**COMMONWEALTH OF THE BAHAMAS**
**IN THE COURT OF APPEAL**
**SCCiv App No. 199 of 2014**

**BETWEEN**

**SECURITIES COMISSION OF THE BAHAMAS**

**Appellant**

**AND**

**ALLIANCE INVESTMENT MANAGEMENT LTD**

**Respondent**

**BEFORE:** **The Hon. Dame Anita Allen, P**
**The Hon. Mr. Justice Isaacs, JA**
**The Hon. Mr. Justice Jones, JA.**

**Appearances:** **Mr. Gawaine Ward, Counsel for the Appellant**
**Mr. Charles Mackay, Counsel for the Respondent 1632**

**Dates:** **8 June 2016; 14 July 2016; 21 September 2016;**
**18 October 2016; 31 October 2016; 14 December 2016**

*Civil Appeal – Securities Commission – Jurisdiction- Right to Hearing – Audi Alteram Partem - whether the Securities Commission of The Bahamas can lawfully issue an order without first giving the person so ordered, an opportunity to be heard – Securities Industry Act*

*In 2012 the respondent was ordered by the appellant, via letter, that as a result of inadequate responses to previously indicated breaches, the appellant was to cease taking on new business and give immediate attention to the deficiencies raised. After a further exchange of letters the respondent filed an application in the Supreme Court for an order of certiorari, to remove the orders into the Supreme Court due to its belief that the appellant exceeded its jurisdiction in issuing the same.*

*Held: appeal allowed, each party to bear its own costs*

*per Isaacs, JA*

*The appellant can issue an order to a person before holding a hearing; however, it must be satisfied that it is necessary and in the public interest to do so. Parliament expressly stated the order is to have a temporary effect; and is intended to protect the integrity and reputation of the securities industry. The power is engaged in circumstances where the appellant, as a prudent regulator charged with oversight of the industry, deems it*

*crucial to intervene quickly and nip in the bud, practices or actions which may be harmful to the country's financial sector, of which the securities industry is a part.*

*It is recognised that a party is entitled to be heard under the audi alteram partem rule but courts have long accepted that the rule may be relaxed provided certain preconditions exist or are reasonably suspected to exist. The issue of whether the belief held by the appellant for the issuance of an order was reasonably justified will be determined at the hearing required under section 133(6) of the Act.*

*The Judge misconceived the effect of section 133(3). In light of the preconditions and limitations imposed by section 133(3) of the Act, it was not Parliament's intent to deprive the respondent of its right to be heard; nor was the respondent deprived wholly of its right to be heard. Parliament made provision for an affected person to be heard via section 133(6) of the Act.*

*Pezim v British Columbia (Superintendent of Brokers) [1994] 2 R.C.S. 557 mentioned*

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**J U D G M E N T**

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**Judgment delivered by the Hon. Mr. Justice Isaacs, JA:**

1. The appellant appeals from those parts of the judgment of Senior Justice Stephen Isaacs rendered in judicial review application no. PUB/jrv/8 and public law application no. 2013/COM/com/00017 on the 17 June 2014, whereby the learned Judge found that the appellant exceeded its jurisdiction when it made certain orders pursuant to the Securities Industry Act 2011 ("the Act").

2. On 31 October 2016, having heard the submissions of Counsel, we reserved our decision. We render it now. For reasons which will become plain later in this judgment, the appeal is allowed.

**The Parties**

3. The appellant is the body responsible for the oversight of the securities industry in The Bahamas. Its functions are set out under section 12 of the Act; and include, inter alia:

> **"(a) advise the Minister on all matters relating to the capital markets and its participants; (b) maintain surveillance over the capital markets and**

**ensure orderly, fair and equitable dealings in securities; ...**

**(d) protect the integrity of the capital markets against any abuses arising from financial crime, market misconduct and other unfair and improper practices; ..."**

4. The respondent is a company which was incorporated on 21st July 1998 as a limited liability company. Alliance functions as a securities investment advisor, broker dealer and consultant for non-resident companies and individuals conducting business in The Bahamas; and is registered as a broker-dealer Class 1 with the Commission. Alliance is a wholly-owned subsidiary of Benchmark (Bahamas) Limited the parent company which is a publicly traded investment company. Mr. Julian Brown was President of the respondent.

