COMMONWEALTH OF THE BAHAMAS 1999

IN THE SUPREME COURT No. 1440

Common Law Side

IN THE MATTER of an application by Petroleum Products Limited and Fabian Investments Limited for leave to apply for Judicial Review

AND

IN THE MATTER of certain provisions of the Securities Industry Act 1999

AND

IN THE MATTER of a Complaint against a decision of the Securities Commission of The Bahamas by the above-named Applicants

BETWEEN

REGINA

SECURITIES COMMISSION OF THE BAHAMAS
Respondent

Ex Parte

PETROLEUM PRODUCTS LIMITED
and
FABIAN INVESTMENTS LIMITED
Applicants

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Appearances: Mr. Maurice Glinton and Mr. Raynard Rigby for the Applicants.

Mr. Harvey Tynes QC, Mr. Carl Tynes and Ms. Nshona Tynes for the Respondent.

Mrs. Caryl Lashley for Freeport Oil Holding Company Limited.

Mr. Frederick Smith and Mr. Robert Adams for The Grand Bahama Port Authority Limited

Mr. Milton Evans and Ms. Leila Green for the Attorney General (only on the morning of day 3 of the hearing, 28 June 2000)

JUDGMENT

Hayton, A.J:

By their application for judicial review the applicants, Petroleum Products Limited and Fabian Investments Limited, seek to impugn the conduct of the respondent Securities Commission of The Bahamas, (**"the Commission"**) in respect of registering a prospectus for the public flotation of Freeport Oil Holding Company Limited, (**"FOHCL"**).

However, counsel for The Grand Bahama Port Authority, (**"the Port Authority"**), intervened at the outset, claiming to be a proper person to be heard in opposition to the application under Order 53 r 9.

Essentially, he had two grounds for intervening. The first was based upon factual matters alleged in the applicants' Statement (filed on 21 December 1999 pursuant to Order 53 r 3) which impugned the conduct of the Port Authority, particularly in relation to a licence granted by the Port Authority to Freeport Oil Company Limited

("**Focol**") wholly owned by FOHCL, and which were relevant to the relief requested by the applicants, particularly in para. 3(10) and (11) of the Statement.

The second ground was based upon a matter of law: the submission that this application impugning the conduct of the Commission under the Securities Industry Act 1999 is pointless because that Act does not extend to the regulation of companies operating within the Port Authority's jurisdiction (conferred by the Hawksbill Creek Agreement) and FOHCL is such a company, as is its subsidiary, Focol.

This submission concerns a matter of fundamental importance relating to the constitutional position of the Port Authority in relation to that of the Government of the Bahamas and, if correct, pulls the rug from under the feet of the applicant.

Accordingly, I hold that the Port Authority is a proper person to be heard within Order 53 r 9 and so shall be heard. However, any leave for it to be heard is mainly to enable it to be heard on the matter of law. The extent to which it needs to be heard on the factual matters mentioned above depends upon the extent to which the applicants delve into alleged underhand dealings involving the Port Authority and Focol, the subject matter of another action brought by the applicants. As will be seen, in the course of the hearing, counsel for the applicants conceded that he was no longer asking the court to find that the FOHCL prospectus registered by the Commission usurped the court's jurisdiction to determine issues sub judice and actually contained statements that were misleading false and

deceptive, resulting in an unconscionable consideration being paid for the acquisition of shares in FOHCL. Thus, he withdrew his claims for relief in para 3(10) and 3(11) of the Statement.

As a result of the Port Authority having leave to be heard, the applicants and the respondent agreed to serve copies of their trial bundles upon the Port Authority's counsel, while the latter agreed to inform the Attorney-General's office of the jurisdictional submission and to let the Attorney General have the skeleton submissions thereon as soon as practical. Clearly, the Attorney General needs to be heard on this constitutional issue, so that leave was granted when counsel for the Attorney General appeared on the morning of the third and final day of the initial part of the proceedings. It then became clear that a lengthy adjournment would be needed to afford the Attorney General time for proper preparation on the important constitutional issue. However, such issue would not arise if the judicial review application failed on its own merits.

It was thus agreed that it is only if the application merits the award of some relief that steps will be taken to adjourn the case part-heard for the constitutional issue to be tried.

With this background I turn to the merits of this application, first addressing the need for an application for judicial review to **'be made promptly and in any event within six months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made" (Order 53 r 4).**

Was the application made promptly and in any event within six months? No. Is there good reason for extending time? No.

Counsel for the Commission submitted that the date when "grounds for the application first arose" was 1 June 1999 when the Commission registered the FOHCL prospectus in respect of which the applicants seek relief. Counsel for the applicants submitted that it was 5 July 1999 when the applicants first acquired knowledge of the public offering of shares (as apparent from their letter of 6 July to lawyers acting for FOHCL). Failing that, it was the day the prospectus was published. The application forms indicated the offer ran from 1 July 1999 to 5 p.m. on 30th July 1999 (the declaration therein acknowledging "receipt of the prospectus dated 1 July 1999"), while the offer was given full publicity on Friday 2 July 1999 in the Freeport News and in a full page advertisement in the Nassau Guardian. After all, was it not the very publication of the prospectus to the world that caused the alleged detriment to the applicants?

The applicants' ex parte application for judicial review was filed on 21 December 1999, more than six months after 1 June 1999 but fewer than six months after the period 1 to 5 July 1999.

