



[2020] JMSC Civ. 180

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2009 HCV 011975**

|                |                                      |                                |
|----------------|--------------------------------------|--------------------------------|
| <b>BETWEEN</b> | <b>WORLDWISE PARTNERS LIMITED</b>    | <b>1<sup>st</sup> CLAIMANT</b> |
| <b>AND</b>     | <b>NOEL STRACHAN</b>                 | <b>2<sup>nd</sup> CLAIMANT</b> |
| <b>AND</b>     | <b>FINANCIAL SERVICES COMMISSION</b> | <b>DEFENDANT</b>               |

**IN CHAMBERS (SUBMISSIONS)**

**Huntley Watson instructed by Watson and Watson**

**Miss Sandra Pratt, Administration Manager of Company**

**Mrs Aviary Stewart auditor of Company**

**Mr. Shawn Shelton watching proceedings for Representatives**

**Langston Robinson and Miss Carole Barnaby instructed by Director of State Proceedings**

**Miss Audrey Jacobs representative Financial Service Commission**

**Miss Pauline McKenzie representative Financial Service Commission**

**Heard: March 14, 15; May 30; June 1, 2, 3 and July 5, 6, 7 & 8, 2011 and August 27, 2020**

**Cease and Desist Order – Section 68(b), (IB) Securities Act, 1993 – Financial Service Commission Act, 2001, sections 2,3, 6, 8, - Nature of activity of Company taking money from investors – Section 2, Securities Act – meaning – Dealing in**

**security business – Fairness of Procedure by Financial Service Commission – natural Justice – Jurisdiction of Financial Service Commission - Right of Appeal – Sec. 68(C) or Sec. 74 of Securities Act.**

Daye, J.

### **Apology**

[1] I have the unenviable task of delivering a judgment some 9 years old. It is a statistic standing on its own which can be used and has been used adversely. The file and judge's bundle as well as the notes of evidence were in my possession and was put up, I thought, safely and I could not locate it for a couple of years. But thankfully it was not lost. I apologise profusely for this excessive delay and follow the lead of my senior and esteemed colleagues in the judiciary in so doing. (Panton, P., **Jamaica Observer Ltd. v. Chong** [2016] JMCA. Civ. 35, para [38], **Morrison J.A., as he then was, Jamaica Observer Ltd. v. Gladstone Wright** [2014] JMCA. Civ. 18, Sykes, J. (as he then was), **Joseph Matalon and Mayer Matalon v The Jamaica Observer Ltd.** [2014] JMCA, Civ. 127, para 100. Though none of these cases were in the category of excessive undue delay as the one at hand.

[2] The financial market like other markets in goods and services in a state is governed by the laws of demand and supply. There are several players in the financial market and this market is not homogenous. In addition, there are segments of the market that is specialised. The traditional theory is the market should be free to operate freely as the forces which govern it will permit it to attain its optimum and efficient level. (**Economic Analysis of Law, 5<sup>th</sup> ed., Richard A. Posner, Chap. 2: Antitrust laws and Economics, in a nutshell, 5<sup>th</sup> ed. (2004), pp.60 - 103 and Chap. 2 and 3, Earnest Gellhorn, William C. Kovacic, Stephen Calkins**) However, experience has shown this objective is not always attained and this can result in consequences inimical to the public good. A government therefore, has to intervene at times in the freedom of a market to regulate it for the public good. (**Richard Posner, Antitrust Law 16'17 (2<sup>nd</sup> ed. 2001); Richard Posner, The Social Cost of Monopoly and Regulation, 83 J. Pol. Econ. 807 (1975). Robert**

**Bork, The Antitrust Paradox 27(1978)., F.J. Stimson, "Trust" 1 Harv. L. Rev. 1329 (1087).**

## **Jurisdiction**

[3] In 1993 Parliament enacted the **Securities Act (SA)** and under it a regulatory body the **Security Commission (SC)** was established. (Sec. 4 duties of Commission). Also, in 2001 **The Financial Services Commission Act (FSCA)** was enacted and another regulatory body, the Financial Service Commission was established (Sec.3 and 6(1)(a) duties to supervise and regulate prescribed financial institutions). An issue of jurisdiction is raised by WWPL in that they claim the latter commission purportedly exercised some duties and powers relative to securities which they do not have as those duties are solely in the province of the Securities Commission. Consequently, they contend the CEASE and DESIST ORDER issued to them by FSC had no effect in law. In **Jamaica Stock Exchange v. Fair Trading Commission, SCCA No. 92/97, del. Jan, 28, 2001** the Court of Appeal considered the principle that where two statutes deal with the same subject matter and there is a conflict the later statute or legislation repeal the former to the extent of the inconsistency, that is, implied repeal. (per Panton, JA. at p. 70). The Court of Appeal, having examined the **Fair Trading Act** and the **Securities Act**, and the Memorandum of Association of the Jamaica Stock Exchange, The Fair Trading Commission did not have jurisdiction over that body as they did not abuse any dominant position in the security market or adopted any uncompetitive practice. But they were engaged in the security market for profit and fell under the powers of the Securities Act.

