COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 252 of 2013

B E T W E E N

FUND HAVEN LIMITED
(formerly known as ACCUVEST FUND SERVICES LIMITED)
Intended First Appellant

AND

SOUTH AMERICAN INVESTMENT FUND LIMITED
Intended Second Appellant

AND

THE EXECUTIVE DIRECTOR OF THE SECURITIES COMMISSION OF THE BAHAMAS
Intended Respondent

BEFORE:	**The Honourable Dame Anita Allen, P** **The Honourable Mr. Justice Isaacs, JA** **The Honourable Ms. Justice Crane-Scott, JA.**
APPEARANCES:	**Mrs. Gail Lockhart-Charles with Mr. Ryan Elliott, Counsel for the First and Second Intended Appellants** **Mr. Gawaine Ward with Ms. Vandera Carey, Counsel for the Intended Respondent**
DATES:	**16, 24 March 2016; 10, 30 May 2016; 22 June 2016**

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Civil appeal – Certification of a point of law of general public importance – Section 21(1) of the Court of Appeal Act – Second or further appeal – Point of law alone

On 29 March 2011, following a regulatory hearing, the intended appellants, were found guilty and fined in respect of several breaches of the Securities Industries and Investment Funds Acts. Pursuant to the Rules of the Supreme Court they appealed to the Supreme Court which, on 6 January 2012, upheld the Committee's finding of guilt but reduced the fine. By Notice of Motion, filed on 7 October 2013, the intended appellants sought leave to appeal, out of time, the 2012 Supreme Court decision. At the extension of time hearing a preliminary objection was raised, resulting in an oral application, on behalf of the intended appellants, to certify the appeal as one involving a point of law of general public importance.

Held: application refused; costs to the intended respondents.

Section 21(1) of the Court of Appeal Act gives a statutory right of further appeal to any person who is aggrieved by any judgment made by the Supreme Court in its appellate or revisional jurisdiction from a committee on any ground which involves a point of law alone. The section expressly forbids an appeal to this Court on any ground of appeal which involves a question of fact or a question of mixed fact and law. The proviso also expressly prohibits the Court of Appeal from entertaining an appeal, even on a point of law, unless the point of law is first certified as one of general public importance. The requirement for certification in section 21(1) involves a filtering process designed to ensure that only appeals which clearly raise points of law of general public importance reach the next appellate level.

Therefore, on an application for certification two questions must be determined: first, whether any or all of the grounds of appeal disclose "a point of law alone". If so, the second question which arises is whether the point(s) of law so identified is/are point(s) of general public importance.

Having reviewed the proposed grounds of appeal alongside the two questions posed we consider that the intended appellants have failed to surmount the statutory hurdle of establishing that the grounds involve "a point of law alone". Nothing in any of the grounds suggests any connection with s. 7(1) of the Investment Funds Act or discloses any error of law in relation thereto. Even if it were possible to agree that one or other (or even both) questions involve a "point of law alone", the questions posed have not been shown to transcend the circumstances of the parties or to be of great public importance to the financial sector or to the public in general.

Hermanus Phillipus Steyn v Giovanno Gnecchi-Ruscone [2013] Civil Appl'n No. 4 of 2012 applied
Edwards v Bairstow (1955) 3 All ER 48 mentioned
O'Kelly et al v Trusthouse Forte plc (1983) 3 All ER 456 mentioned
O'Shea v Grand Bahama Hotel Country Club [1989] BHS J No. 22 distinguished

R v Secretary of State for Trade and Industry ex parte Eastway [2001] 1 All ER 27 considered

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JUDGMENT

Judgment delivered by the Honourable Ms. Justice Crane-Scott, JA:

Introduction

1. This is our ruling on an oral application on behalf of the intended appellants seeking our certificate pursuant to section 21(1) of the Court of Appeal Act, Ch. 52 that the intended further appeal involves two points of law of general public importance. The application was made on 16 March 2016 following a preliminary objection as we were preparing to hear a Notice of Motion filed on 7 October, 2013 for leave to appeal out of time from a judgment of the Honourable Mrs. Justice Claire Hepburn handed down on 6 January 2012 - over four years ago.

