COMMONWEALTH OF THE BAHAMAS *2013*

IN THE SUPREME COURT *PUB/con/00027*

Public Law Division

IN THE MATTER OF ARTICLE 20, 21, 23, AND 27 OF THE OF THE CONSTITUTION OF THE COMMONWEALTH OF THE BAHAMAS

AND IN THE MATTER OF THE PROVISIONS OF THE SECURITIES INDUSTRY ACT, 2011

AND IN THE MATTER OF THE PROVISIONS OF THE SECURITIES INDUSTRY REGULATIONS 2012

AND IN THE MATTER OF THE PROVISIONS OF THE EVIDENCE (PROCEEDINGS IN OTHER JURISDICTIONS) ACT, 2000

BETWEEN

GIBRALTAR GLOBAL SECURITIES INC.

Plaintiff

AND

THE SECURITIES COMMISSION OF THE BAHAMAS

Defendant

Before: The Hon. Mrs. Justice Deborah Fraser

Appearances: Mr. Neville Smith Q.C and Mr. Gawaine Ward for the Defendant

Mr. Gail Lockhart-Charles and Mr. Rhyan A. A. Elliott for the Plaintiff

Hearing Dates: 5th October 2015, 17th December 2015, 18th March 2016, 20th May 2016, 25th November 2016

FRASER, J:

1. This is an application by the Defendant filed on the 10th December 2014, to have the Plaintiff's Writ of Summons struck out pursuant to order 18 rule 19 (1) (a) or (b) or (d) of the rules of the Supreme Court. The Plaintiff's case be dismissed under the inherent jurisdiction of the Court on the grounds that there is no reasonable cause of action disclosed. The Plaintiff's case be dismissed for Want of Prosecution. The costs of and occasioned by this application be borne by the Plaintiff and such other relief as may be just.

2. A further summons was filed on April 23rd 2015, which added in the alternative that the Plaintiff give security for the costs of the Defendant under the Companies Act.

3. The Writ in this action was issued on the 16th September. 2013. The Plaintiff is a Bahamian Broker-Dealer domiciled in The Bahamas and registered with the Defendant since March 2005. The Defendant is the entity established under the Securities Industry Act of The Bahamas and is responsible for the regulation of securities exchanges and the securities industry.

4. A Statement of Claim was filed by the Plaintiff on November 26th 2013. The Plaintiff claimed against the Defendant for breaches outlined in the Statement of Claim, damages, to be assessed, interest, costs and such further and other relief as the Court may deem just. Those breaches claimed may be summarized as follows:

(a) When the Plaintiff applied to the Defendant for the voluntary surrender of its license under section 71 of the Securities Industry Act (SIA 2011) the Defendant failed and refused to respond to the application resulting in loss suffered by the Plaintiff in the sum of $17,000.00 in annual registration fees;

(b) The Defendant disclosed information obtained during an on-site inspection contrary to section 34 of the SIA 1999) and did not provide certain safeguards pursuant to section 36 (SIA 2011) as to confidentiality of information it disclosed to an overseas regulatory body and also failed to give the Plaintiff the purpose of the information resulting in the Plaintiff paying a fine of $300,000.00 and the cost of defraying legal action.

(c) The Plaintiff also claims the unauthorized disclosure by the Defendant was in breach of section 91 of SIA (as the law existed at the time) alternatively the disclosure was in breach of the Evidence Proceedings in Other Jurisdictions) Act, 2000.

5. On the 5th December 2013, an amended Statement of Claim was filed claiming a number of declarations by the Plaintiff for the breaches outlined in the Statement of Claim; they are as follows:

(1) An order to direct the Defendant to exercise its powers under section 71 of the Securities Industry Act, 2011 ("SIA");

(2) A Declaration that the Defendant by its failure to act pursuant to its powers under the said section 71 of the SIA is in violation of the said section;

(3) A Declaration that the ambit of the Defendant's statutory power or authority under section 71 of the SIA does not impose upon the Defendant a right to reject a voluntary surrender of registration by a registrant;

(4) A Declaration that the Defendant's refusal to accept, whether subject to terms or otherwise, the Plaintiff's voluntary surrender of registration is foul of the said section 71 of SIA, against administrative jurisprudence and the law generally as a regulator;

(5) A Declaration that section 71 of the SIA by reasonable implication mandates that the Defendant would act prudently in considering an application for voluntary surrender of registration and would not unreasonably withhold its approval (or otherwise);