Authority for 1 June 1999 being the key date is found in the English Court of Appeal's decision in **R v Secretary of State for Transport ex p Presvac** of 25 June 1991 published in (1992) 4 Admin LR 121. In that case the applicant submitted that time did not run until he knew of the issue of a certificate indicating that a competitor's valves complied with certain Regulations or, rather, did not run until he had enough admissible "ammunition" to enable him

to formulate his application with reasonable confidence in its success. In response, Purchas LJ (with whom the other Lord Justices simply concurred) stated (pp 122-134)

> **"In my judgment the words of the order are perfectly clear and do not admit of any implication of the kind which would be necessary to support [the applicant's] submission. In my judgment order 53 r 4 provides that (a) the application should be made promptly (b) that in any event it should be made within three months** [the English period] **from the date when the grounds for the application first arose. Therefore the subjective experience and state of knowledge of [the applicant] upon which [he] relied for his submission that time did not run until mid April or May 1988 are not relevant. They may, however, be relevant when the court comes to consider the proviso 'unless the court considers that there is good reason for extending the period'."**

A similar approach was adopted by the English Court of Appeal in R v Stratford-on-Avon DC ex p Jackson [1985] 1 WLR 1319 at 1324. On 30 August 1984 the respondent planning authority passed a resolution granting planning permission. Giving the judgment of the court Ackner LJ stated,

> **"It was on 30 November that the three month period referred to in Order 53 r 4 ran out."**

Similarly, the English Divisional Court in **R v London Borough of Redbridge ex p G (Judicial Review pp 394 - 400, 1991 Crown Office Digest 347 - 434)** held that time ran from the date the Borough's Education Committee made its decision on 2 July 1990, not when the child's father received notification on 8 November 1990.

I respectfully concur that the date when time begins to run cannot be the date that the applicant acquires knowledge which could be two months, two years or twenty years after the impugned event which he now claims to affect him. The date must be objective, not subjective (although in **Rey v Attorney General of The Bahamas, No. 1351 of 1999**, which I decided on 27 June 2000, counsel were content, in presenting that particular case, to act as if the time of Rey's knowledge of Notes by the Bahamian government to the Swiss government was the crucial date and, even on that basis, the application was held to be out of time).

In the present circumstances, is the key objective date the date the Commission registered the prospectus of which the applicants complain or the date FOHCL publicly published the prospectus, thereby allegedly detrimentally affecting the applicants' interest (by making known to the world the information contained therein, which ought to have been better slanted towards the applicants if the Commission had investigated matters in proper fashion, having afforded the applicants the opportunity to make representations, as claimed by the applicants)?

In my view, "when grounds for the application first arose" was on 1 June 1999, when the prospectus was registered, being the complained of conduct of the Commission, not on 1 July 1999 when FOHCL inevitably took advantage of such registration to market itself to the public. Thus, the application is even beyond the six month limit, quite apart from the fact that, as the English Court of Appeal stated in **R v Stratford-on-Avon DC ex p Jackson [1985] 1 WLR 1391 at 1322,**

> **"The essential requirement is that the application must be made promptly".**

If such essential requirement is not satisfied in any event within the objective six month period, the question arises whether or not "the Court considers that there is good reason for extending the period". It is here, in my view, that the Court should take account of the time the impugned matter came to the knowledge of the applicant. It should consider whether the applicant, after acquiring such knowledge, made the application promptly, there being a greater need to act promptly the greater the period since the objective date of the grounds for the application. If the applicant did then apply promptly the period should be extended to that necessary to make the application timely.

The **"essential requirement"** then becomes that the applicants must here show that they acted promptly after 5 July 1999.

On 6 July their lawyers wrote a lengthy (5 pages) hard-hitting letter faxed to FOHCL's lawyers and copied to the Commission.

Two and a half pages set out the parts of the prospectus that cause concern "as gross misrepresentations of the facts and of the true legal position", and as "statements contemptuous of the jurisdiction of the Court of Appeal and which, if allowed to go unchallenged, are certain to materially and irrevocably prejudice our clients' interests". Then a retraction of the statements and an apology are required before the letter concludes on page 5 as follows (including a specific reference to applying for judicial review).

> **"In terms of time, it being of the essence having regard to the deadlines set by the Company under the terms of its offer to the public, we would expect a reply to this our demand by not later than the close of business tomorrow, 7th July.**
>
> **You should also be advised that in so far as the said statements and representation amount to infractions of the law and in themselves raise legitimate complaints against the performance by the Securities Commission of its duties to act in and safeguard the public interest under the Securities Industry Act, 1999, we not only regard ourselves obligated to bring this matter to the Commission's attention (which we intend to by forwarding a copy of this letter) but, if necessary, by reason of our not being satisfied by any action which it may take, apply for judicial review in the Supreme Court without prejudice to any relief which might be available to our clients in the Court of Appeal in the interim.**

We trust that we have made ourselves clear as to the importance of this matter to the clients who are not prepared in any way to be dissuaded from pursuing their interest in the prosecution of this Action to its final resolution, whether that be in the Court of Appeal or Her Majesty's Privy Council."

