ensure that regulatory obligations are met in a timely manner.

It is the Panel's view that Accuvest did not use reasonable efforts to ensure the Fund and its operators did not carry on business contrary to the Act. They also failed to meet their obligations and comply with the Act and Regulations.

The Fund

The Panel has also found the Fund guilty of the breaches in the Complaint based on the evidence presented. The Panel noted that once the former administrator resigned the Fund's license could no longer subsist. As a RIFA, Accuvest could not license the Fund and therefore was obliged to ensure that the required documentation was submitted to the Commission to license the Fund. The evidence presented by the Executive Director indicates that the Fund did not cease operations pending its submission of all of the documentation required for it to be licensed. The Panel notes the Commission's repeated requests for the required documents, and that it took the defendants about two (2) years to submit those documents.

The Panel finds that the Fund was operating without a license and also failed to submit its annual declaration for the year 2008. As indicated at line 36 on page 4 above, the Executive Director presented an alternative offence. The Panel determined however that the Fund was operating without a license, and is therefore guilty of Breach 1 in the Complaint.

SANCTIONS

In making it decision, the Panel considered the prevailing circumstances such as these being first-time violations and whether the actions complained of are

continuing. Emphasis has also been placed on, inter alia, whether the defendant engaged in the misconduct despite prior warnings from the regulator, the seriousness of the misconduct, evidence of whether the defendant addressed the failing(s) complained about and whether the defendant took full responsibility for the misconduct. We also take into consideration the defendants having since taken corrective action and incorporated procedures aimed at preventing a recurrence of such and incident.

The Panel considered that any sanctions that may be imposed ought to reflect the seriousness of the breaches. The Panel also considered the gravity of this matter given the nature of each of the breaches for which there was a finding of guilt.

The Executive Director sought a fine in the circumstances of this matter, but the defendants have asked the Panel to consider the imposition of a censure as opposed to a fine should it decide to impose sanctions. The defendants have asked that alternatively, any fine imposed be as lenient as possible given that the matters complained of have been remedied, as well as in light of the mentioned special circumstances.

The Panel notes that the defendants appear to be good registrants. The Panel also considered the defendants' special circumstances. However, as indicated at lines 29-30 on page 5 above reasonable efforts must still be made to ensure that regulatory obligations are met in a timely manner. As indicated above the Panel is of the view that any penalty must reflect the seriousness of the breach and ought also to have a deterrent effect. As such while the Panel may impose censure, these breaches do not warrant censure.

The Panel, having heard and considered the submission of both the Executive Director and the defendants, finds that the breaches warrant the imposition of fines. Therefore, having also considered recent precedents we recommend that fines be imposed as follows:

Accuvest:

1) Section 42(2) – failure to file audited annual financial statements for 2005-2007 (3 years) $12,000 for each of the unfilled audited statements, totaling $36,000;
2) Section 26 – failure to use reasonable efforts to ensure a fund carries on business in accord with the Act $7,500;
3) Regulation 17(1)(g) – failure to take all reasonable steps to ensure that operators are meeting their obligations pursuant to securities legislation:$7,500; and
4) Regulation 53 – failure to submit annual declarations for the year 2006: $2,500.

The total for Accuvest's breaches is $53,500

The Fund:

1) Section 3 – carrying on business as an unlicensed fund:$25,000; and
2) Regulation 52- Failure to submit declarations for the year 2008: $2,500.

The total for the Fund's breaches is - $27,500

The total penalty amount - $53,500 + 27,500 = $81,000

The sanctions take effect from the date of this decision and the above penalty is to be paid within thirty (30) days after receipt of this decision.

This is the unanimous decision of the Panel.

Dated this 29 day of March, 2011."

Discussion

31. There are two preliminary issues that must be determined at the outset. The first is the issue of the reception of new evidence raised by Mr Ward and the second is the issue of the limitation period raised by Mr Scott.

Should new evidence be admitted on the hearing of the appeal ?