[4] Counsel Mr. Langston Robinson for the FSCA submitted that any apparent inconsistency between the SA and the **FSCA** in question was expressly settled as Parliament transferred the powers of the Securities Commission to the Financial Service Commission. Counsel is correct. By virtue of an amendment in 2001 to Sec. 2 of the SA (**Act 8 of 2001**) Parliament provided "Commission" in that Act means the Financial Services Commission established under section 3 of the

Financial Services Commission Act. (Act 9 of 2001). Thus, the FSC does have powers and duties relative to the SA. The jurisdiction of the Financial Service Commission to issue a Cease and Desist Order was challenged on another ground that it had no power to take any action relating to securities. This is a question of law that the court has to determine.

[5] Worldwise Partners Ltd. (WWPL) and its principal, Noel Strachan raised this issue, among others, in the Fixed Date Claim Form they filed on the 14th April, 2009. They claim the following orders:

1. For relief under Section 74 of the Securities Act,
2. Damages and Aggravated Damages,
3. Liberty to apply.
4. Declaration that Cease and Desist Order is null and void.

(in Submissions).

[6] They filed or relied on ten (10) grounds of appeal in support of their claim. This Fixed Date Claim Form is in effect an appeal against the Cease and Desist Order of the Financial Services Commission, dated 5th. August, 2008 and issued to Worldwise Partners Ltd. The Company filed a Notice to Appeal to a Judge in Chambers which is provided for in section 68 (1C) of the Securities Act as also section 74. The same grounds of appeal are those of the Fixed Date Claim Form. Although it may appear from the nature of the claim that the appellant may be invoking the original jurisdiction of the court or even the judicial review jurisdiction of the court. Counsel for the appellant submitted as this was an appeal there should be a rehearing of the evidence or as he posited the absence of evidence. In other words, this should be a **de novo** hearing.

## Grounds of Appeal

“1. The Commission acted in breach of the principles of natural justice in that it took a decision which has prejudiced the Appellants’ rights to associate with fellow citizens in pursuit of a regularly organized and legitimate activity, in the absence of the Appellants and without first giving to the Appellants and opportunity to be fairly heard in defence of their rights of association and/or property.

2. The Commission erred in determining that the activities of the Appellants, their agents, brokers or other persons acting on their behalf of way of advertisements and e-mails did induce or attempt to induce persons in Jamaica to enter into agreements with respect to accounts managed by them.

3. The Commission erred in that it purported to act on the basis of a finding that the Appellants their agents, brokers, representatives or other persons acting on their behalf are required for the purpose of carrying on their legitimate operations to hold a licence or licenses to deal in securities in Jamaica and or that they are required to be registered by the Commission to carry on their legitimate operations by virtue of the provisions of the Securities Act.

4. The Commission acted outside its lawful powers and remit, in that the Appellants are not “Prescribed Financial Institutions” within the meaning of the Financial Services Commission Act nor do they offer financial services in Securities as defined under the said Act.

5. The nature of the operation of Worldwise Partners Limited is such that the Cease and Desist order placed the assets of the several partners comprising the several partnerships at considerable risk of depreciation. This ought to have been manifest to the Commission which ought to have recognized that the nature of the international currency markets in which the 1<sup>st</sup> Appellant with express authority participated on behalf of its partners is such that a position taken in any single currency must be capable of being reversed at any time and that this process would be hindered by an order for the Appellants to cease and desist its operations which were as a conduit between the several partners and currency traders overseas with whom they being members of the said partnerships engaged.

6. Furthermore, the Commission has acted in contravention of its remit in exposing funds belonging to third party partnerships to significant depreciation in circumstances where they would or ought to have known or recognized that the partnerships needed unimpeded access to the overseas traders with whom they contracted so that they would be able to trade amongst currencies in order to preserve the value of these funds.