In the absence of a reply, steps were taken on 7 July 1999 to apply for injunctive relief in a direct interlocutory application by Notice of Motion to the Court of Appeal to whom an appeal was pending relating to the 19 December 1996 judgment of Mr. Justice Longley in a case brought by the applicants against The Grand Bahama Port Authority Limited and Focol (1991 No. 1327). As revealed by the affidavit of Pamela Seymour (sworn on 12 July 1999 and filed on 13 July 1999 for the hearing on 23 July by the Court of Appeal), there is a very long acrimonious history of legal actions involving the applicants' complaints against the Port Authority and Focol, and the applicants considered that the flotation of FOHCL (the value of which hinged on its ownership of Focol) could be regarded as designed to frustrate or undermine the above action 1991 No. 1327, and even to amount to a contempt of court.

That action had been struck out by Mr. Justice Longley on the basis that the parties had by agreement in 1980 settled all the issues between them. The applicants hoped to be able to have that preliminary striking out overturned in the pending appeal, so that the merits of the bitter issues between the parties could then be examined.

On 23 July 1999 the Court of Appeal rejected the applicant's claims to injunctive relief to protect the applicant's position. The appeal from Mr. Justice Longley's 1996 decision is still pending.

On 13 July the applicants' lawyer wrote to the Commission a lengthy 4 page letter about its "lack of due diligence", so that "material facts contained in or omitted from the said prospectus are patently untrue and intentionally misleading", about "the numerous and significant breaches of and non-compliance with the Security [Industry] Act 1999", and requesting it to take steps to order a retraction of the seven offending statements in the prospectus. This letter was copied to the Office of the Prime Minister and to the Attorney General of The Bahamas.

On 19 July 1999 the Commission replied by a faxed letter:

> **"Receipt of your letter dated July 13 1999 is acknowledged and the contents thereof noted.**
>
> **The commission's determination that the captioned company made full and proper disclosure regarding outstanding claims against it was based on a complete review of all matters related to this issue. We are therefore not prepared to consider any action regarding the prospectus issued by Freeport Oil Holdings Company Limited. The position taken has provided potential investors of the company ample protection since the company has disclosed their existence and the details of the claims are a matter of public record. Further, we do not find the**

statements made by the company in the prospectus misleading.

Should you have any further query in this regard, please do not hesitate to contact us."

In view of the prompt interlocutory application to the Court of Appeal, and in view of the serious allegations concerning the prospectus that were alleged seriously to affect the applicant's interests, and in view of the threat to bring judicial review proceedings in the cited 6 July 1999 letter, one would thereafter expect the prompt issue of judicial review proceedings. After all, the matters complained of had already been identified, especially the major one that Focol was stated to have an exclusive licence from the Port Authority to provide petroleum products throughout Freeport until 2054, while the applicants claimed themselves to have earlier licences from the Port Authority to supply petroleum products wholesale in Freeport. Moreover, the applicants' lawyer had already clearly shown how speedily he could act when circumstances required it as in the case of the interlocutory hearing before the Court of Appeal.

Instead, over 5 months elapsed before the application for judicial review was filed on 21 December 1999, although it seems to have been ready for filing on 25 November 1999, the date on page 4 of the Statement under Order 53 r 3. By no stretch of the imagination can that be regarded as acting promptly in all the circumstances of the case, which, of course, include the ongoing nature of the

Commission's work in overseeing public flotations from time to time. In the financial regulatory context persons must be kept in suspense only for a short period: **O'Reilly v Mackman [1983] 2 AC 237 at p. 281; R v Monopolies Commission [1986] 1 WLR 763 at pp 774 - 775; R v Panel on Take-overs [1987] 1 QB 815 at p. 842.** One month, or at the most, two months should have sufficed after 19 July 1999 to make the application.

Is there, then, any "good reason" to extend the period beyond 19 September (required for a prompt application in my view) for over three months to 21 December. Counsel for the applicants had to fall back on asserting that it took time to discover all the facts and marshall all the materials. However, it seems to me abundantly clear that more than enough to justify an application was already present in the cited July letters and in the preparation for the interlocutory hearing before the Court of Appeal.

It seems more likely than not that, after the failure of the 13 July 1999 interlocutory application to the Court of Appeal, the applicants considered the sensible course was to await a hopefully successful outcome of the appeal against Mr. Justice Longley's striking out of their action in case No. 1327 of 1991, so that, then, the merits of their case against Focol and the Port Authority could be heard and, hopefully, decided in their favour. Belatedly, in November the applicants decided they might as well seek to advance their interests in matters relating to some of the issues in their case against Focol and the Port Authority by bringing these judicial review proceedings just before the six months time limit expired, perhaps

believing that in any event they had six months from 5 July 1999. As held, the essential requirement is to act promptly, not in any event to act within six months. As emphasised in **Rey v The Attorney General of the Bahamas** (No. 1351 of 1999 decided on 27 June 2000) lawyers must act on the principle "Don't delay, act today" if they are to ensure that the groundwork is done for a prompt ex parte application for judicial review.

Thus, in this particular battle in the war between the applicants and Focol and the Port Authority I find against the applicants and dismiss the application.

In view of the fact that the applicants should have appreciated that the extent of their hard-hitting allegations would probably provoke the intervention of the Port Authority - and its presence by counsel may partly have explained why the applicants' counsel conceded on the second day of the hearing that it was possible for it to appear to the Commission that the prospectus statements were not misleading, false or deceptive - I find that the applicants should pay the costs not just of the respondent and of FOHCL but also of the Port Authority.