(6) A Declaration that section 32 of SIA is foul of the Constitution and more particularly Articles 20, 21, 23 and 27 application for voluntary surrender of registration and would not unreasonably withhold its approval (or otherwise);

(7) A Declaration that section 32 of SIA is foul of the Constitution and more particularly, Articles 20, 21, 23 and 27;

(8) A Declaration that section 28 of SIA is void in as much as it seeks to prevent the Defendant from making reasonable disclosures to the Plaintiff (or a registrant) and is thereby foul of Articles 20, 21,23 and 27 of the Constitution;

(9) A Declaration that the provisions of section 42 and 43 of the SIA do not empower or authorize the Defendant to exercise any of its (statutory) investigative powers for the purpose of facilitating or promoting the requests from Foreign Regulatory Authorities;

(10) A Declaration that provisions of section 32 of the SIA is not operative to ground a jurisdiction in the Defendant to issue compliance orders for the purposes to facilitate any assistance that can (or should be) rendered under section 37 of the SIA, that is the jurisdiction under 32 can only be invoked by the Defendant in the context of its lawful legislative (constitutional) powers under the Act;

(11) A Declaration that the Defendant has a legal right, duty and obligation to disclose to the Plaintiff (or any registrant) the nature, scope, specifics and appropriate details of a request for information or documents emanating from a Foreign Regulatory Authority;

(12) A Declaration that section 28(1) of the SIA does not prevent, hinder or curtail the Defendant's legal duty and obligation to disclose to the Plaintiff (or any registrant) the nature, scope and specifics of a request from Foreign Regulatory Authorities, whereby the same does not constitute a criminal offence or a breach of securities law of The Bahamas;

(13) A Declaration that section 28(2) empowers the Defendant to disclose such details or information to the Plaintiff (or a registrant) as to be aware of the scope and nature of the request of Foreign Regulatory Authorities;

(14) A Declaration that the provisions of the SIA relative to the disclosure of information, pursuant to section 37 of the SIA and / or the provisions of section 50 and 53, are foul of Articles 20, 21, 23 and 27 of the Constitution;

(15) A Declaration that section 53 of the SIA is foul of the Constitution and amounts to a contravention of the rights set out in Articles 21, 23 and 27 of the Constitution;

(16) A Declaration that the relevant provisions of the SIA, namely sections 28, 37 and 53 (and otherwise) are foul of and should be read in conjunction and alongside the provisions and the legislative requirement set out in the Evidence (Proceedings in other Jurisdictions) Act, 2000;

(17) A Declaration that the purported powers under which the Defendant purports to act in its letters dated 25th March 2013, 29th April 2013 and 22nd August 2013, are foul of the law and the said Articles of the Constitution and thereby the Defendant has no lawful ground or basis to demand the disclosure of any such information and / or documents in the possession of the Plaintiff (or any registrant);

(18) A Declaration that the power and jurisdiction granted unto the Defendant under section 45 of the SIA could not be used for any ancillary purposes relating to a request from a Foreign Regulatory Authority whether pursuant to section 37 of the SIA or otherwise;

(19) An injunctive order to prevent and prohibit the Defendant, its servants or agents from seeking, demanding, ordering or seeking to compel the Defendant to disclose any of the information as requested in the Defendant's letters dated 25th March 2013, 29th April 2013 and 22nd August 2013, pending the hearing and determination of the matter or upon further orders;

(20) An order that by the disclosures of the Plaintiff on previous occasions to the Defendant pursuant to its purported statutory powers (under sections 36 and 37 of SIA or otherwise) the Defendant's actions arising from the said disclosure by the Plaintiff caused the Plaintiff to suffer loss and damages and to suffer loss of reputation and thereby the Defendant is liable to the Plaintiff;

(21) An order for damages to be assessed arising from the wrongful acts of the Defendant as aforesaid;

(22) Interests pursuant to the Civil Procedure (Award of Interest) Act, 1992 on such amount as found due and owing to the Plaintiff;

(23) Costs to the order of the Plaintiff;

(24) Such further and other relief as the Court may deem just.

6. The Defendant filed its defense on June 5th 2014, which was basically a full denial of the Plaintiff's claim or at any rate the Defendant says that the matter is statute barred by section 12 of the Limitation Act.

7. Subsequently, a notice of referral to case management conference under Order 31(a) of the Rules of the Supreme Court was filed by the Plaintiff on September 30th 2014, however that hearing has never occurred.

