

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
PUBLIC LAW DIVISION

2019/PUB/jrv/00024

IN THE MATTER of an application by Mintbroker International Ltd. (formerly Swiss America Securities Ltd.) T/A Sure Trader for leave to apply for Judicial Review

AND THE MATTER of the application for Leave to apply for an Order of Certiorari

AND IN THE MATTER of Purported Orders dated the 18th September, 2019 made pursuant to Sections 133 (1) (b) and (f) and 133 (3) of the Securities Industry Act, 2011

AND IN THE MATTER of the decision dated the 20th September, 2019 of the Securities Commission of The Bahamas to appoint an auditor with costs payable by the Applicant pursuant to Section 45 of the Security Industry Act, 2011

AND IN THE MATTER of the Securities Industry Act 2011, as amended

AND IN THE MATTER of the Securities Industry (Disciplinary Proceedings) (Hearings and Settlements) Rules, 2017

B E T W E E N

MINTBROKER INTERNATIONAL LTD. (FORMERLY SWISS AMERICA SECURITIES LTD.) T/A SURE TRADER

Applicant

AND

THE SECURITIES COMMISSION OF THE BAHAMAS

Respondent

Appearances: Mr. Philip Davis QC and Ms. Glenda Roker – Applicant
with Creswell Sturup

Mr. John Delaney QC and Ms. Lena Bonamy – Respondent

Mr. Gwayne Ward – Securities Commission of The Bahamas

Hearing dates: 23rd September, 2019, 22nd October, 2019, 4th November, 2019, and
26th November, 2019

RULING

1. The Applicant by way of a Certificate of Urgency applied for...

leave pursuant to Section 18 and 19 of the Supreme Court Act Order, 53 Rule 3 of the rules of the Supreme Court,

Section 157 (1) of the Securities Industries (Amendment) Act 2019 and under the inherent jurisdiction of the Supreme Court that leave be granted to the Applicant to commence an application for Judicial Review against the Respondent with respect to the purported Suspension Order dated 18th September, 2019 made pursuant to sections 133 (1)(b) and (f) and 133(3) of the Securities Industries Act, 2011 and the amendments thereof and for an Injunction against the Applicant [Respondent] from making orders ultra vires of the powers under the Securities Industries Act, 2011 as amended [and] that the costs of this application be provided for.

2. Section 157A of the Securities Industry Act, as amended provides:

Judicial review of other Commission decisions

- (1) A person directly affected by a decision of the Commission other than a final decision or a decision stated not to be subject to appeal, may apply to the Supreme Court for judicial review of that decision in accordance with the Rules of the Supreme Court within thirty days after the making of the decision or the issuing of reasons for the decision whichever is the latter.**
- (2) Notwithstanding the fact that an application for judicial review is taken under this section, the decision under review takes effect immediately, but the Commission or the Supreme Court may grant a stay until disposition of the application.**

3. The Ex Parte Summons of 23rd September, 2019 was supported by the Affidavit of Guy Gentile also sworn on 23rd September, 2019. Also filed was the Notice of Application for Leave to apply for Judicial Review giving the details of the parties and the relief/s sought. Later, there was an affidavit of Edward Charles Cooper, the chief financial officer and compliance officer of the Applicant, filed 24th October, 2019 and which affidavit was not before the Court on the hearing for leave.
4. Relief was sought in respect of the decision of the Securities Commission made on 18th September, 2019 which affected the business and wellbeing of the subject company. More specifically, for an Order of Certiorari to remove to the Supreme Court for the purpose of a hearing to quash the decision\orders of the Commission dated 18th September, 2019 made pursuant to Sections 133 (1) (b) and (f) and 133 (3) of the said Act and prohibiting any and all consequential acts related thereto.
5. Leave was granted 23rd September, 2019 and the Order filed the same day.
6. The Respondent filed its first Summons on 24th September, 2019 seeking to set aside the Order of 23rd September, 2019 pursuant to Order 32 Rule 6 on the grounds that the Applicant failed to give full and frank disclosure. This was supported by the Affidavit of Christina Rolle filed on 24th September, 2019. Another such Summons was filed on 25th September, 2019. Two further Supplemental Affidavits of Christina Rolle were file on 15th and 31st October, 2019.

7. The Applicant filed its Notice of Motion on 1st October, 2019 and the matter came on for full hearing on 4th November, 2019.
8. This application is made pursuant to Order 53 of the Rules of the Supreme Court.

ORDER 53 JUDICIAL ORDER

1. (1) An application for —

(a) an order of mandamus, prohibition or certiorari; or

(b) an injunction under section 18 of the Act restraining a person from acting in any office in which he is not entitled to act, shall be made by way of an application for judicial review in accordance with the provisions of this Order.