However, out of deference to the efforts of learned counsel over three days (particularly the thoroughly researched submissions of Mr. Glinton, counsel for the applicants, who produced fifty pages of submissions and bundles containing over eighty authorities) and to the fact that the Commission may derive assistance in carrying out its important functions under the Securities Industry Act 1999 if I consider the merits of the application, I shall now proceed to do so.

The relief sought by the applicants

Matters having changed since 21 December 1999, when the applicants filed their statement pursuant to Order 53 r 3, their counsel on the third day of the hearing quite properly requested the court in its discretion to select fewer and slightly varied reliefs or remedies from those initially sought: see **R v IRC ex p Federation of Self Employed [1982] AC 617 at 647H.**

Ultimately, the remedies requested were as follows:

1. Mandamus, requiring the Commission to establish and promulgate Rules consistent with its responsibilities under the Act so as to provide for all such matters as may be necessary or expedient for giving effect to such responsibilities, according to law (see para 3(6) of said Statement).
2. A declaration that, in so far as statements or other representations regarding the undertaking being projected in the Prospectus for the initial public offering of shares in FOHCL are likely to affect the commercial well-being and/or status of the Applicants as Licensees entitled to engage in the particular business or industry to which the said undertaking relates, the Applicants were entitled to make representations, whether orally or in writing, in relation thereto pursuant to the Commission's authority in virtue of section 33 of the Securities Industry Act 1999, prior to registration of the said Prospectus (see para 3(9) of said Statement).
3. A declaration that the Commission should have conducted proper and thorough investigations and hearings at which the Applicants and any other persons affected by the Commission's exercise of its

regulatory authority in respect of the subject-matter of the said Prospectus would be entitled to be heard, according to law (see para 3 (4) of said Statement).

4. A declaration that the Commission should have permitted and called for the production of such documents and other information at such hearing or hearings as may be relevant to the matters being dealt with by the Commission (see para 3(4) of said Statement).
5. A declaration that the Commission should have given proper, intelligible and adequate reasons for its decisions (see para 3(7) of said Statement).
6. A declaration that the Commission was obliged to produce and disclose any Minutes of meetings when the matter of FOHCL's application for registration of the said Prospectus and related issues would have been dealt with (see para 3(8) of said Statement).

It is noteworthy that the applicants no longer seek the reliefs mentioned in para 3(1) or (2) or (3) or (10) or (11) of the said Statement.

On the second day of the hearing the applicants' counsel conceded that he was not seeking to impugn the decision of the Commission to register the Prospectus with the statements therein: he was seeking only to impugn the decision-making process. He accepted that it was possible that, if the Commission had conducted itself in accordance with the above declarations sought, it might just have registered the prospectus as satisfying s. 56(6), because not containing any statement that was misleading, false or deceptive

which could lead to an unconscionable consideration being paid for the acquisition of shares in FOHCL.

The applicants' complaint as to the Commission's decision-making process

The burden of the applicants' complaint was that the Commission had enough material before it in May 1999, (e.g. the 22 June 1967 Agreement between the Port Authority and Focol) to indicate that the applicants, as business competitors of FOHCL (the owner of Focol with a stated exclusive licence), ought to be approached to enable various matters to be clarified. This would be to ensure that the prospectus would not contain any misleading, false or deceptive statements that could lead the public to pay an unconscionable price for shares in FOHCL. He submitted that such an approach would have led the applicants to make representations (supported by documentary and other evidence) such that the prospectus, as registered by the Commission after proper investigations and hearings, could have contained lengthier statements on the applicants' licences and on their action 1991 No. 1327 which would have been more favourably slanted in the applicants' favour than the actual brief statements which were slanted as much against the applicants as possible without actually being misleading, false or deceptive.

The respondent's response is that after receiving the cited letters of 6 and 13 July, Mrs. Sandra Knowles (the Executive Director of the Commission), Mr. Hillary Deveaux (the Secretary to the Commission) and Mr. Keith Davies (technical assistant to the

Executive Director) reconsidered whether FOHCL's prospectus had fully complied with the 1999 Act: see Ms Knowles' affidavit of 21 June 2000 para 18. However, they concluded that it had so complied and they were entitled to come to that conclusion within the reasonable leeway afforded to them by the 1999 Act.

The applicants' rejoinder is that once those persons had come to a conclusion without the benefit of any imput from the applicants, they would naturally seek to uphold their conclusion if it was one that it was possible for them to arrive at, many of the public having already put in applications to buy shares in FOHCL. If, however, the applicants had had the opportunity to influence the Commission when it was in the process of forming conclusions, the Commission could well have required more explanation in the prospectus as to the compatibility of Focol's exclusive licence with the appellant's licences and as to what might happen if the applicants succeeded in their appeal against Mr. Justice Longley's striking out order in the action No. 1327 of 1991.

In rebuttal, the respondent refers to the letter of Mr. Larry Gibson, dated 20 July 1999, written in reply to a letter, dated 19 July 1999, from Mr. Davies of the Commission requesting the prompt provision of "information supporting the exclusivity of the licence granted by the Grand Bahama Port Authority to Freeport Oil Company Limited". Mr. Gibson states as follows.

"With regard to your letter dated July 19 1999, we have been advised as follows:

In the prospectus, there are numerous assertions that ***FREEPORT OIL COMPANY LIMITED*** has exclusivity in connection with it license to be a supplier of petroleum products in Freeport. It is clear, however, that those assertions relate primarily to gasoline and diesel. On page 15 of the prospectus it is set out that "The Company derives revenue principally from the sale of gasoline to service stations in Freeport and diesel sales to industrial customers". Lube oils were a small but consistent contributor, and propane was an afterthought.