Background

2. For a better understanding of the application before us, it will be useful to briefly set out the background to the intended appeal and how the issue of certification arose before us.

3. On 29 March 2011 following a regulatory hearing, the intended appellants were found guilty by the Disciplinary Committee of the Securities Commission of the Bahamas ("the Committee") of certain breaches of the Securities Industries Act, 2011 ("the SIA"), the Investment Funds Act, 2003 ("the IFA") and the Investment Funds Regulations ("the Regulations"). They were fined in respect of the breaches and appealed to a single judge of the Supreme Court pursuant to O.55 of the Rules of the Supreme Court.

4. Following hearing of the appeal, Hepburn J. in a lengthy written judgment handed down on 6 January 2012, upheld the Committee's findings of guilt against both intended appellants. She, however, reduced the fines by roughly one-third, being satisfied that breaches had been made out for only two of the three years.

5. Based on the documentation before us, the intended appellants appear to have taken no further action in relation to the Committee's findings until 3 July 2013 when they applied to this Court by Notice of Motion [the "first Motion"] on appellate file (CAIS No.183/2013) for leave to appeal out of time. On 3

September 2013, this Court (differently constituted) dismissed the first Motion without a hearing on the basis that the intended appellants had failed to obtain a certificate pursuant to section 21(1) of the Court of Appeal Act, Ch. 52 that the appeal involved a point of law of general public importance.

6. The intended appellants then filed a fresh application for leave to appeal out of time [the "second Motion"] on 7 October 2013, this time on appellate file (CAIS No.252/2013).The second Motion initially came on for hearing before the Court (again differently constituted) on 11 November, 2013. Once again the intended appellants were unable to produce a satisfactory certificate from the judge below which on its face clearly identified the point (or points) of law of general public importance to be heard by the Court of Appeal. At the hearing on 11 November 2013, instead of dismissing the second Motion, the Court adjourned it *sine die* and awarded costs of the day to the intended respondent.

7. The matter appears to have gone into abeyance in this Court until around mid-March, 2016 when the intended appellants filed a number of supplemental affidavits. In particular, there was exhibited to the affidavit of Sharanna Bodie filed on 14 March, 2016, a copy of a document filed in the Supreme Court on 30 December, 2015, ostensibly signed by the Deputy Registrar of the Supreme Court on 18 December 2015. The document purports to be a certificate from the judge below specifying two points of law as points of law of general public importance.

8. The second Motion for leave to appeal out of time was re-listed and came on for hearing before us on 16 March 2016. On that date Counsel for the intended respondent, Mr. Ward, made a preliminary objection. He questioned the authenticity of the second certificate of 30 December 2015 exhibited to the affidavit of Sharanna Bodie and the manner in which it had issued out of the Supreme Court. He stated that following the adjournment of the second Motion in the Court of Appeal on 11 November 2013, he had neither reappeared before Hepburn J., nor seen a draft of the second certificate purportedly settled by Hepburn J. who, he said, had demitted office by the time the second certificate "suddenly" materialized more than two years later.

9. In response, Mrs. Lockhart-Charles advised that she was in possession of the transcript of the proceedings which had taken place before Hepburn J. when the intended appellants' application for certification pursuant to section 21(1) of the Act had been heard. She insisted that the transcript would confirm that Hepburn J. had signaled her intention to certify both points of law identified in

the intended appellants' skeleton arguments as points of general public importance before she demitted office.