8. Counsel for the Plaintiff filed a Summons to Withdraw on June 10th 2015, and a Notice of Change of Attorney was filed on September 7th, 2015.

9. This Court heard the summons to Strike out the action of the Plaintiff and the application for Security for Costs commencing the 5th October 2015 with closing submissions given on the 25th November, 2016. I have considered the submissions and the evidence presented in this matter, including the oral evidence of the President and Director of the Plaintiff and determined that this matter should be dismissed as it is frivolous and vexatious and to allow it to continue would be an abuse of the Court's process. My reasons are set out hereunder.

10. Counsel for the Defendant's application to strike out is supported by the Affidavit of Christina Rolle filed 24 February 2015, the affidavits of Andrea Knowles filed on 23 July 2015, 21 August 2015 and the 3rd September, 2015. The affidavit of Andrea Knowles references certain court documents which would have been received by the Defendant and

which were filed and used in an action brought in the United States of America against the Plaintiff's company and its majority shareholder Warren A. Davis. This Court has taken judicial note of the same. In that action it appears the defendants in that case (Gibraltar Global Securities Inc.) (GGSI) and Warren Davis were required to produce all GGSI files located in The Bahamas concerning GGSI US customers. They have not complied with that request and have set forth the position to the Securities and Exchange Commission that they are not able to comply as they no longer have control over the documents as Gibraltar Global Securities, Inc and Warren Davis no longer had management and control of the company as it was under the control of a liquidator since August 29th, 2012.

11. In the affidavit of Christina Rolle the Executive of the Defendant she stated that the Plaintiff notified them by letter dated 31st January 2013 that it had voluntarily surrendered its registration on that date. Under section 71 of the Securities Act, 1999 (the Act) the Defendant may accept the voluntary surrender if it is not prejudicial to the public interest. Also, at the time the Defendant received the purported surrender they were in the process of providing assistance to an overseas authority in relation to the Plaintiff under section 37 of the Act which the Plaintiff had refused to supply to the Defendant. The Plaintiff proceeded to surrender the license and no opportunity had been given to the Defendant to consider the application.

12. Ms. Rolle further stated that the Plaintiff did not seek the necessary approval of the Defendant under section 73 of the Act prior to going into voluntary liquidation. It is the submission of the defence that the Plaintiff

then filed a Writ in September 2013 as a means of delay and to prevent discovery by the US Securities Commission in an action filed against the Plaintiff on March 1^{5th}, 2013. The affidavit further states that the Plaintiff has not sought to move the Court proceedings along and this is causing serious prejudice to the defendant as a regulator.

SUBMISSIONS

13. Counsel for the Defendant submits that this action should be struck on the following grounds-

(1) That the Plaintiff only brought this action against the Defendant in order to avoid production of documents in the United States District Court for the Southern District of New York where the Securities and Exchange Commission of the United States had sued the Plaintiff for a breach of the Securities law in the United States.

(2) That the Plaintiff is a limited liability company and does not have sufficient assets to pay the costs of the defendant should they be unsuccessful in this action and that under section 285 of the Companies Act gives the power to a judge to require surety to be given for such costs as may be recovered by a defendant against a limited liability company if it appears by credible evidence that there is reason to believe that if the defendant is successful in his defence the assets of the company may be insufficient to pay his costs. That according to the evidence of the President of the Plaintiff he confirmed that he was President and Director of the Plaintiff , the

Plaintiff was placed in liquidation and has no assets and is no longer in business.

(4) That according to the evidence of the President of the Plaintiff the Plaintiff went into voluntary liquidation on the 29th August 2012 so when it brought the action in 2013 reference should have been made to a liquidator and prior approval should have been obtained from the Defendant.

(5) That under section 212 of the Companies Winding up (Amendment) Act 2011 voluntary winding up the directors of the company were required to file notice of the winding up with the Registrar, file the liquidators consent to act and serve the notice of winding up on the Regulator; none of this was done. There was no evidence to show a liquidator was appointed and based on the evidence the action was commenced without the authority of a liquidator and the matter should not be in court and anything done or purported to be done is in contravention of subsection 232(1) of the Companies Winding up Act.

(6) The winding up is deemed to have commenced at the time of the passing of the resolution authorizing such winding up and if no resolution was passed the Plaintiff would have been misleading the United States Court as once a liquidator is appointed the directors of the Plaintiff cease and the liquidator is responsible for the management of the Plaintiff. That the submission of the President of the Plaintiff to amend the pleadings to rescind the winding up of the plaintiff and to

permit the same is an abuse of the process of the Court and the Defendant should not be made to continue to expend considerable government funds to defend against all the missteps of" an 'asset-less company".