(2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1) (b) may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to —

(a) the nature of the matters in respect of which relief may be granted by way of an order or mandamus, prohibition or certiorari

(b) the nature of the persons and bodies against whom relief may be granted by way of such an order; and

(c) all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

2. On an application for judicial review any relief mentioned in rule 1(1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter.

3. (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.

(2) An application for leave shall be made ex parte to a judge by filing in the Registry — (a) a notice in Form A in the Schedule to this Order containing a statement of

(i) the name and description of the Applicant;

(ii) the relief sought and the grounds upon which it is sought;

(iii) the name and address of the Applicant's counsel and attorney (if any); and (iv) the Applicant's address for service; and

(b) an affidavit which verifies the facts relied on. (3) The judge may determine the application without a hearing, unless a hearing is requested in the notice of application, and need not sit in open Court and in any case, the Registry shall serve a copy of the judge's order on the Applicant:

9. The leave having been granted, the Respondent's application was made pursuant to Order 32 Rule 6 Rules of the Supreme Court:

6. The Court may set aside an order made ex parte

9. The Applicant claims that the offending document was the Suspension letter of 18th September, 2019 in which the Securities Commission of The Bahamas effectively suspended the registration and operations of the Applicant Company and sought to make related disciplinary Orders against the company. At page two (2) of the said letter the Commission cited as its authority to act as being Sections 133(1) (b) and (f) and 133 (3) of the Securities Industry Act, 2011. The suspension was for a period

of five (5) days. Pursuant to the letter the Applicant was restricted in its activities, the letter noting five (5) specific activities.

11. The relevant sections of the Act noted therein are:

133. Orders in the public interest

(1) if the Commission considers it in the public interest to do so, the Commission may, upon a settlement with the person or after hearing

...(b) order a person, a class of persons or all persons to cease trading in security, a class of securities or all securities;

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

AND

(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 more than 15 days.

11. The Applicant contends that the Commission's decision was "arbitrary, oppressive and against the Applicant's wellbeing and business, and moreover, was ultra vires the Securities Industry Act, 2011. Further, by affidavit the Applicant's chief executive officer averred that the said orders made denied the Applicant a right to be heard especially at a time when it was in "active dialogue" with the Commission. He averred that no formal notice of a hearing nor was the Applicant given an opportunity to be heard.

12. In submitting that the ex parte Order ought to be set aside in its entirety the Respondent stated the following as its reasons:- *(i) the ex parte order was granted in circumstances in which the Applicant failed to make full and frank disclosure of all material facts and on such ground it ought rightly to be set aside; (ii) the Applicant failed to observe the proper practice in making a judicial review case (that ought to have included letter before claim, or other notice), which would have enabled the Respondent to respond with summary grounds against the application for leave; and (iii) in any event, on a balance of convenience, injunctive relief ought not to be granted to restrain the discharge of Respondent's supervisory remit over the Applicant and the carrying out of important inquiries and investigations into the applicant's affairs. Such a restraint is detrimental to the interests of clients of the applicant in the particular and the public interest in general.*

12. The Affidavits of Christina Rolle, although done in a series, set out fully the chronology of events leading up to the Commission's move to discipline the Applicant. The Applicant's affidavits (Gentil and Cooper) seem to be limited to the most immediate events leading up to and including the sanction.

13. The most immediate event that prompted the Commission to act was the meeting of 12th September, 2019 when in answer to the Commission's inquiries as to its trading activities Gentil advised that the Applicant was "trading in principle". The Commission was, at this point, convinced that the trading activities of the applicant had been compromised and that its clients and the general public were at risk. Hence the suspension order of 18th September, 2019.

14. The Applicant maintained that the Respondent failed to demonstrate to the Court the materiality of the non-disclosed facts as a sufficient reason for the invoking of the suspension order of 18th September, 2019. Despite the Applicant's claim that it was not afforded a hearing, a hearing date of 24th

September, 2019 was stipulated in the letter of 18th September, 2019. This surely was within the fifteen (15) day suspension limitation provided for in the Act. Of note also was the fact that the Applicant had failed to deliver up the documents requested by the Respondent for facilitating its investigations.

15. For the most part the Applicant asserted that the Respondent, although advising that it was investigating the Applicant, had in fact predetermined the case and had made unsupported conclusions as to its business affairs.

16. While the Applicant failed to give the Respondent notice of its intended application to the Court, it also failed to make full and frank disclosure as to the material facts of its case and to advise the Court of any inquiries made as to any additional relevant facts that might assist when considering its application for Judicial Review. The Applicant was obligated to fully inform the Court of ALL the circumstances surrounding its case. The ex parte order was at best a temporary order given based on the affidavit evidence and submissions from the Applicant. In failing to so advise the Court and obtaining the stay as it did, the Respondent was unable to carry out its regulatory functions and likewise impose any disciplinary sanctions. In this regard the Respondent was unable to properly minimize any risk to the Applicant's clients or to the general public.