**Background**

5. In late April, 2011, the respondent received a notice from the Commission for an inspection scheduled for two weeks following the said notice. In May 2011 the accounting firm, Pannell Kerr Foster (PKF), acting on behalf of the appellant, performed an on-site examination of the respondent. It seems that PKF was the respondent's external auditors. The results of this examination caused concern to the appellant relative to the segregation of accounts and to regulatory capital; and this concern was communicated to the respondent sometime in November 2011.

6. There was sustained correspondence between the appellant and the respondent in respect of the appellant's concerns, during the period November 2011 through April 2013. The appellant alleged noncompliance with the Act. The respondent maintained that there had been compliance because as the appellant was aware (it had downloaded all of the respondent's records), the respondent segregated the accounts so that each client had a separate account at its firm. Further, the respondent asserted that this position had been endorsed, approved and checked by the respondent's external accountants at each annual audit; and the accountants had given no notification to the appellant that the respondent has been found wanting.

7. By letter dated 30 November 2011, Mr. Julian Brown, writing on behalf of the respondent - and acknowledged on 19 December 2011 - advised the appellant that it had segregated the accounts on its books; and further asserted, that he

believed the appellant's calculation for regulatory capital was flawed. He rejected the deficiency amount provided by the appellant.

8. It seems that Mr. Brown made several attempts to arrange a meeting with the appellant but with no success. On 6 June 2012 the respondent wrote to the appellant and set out two separate positions indicating the difference in the amount calculated as regulatory capital. He sought clarification from the appellant on its position relative to segregated accounts and to regulatory capital. By letter dated 19 June 2012, the appellant replied reiterating its concerns relative to segregated accounts and to regulatory capital; and hinting at possible sanctions should the respondent fail to address them.

9. By letter dated 22 June 2012, Mr. Brown made another request for a meeting with the appellant to discuss the outstanding issues. Also on the 22nd, the appellant wrote to PKF in exercise of its authority under the Act to provide an assessment on the viability of the respondent to operate as a going concern. PKF submitted a "report" which was not unfavourable, but shortcomings in it failed to allay the appellant's concerns. The appellant thought that "insufficient and unreliable documentary evidence" had been provided. By letter dated 27 July 2012, the appellant laid out its continued concern with the respondent's deficiencies.

10. On 30 July 2012 the appellant wrote a letter to the respondent advising as follows:

> **"Dear Mr. Brown,**
>
> **Re: <u>Alliance Investment Management Ltd. – Compliance Concerns</u>**
>
> **The Securities Commission of The Bahamas ("the Commission") writes further to our letters of 31 May 2012 and 19 June 2012 and the concerns therein. The Commission has taken account of your responses in regard to concerns raised in the aforementioned letters and provides further comments as below.**
>
> **Regulatory Capital – Alliance was directed on two (2) occasions to submit to the Commission, its capital management plan to address the company's regulatory capital shortfall. Alliance**

**has not complied with the Commission's directives to comply with regulation 42 of the Securities Industry Regulations, 2012.**

**Segregation of Accounts – Alliance was directed to provide evidence to confirm that the assets of its clients had been segregated externally from that of the company's. The evidence subsequently submitted did not fulfill the requirements pursuant to Section 88 of the Securities Industry Act, 2011.**

**Having regard to the aforementioned failures, the Commission now directs Alliance to:**

1. **Cease taking on any new business; and**
2. **Give immediate attention to the abovementioned deficiencies within fifteen (15) days pursuant to Section 133(3) of the Securities Industry Act, 2011.**

**Kindly acknowledge receipt by signing and returning a copy of this letter."**

11. On 14 August 2012, the appellant wrote another letter to the respondent in terms similar to the letter dated 30 July 2012 except a penultimate paragraph was added. It read:

> **"Further, the Commission hereby notifies Alliance pursuant to section 133(6) of the Act that Alliance will have the opportunity to be heard on a date and at a time that will be communicated well in advance of the hearing date."**

12. Three days later the appellant wrote to the respondent reiterating its concerns. The letter mentioned a meeting that had taken place the day before, I.e., on 16 August 2012. This was followed by another letter dated 21 August 2012 from the appellant advising the respondent that Krys Global, a specialized corporate and recovery firm, was to conduct a "Regulatory Compliance Assessment" at the respondent's expense.