32. Central to SAIF's appeal against the Decision of the Panel is the claim that it is a closed end fund and, therefore, could elect pursuant to section 7 of the IFA to be registered and regulated by the Commission; that it did not elect to be registered prior to 2008 and, therefore, its activities prior to such election could not come under the jurisdiction of the Commission.

33. The Respondents asserted that the question whether SAIF was a fund or not was never an issue raised at the Hearing before the Panel; that that question was raised for the first time in this appeal; that the evidence deposed to by Mr Nottage in his affidavit in support of the Motion would have been known to the Appellants at the time of the Hearing and ought to have been produced to the Panel at the Hearing; and, that, therefore, this court ought to reject the new evidence on the principles set out in **Ladd v Marshall** 1954 EWCA Civ. 1 (29 November 1954); [1954] 3 All ER 745, [1954] 1 WLR 1489.

34. Mr Scott rejected that argument and asserted that:

> **"... what Mr Nottage is doing is recording for purposes of evidence, statement made by Mr Jensen in the hearing before the Panel; this material was there. One of the complaint** (sic) **in my learned friend's skeleton argument is that this position is being taken for the first time, it is not. All the evidence we are relying on was available in some form before the Panel. Mr. Nottage in his affidavit is putting it in a comprehensive way."**

(See transcript, 18 July 2011, page 46 lines 23 to 31.)

35. I have carefully reviewed the Record. Mr Nottage raised the issue of whether SAIF was a fund in his letter to the Commission dated 17 August 2009 ("PS 2"), where he said in part at page 7 thereof:

> **"SAIF is an investment holding vehicle for a family business located in Chile, which is an ongoing concern. Nothing SAIF does even slightly resembles the activities of an investment fund; and the family business has been doing what it does for a very long time – long before the creation of SAIF. The restructuring that introduced SAIF into the family's holding structure, which Accuvest Limited (our broker/dealer/SIA arm) manages, could as easily have been accomplished using a straight-forward IBC or company in any other tax favourable jurisdiction. What SAIF does in no way triggers the need to make application to the Securities Commission or other licensor for a fund licence. It was simply the choice of the client, who desired a level of sophistication in their holding structure, to apply for registration of SAIF as SMART Fund 005. To make the election to seek out this registration a violation of the securities laws of The Bahamas would surely thwart one of the primary purposes of the SMART Fund program. That would suggest that every venture out there that may wish to become registered in The Bahamas as a SMART Fund would run the risk of violating the Investment Funds Act by carrying into effect their desires. We are certain that this cannot be the intent."**

36. However, that was not the way the Appellants couched their Answer to the Breaches against SAIF (Tab 2 of the Record). Mr Nottage did not raise the issue of whether SAIF was a fund in his oral statement to the Panel. Mr Jensen merely informed the Panel that the structure of SAIF "was put in place for this individual, and Argentine citizen, as a holding vehicle", and that it was never anticipated that SAIF would be engaged in any traditional fund activity. (See transcript of Hearing at page 31, lines 8 to 11.) Mr Nottage and Mr Jensen, as representatives of the Appellants, did not, however, produce any documentary evidence to the Panel in support of their assertion that SAIF was merely a holding vehicle for the investment of their Argentine client

notwithstanding SIA Regulation 121(6)(b) and 121(6)(d) permits parties to submit evidence and call witnesses. It was only in Mr Nottage's affidavit in support of the Motion that he produced, for the first time, the financial statements of SAIF for the period in question; and the Memorandum and Articles of Association of SAIF and the licence of SAIF which was cancelled by Winterbotham.

37. Mr Ward in his oral submission before this court, submitted that the evidence of Mr Nottage and the submission of Mr Scott to the effect that SAIF was a closed-end fund, which was not subject to the regulatory jurisdiction of the Commission, were raised for the first time in the appeal and ought to be rejected. He referred the court to the three now familiar conditions laid down the English Court of Appeal, per Denning LJ in the case of case of **Ladd v Marshall** that need to be satisfied when fresh evidence is sought to be introduced in an appeal, namely, that it could not have been obtained with reasonable diligence for use at trial; if given it would probably have had an important influence on the result of the case; and it is apparently credible although not incontrovertible. The Bahamian Court of Appeal has accepted the language of Deming L.J. as representing a good test of special grounds within the meaning of the rule.