10. Mrs. Lockhart-Charles then read several extracts from the transcripts of the hearing of the intended appellants' application for certification in the court below. The following extract of a discussion between the judge and Mrs. Lockhart-Charles during the hearing is most instructive as to the judge's approach to the application:

> **"THE COURT: I just want to be clear again in my head that you say that when one looks at the entirety of your grounds of appeal, and when I say "your", I mean the applicant, that when one looks at all of these 16 grounds of appeal that really they may all be summarized by paragraph 12(a) and (b) of your skeleton. And 12(a) and (b) of the skeleton have precisely the points that were just referred to here by virtue of section 7 of the IFA Act.**
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> **MRS. LOCKHART-CHARLES: My Lady, not that they may be summarized, but the legal point that is expressed in paragraph (a) and (b) of the skeleton will determine whether the grounds of appeal will succeed or not...**
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> **THE COURT: Sorry, if you had then to summarize to me what is the point of general importance in this appeal or where the... points...of law that are of general public importance...what would you say they are?**
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> **MRS. LOCKHART-CHARLES: <u>That a company that does not fit the definition of "investment fund" as defined in section 2 of the Act cannot, by virtue of section 7 (1) of the Act, be in breach of section 3 of the Act. So a company that does not fit the definition of "investment fund" may elect to be licensed and in which case it will be deemed a fund, but it cannot be in breach of section 3 of the Act which says that an investment fund shall not carry on or attempt to carry on business unless it is licensed</u>. Can't be in breach because it is either licensed because it is deemed. ... Once you are licensed, are you forever after deemed to be a fund or are you once you are no longer licensed, do you go back to being an**

ordinary IBC, that is not subject to sanction under the Investment Funds Act? [Emphasis added]

11. The following excerpt from the judge's 'ruling' (such as it was) convinced us that the judge had not properly considered the application before her, and more importantly, had not actually certified the points as required:

> **"I have heard both of you and <u>most of the time my attitude towards an application from an appeal is that if someone wants to appeal a ruling or a judgment, I will just allow them to appeal it</u>. I just simply because I think <u>the more decisions we can have on appeal the better for our jurisprudence</u>. And I appreciate that this is a case, though I have to consider whether the point raised is a point of law of general public importance, and I think Mr. Ward made some very strong arguments as to why it ought not to be regarded as the appeal has not raised any point of general public importance. I think I am persuaded that the point ought to be certified. <u>The appeal ought to be certified simply because it raises a question or questions with respect to our securities, our laws governing the securities industry and I still see it as fairly fledgling, although it has been around for many years, but these points ought to be considered by the Court of Appeal because the questions impact the financial sector</u>...But I do think I am going to certify that the appeal raises a point of general public importance...Do I have to give you a written ruling on this?..." [Emphasis added]**

12. In view of the obvious difficulties which arose in relation to the certificate, we acceded to Mrs. Lockhart-Charles' oral application for certification and agreed to ourselves consider whether there is disclosed on the documents before us, as she suggested, points of law of general public importance such as would give this Court jurisdiction under section 21(1) of the Court of Appeal Act, to hear the intended appellants' application for leave to appeal out of time and ultimately, the intended appeal.

Discussion

13. We commence consideration of the application for certification by adverting to section 21(1) of the Act which provides:

> **21. (1) <u>Any person aggrieved by any judgment, order or sentence given or made by the Supreme Court in its appellate</u> or revisional jurisdiction, whether such**

> **judgment, order or sentence has been given or made upon appeal or revision from a magistrate or any other court, board, committee or authority exercising judicial powers, and whether or not the proceedings are civil or criminal in nature may, subject to the provisions of the Constitution and of this Act, appeal to the court on any ground of appeal which involves a point of law alone but not upon any question of fact, nor of mixed fact and law nor against severity of sentence:**
>
> **Provided that no such appeal shall be heard by the court unless a Justice of the Supreme Court or of the court shall certify that the point of law is one of general public importance. [Emphasis added]**

14. We observe in passing that section 21(1), is not unlike similarly worded provisions found in appellate statutes in England and other parts of the Commonwealth in which a litigant's ability to launch a second or further appeal to a higher court from a decision of a lower level court has been statutorily curtailed.