The following history supports those assertions:

24.2.59 ***THE GRAND BAHAMA PORT AUTHORITY*** granted ***PETROLEUM PRODUCTS LIMITED*** a license to carry on the business of garage proprietors and of a service station; ...
to buy and sell by retail or wholesale petrol...
PROVIDED that all petroleum products shall be purchased from ***Freeport Bunkering.***

22.6.67 ***THE GRAND BAHAMA PORT AUTHORITY*** granted ***FREEPORT OIL COMPANY LIMITED*** a license to distribute wholesale and retail petrol...
And to construct and operate filling stations.
THE GRAND BAHAMA PORT AUTHORITY further covenanted with ***FREEPORT OIL COMPANY LIMITED*** that it would for the term of the Hawksbill Creek Agreement have the sole and exclusive right to wholesale and distribute petroleum products. This licence is subject to the

licences provided to *Petroleum Products Limited* (24.2.59) and *Bahamas Gas and Fuel Company Limited* (20.9.61).

BY A RIDER in this license agreement *Freeport Bunkering's* licensee rights would when terminated go to *FREEPORT OIL COMPANY LIMITED.*

10.6.69 *THE GRAND BAHAMA PORT AUTHORITY amended PETROLEUM PRODUCTS LIMITED'S* licence to indicate that "all petroleum products to be sold by Licensees in the Port Area shall be purchased from *FREEPORT OIL COMPANY LIMITED* or any company or companies designated by *FREEPORT OIL COMPANY LIMITED.*

22.1.76 *THE GRAND BAHAMA PORT AUTHORITY* confirmed to *FREEPORT OIL COMPANY LIMITED* that they would not vary the terms of the *PETROLEUM PRODUCTS LIMITED* license requiring that all petroleum products must be purchased from *FREEPORT OIL COMPANY LIMITED. THE GRAND BAHAMA PORT AUTHORITY* further confirmed that they would neither grant new licenses to *PETROLEUM PRODUCTS LIMITED* or *Bahamas Gas,* nor allow them the use of other premises to conduct business.

As a matter of interest, and note, *PETROLEUM PRODUCTS LIMITED* has lost its site, and has some years ago ceased to do business. *Bahamas Gas* (now Shell) sells propane only, and is therefore of no consideration as the prospectus clearly indicates that for *FREEPORT OIL COMPANY LIMITED* gas and diesel make up 93% of the product volume and

propane and lubricants together make up 7% only.

Please contact me if you require additional information."

In the light of background matters in Pamela Seymour's affidavit with its exhibits, the point of the letter seems to be that Focol has the exclusive right to sell wholesale petroleum products, whether by direct sales to retailers or by sale to the first applicant, Petroleum Products Ltd, which cannot buy from anyone else and which will then sell on to retailers, placing the applicant in an invidious position. Originally, however, it seems the applicant bought from Focol's predecessor, Freeport Bunkering Co. Ltd, restricted as a bunkering company to operating outside the Harbour, leaving the applicant to operate in the Harbour area. The Port Authority then formed Focol which could operate in the Harbour area and which replaced Freeport Bunkering as the applicants' sole supplier. The Port Authority then sold Focol to certain allegedly associated purchasers in a manner impugned by the applicant. Various bitter legal actions have been bought since 1974, culminating in action No. 1327 of 1991 already discussed.

The applicants' comment on Mr. Gibson's letter of 20 July 1999 written to try to clarify the position for the Commission, is how odd it is that this letter postdates the letter dated 19 July faxed from the Commission to the applicants telling them it was satisfied with the situation and would take no further action (although it did write

on 19 July to Mr. Gibson, so provoking Mr. Gibson's reply of 20 July). Thus, the Commission was strongly predisposed to upholding the correctness of its 1 June registration of FOHCL's prospectus in relation to its key asset, Focol, the value of which hinged on Focol's exclusive licence.

Thus, the applicants submitted that the Commission's denial of any opportunity to the applicants in the period 7 May to 1 June (when the prospectus was registered) to develop their case for the prospectus to be clearer on Focol's exclusive licence and the implications of action No. 1327 of 1991 adversely affected their interests, because it could not be said with any certainty that the Commission's decision would have been the same if it had received representations from the applicants, investigated documents and, perhaps, held an oral hearing. **Wong Ah Suan v Sarawak Electricity Supply Corporation (1982) 4 Privy Council Cases 21 at pp 29-30.**

I accede to this submission (leaving aside whether or not there was any legal duty conferring such opportunity upon the applicants), taking account of the fact that I find there was sufficient material before the Commission to alert it to the need for further investigation of the applicants' interests as a possible business competitor of Focol e.g. the 1967 Licence Agreement by the Port Authority in favour of exclusive rights for Focol, being subject to licences for the applicants already granted by the Port Authority; the Port Authority owned Focol and then sold it on (as the prospectus shows on p.47) to FOHCL, formed as a holding company to acquire 100 per cent of Focol from the Port Authority, while the Chairman and President of

FOHCL is Mr. A. J. Miller, Co-Chairman of the Port Authority; there was the applicants' litigation against FOHCL relating to the exclusive licence.