(7) That once the writ was settled the attorney ought to have known that the Plaintiff was in voluntary liquidation and the Plaintiff was unable to give a retainer to commence this action and the matter ought to have been brought by the liquidator.

(8) That the Plaintiff mis-represented to the United States Court that it sought permission to surrender its license and return license fees under section 71 of the SIA and the Defendant refused.

(9) That there is no basis to grant the constitutional relief sought by the Plaintiff and the President of the Plaintiff in his affidavit and oral evidence has stated that it is his intention to remove all constitutional references including the claim for reimbursement of the specific fine levied against and paid by the Plaintiff to the British Columbia Securities Commission.

(10) The Defendant further submitted that they are not liable for the fine incurred by the Plaintiff in the United States and that the Limitation Act applies to any production of information produced in this case. It has been noted that information would have been forwarded to an overseas regulator by the Defendant on January 20th, 2011.

(11) Finally, it is submitted by counsel for the Defendant that due to all of the infractions by the Plaintiff in bringing this matter it should be dismissed as being void and of no effect.(**Dennis Dean v Arawak Homes Ld SCCivApp & Cais No. 123 of 2010)** and should the Court not strike out the action, the Defendant is seeking security for costs in the sum of $100,000. 00.

14. Counsel for the Plaintiff in opposition to the application to strike submits that the application by the Defendant is premature and the Court should not permit the Plaintiff to be driven from the judgment seat on a summary process.

15. The Plaintiff also submits that the Defendant has failed to produce any evidence which speaks to the scandalous, frivolous or vexatious nature of the Plaintiff's claim.

16. They further submit that there has been no prolonged delay in this matter and the matter should not be dismissed. (**Allen v. Sir Alfred McAlpine and Sons Ltd (1968) 1AllER .) (Ferguson v Commissioner of Police (1997) BHS J 127) (Grovit v. Doctor (1997) 1 WLR 640.** It is submitted by counsel for the Plaintiff that the Plaintiff is not guilty of any delay and the Defendant has not suffered any prejudice by the action of the Plaintiff.

17. According to the affidavits of Rhyan Elliot filed on 1st October 2015 and the affidavit of Warren Davis, the President and Director of the Plaintiff filed on December 14 2015, a resolution of the 29th August 2012, to commence the voluntary winding up of Gibraltar and the appointment of Mr. Philip Galanis as Liquidator, had been made.

18. The President and Director of the Plaintiff Company in his affidavit sworn on December 14th 2015 stated that he was unaware that it was required to obtain the Defendant's approval prior to going into voluntary liquidation until after the passage of the resolution.

19. That the disclosure of documents and information relating to the Plaintiff and its registrants to the British Columbia Securities Commission (BCSC) was made in bad faith and the Defendant failed to obtain all the relevant undertakings of Confidentiality as required under section 91 (6) of the SIA(1999). Evidence of emails by an employee of the Defendant have been produced by the Plaintiff to show the period of delay and reasons provided as to why the defendant had not complied with the request for information regarding the Plaintiff until January 20th 2011.

20. Counsel for the Plaintiff however submits that the Defendant cannot benefit from the protection of a limitation defence when its acts or omissions are carried out in bad faith; that is when its actions are from some motive other than an honest desire to execute its statutory duty that is justified by statute (**G <u>Scammel vNephew Ltd Hurley (1929) 1KB 419).</u>** Also, that the statutory powers should be exercised in good faith and for the purposes for which they were conferred. (**Halsbury Law of England (Volume20 (2014) 14)**.

21. Finally, counsel for the Plaintiff submits that the Evidence Proceedings in Other Jurisdictions

22. Act, 2000 Ch. 66 applies in this case. The Evidence Proceedings in Other Jurisdictions is an act to make provision for enabling the Supreme Court to assist in obtaining evidence requested for the purposes of civil proceedings in other jurisdictions.

23. In response to the issue of security of costs raised by the Defendant, the Plaintiff submits that this is a matter of public importance **(Midland Bank v Crossley-Cooke (1969) IR 56)** and the request by the Defendant for the payment of security for costs could stifle a legitimate claim. The case of **Moore and Others v Attorney General and others (No 2) (1929) IR 544** was cited by counsel for the Plaintiff as a case in which the court refused a security for costs application on the ground that the action concerned a point of law of public importance .