38. There is good reason for these principles. Courts in this jurisdiction have reminded us on many occasions that it is in the interest of our system of justice that there should be an end to litigation and that litigants should put their full case before the court at the trial and should not be allowed to have a second bite at the cherry without good reason. The court in this appeal has power to receive further evidence on questions of fact and the evidence may be given in such manner as the court may direct, including by affidavit. (See Order 55 rule 7(2).) The discretion to admit fresh evidence, like every discretion under the rules, must be exercised having regard to the overriding objective of doing justice.

39. I understand Rule 7(2) to mean that an application should be made to the court for leave to produce fresh evidence. The normal procedure on such an application is that evidence would be led to explain why it would not have been possible to obtain the

new evidence for use at the trial by the exercise of reasonable diligence. There is nothing to indicate that the evidence of Mr Nottage could not with reasonable diligence have been obtained for the hearing before the Panel. The fresh evidence which the Appellants sought to rely on in the appeal would have been known and available to the Appellants at the time of the Hearing and do not fulfill the requirement of **Ladd v Marshall**: it could have been obtained with reasonable diligence at the Hearing before the Panel. It will be a rare case where the **Ladd v Marshall** conditions are not satisfied but the court will nevertheless admit new evidence on the appeal (see, for example, **Shaker v Al-Bedrawi and others** [2003] 1 BCLC 157).

40. Furthermore, no application was made to this court for leave to produce the fresh evidence and no explanation was given as to why it could not have been produced at the Hearing before the Panel.

41. In the circumstances of this case, I am satisfied that to refuse to admit such evidence now entirely accords with the overriding objective of doing justice. I therefore order that:

(i) the Exhibits to Mr Nottage's affidavit be struck out and may not be relied upon;

(j) paragraph 4, save and except for the first three sentences thereof, be struck out and may not be relied upon;

(k) paragraph 5, save and except for the first and sixth sentences thereof, be struck out and may not be relied upon;

(l) paragraph 6 be struck out and may not be relied upon; and

(m) the words "it is clear from the financial statements that" which appear in the second sentence, and the final sentence of paragraph 7 be struck out and may not be relied upon.

Are the Breaches against Accuvest and SAIF prior to 2006 statute barred?

42. Section 39 of the SIA provides as follows:

> **"No proceedings against any person or body corporate for a breach of any of the provisions of this Act, or for a failure to comply with any of its provisions may be commenced after the expiration of four years from the day upon which the breach or non-compliance is or ought to have been discovered".**

43. For completeness, I also set out the provisions of section 34(4)(c) of the SIA, as Mr Ward relied on that section in his response to Mr Scott's submission:

> **"Upon completion of his investigation, the Executive Director shall report his findings to the Disciplinary Committee for any appropriate action and the Disciplinary Committee may recommend to the Commission –**
>
> **(a)...**
> **(b)...**
> **(c) The filing of a formal complaint and proceeding with a regulatory hearing before the Commission; or**
> **(d)...**

44. Mr Ward submitted that proceedings in this matter commenced in 2007 with an investigation which resulted in discovery of the Breaches by the Appellants, well within the four year limitation period. He also submitted that the Complaint was not statute barred as time began to run when the breach was discovered or ought to have been discovered. He submitted that the breach was discovered when the Commission carried out the inspection in September 2007.

45. Mr Scott submitted that proceedings commenced on 11 November 2010, when the Complaint was laid by the Commission. He submitted that the word "proceedings" in section 39 of the SIA could not include the investigation as the investigation might very well result in no further action being taken.