Should the Commission have afforded the applicants the opportunity to make representations? Yes

In Public Disclosure Commission v Isaacs (1988) 37 West IR 1 at p.8 the Privy Council endorsed Lord Denning MR in R v Race Relations Board ex p Selvarajan [1975] 1 WLR 1686 at p 1693 - 1694 where he said:

> **"In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion... In all these cases it has been held that the investigating body is under a duty to act fairly: but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some other way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it".**

In Fraser v State Services Commission [1984] 1 NZLR 116 at 124 Richardson J (in the New Zealand Court of Appeal) dealt with this aspect of natural justice as follows.

"First, the conceptions which are indicated where natural justice is raised are not comprised within certain hard and fast and rigid rules *(Furnell v Whangarei High Schools Board [1973] 2 NZLR 705; Wiseman v Borneman [1971] AC 297).* The requirements of natural justice must depend on the subject-matter under consideration and the circumstances of the particular case. Where they find it necessary to do so in order to ensure that the procedure is fair in all the circumstances, the courts will supplement a procedure laid down in legislation and will do so by reference to those requirements. Second, in determining whether an opportunity to be heard must be given before a decision potentially adverse to the person is made, it is necessary to consider the scheme and context of the governing statute. One does not start by assuming that what Parliament has done is unfair. The supplementation of the statutory procedure in that respect is warranted where and because the express provision is insufficient to achieve justice and to require additional steps would not frustrate the apparent purpose of the legislation *(Wiseman v Borneman per Lord Reid p 308).* In this regard it is a mistake to view the implied obligation to afford an opportunity to be heard as being intended simply for the protection of the individual affected by the decision that will be made and as having to be balanced against the needs of efficient decision-making. The decision-maker is more likely to reach a sound decision if he is better informed about the issues through having heard both sides; and in

that way the existence of the implied obligation should be seen as contributing to the soundness as well as to the fairness of the decision-making process."

In the context of sections 30 to 44 and 54 to 60 of the Securities Industry Act 1999 in Part IV (Regulatory Authority of the Commission) and Part VI ("The issue of securities to the Public: Prospectus"), the opportunity in the special circumstances of this case for a peculiarly affected business competitor to be afforded the opportunity to deal with dismissively damning statements is not simply for the protection of that competitor but, primarily for the protection of the public interested in buying shares on the faith of the prospectus. To this end, the Commission has power to make rules (s.30(1)), to conduct investigations and regulatory hearings (s.33), to require the production of documents and to summons witnesses (s.34) and to impose sanctions and make orders (ss. 33(b) and 37). Moreover, the Commission is not to register a prospectus unless certain requirements have been fulfilled, and must refuse to register a prospectus if certain matters appear to the Commission e.g. there are misleading, false or deceptive statements, an unconscionable consideration is to be paid for promotional purposes, the purpose of the issue as stated in the prospectus will not be accomplished due to insufficient resources, certain persons are not financially responsible, fit and proper persons: see ss. 55 and 56.

Clearly, the Commission has to be on guard against self-serving statements of those preparing the draft prospectus e.g. "The

Company is the defendant in a series of legal actions dating back to 1991 which primarily relate to its licence agreement to distribute petroleum products exclusively in the Freeport area. All of these actions have a common plaintiff. The issue in all of these actions is one which was fully resolved and determined in 1980 [according to a striking out ruling of Longley J which is currently being appealed by the plaintiff]. [The Company's] Legal counsel is of the opinion that these claims are without merit and, accordingly, no provision has been made in the financial statements for any loss in connection therewith [including any losses that would flow if the court found the plaintiff had a licence detracting from the exclusivity agreement that is the basis of the Company's business]". The prospectus (pages 32 and 49) did not include the bracketed words which the applicants would have liked to see. It is also odd that, as Mr. Deveaux's affidavit of documents reveals, the Commission did have in its possession at one stage "opinion of legal counsel" and "consent of legal counsel" but has since misplaced them, so their content is unknown.

In my view, the applicants are right to allege that the inquiries made by the Commission in its letter of 19 July to Mr. Gibson should have been made before registration of the prospectus and that the applicants should have had the opportunity to make representations to the Commission in the very special circumstances of this case (affecting the core of the businesses of the applicants and of FOI CL) which have already been dealt with at length. However, the mere fact that someone is known to be a business competitor of a company

being publicly floated gives rise to no duty upon the Commission to approach such competitor. It is only the said very special circumstances that in this case warrant the supplementation of the statutory section to help achieve one of the main purposes of the legislation, to protect the interest of the investing public. In so far as a "regular practice" (to use Lord Fraser's words in **CCSU v Minister for Civil Service [1985] AC 374 at 401**) can ever develop for the rare type of special circumstances covered by the present case the Securities Industry Act 1999 in my view requires the establishment of such a practice, so creating a legitimate expectation that a person in such special circumstances will be afforded the opportunity to make representations to the Commission.

Thus, but for the application being out of time and subject to any countervailing considerations appearing from the Port Authority's jurisdictional challenge, I would have been prepared to grant the declaration numbered 2 under the earlier heading "The relief sought by the applicants", but inserting the word "core" before "commercial well-being", while being prepared to grant diluted versions of declarations numbered 3 and 4.

Thus 3 would then have declared that the Commission, in the light of representations made by the applicants and any response of FOHCL, should have conducted investigations and after such investigations, if considering it necessary or expedient, should have conducted a hearing or hearings to enable the Commission to carry out its duty under section 56(6) of the Securities Industry Act 1999

but without entering into the rights or wrongs of matters that were sub judice in case No. 1327 of 1991.