15. Section 21(1) (which exactly reproduces the former section 17(1) of the Court of Appeal Act, Ch. 34) gives a statutory right of further appeal to the Court of Appeal to any person who is aggrieved by any judgment, order or sentence given or made by the Supreme Court in its appellate or revisional jurisdiction from a magistrate or other court, board, committee or authority exercising judicial powers, whether criminal or civil, on any ground which involves a point of law alone.

16. Section 21(1) expressly forbids an appeal to this Court on any ground of appeal which involves a question of fact; or a question of mixed fact and law; or an appeal against severity of sentence. The proviso also expressly prohibits the Court of Appeal from entertaining an appeal, even on a point of law, unless the point of law is first certified as one of general public importance.

17. A provision of the kind in section 21(1) which requires certification of a point of law of general public importance is distinguishable from a provision of the type found for example in section 11(e) and (f) of the Court of Appeal Act which require an intended appellant to obtain leave to appeal before the appeal can be entertained.

18. While both provisions establish the Court's jurisdiction and provide different filters through which deserving appeals may proceed to a hearing before the Court of Appeal, the purpose of each is different.

19. On the one hand, the statutory filter in section 11 (e) and (f) requiring leave to appeal is imposed, as Lord Bingham of Cornhill observed in **R v. Secretary of State for Trade and Industry, ex parte Eastway** [2001] 1 All E.R. 27 *"primarily to protect the courts against the burden of hearing and adjudicating on appeals with no realistic chance of success".* While Lord Bingham's observations in **Eastway** were made in the course of a comparison between the legislative purposes of the requirement of permission to apply for judicial review *vis-a-vis* the requirement for leave to appeal, we consider that the foregoing observation satisfactorily explains the underlying rationale for the leave to appeal provisions found in our Act.

20. On the other hand, the requirement for certification in section 21(1) involves, as observed in **Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone** [2013] Civil Appl'n No. 4 of 2012, *"a filtering process"* designed to ensure that only appeals which clearly raise points of law of general public importance reach the next appellate level.

21. In considering whether the two questions identified by Mrs. Lockhart-Charles are points of law worthy of certification as points of general public importance, we are not required to determine whether the intended appellants have a realistic chance of success. As section 21(1) expressly provides, our task on an application for certification is simply to determine two questions. The first and arguably the more important question to be determined is whether any or all of the 16 grounds of appeal set out in the draft Notice of Appeal disclose "a point of law alone". If we so find, the second question which arises is whether the point(s) of law so identified is/are point(s) of general public importance.

22. Counsel for the intended appellants, Mrs. Lockhart-Charles submitted that the several grounds of the intended appeal involve two points of law of general public importance which are encapsulated in two questions which she submitted to us for certification as follows:

> **"a. Whether by virtue of section 7. (1) of the Investment Funds Act (IFA), or any other theory of law, a company that does not issue or have equity interests the purpose or effect of which is the pooling of investor funds with the aim of spreading investment risks and achieving profits and gains arising from the acquisition, holding,**

management or disposal of investment can be considered to be carrying on business within the meaning of section 3 of the IFA?

b. Whether a company that was once but is no longer licensed by the Commission as an investment fund continues to be deemed by virtue of s. 7(1) of the IFA to be carrying on business as an investment fund contrary to section 3 of that Act?"

23. Mrs. Lockhart-Charles cited a previous decision of this Court (differently constituted) in **O'Shea v. Grand Bahama Hotel Country Club** [1989] BHS J. No. 22 as authority for how we should proceed in relation to ascertaining whether the intended appeal involves a pure point of law.

24. We have considered **O'Shea** and consider that it is clearly distinguishable from the current appeal in the following respects. Firstly, the Court was not there considering, as we are, an application for certification under section 21(1) of the Court of Appeal Act.

25. The second, and perhaps the more important point of distinction is that there is a significant difference between the wording of section 70 of the Industrial Relations Act, 1970 which gave O'Shea a right of appeal to this Court on "a point of law" and section 21(1) of the Court of Appeal Act, which expressly precludes appeals upon any question of fact or upon questions of mixed fact and law or against severity of sentence, but expressly permits appeals on a "point of law alone" provided that the point of law alone is certified as one of general public importance.