LAW

24. Order 18 rule 19 (1) (a) of the RSC provides that the Court:

"... ***may at any stage of the proceedings order to be struck out or amend any pleadings... on the grounds that –***

(1) (a) it discloses no reasonable cause of action or defence, as the case may be or;

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice embarrass or delay the fair trial of the action; or
(d) it is otherwise an abuse of the process...".

25. Acting Justice Moree in the case of **Dykton Mechanical Co. Ltd. v Paradise Blue Water Ltd. 2015** summarized the approach in an application under order 18 rule 19 of the rules of the Supreme Court at paragraphs 9 and 10 and he stated:

"9. It is well settled that the Court will only strike out an action under Order 18 Rule 19 in plain and obvious cases. The threshold test is deliberately and justifiably an onerous one as the applicant in such an application is seeking to summarily strike out the pleading or action without further enquiry. When making a strike out application the applicant is in effect contending that the pleading or action is so clearly and incontestably bad that it has no prospect of success and does not deserve a full hearing at a trial. In this instance, by filing the Strike out Summons, the Defendant is submitting that the Writ and Statement of Claim filed by the Plaintiff is unsustainable and unarguable in law…

10. The authorities establish that apart from an application to strike out on the ground that the pleading or action discloses no reasonable cause or action; the Court can consider evidence properly admitted through affidavits in an application under Order 18 rule 19. This was clearly stated in Lonrho plc v Fayed (no 2) [1991] 4 All ER 961 at 966. However, conflicting evidence is not to be resolved by the Court at the interlocutory stage when hearing such an application. Rather, for the narrow purpose of considering a strike out application, the Court should assume that the respondent (in this application the Plaintiff) would be able to prove its pleaded case on the evidence at the trial. The authorities also indicate that the Court is not to conduct a protracted and minute examination of the issues or to engage in a "mini trial "when dealing with an Order 18 rule 19 application – see Williams & Humbert Ltd. v. W. & H. Trademarks (Jersey) Ltd. [1986] AC 368. However, the mere appearance of complexity or the fact that the underlying legal principles are disputed by the parties should not prevent a Court from striking out a pleading or an action if it is satisfied that the law is clear and makes the pleading or action unsustainable.

25. In West Island Properties Limited v Sabre Investment Limited and others (2012) 3BH SJ. No. 57, our Court of Appeal provided guidance on such application. Allen P, who delivered the majority decision stated:

"In West Island Properties Limited v Sabre investment Limited and others – [2012] 3 BHS J. No. 57 The Bahamas Court of Appeal has

provided some guidance on the question of striking out actions under Order 18 rule 19 (1). Allen P., delivering the majority decision of the Court, stated:

15. In the case of __Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688,__ Lord Pearson determined that a cause of action was reasonable where it had some chance of success when considering the allegations contained in the pleadings alone. That is, beginning at page 695, he said the following:

"Over a long period of years it has been firmly established by many authorities that the power to strike out a Statement of Claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.

In my opinion, the traditional and hitherto accepted view-that the power should only be used in plain and obvious cases – is correct according to the intention of the rule for several reasons. First, there is in paragraph (1)(a) of the rule the expression "reasonable cause of action" to which Lindley M.R. called attention in Hubbuck & sons Ltd. v. Wilkinson, Heywood & Clark Ltd. [1899] 1 Q.B. 86, pp. 90 – 91. No exact paraphrase can be given, but I think "reasonable cause of action" means a cause of action with some prospect of success, when (as required by paragraph (2) of the rule) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the Statement of Claim should be struck out. In Nagle v Feilden [1966] 2 Q.B. 633 Danckwerts L.J. said at p. 648:

> *'the summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the Court.'*

Salmon L. J. said, at p. 651: 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable'. Secondly, subparagraph (a) in paragraph (1) of the rule takes some colour from its context in subparagraph (b) 'scandalous, frivolous or vexatious,' subparagraph (c) 'prejudice, embarrass or delay the fair trial or the action" and subparagraph (d) "otherwise an abuse of the process of the Court."