It follows that declaration 4 would have declared that in so far as hearings were held as a result of declaration 3 the Commission should have permitted and called for production of such documents and other information considered necessary or expedient for carrying out its duty under s. 56 (6) as above.

However, I would have refused declarations numbered 5 and 6. As Lord Mustill stated in **Doody v Home Secretary [1993] 3 All ER** 92 at p110

> **"The law does not at present recognise a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied".**

In my view, in the context of the decision to register a prospectus as satisfying the requirements laid down in s. 56 (as opposed to refusing to register when S. 56(4) (b) requires reasons) there is no need to give reasons, whether to the company whose prospectus it is or to a person in the rare special position of the applicants, even if the imprimatur of the Commission is likely to have substantial financial consequences for the applicants: see **R v HEFCE ex p Institute of Dental Surgery [1994] 1 All ER 651.** It suffices that the actual registration of a prospectus reveals that it

appears to the Commission that the detailed requirements in s. 56 have been complied with.

I would have seen no point in making declaration 6 because under para 12(5) of the First Schedule it is expressly required that Minutes of the meetings of the Commission are to be kept in proper form by the secretary or any officer the Commission may appoint. Furthermore, it appears that there were no meetings (and so no Minutes) of the Commission dealing with registration of the prospectus and related issues.

Do the applicants have a sufficient interest in the matter to which the application relates? Yes

Clearly, in view of the rehearsed facts leading to my preparedness to making declarations 2, 3 and 4 (but for the application being out of time and subject to any countervailing considerations that might appear if dealing with the Port Authority's jurisdictional point) the applicants do have a "sufficient interest" (within order 53) to bring these judicial review proceedings permitted by s. 42 of the 1999 Act to "any person aggrieved by a decision of the Commission".

Did the Commission validly delegate its duty to register prospectuses? Yes

It has been seen that the Executive Director, Mrs. Sandra Knowles, the Secretary, Mr. Hillary Deveaux, and the Executive Director's Technical Assistant, Mr. Keith Davies, worked together on vetting the prospectus. In Mrs. Knowles' affidavit, paras 3 and 4, she states the Commission assigned to her various duties including the

vetting of prospectuses for registration and with the full knowledge and concurrence of the Commission she did this with the assistance of Mr. Deveaux and Mr. Davies.

On 1 June Mrs. Knowles wrote on behalf of the Commission.

> **"The Commission is satisfied after reviewing the prospectus submitted to this office on 20 May 1999 that the same complies with the requirements of the Securities Industry Act 1999 and the proposed Regulations. This prospectus is, therefore, suitable for distribution to the public".**

By S. 15 (2)(b) of the 1999 Act

> **"The secretary shall perform any other duties assigned to him by the Commission and by the Executive Director".**

while by s. 16

> **"The Minister shall appoint and may dismiss an Executive Director as he considers necessary for the purpose of performing the duties assigned to such officer by the Commission or by any written law".**

and by s. 33(c)

> **"The Commission shall have the authority to establish and promulgate procedures to be used in carrying out any of the functions [e.g. to make investigations to determine whether there has been or is likely to be a failure to comply with the provisions of the Act or any regulations or rules made thereunder] conferred by this section upon the Commission".**

Taking account of the plethora of detailed matters to be vetted under ss 54 - 56 before the Commission allows a prospectus to be registered with it (so that a public flotation then is lawfully possible), and taking account of Mrs. Knowles' affidavit and the above cited statutory powers, I hold that the Commission does not have to meet and solemnly go through the matters covered by a lengthy prospectus before allowing it to be registered with the Commission. The Commission can delegate this to its Executive Director. Thus, in his case FOHCL's, prospectus was validly registered via the procedure adopted.

The significance of s.30 of the 1999 Act

Finally, the applicants seek an order of mandamus requiring the Commission to establish and promulgate Rules consistent with its responsibilities under the Act so as to provide for all such matters as may be necessary or expedient for giving effect to such responsibilities according to law. This claim rests on s.30(1):

> **"In carrying out its responsibilities under this Act the Commission may make rules providing for such matters as may be necessary or expedient for giving effect to such responsibilities".**

In contrast by s.93:

> **"The Minister may, after consultation with the Commission, make regulations for carrying out the provisions of this Act".**

One needs to bear in mind that the Act came into force on 1 May 1999 and the Commission was approached by a letter of 7 May 1999 to review the proposed prospectus for public flotation of FOHCL. However, the Act was published on 19 February 1999 in an Extraordinary Official Gazette, the new Act, with its Commission, being designed to replace the Securities Board Act 1995, although by ss.3 and 95 of the new Act the Securities Board becomes the Securities Commission. This may help to explain the reference in the Commission's letter of 1 June 1999 (that registered the prospectus) "that the same complies with the requirements of the Securities Industry Act 1999 and the proposed Regulations".