46. In support of his submission, Mr Scott referred the court to the first definition of that word in Stroud's Judicial Dictionary of Words and Phrases (Sixth Edition, Volume 2):

> **"PROCEEDING: The primary sense of 'action' as a term of legal art is the ivocation of the jurisdiction of a court by writ; 'proceeding' the invocation of the jurisdiction of a court by process other than writ. (per Lord Simon in *Berry (Herbert) Associates v IRC* [1977] 1 WLR 1437."**

47. Relying on that definition of the word "proceeding", Mr Scott submitted that a proceeding is an act or process by which a particular jurisdiction is engaged with a result to find damages or some sentence or award.

48. Mr Scott also submitted that:

> **"... a proceeding is an act or a process by which a particular jurisdiction is engaged with a result to find damages or some sentence or award. An investingation by itself under the dictionary provision, under the Investment Fund Act, relative to SIA, what it does is enable the Executive Director to recommend a dismissal of the matter or to issue a letter of caution or impose some sentences, informally, on the conclusion of the investigation. What it does empower him to do through the Disciplinary Committee is to issue a complaint. It is upon the issuance of the complaint that time is then followed, not before, because it is only upon the completion of the complaint process, in other words, the hearing, the judgment that the final sentence can be imposed. That, my Lady, is plain from the Section."**
>
> (See transcript 18 July 2011 at page 69, lines 6-21.)
>
> **"... lets take that fact and apply it to the financial statements. Lets, for example, take the year 2005 in respect to my submission that it is statue barred. The obligation, my Lady, to file financial statement for the year 2005, without being out of limit, would be the 30th of April, 2006; because by then if you have not filed then your time limit has expired and if the time limit has expired and if you have not applied for extension, then in my respectful submission, The Commission itself is or ought to have discovered that, that particular provision of the Act was not complied with. Now, if you add four years from the 30th of April, 2006, you arrived at the 30th of April, 2010, and the complaint was not launched until November, 2010; that is my submission on that point."**
>
> (See transcript 18 July 2011 at page 70, lines 16-29.)

49. The definition of proceedings in Black's Law Dictionary (8th Ed.) tends to support Mr Scott's submission:

> **PROCEEDINGS: 1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment. 2. Any procedural means for seeking redress from a tribunal or agency. 3. An act or step that is part of a larger action. 4. The business conducted by a court or other official body; a hearing. 5. Bankruptcy. A particular dispute or matter arising within a pending case – as opposed to the case as a whole.**

50. Mr Ward submitted that the word "proceeding" in section 39 included "an investigative proceeding, where the procedure is regulatory proceeding". The definition of "administrative proceeding" in Black's Law Dictionary (8th Ed.) does include investigations:

> **"administrative proceeding. A hearing, inquiry, investigation, or trial before an administrative agency, usu. Adjudicatory in nature but sometimes quasi-legislative. - Also termed *evidentiary hearing; full hearing; trial-type hearing; agency adjudication*." "**

51. However, the type of investigation which was carried out by the Commission in this matter was not adjudicatory in matter. Furthermore, the intent of section 39 seems clear to me. The purpose of commencing proceedings against a person or body corporate is "for a breach of any of the provisions of this Act, or for a failure to comply with any of its provisions". The Commission can only determine that there has been such a breach or failure after an investigation has taken place. If I am correct, the investigation cannot be a part of the proceedings referred to in section 39.

52. For the reasons set out above, I accept Mr Scott's submission the Breaches which took place in 2004 and 2005 are statute barred.

The Grounds of the Appeal

53. By ground 2 of the Appeal, the Appellants asserted that although Accuvest became licenced in 2004, it was not carrying out administration services during the financial years 2005, 2006 and 2007 and as a consequence no audited financial reports

were produced or required to be produced. By ground 2 the Appellant asserted that the Respondent had erred in finding that that administrative activities had commenced at the time of the inspection in 2007 Mr Scott submitted that Accuvest was licenced in 2004 and was not active in the funds administration business during the period 2005 through 2007 ; that the Act must only apply to an entity that is active in the funds administration business during the relevant years ; and that if the business was not active then there would be no activity on which to conduct an audit it would have no AFS to be filed. In such circumstances, Accuvest ought not to be penalised.