26. In **O'Shea,** the Court overruled a preliminary objection by the respondent who had argued that the Court had no jurisdiction to entertain the appeal since, in his view, the appellant's three grounds of appeal failed to disclose any point of law. In overruling the objection and essentially holding that it had jurisdiction to hear the appeal, the Court satisfied itself that it was possible following an examination of the grounds of appeal, to distill or extract pure points of law from the appellant's three grounds of appeal. After an analysis of the grounds of appeal and following the approach used in the English cases discussed in the decision, the Court further held, *inter alia*, that the following point of law had been disclosed, namely, that it is an error of law for a tribunal to reach a conclusion on evidence presented to it which no reasonable tribunal properly directing itself could reach. See also **O'Kelly et al v.**

Trusthouse Forte plc (1983) 3 All E.R. 456 and **Edwards v. Bairstow** (1955) 3 All E.R. 48 discussed in **O'Shea**.

27. However, notwithstanding **O'Shea**, it is our view that based on the express wording of section 21(1) of the Court of Appeal Act, this Court has no jurisdiction to entertain a further appeal on grounds which involve questions of fact, or of mixed fact and law or which question the severity of sentence. In the circumstances, notwithstanding the approach adopted in **O'Shea** where a differently worded statute and provision was under consideration, we consider that it is no part of our task, in determining whether to certify the questions posed for certification, to essentially, mine or extract from facts, or issues of mixed fact and law disclosed in an intended appellant's grounds of appeal, that nugget described as "a point of law alone". The intended ground of appeal must, as section 21(1) expressly states, involve "a point of law alone".

28. We turn to consider the two questions which Mrs. Lockhart-Charles submitted for certification. We must confess that we have found great difficulty in understanding what possible connection these two questions have with the intended grounds of appeal as framed.

29. The two questions appear to be deductions of logic based on the statutory interpretation which the intended appellants seek to place on section 7(1) and other sections of the IFA read in conjunction with the Regulations and the SIA under which they were charged, found guilty and ultimately fined. The argument proceeds from a premise of fact, namely, that the second intended appellant had once been licensed as an "investment fund" but that the company had subsequently ceased to be so licensed. Consequently, they contend, having regard to the definition of "investment fund" in section 2 of the IFA, neither of the intended appellants could lawfully be in breach of section 3 of the IFA, nor found guilty of breaches of the relevant regulatory provisions in the period when the second intended appellant held no licence.

30. It is evident that if certified, the two questions submitted for our certificate will require this Court to embark on an exercise involving the statutory interpretation of section 7(1) and other sections of the IFA. Both questions are, in our view, completely unconnected with any of the proposed grounds of appeal as framed. It is also not hard to discern that both questions have been carefully crafted to buttress the grounds of the intended appeal, but we are convinced that neither question has any obvious connection with any of the grounds. Nor do the questions relate to any ground which specifically seeks to impugn the judge's interpretation of section 7(1) of the IFA.

31. After, reviewing the questions posed alongside the proposed grounds, we have gained the distinct impression that the intended appellants have, as it were, placed the proverbial cart before the horse. As we have already indicated, according to the express wording of section 21(1), to qualify for a further appeal before this Court, the intended appellants must first surmount the statutory hurdle of establishing that the proposed grounds of appeal involves "a point of law alone". This they have failed to do.

32. We are satisfied that nothing in any of the 16 grounds of appeal suggests any connection with section 7(1) of the IFA or discloses any alleged error of law by the judge in relation thereto. We are accordingly unable to agree that either question can be regarded as a "point of law alone" which arises from any or all of the 16 grounds of the intended appeal as those grounds are currently framed.

33. What is more, even if it were possible for us to agree that one or other (or even both) of the questions for which Mrs. Lockhart-Charles seeks certification involves a "point of law alone", we would have the greatest of difficulty in finding that either constitutes a "point of law of general public importance" for purposes of section 21(1) of the Court of Appeal Act.