DISCUSSION AND ANALYSIS

26. Having regard to the aforementioned I will deal firstly with the alleged breach by the Defendant of section 91 of the Securities Industry Act 1999. The Plaintiff alleges that the Defendant in disclosing the information in 2011 under section 91 of the Act the Defendant failed to obtain the relevant undertakings of confidentiality from the overseas regulatory body. Further, that the information should have been obtained via a Court under the Evidence (Proceedings in other Jurisdictions) Act Ch. 66. Before I comment on section 91 of the Act I should state that the Evidence (Proceedings in other jurisdictions) Act is not applicable to the request which was made by a regulatory body in 2009. The Evidence (Proceedings in other Jurisdictions) Act applies only when information has been requested for civil proceedings before a court outside the jurisdiction.

27. I turn now to section 91 of the Securities Industry Act, 1999 which reads as follows:

"91 (1) Subject to subsections (2) and (3), the Commission or any officer, employee, agent or advisor of the commission who discloses any information relating to –

(a) the affairs of the Commission;

(b) any application made to the Commission;

that it or he has acquired in the course of its or his duties or in the exercise of the Commission's functions under this or any other law, is guilty of an offence and shall be liable on summary conviction to a fine not exceeding fifty thousand dollars or to imprisonment for a term not exceeding three years.

(2) Subsection (1) shall not apply to a disclosure-

(a) lawfully required or permitted by any Court of competent jurisdiction within The Bahamas;

(b) for the purpose of assisting the Commission to exercise any functions conferred on it by this Act, by any other Act or by regulations made there under;

(c) in respect of the affairs of a registrant or licensee or of a customer or client of a registrant or licensee, with the consent of the registrant or licensee, customer or client, as the case may be, which consent has been voluntarily given;

(d) where the information disclosed is or has been available to the public from any other source;

(e) where the information disclosed is in a manner that does not enable the identity of any registrant or licensee or of any customer or client of a registrant or licensee to which the information relates to be ascertained;

(f) to a person with a view to the institution of, or for the purpose of-

(i) criminal proceedings;

(ii) disciplinary proceedings, whether within or outside The Bahamas, relating to the exercise by a counsel and Attorney, auditor, accountant, value or actuary of his professional duties;

(g) in any legal proceedings in connection with –

(i) the winding-up or dissolution of a registrant or licensee; or

(ii) the appointment or duties of a receiver of a registrant or licensee.

(3) Subject to subsection (6), the Commission may disclose to an overseas regulatory authority information necessary to enable that authority to exercise regulatory functions including the conduct of civil or administrative investigations and proceedings to enforce laws, regulations and rules administered by that authority.(emphasis mine)

(4) In deciding whether or not to exercise its power under subsection (3), the Commission may take into account-

(a) whether the inquiries relate to the possible breach of a law or other requirement which has no close parallel in The Bahamas or involve the assertion of a jurisdiction not recognized by The Bahamas; and

(b) the seriousness of the matter to which the inquiries relate and the importance to the inquiries of the information sought in The Bahamas.

(5) The Commission may decline to exercise its power under subsection (3) unless the overseas regulatory authority undertakes to make such contribution towards the cost of the exercise as the Commission considers appropriate.

(6) Nothing in subsection (3) authorizes a disclosure by the Commission unless:-

(a) the Commission has satisfied itself that the intended recipient authority is subject to adequate legal restrictions on further disclosures which shall include the provision of an undertaking of confidentiality; or

(b) the Commission had been given an undertaking by the recipient authority not to disclose the information provided without the consent of the Commission; and

(c) the Commission is satisfied that the assistance requested by the overseas regulatory authority is required for the purpose of the overseas regulatory authority's functions including the conduct of civil or administrative investigations and rules administered by that authority; and

(d) the Commission is satisfied that information provided following the exercise of its power under subsection (3) will not be used in criminal proceedings against the person providing the information.

(7) Where in the opinion of the Commission it appears necessary in relation to any request for assistance received from an overseas regulatory authority to invoke the jurisdiction of a Stipendiary and Circuit Magistrate in obtaining information requested by the overseas regulatory authority,

the Commission shall immediately notify the Attorney-General with particulars of the request, and shall send him copies of all documents relating to the request, and the Attorney-General shall be entitled, in a manner analogous to amicus curiae, to appear or take part in any proceedings in The Bahamas, or in any appeal from such proceeding, arising directly or indirectly from any such request.'

28. Section 91 (1) of the Act makes it an offence for any officer, employee, agent or advisor of the Commission to disclose any information relating to the affairs of the Commission, the affairs of a registrant or licensee or the affairs of a customer or client of a registrant or licensee, acquired in the course of his duties or in the exercise of the Commission's functions. The exception to that is contained in subsection 2.