13. On 23 August 2012, the respondent provided to the appellant a Capital Management Plan to address the respondent's regulatory capital shortfall; and

certain financial statements to show clients' assets had been segregated externally from the respondent's.

14. By letter dated 18 September 2012, Mr. Brown wrote to Mrs. Tonya Bastian-Galanis, the Chairman of the Commission, to request her intervention in forestalling the appointment of Krys Global; and suggesting that the respondent's auditors be used instead. On 9 October 2012, the Chairman responded that the appointment of Krys Global had been deferred and the appellant would revert to the respondent about its auditors. However, the appellant's forbearance only lasted until 25 March 2013, when the appellant wrote advising the respondent that the Krys Global assessment of the respondent as a going concern would go forward.

15. On 11 April 2013, the appellant wrote another letter to the respondent in similar terms to the letters dated 30 July and 14 August 2012. In response to the appellant's letter, on 15 April 2013, the respondent filed an application in the Supreme Court for an order of certiorari pursuant to the provisions of the Supreme Court Act, to remove the purported orders into the Supreme Court due to its belief that the appellant exceeded its jurisdiction in issuing the two mentioned orders.

16. For their part, on 16 April 2013, the appellant commenced an action by an originating Summons seeking an order that Krys Global, as Auditor appointed by the appellant under section 45 of the Act, be granted unfettered access to the respondent's business premises and records for the purpose of determining the respondent's ability to continue as a going concern. The learned Judge subsequently ordered that the matter "**be continued as if this action had been commenced by writ of summons**".

17. In a decision dated 17 June 2014, the learned Judge concluded that the orders made by the appellant should be quashed. In the course of his decision, he identified the issues to be determined by him and said, inter alia, at paragraphs 18 through 21:

> **"18. The facts as laid out in the Affidavit evidence indicate that the Commission took a heavy handed approach and ignored the general rule of audi alteram partem. The Commission's approach was grounded in its interpretation of section 133(3) of the Act. As a matter of legal construction**

**s.133(3) is not couched in the language of an overriding provision by the use of such words as "notwithstanding the provisions of section 133(1)".**

**19. I am of the view that section 133 (3) cannot stand alone and be separated from section 133(1) without negating the requirement for a hearing in all but three of nineteen of the provisions of section 133(1). In other words it could not be the intention of Parliament to deprive Alliance wholly of its right to a hearing under section 133(1).**

**20. In the course of the interaction between the parties I can see no good reason why a hearing was not conducted. The Commission cannot operate as a law unto itself. I note that under section 133(1) there is no provision that speaks to the cessation of a registrant's business operations. 'Registrant" and "Registered firm" are both defined as "a person" registered under Part IV of the Act. It follows that imposing restrictions or conditions on a registration, or suspending or revoking same cannot arrest the business of Alliance. Further, the alteration of a registration as defined is certainly only to be ordered after a hearing as seen above.**

**21. In my judgment the Commission exceeded its jurisdiction when it made the orders of 11 April 2013 and accordingly these orders must be quashed, The Commission is obliged to conduct a hearing before such orders can be issued..."**

18. On 25 July 2014, the appellant gave notice of its intention to appeal the learned Judge's decision. At the request of the appellant, the learned Judge certified two matters as points of law of general public importance pursuant to section 21 of the Court of Appeal Act. The appellant holds the view that the judgment effectively prevents the appellant from acting in the public interest without a hearing, as authorized by section 133(3) of the Act.

19. During the hearing, the Court pointed out to Mr. Ward its difficulty with the certified question. He requested, and was granted, an adjournment to correct the apparent deficiency. On the adjourned date he presented an amended question which after some tweaking, he finally asked the Court to certify. The Court over the objection of Mr. Mackay, acceded to the certification of the question which reads:

> **"On a true construction of section 133(3) of the Securities Industry Act 2011, can the Securities Commission of The Bahamas (the Commission) lawfully issue an order it considers necessary and in the public interest, without first providing the person so ordered an opportunity to be heard?"**

**The Relevant Section**

20. Before answering the certified question and insofar as they are material to this appeal I set out the relevant portions of section 133 of the Act:

> **"(1) If the Commission considers it in the public interest to do so, the Commission may, upon a settlement with the person or after a hearing –**
>
> **(a) order a person to comply with-**
>
> **(i) securities laws or a Commission decision, or**
>
> **(ii) the regulatory instruments or a decision of a person registered under Part V;**
>
> **(b) order a person, a class of persons or all persons to cease trading a security, a class of securities or all securities;**
>
> **(c) order that any or all of the exemptions in securities laws do not apply to a person;**
>
> **(d) prohibit a person from –**
>
> **(i) acting as a partner, director or officer of another person;**
>
> **(ii) acting as a registrant, or representative of a registrant;**

(iii) acting as a party related to an investment fund;

(iv) acting as an auditor of a market participant;

(v) acting in a management or consultative capacity in connection with activities in the securities market; or

(vi) promoting the trading of a security or of securities generally;

(e) issue a censure or reprimand;

(f) impose conditions or restrictions on a registration, or suspend or revoke a registration;

(g) restrict the trading or advising activities of a registrant or a person exempt from registration;

(h) order a person to change a document;

(i) order a person to publish information or a document;

(j) order a person not to publish information or a document:

(k) order a person that is a market participant to make changes to its practices and procedures;

(l) appoint a person to advise a regulated person on the proper conduct of its affairs and to report to the Commission thereon;

(m) appoint a person to assume control of a regulated person's affairs who shall, subject to necessary modifications, have all the powers of a person appointed as a receiver or manager of a business appointed under the law governing bankruptcy or winding up;

(n) apply to the court for an order to take such action as it considers necessary to protect the interests of- (i) clients or creditors of a registrant; (ii) investors or creditors of an investment fund;

**or (iii) investment funds administered by an investment fund administrator or creditors of ail investment fund administrator;**

**(o) apply to the court for an order that the person be wound up by the court;**

**(p) order that a distribution of securities cease and that any subscriptior funds collected be repaid to subscribers;**

**(q) order the disgorgement of profits or other unjust enrichment plus a penalty not to exceed twice the amount of such profits or unjust enrichment;**

**(r) order restitution; or**

**(s) impose any other sanctions or remedies as the justice of the case may require.**

...

**(3) If the Commission considers it necessary and in the public interest to do so, the Commission may, without providing an opportunity to be heard, make an order under subsection (1), other than an order under subsection (1) (h), (i) or (j), that is effective for not more than 15 days.**

**(4) If the Commission considers it necessary and in the public interest to do so, the Commission may, without providing an opportunity to be heard, extend an order made under subsection (3) until the Commission makes a final decision after-**

**(a) a hearing under subsection (1) is held; or**

**(b) an opportunity to be heard under subsection (2) is provided.**

**(5) If the Commission makes an order under this section, the Commission must send the order to each person named in the order.**

**(6) If the Commission sends an order made under subsection (3) or (4), the Commission must send a notice of hearing, or a notice of opportunity to be heard, with the order."**

**The Authorities**

21. In **Pezim v British Columbia (Superintendent of Brokers)** [1994] 2 R.C.S. 557 the Superintendent of Brokers, the chief administrative officer of the British Columbia Securities Commission (the BC Commission), instituted proceedings against persons connected with two companies. The BC Commission concluded that there had been breaches of the Securities Act. On appeal to the Canadian Supreme Court, Locabucci, J, speaking on behalf of the Court observed at p. 589, letter d:

> **"The Securities Act is part of a much larger framework which regulates the securities industry throughout Canada primarily for the protection of the investor but also for capital market efficiency and ensuring public confidence in the system."**

22. He continued at pp. 592-3:

> **"As already mentioned, the primary goal of securities legislation is the protection of the investing public. The importance of that goal in assessing the decisions of securities commissions has been recognized by this Court in *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301 (*Brosseau*), where L'Heureux-Dubé J., writing for the Court, stated the following at p. 314:**
>
> **Securities Acts in general can be said to be aimed at regulating the market and protecting the general public. This role was recognized by this Court in *Gregory & Co. v. Quebec Securities Commission*, [1961] S.C.R. 584, where Fauteux J. observed at p. 588:**
>
> **The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good**

**repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business.**

**This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts."**

23. In the same vein that the BC Commission's function under the Securities Act is to ensure "public confidence in the system", the Commission under the Act is intended to do the same in The Bahamas.