However, well over a year has elapsed and there are no Regulations made by the Minister (after consultation with the Commission) nor any Rules made by the Commission. This is a little surprising when, for example, s 56(1)(b) refers to "a copy of any

contract required by regulations to be stated in the prospectus", s.56(1)(c) refers to "any report required by any regulations", s.56(5) refers to "financial statements, reports or other documents as are required by this Act or any rules or regulations made thereunder", while s.56(6)(a)(i) is concerned with failures to comply with "any of the requirements of this Act or any regulations or rules made thereunder". Section 94 also states:

> **"The Commission may publish guidelines of any regulations or rules made pursuant to this Act, or of any provisions of this Act, provided, however, that such guidelines shall not be taken as having the force of law".**

Thus, the legislature contemplated that, to help the Commission to carry out its wide-ranging functions under the Act (and, in particular, to facilitate the raising of capital by promoters, while protecting and giving confidence to investors via clear and accurate disclosure in prospectuses vetted by the Commission), there would be a need to fill out the provisions of the Act with regulations of the Minister and rules of the Commission, supplemented by guidelines not having the force of law. The basic scheme of the Act is similar to that found in other jurisdictions like New Zealand, as described by Richardson J. in Re AIC Merchant Finance [1990] 2 NZ LR 385 at pp 391-392.

Finally, aside from the Minister's regulations and the Commission's rules, the Commission has power "to establish and promulgate its own procedures" for appeals under s.31(2)(c) and for carrying out its functions under s.33.

Counsel for the applicants boldly submitted that the Commission was under a mandatory duty as a regulatory and investigatory body to exercise its power to make rules as a precondition for exercising its functions: this could lead the court to find that until exercise of such power the Commission had no jurisdiction unless in the courts discretion, in the events which had happened, this draconian retrospective view would not be appropriate and some lesser relief would be appropriate. Counsel for the Commission (supported by counsel for FOHCL) submitted that in the case of FOHCL's prospectus, in the first month of the Commission's existence, there was no need for making rules, section 56 providing plenty of clear guidance for all concerned, although the Executive Director and her two colleagues also bore in mind some internal guidelines, as indicated by the 1 June 1999 letter stating that the prospectus complied with the requirements of the Act "and the proposed Regulations".

While s.56(6) requires the Commission to refuse to register a prospectus "if it appears to" it that any of paragraphs (a) to (e) have been infringed, whether or not it so appears cannot be left to the whim of the Executive Director assisted by her two colleagues. They need to develop procedures and standards, as also in the case of regulatory investigatory processes under s.33. Indeed, counsel for

FOHCL alleged that there were internal procedures and standards which were known to the three or four specialists dealing with the Commission in respect of public flotations, so that there was no need for publishing these matters under the Commission's rule-making power. Counsel for the applicants pointed out, and I accept, that there is no admissible evidence in affidavits to support such allegation.

In my view, once the Commission has acquired experience (as must now be the case) in carrying out its responsibilities under the Act, so that internal procedures and standards have begun to crystallise into internal rules for observance within the Commission, then the Commission becomes, at the least, subject to an obligation to consider exercising its power to make rules publishing the internal practices that have developed or should have developed. Publication of such rules will make it plain that there is a level playing field for all persons interested in publicly floating their companies and, by revealing what thorough inquiries and investigations are made in the light of particularised documentary or other evidence, will encourage persons to invest in such companies so that the flotations will be a success.

A complicating factor is the relation between regulations, made by the Minister after consultation with the Commission, and rules made by the Commission. "Regulations" are contemplated by s 56(1)(b) and (c), while "regulations or rules" are contemplated by s.56(5) and (6)(a)(i), and the criminal sanctions in s.56(7) apply until there is a prospectus that complies "with all the requirements of this Act and the regulations", omitting "or rules" present in s.56(5) and

(6)(a)(i). This latter point (not adverted to by counsel) may indicate that it will be better to make regulations to supplement the prospectus provisions, while, perhaps, leaving it to the Commission to make rules in other areas, although the Commission clearly has power to make rules concerning prospectuses as indicated expressly by s.56(5) and (6)(a)(i).

In these circumstances, but for rejecting the application as out of time, I would have considered it appropriate (subject to any countervailing considerations that might appear on the jurisdictional point if argued by the Port Authority) only to require the Commission to consult the Minister, in the hope that he will make a decision on the extent to which public regulations should be made by him (inter alia to achieve a level playing field for promoters of companies and to encourage persons to invest with confidence in such companies) and, then, to consider itself making rules for areas considered inappropriate for such regulations, where it considers such rules as necessary or expedient for giving effect to its responsibilities under the Act, bearing in mind that the time elapsed since 1 May 1999 raises a presumption that it is likely that the time has come for making such rules.

Thus, I would reject counsel for the applicants' earlier mentioned submissions based on **R v Mitchell [1913] 1KB 561 at p. 570, Brant Dairy Co. v Milk Commission (1973) 30 DLR(3d) 559** and **Air Canada v City of Dorval (1985) 19 DLR (4th) 401.** As made clear by the Privy Council in **Wang v Commissioner of Inland Revenue [1994] 1 WLR 1286 at p. 1296** (after endorsing Lord

Hailsham's approach in **London & Clydesdale Estates Ltd. v Aberdeen D.C. [1980] 1 WLR 182 at p190)** and by McHugh, Gummow, Kirby and Hayne JJ in **Project Blue Sky Inc. v Australian Broadcasting Authority (1998) 194 CLR 355 at pp 390-391**, one has to consider what was the purpose of Parliament in enacting section 30(1), regard being had to the language of the specific provision, but in the context of the scope and object of the whole Act as already rehearsed. It will be seen that I have so considered section 30 in reaching my conclusions on an appropriate mandamus order if I had not dismissed the application as out of time and ordered the applicants to pay the costs of the Commission, FOHCL and the Port Authority.

Dated this 4th day of July, 2000.

David Hayton,
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