54. Mr. Ward in response relied upon the admissions and qualified admission made by Mr Nottage in his statement to the the Panel ; the correspondence which passed between the Commission and the Appellants (PS3 to PS12) and in particular, SAIF's letter dated 14 June 2006 to the Commission informing the Commission that Accuvest had been appointed its Investment Fund Administration in succession to administration provided by Winterbotham (PS3), and the payment by Accuvest of the annual principal office fee payable with respect to Accuvest providing the principal office to SAIF (PS6) ; and the protracted period of time which the Appellants took to become compliant. Mr Ward submitted that the services provided by Accuvest for SAIF as revealed in the correspondence between the Commission and SAIF and Accuvest, came within the definition of "investment fund administration" in section 2 at sub paragraph (c) of the IFA.

55. Having reviewed the evidence before the Panel, the statements made to the Panel and the submissions of counsel in this appeal, and subject to my finding that the complaints against Accuvest and SAIF for the period prior to 2006 are statute barred, I agree with the finding of the Panel that there was evidence to support a finding that the Accuvest was operational and failed to submit its AFS for 2005 though 2007, inclusive. Based on the evidence before the Panel at the Hearing. Mr Nottage who was a Director and General Counsel of Accuvest, and a Director of SAIF and intimately involved in the affairs of Accuvest and SAIF, wrote to the Commission by letter dated 14 June 2006 (PS3) to advise that SAIF had appointed Accuvest as its Investment Fund Administrator

in succession to administration provided by Winterbotham. By letter dated 31 January 2007 (PS6), Accuvest also paid the required fee under section 36(1) of the IFA for providing the principal office of SAIF. The prescribed principal office fee is payable "immediatley upon starting to provide the principal office to a licensed investment fund ". (See section 36(1) of the IFA).

56. On 27 April 2007, Accuvest also submitted to the Commission their application for the re-licencing of SAIF. The licence was finally issued in January 2008 due to delays on the part of Accuvest. The act of submitting the application for the re-licensing of SAIF was an administrative act.

57. Additionally the admissions and qualified admissions made by Mr Nottage to the Panel and his statement to the Panel that SAIF's holding were held by Accuvest's third party consultants were also evidence that Accuvest was providing administration services for SAIF.

58. The provision of the principal office for SAIF and the payment of the principal office fee fall within the definition in section 2 of the IFA of "investment fund administration".

59. By grounds 5 and 6 of the Motion, the Appellants asserted that SAIF was not licenced until 2008 and it was only from the date on which it was licenced that SAIFwas subject to the SIA and the IFA. The submission by the Appellants that the Appellants did not at anytime prior to 2008 produce any evidence to show that SAIF had elected to be licence by the Commission prior to 2008 ; that SAIF was under no obligation to be registered or licenced unless and until it elected to do so, which it did in 2008 ; that the Respondent had not shown any reason to believe SAIF was subject to IFA ; and that any alleged breaches prior to 2008 are rejected by the court.

60. As regards the Breaches against SAIF, Mr. Scott's core submission was that SAIF was not a fund within the meaning of the IFA and so was not subject to the regulatory jurisdiction of Commission. That submission was not put to the Hearing

Panel. Mr Ward submitted that Mr Scott could not make that submission as that submission had not been made to the Panel. I do not accept Mr. Ward's submission as being correct. I am satisfied that Mr Scott could put that submission to this court. The difficulty which faced Mr. Scott, however, is that the evidence of fact on which his submission was based is only found in Mr Nottage's affidavit and I have ruled that that evidence is not to be received by the court in this appeal. Without the evidence in Mr Nottage's affidavit, and in particular the exhibits to Mr Nottage's affidavit, Mr. Scott's submission that SAIF was not a fund within the meaning of the IFA and so was not subject to the regulatory jurisdiction of Commission and the submissions which flow there from are rejected.