29. Subsections (3) and (8) of section 91 set out the circumstances in which the Commission may disclose confirmation to an overseas regulatory authority. **The Commission may disclose what information may be necessary for the overseas authority to exercise its regulatory functions. This includes the conduct of civil or administrative investigations and proceedings to enforce any laws, regulations and rules administered by that overseas regulatory authority. (emphasis added)**

30. Under subsection (6) of section 91 a disclosure by the Commission shall not be made unless the Commission has satisfied itself that:

(a) ***the intended recipient authority is subject to adequate legal restrictions on further disclosures which shall include the provisions of an undertaking of confidentiality, or***

(b) the Commission has been given an undertaking by the recipient authority not to disclose the information provided without the consent of the Commission; and

(c) the Commission is satisfied that the assistance requested by the overseas regulatory authority is required for the purpose of the overseas regulatory authority's functions including the conduct of civil or administrative investigations or proceedings to enforce laws, regulations and rules administered by that authority; and

(d) the Commission is satisfied that information provided following the exercise of its powers under subsection (3) will not be used in criminal proceedings against the person providing the information.'.

31. The Commission was therefore required to satisfy itself of these conditions prior to the release of the information, not at the same time the information is disclosed. It appears from the wording of the letter that the Commission sent the information to the overseas regulatory body at the same time it would have requested the undertaking of confidentiality under section 6.

33. Under the Act, the Plaintiff was obligated to produce the information to the Commission however the Plaintiff in this case refused to provide the information and claims that the Commission sent by them was obtained during an onsite inspection in 2010. The information was sent on January 20th 2011, some two (2) years after the request.

34. There does appear from the email communication attached to the affidavit of Rhyan Elliot to be some uncertainty on the part of the defendant and considerable delay in providing the information however it is noted from the correspondence that was finally issued by the Defendant that after obtaining the necessary legal advice they were satisfied that the disclosure could be made. When the Commission sent the information in January 2011, it was made clear in the correspondence that the information was only for the purposes of BCSC's regulatory functions including the conduct of

civil or administrative investigations or proceedings to enforce laws, regulations and rules administered by the BCSC.

35. Counsel for the Defendant however submits that the delay by the Plaintiff in not prosecuting the action makes it statute- barred and amounts to an abuse of the process of the Court as a claim which is clearly outside the relevant limitation period may be struck out on the grounds that it is frivolous and vexatious. The considerable delay by the Defendant in responding to its overseas counterpart could possibly damage the Defendant's reputation as a regulator but there is no evidence that the Defendant was acting in bad faith when the information was disclosed.

36. The proposed re-amended statement of claim is contained in the affidavit of Warren Davis, the President and Director of the Plaintiff and it proposes to include particulars of bad faith on behalf of the defendant. The proposed Re-Amended Statement of Claim has not been approved by this Court and cannot be relied upon by the Plaintiff.

37. In relation to the claim regarding section 91 of the Act it is considered settled law that a claim laid in the face of the Limitation Act, where no excuse is permissible is frivolous and vexatious. **(Ronex Properties Ltd v. John Laing Construction Ltd and others) 1982)3AllER961.** In this case the Defendant was acting in accordance with section 91 of the Act and there are no pleadings presently before this Court or any evidence produced by the Plaintiff to show that the Defendant did not have an honest belief that they were justified in disclosing the information to the British Columbia Securities Commission.

38. The information was sent by the Defendant in 2011 and the Plaintiff writ was filed in September 2013. The Plaintiff was aware of the request for information for two years prior to when it was sent by the Defendant.

39. This claim is clearly outside the Limitation period under section 12 of the Limitation Act. Section 12 of the Limitation Act, 1995 provides as follows-

"12. (1) Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any written law, duty or authority the provisions of subsection (2) shall have effect.
(2) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within 12 months next after the act, neglect or default complained of or in the case of a continuance of injury or damage within twelve months after the ceasing thereof."

40. In relation to the issue of the surrender, the Commission is not obligated to accept a surrender of registration under section 71 of the Act. Section 71 of the Securities Industries Act 2011 states:

"71. Surrender of registration-

16. ***The Commission may on application by a registrant, accept, subject to such terms and conditions as it may impose the voluntary surrender of the registration of the registrant if the Commission is satisfied that the surrender of the registration would not be prejudicial to the public's interest.***
17. ***On receiving an application under subsection (1), the Commission may, without providing an opportunity to be heard, suspend or impose any condition or restriction on the registration that the Commission deems appropriate."***

41. Regulation 64 of the Securities Industry Regulations 2012 states-

"(1) No registered firm shall cease to carry on securities business or go into voluntary liquidation without the prior approval of the Commission.