**The Appeal**

24. I hold the view that the question is amenable to a qualified affirmative response, to wit, the appellant can issue an order to a person before holding a hearing; however, it must be satisfied that it is necessary and in the public interest to do so. Parliament expressly stated the order is to have a temporary effect; and is intended to protect the integrity and reputation of our securities industry. The power is engaged in circumstances where the appellant, as a prudent regulator charged with oversight of the industry, deems it crucial to intervene quickly and nip in the bud, practices or actions which may be harmful to the country's financial sector, of which the securities industry is a part. As one of the pillars of our economy, it is important that no effort be spared to ensure that those who engage in the business of handling investors' funds do so with probity and integrity; and are not allowed to tarnish the reputation of our financial industry.

25. It is recognised that a party is entitled to be heard under the audi alteram partem rule but courts have long accepted that the rule may be relaxed provided certain preconditions exist or are reasonably suspected to exist. Even the fundamental rights found in Articles 16 through 27 of the Constitution are subject to exceptions and qualifications. A ready example of such lawful interference with a constitutional right is the arrest and detention of an individual on suspicion of having committed a criminal offence. Despite the person's right to his liberty, he may be temporarily deprived of his liberty without a trial.

26. The issue of whether the suspicion of the authority detaining the individual, was well founded or not, will be ventilated during a hearing which should take place

so soon as is practicable after the individual has been reduced into custody. Similarly, the issue whether the belief held by the appellant for the issuance of an order was reasonably justified will be determined at the hearing required under section 133(6) of the Act.

27. The Judge's observation that "**s.133(3) is not couched in the language of an overriding provision by the use of such words as "notwithstanding the provisions of section 133(1)"** appears to suggest there is a conflict between the two sub-sections. I do not perceive any such conflict as both require that a hearing occur. The only differences between the two is: 1) a matter of timing, to wit, pursuant to section 133(1) the Commission acts after a hearing whereas pursuant to section 133(3) the Commission acts before a hearing; and 2) section 133(3) does not apply to orders under section 133(1)(h), (i) and (j).

28. It is my view that the Judge misconceived the effect of section 133(3) when he opined in paragraph 19 of his judgment: "**In other words it could not be the intention of Parliament to deprive Alliance wholly of its right to a hearing under section 133(1)"**. In light of the preconditions and limitations imposed by section 133(3) of the Act, it was not Parliament's intent to deprive the respondent of its right to be heard; nor was the respondent deprived wholly of its right to be heard. Parliament made provision for an affected person to be heard: section 133(6).

29. In the premises we answer the question certified: **"On a true construction of section 133(3) of the Securities Industry Act 2011, can the Securities Commission of The Bahamas (the Commission) lawfully issue an order it considers necessary and in the public interest, without first providing the person so ordered an opportunity to be heard?"** in the affirmative.

30. Although not necessary for the disposition of this appeal inasmuch as Mr. Ward accepted the order sent to the respondent was deficient, during the hearing I indicated to Mr. Ward that the notice of hearing mentioned in section 133(6) requires that a date, time and place must be set although it does not specifically say so; and communicated to the affected person with the order. To do otherwise would rob the provision of its adherence to the basic principle of the audi alteram partem rule.

31. Also during the hearing, I had formed the view there was no difference between a notice of hearing and a notice of an opportunity to be heard but there is. The former is **available under section 133(1) and (6); and the latter is available**

**under section 133(2)** to a person who may fall within the category of persons therein listed.

32. Section 133(4) illustrates the point made in the above paragraph:

> **"(4) If the Commission considers it necessary and in the public interest to do so, the Commission may, without providing an opportunity to be heard, extend an order made under subsection (3) until the Commission makes a final decision after-**
>
> **(a) a hearing under subsection (1) is held; or**
>
> **(b) an opportunity to be heard under subsection (2) is provided."**

33. In the premises the appeal is allowed with costs to be borne by each party because notwithstanding the appellant's appeal has been allowed and costs generally follow the event, the Judge's finding that the order bears the infirmity he identified has not been quashed or overturned. That portion of his decision remains unimpeached. Indeed, Mr. Ward has conceded that the order was deficient; this means that our decision will not make any difference to the ultimate resolution of the action in the court below as such, each party is to bear its own costs.

**The Honorable Mr. Justice Isaacs, JA**

34. I agree.

**The Honorable Dame Anita Allen, P**

35. I also agree.

**The Honourable Mr. Justice Jones, J.A.**