34. Mrs. Lockhart-Charles cited the decision of the Kenyan Supreme Court in **Hermanus Steyn** which she said, provides guidance as to the principles to be considered when deciding whether a point of law of general public importance meriting certification for final appeal has arisen.

35. She urged us to find that the intended appeal involves the two questions of law (identified earlier) which transcend the circumstances of the parties and are of great public importance to The Bahamas' financial sector and to the public generally and asked us to certify both points for further appeal before us in accordance with section 21(1) of the Court of Appeal Act.

36. In response, Counsel for the intended respondent, Mr. Ward, submitted firstly that the two questions identified by Mrs. Lockhart-Charles raise no points of law but rather involve a difference of interpretation of the facts. He further submitted that the intended appellants were attempting to raise points which were never raised as issues at the regulatory hearing before the Committee, namely, that the second appellant should not have been treated as an investment fund since it no longer held a licence. That point, he submitted, had only been raised during the first appeal before Hepburn J. who noted that the argument had not been raised before the Committee.

37. Relying on dicta in **Hermanus Steyn**, Mr. Ward submitted that while the two points sought to be certified may be significant to the intended appellants, neither point had any substantial, broad-based impact or consequences which transcend the narrow litigation-interests of the parties or which impact adversely upon the public interest. He urged us to find that no legal point of general public importance for consideration has been disclosed and urged us to refuse the application for certification. We fully agree.

38. At paragraph 63 of her decision, the learned judge found that the intended second appellant had been licenced as a SMART fund when it elected to become registered as a fund under section 7 in 2004 and once it elected to become registered it could not simply choose not to be registered particularly if it did not inform the Commission of its decision.

39. We are satisfied that none of the 16 grounds of appeal purport to challenge this particular aspect of the judge's findings, yet it is now being suggested on behalf of the intended appellants that the two points of law proffered for our certification transcend the circumstances of the parties and are of great public importance to The Bahamas' financial sector and to the public generally. Respectfully, we do not agree.

40. Section 7 of the IFA provides that upon its election to be licensed as an investment fund, a company shall from the date of licensing be deemed an investment fund for purposes of the IFA. Once licensed, an investment fund is, as the section expressly states, subject to the provisions of the IFA, and becomes obligated to comply with the applicable regulatory provisions. A reading of the Act suggests that its obligations include such matters as keeping and maintaining proper books of accounts and records and documents, notifying the Commission of the surrender of its licence and where applicable, the notifying the Commission if it ceased to trade or has become dormant.

41. The judge clearly found that once licensed, a company could not simply ignore its obligations particularly if it did not inform the Commission as the regulator, of its decision. This finding has not been appealed.

42. Apart from this, the intended appellants have, in our view, failed to establish that the application for certification of the two questions has been occasioned by a state of uncertainty in the law which has arisen from an incorrect interpretation of the law by the judge below. Nor is there any evidence before us to suggest that persons other than the intended appellants will be affected by the outcome of the intended appeal were the questions to be certified.

43. In the circumstances, we are satisfied no "point of law alone" has been disclosed in the intended grounds of appeal; and further, that the questions posed have not been shown to transcend the circumstances of the parties or to be of great public importance to the financial sector or to the public in general.

Disposition

44. As the intended appellants have not demonstrated to our satisfaction that any or all of the 16 grounds of appeal involve a point of law alone of general public importance, we decline to issue our certificate which would permit a further appeal to this Court from the decision of the court below. We consequently refuse the oral application for certification of a point of law of general public importance pursuant to section 21(1) of the Act.

45. In the result, we accordingly decline jurisdiction to hear the Notice of Motion (filed on 7 October, 2013) for leave to appeal out of time which is hereby dismissed with costs to the intended respondent.

The Honourable Ms. Justice Crane-Scott, JA

The Honourable Dame Anita Allen, P

The Honourable Mr. Justice Isaacs, JA