17. It is common for a financial entity so aggrieved by a regulator to claim a breach of Natural Justice. Notwithstanding the full import of the Rule of Natural Justice, the Parliament of The Bahamas made provisions within the Securities Industry Act at Section 133 (3) for the immediate suspension without providing an opportunity to be heard, such suspension not to exceed fifteen (15) days. The Act specifically states that the section is to be invoked in the public interest

18. A Judicial Review is ultimately connected with rights. Any review must consider the proportionality and rationality of the issues before the Court when public bodies seem to conduct disciplinary proceedings. Such reviews are in

relation to the statutory authority and its attendant rules. Of great import also is the adherence to the Rule of Natural Justice. The Court must consider the substantive legality of and the decision rendered by a public body.

19. In Judicial Review applications the Court exercises a supervisory jurisdiction where it can exercise its discretion in the granting of permission for review once it is satisfied that the Applicant has met the threshold required. The case must be one in which it is clear that there is a point fit for further investigation in a substantive hearing with all such evidence as may be necessary on the facts and all such arguments. There must be arguable grounds for review and the Court has eliminated all that is frivolous and vexatious and any baseless claims.

20. The Court can also grant a stay thereby imposing a stay on the process under review and the decision which is being challenged and in so doing treat that stay as it were an interim injunction. The Court is mindful of the parameters set out in the case of **American Cyanamid v Ethicon Ltd. [1975] AC 396** and which fall for consideration in the instant case and for the exercise of the Court's discretion. To this end the Court has considered the affidavits of the parties hereto and, when put in the balance, it is difficult to concede that the Applicant has a serious issue to be tried and, if serious, that damages would not be an adequate remedy.

21. Per the Securities Industry Act 2011, together with all of its amendments, the Parliament of The Bahamas has delegated regulatory oversight of the securities and capital market industries to the Securities Commission of The Bahamas

22. The relevant sections of the Securities Commission Act 2011 have been considered, notably the functions of the Commission; powers for obtaining information; compliance and inspection; and orders in the public interest

[Sections 12,43,45 and 133 (3)]. The Securities Commission of The Bahamas invoked and exercised its relevant powers and by way of letter and action to suspend the trading operations of the Applicant

23. In **Securities Commission of The Bahamas v Alliance Investment Management Ltd. [SCCiv App No. 199 of 2014]** Isaacs, JA noted that the Securities Commission of The Bahamas can issue an Order as per Section 133 (3) and as such before holding a hearing; however, it must be satisfied that it is firstly, necessary, and secondly, that it is in the public interest to do so. Such orders are temporary in nature. He was certain to note that *“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”*

24. There is no doubt in interpreting the provisions of the Securities Industry Act, 2011 that it was Parliament’s clear and unambiguous intention to empower the Securities Commission to exercise its powers **before and after** a hearing as found in Section 133 (3) and 133 (1) of the Act.

25. The Respondent’s application pursuant to Order 32. Rule 6 of the Rules of the Supreme Court was made timeously and was heard before the hearing of the substantive matter for the judicial review. See **R v Derbyshire County Council, ex p Noble [1989 C.O.D 285]**

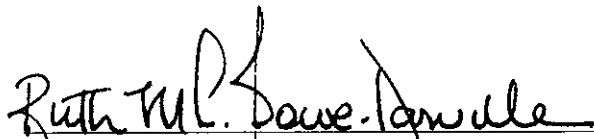
26. The Court finds that the Securities Commission of The Bahamas did not act ultra vires in the instant matter. The Commission did not act unreasonably or irrationally. Its actions met the tests of Greene, MR in **Associated Pictures Houses Ltd. V Wednesbury Corporation [1948] 1 KB 223** namely that the Respondent did not take into account any unnecessary or irrelevant factors; it did not fail to take into account factors that it should have when exercising its

powers; and that the decision was unreasonable such that a reasonable authority would not impose it.

27. The Commission did not act for an improper purpose. As deposed by the Commission's affiant there were several breaches pre- and post- inspections and examinations; other breaches had been repeated. The Commission, in its affidavits in support, disclosed these and many other acts of non-compliance by the Applicant. In all the Applicant did not make full and frank disclosure as is required under the Act and the attendant Rules.

28. The Court finds that the Securities Commission of The Bahamas acted within its statutory remit and that its actions were not arbitrary, irrational, oppressive or unreasonable.

29. The Ex Parte Order of 23rd September, 2019 is set aside with costs to the Respondent to be taxed if not agreed.



Ruth M. L. Bowe-Darville

Justice of the Supreme Court

Dated this 2nd November, 2020