61. There was ample evidence before the Panel for it to arrive at its findings of guilt against the SAIF. I have already refered to the letter of 14 June 2006 (PS3). In its response to Accuvest's letter on 7 July 2006 (PS4), the Commission reminded SAIF that it had to notify the Commission of the particulars prescribed in Schedule 9 to the Investment Funds Regulations, 2000. The particulars required by Schedule 9 included :

1. name of investment fund;
2. investment fund licence number;
3. name and address of existing investment fund administrator;
4. effective date of termination of relationship with existing investment fund administrator;
5. name of new investment fund administrator;
6. effective date of commencement of relationship with new investment fund administrator;
7. if transferring from Unrestricted to Restricted administrator advise of status of licence of fund; and
8. such other information as the Commission may deem necessary.

62. It took Accuvest some 2 years to provide the Commission with the requested information. Mr Nottage did not object to the many requests of the Commission for the additional information in support of the application to have SAIF re-licenced; he did not say to the Commission that SAIF was not an investment fund and so did not come within the ambit of the Commission's jurisdiction. Instead, Mr Nottage's response to the Panel that the protracted delay was due "in a very large part" to special circumstances.

Accuvest also paid the principal office fee which it was required to pay for providing the principal office of SAIF. By letter dated 27 April 2006 ("PS5"), Mr Nottage on behalf of Accuvest enclosed Accuvest's application for the re-licencing of SAIF (as opposed to the licencing of SAIF) following the transfer of the administration of SAIF. He stated that SAIF had previously held licence number 61-SFM003-002, which was licenced by Winterbotham, SAIF's former administrator. Mr Nottage also stated in that letter (« PS 5 ») that Accuvest had overlooked the need to re-apply and apologised for the delay in making the application. At all times he referred to SAIF as "the Fund".

63. I am satisfied that "PS3" to "PS12" is evidence on which the Panel could make its findings of guilt SAIF. The evidence is that Accuvest elected to be registered in 2004, when it was being administered by Winterbothan. The application to the Commission in 2007 was with respect to the re-licencing of SAIF following the transfer of of administration from Winterbothan. In response to Breach 2 against Accuvest, Mr Nottage told the Panel that at the relevant time SAIF was either a SMART Fund and held a licence or was in the process of registering as a SMART Fund once the administration services was transfered to Accuvest. SAIF was licenced as a SMART Fund when it elected to become registered as a fund under section 7 of the SIA in 2004 and once it elected to become registered it could not simply chose not to be registered, particulary if it did not inform the Commission of its decision.

64. The Appellants submission that the Respondent had waived the breaches in 2006 cannot be upheld in light of the correspondence passing between the Appellants and the Commission between 2006 and 2008 ("PS3" to "PS12"). The Appellants would have been aware that the Commission was not happy with the protracted period of time it took to have SAIF re-licenced following the transfer of administration from Winterbotham.

65. However, as I have already found, the Breaches against SAIF up to 2006 are statute barred for the reasons already given.

66. Grounds 4 and 8 relate to "special circumstances". The explanation given was that the protracted delay in bringing the Appellants into compliance was due to "special circumstances" of one of the Appellants. The case for the Appellants is set out in the Conclusion of the Answer, the first two paragraphs of which (beginning at line 3) are set out below.

> **"the Special Circumstances involved the near complete disabled functioning due to extreme personal circumstances of one of the operators of [the Appellants] (and the key operator) of [the Appellants]. The other operator of [the Appellants] was unaware of this situation until July 2007, and even then only partly aware. The disabled operator kept much of the disability to himself and even misled the other operator as to the truthful situation with regard to the wide range of issues, including the matters giving rise to the Formal Complaint to which this Answer relates.**
>
> **We give every assurance that the Special Circumstances no longer exist and that Accuvest has expanded its operations to a level whereby best practices and compliance are absolute, and the norm. Accuvest now has both the operations manager and an administration manager, supervised by the directors."**

67. Counsel for the Appellants submitted that the "special circumstances" highlights why the penalties posed by the Respondent are disproportionate and unfairly harsh".