(2)A registrant may voluntarily surrender the registrant's registration by making application to the Commission and the surrender of the registration shall not take effect until the later if –

(a) 21 days after the notice has been received by the Commission;

(b) all conditions imposed by the Commission on the registrant have been complied with;

(3) Where a registered firm decides to cease to carry on any securities business, it shall ensure that any securities business that is outstanding is properly completed or is transferred to another firm registered to carry on that securities business."

42. The Defendant may accept a surrender if they are satisfied that it is in the interest of the public and this approval may be subject to any terms and conditions as the Defendant may impose. Further under the Interpretation and General Clauses Act Ch2.(the statute which aids in the interpretation of Acts of Parliament) states that where any written law confers power upon any person to issue, grant or give any approval, the person so empowered shall have a discretion either to issue, grant, give or refuse that approval.

43. The Defendant therefore in this case could have refused to accept the surrender of the Plaintiff's licence until such conditions have been satisfied. No application was made by the Plaintiff as prescribed by the Act and no opportunity was given to the defendant to consider the surrender in this case. The Defendant was clearly in breach of section 71 of the Act and regulation 64.

44. Similarly, in the case of section 73 of the Act the Defendant must approve a registered firm going into voluntary liquidation. In this case the

Plaintiff proceeded to appoint a liquidator in August 2012 as confirmed by the President of the Plaintiff. Failure to comply with section 73 of the Act carries a criminal penalty. No permission was obtained by the Defendant for the Plaintiff to go into voluntary liquidation. There is no evidence before this Court to show that in fact a liquidator has been appointed.

45. Four years have passed since the purported appointment of the Liquidator and it is very unlikely that such an irregularity can be cured after such period of time. Particularly in light of the evidence that the Plaintiff has already been found to be in violation of the Securities laws outside The Bahamas and has been fined $300,000.00. Further, if a liquidator had been appointed this matter should also have been properly commenced by such liquidator, a further defect by the Plaintiff. The President in his affidavit has pleaded that he was not aware of the statutory provisions for approval by the Defendant prior to going into voluntary liquidation. That is no defence as he cannot plead ignorance of the law.

46. According to the evidence of the Defendant, the Plaintiff is also in breach of the Companies Winding up Rules, 2011 which requires that the voluntary winding up be filed with the Registrar General so it becomes a matter of public record. The Plaintiff has also failed to do this.

47. On the issue of security for costs, the law is clear that where the company is a Plaintiff in any action and it is shown that the company does not have sufficient assets to pay the costs of the Defendant against whom it brought an action if it should lose the Court could order the Plaintiff's

company to secure an amount for costs of the Defendant and may stay the action until it does make the deposit.

48. Section 285 of the Companies Act Ch.308 reads:

> ***"Where a limited liability company is Plaintiff in any action, suit or other legal proceedings, a judge having jurisdiction in the matter may if it appears by any credible testimony that there is reason to believe that if the Defendant is successful in his defence, the assets of the company may be insufficient to pay his costs, require sufficient security to be given for such costs and may stay all proceedings until such security is given."***

49. Mr. Davis who is the major share holder of the Plaintiff's company in an affidavit in the U.S. action stated that the Plaintiff was placed into liquidation and a liquidator was appointed. He has also confirmed this in cross-examination before this Court and also in his affidavit in which he stated that the Plaintiff has no assets and is no longer in business. Mr. Davis also confirmed in his cross-examination that he was unable to pay the huge legal costs to defend the matter in the United States.

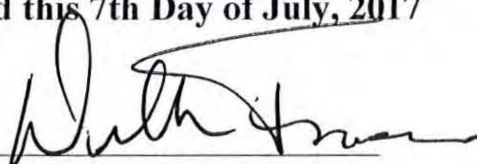
50. The Plaintiff is in breach of the Securities Industry Act and its regulations, and such breaches by the Plaintiff cannot now be cured by further amendments to its pleadings.

51. I hereby order that the Plaintiff's action be struck as it has no prospect of success. It is frivolous and vexatious and to allow it to continue would be an abuse of the Court's process.

52. In light of the above the application for security for costs falls away.

53. The Defendant is entitled to its reasonable costs in respect of two counsel to be taxed if not agreed.

Dated this 7th Day of July, 2017



Deborah Fraser
Justice