68. The Panel was not satisfied with that explanation given by the Appellants. The Panel found that the Appellants did not state what efforts were made at the time in question to prevent commission of the breaches by the Appellants. Whilst the Panel accepted that circumstances may result in hindrances or obstacles to any operation, it held that reasonable efforts must be made to ensure that regulatory obligations are met in a timely manner. The Panel found that Accuvest did not use reasonable efforts to ensure that the Fund and its operators did not carry on business contrary to the Act and also failed to meet their obligations and comply with the Act and Regulations.

69. I can find no reason to overturn the finding of the Panel on the matter of "Special Circumstances". Whilst The Commission may sympathise with operator of the Appellants who was undergoing difficult personal challenges, its duty is first and foremost to maintain surveillance over mutual funds, securities and capital markets ensuring orderly, fair and equitable dealings and to create and promote conditions to

ensure the orderly growth and developments of the capital markets. To carry out this function the Commission has formulated principles to regulate and govern mutual funds, security and the capital market. The SIA and the IFA and their regulations set out the requirements which must be met by all investments funds operating in The Bahamas. Investments funds and their administrators must put in place the necessary controls which would ensure that the provisions of the SIA and the IFA are complied with and that reasonable requests of the Commission are answered in a timely manner. The Commission must act in such a manner as to send a clear message to those involved that it will strictly enforce the legislation which governing mutual funds, securities and capital markets.

70. The Appellants submitted that the Panel ought to have punished their Breaches by imposition of a censure as opposed to a fine; alternatively if it were, that fine should have been as lenient as possible having regard to the fact that the Breaches had been remedied, albeit over a protracted period of time, that the Appellants were described as a good registrant and the "Special Circumstances" referred to by the Appellants.

71. The Panel found that any sanction imposed ought to reflect the seriousness of the breaches, the gravity of the matter given the nature of each of the breaches for which there was a finding of guilt, the fact that reasonable efforts still had to be made to ensure that the regulatory obligations in a timely manner and that the penalty must have a deterrent effect. I agree.

72. I have reviewed and considered the authorities relied upon by the parties and the submissions of counsel. The Commission had the authority under section 55(!) of the IFA to impose one or more of the sanctions, remedies or other relief set out in that section as the result of any settlements of disputes between persons or decisions of the Commission as a result of regulatory hearings. The Hearing before the Panel was a regulatory hearing. Upon finding the Appellants guilty of all of the Breaches set out in the Formal Complaint, the Panel could have, inter alia, imposed a fine not exceeding three hundred thousand dollars. The Panel imposed fines totaling $81,000.00. Save that the fines must be reduced to reflect that the breaches prior to 2006 are statute

barred, I am not satisfied that the fines levied by the Panel are so high or unreasonably excessive that I should interfere with them, having regard to the facts of this Appeal and the maximum fine that the Panel could have imposed on the Appellant.

73. For the reasons already given in this judgment, Grounds 1 and 8 of the Appeal are rejected.

74. The Breaches complained of took over a period of three years. As the Breaches have been made out for only two of the three years, I find, therefore, that the fines imposed by the Panel should be reduced by roughly one-third, as follows:

Accuvest:

Breach 1	**$24,000.00**
Breach 2	**$ 5,000.00**
Breach 3	**$ 5,000.00**
Breach 4	**$ 2,500.00**

The total for Accuvest's Breaches is $36,000.00

SAIF:

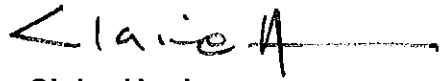
Breach 1	**$17,500.00**
Breach 2	**$ 2,500.00**

The total for SAIF's Breaches is $20,000.00

The total penalty is $56,000.00

75. Save as set out in the previous paragraph 74, the Order sought by the Motion is refused. I will hear counsel on costs.

DATED: 6th January, 2012.



Claire Hepburn
Justice