7. *The Commission has erred in that the particulars of the breaches of the Securities Act complained of against the Appellants and which it avers to have established are vague and as alleged are incapable of informing the Appellants of the precise one or more of their activities which would require licensing under the Securities Act.*

8. *The Commission has erred in that it failed to proceed in accordance with Section 8 of the Financial Services Commission Act or with the Third Schedule of the said Act by which (inter alia) notice should be given containing a statement of the facts constituting any alleged contravention of any relevant Act.*

9. *The Commission has acted arbitrarily and unreasonably in the process of investigating and adjudication over the activities of the Appellants as well as in regard to the sanctions that have been allied.*

10. *Furthermore, in assuming capacity to proceed as it has against the Appellants, the Commission has manifestly and without lawful authority knowingly and/or without regard for proper and established legal procedure overreached the ambit of its jurisdiction, as has been specifically conferred under provisions of the Financial Services Commission Act under which it was established, and to the extent of such overreach its conduct is to be deemed ultra vires and thereafter followed by appropriate sanctions to include a declaration that the steps that have been taken as well as sanctions that have been imposed by the Commission in these circumstances are null and void and would from the beginning have been of no legal effect against the Appellants.*

11. *Such other grounds as may be deemed to be fit and proper and expedient.”*

## **Jurisdiction of Court**

[7] Another aspect of jurisdiction was canvassed by Counsel for the FSC. He submitted the time for filing an appeal under the Act expired. Also, he contends the time for filing the Fixed Date Claim Form expired and no extension was granted. Therefore, there was no claim properly before the court. Counsel did not pursue this submission. He elected to treat with the substantive grounds of appeal.

## **Cease and Desist Order (CDO)**

[8] The terms of this order are:

*Worldwise Partners Limited/Noel Strachan, their servants or agents/brokers and representatives (including principals, directors, officers. and employees) or other persons acting on their behalf immediately **CEASE and DESIST** –*

- a) from carrying on securities business within the meaning of the Securities Act save as herein permitted;*
- b) from issuing securities in contravention of Section 26(1) of the Securities Act; and*
- c) from carrying out functions as a dealer's representative in contravention of Section 10(1) of the Securities Act.*

*unless and until the relevant licence and registration are acquired.*

**[9]** The reasons for this order was recited therein:

*“Whereas, having concluded its investigations, the FSC is satisfied that in the circumstances, a cease and desist order should be made for the following reasons –*

- a) **World Wise Partners Limited/Noel Strachan**, their agents, brokers, representatives or other persons acting on their behalf, by way of advertisements and e-mails and by other means did induce or attempt to induce persons in Jamaica to enter into agreements with respect to accounts managed by World Wise Partners Limited and Noel Strachan, the purpose or purported purpose of which was to secure a profit or gain to the persons who enter into the agreements for investment purpose.*
- b) In so far as **World Wise Partners Limited/Noel Strachan**, their agents, brokers, representatives or other persons acting on their behalf are not the holders of licenses to deal in securities in Jamaica, and are not registered by the FSC to issue securities to the public, they are operating in breach of the provision of the Act.”*

### **Further Submissions of Appellant on Jurisdiction**

**[10]** Counsel Mr. Huntley Watson, of blessed memory, raised different aspect of jurisdiction in his grounds of appeal. I will not deal with each ground seriatim. In para [4] and [5] I examined and ruled on one aspect of jurisdiction. Grounds 2, 3, 4,7 and 10 deal also with jurisdiction and I will consider Counsel for the Appellant submission and Counsel for the Commission response to this submission.

[11] One of Mr. Watson's submission, which he repeatedly and vigorously emphasised, is that WWPL was not dealing in security business and there was no evidence to support and form the basis of an order under the Securities Act that it was engaged in dealing in securities. In an exchange between bench and bar I asked Counsel what is his position of the relationship between the FSCA and the SA. He responded that the nexus between the FSC Act and the Securities Act is found in the definition section of the FSCA, Section 2(b)(i). The relevant portion reads:

*"financial services" means services provided or offered in connection with -*

*(a) Insurance;*

*(b) The acquisition and disposal of -*

*(1) Securities within the meaning of the Securities Act,*

*(11) units under a registered unit trust scheme*

*(c) such other services as the Minister by order declare to be financial services."*

### **Nature of business of existing WWPL**

[12] Counsel argued WWPL was not engaged in acquiring or disposing of securities to attract the statutory duties of FSC. In particular, he argued Exhibit 2(h) which were copies of cheques paid to WWPL as a partner who collect money and issue receipts for onward transmission to overseas traders. He says the cheques or receipts are innocuous documents that do not prove dealing in securities. He elaborated in his submission that WWPL was acting as a liaison between traders. It facilitated the trading of partnerships and by doing foreign exchange trading on a global market. Its function was to provide administrative liaison between the traders. This service did not involve, he said. any reliance on their profit making skill. If there was any reliance it was on the profit making skill of the trader. This was not any business, he contends, of trading in securities. It was not either acquiring or disposing of securities. Counsel may have been understating or over simplified WWPL activities. (see para 15).



- [13] Turning to the functions of the FSC under the FSCA Counsel submitted it had power to supervise and regulate prescribed financial institution and he does not deny that this function is for the purpose of protecting consumers of financial services. (sec. (6)(1)(a) FSCA). In the FSCA “prescribed financial institution” means an institution or person offering or providing service to the public. He submitted that WWPL was providing a customer liaison service to private members of a partnership and this was not the same as providing financial services. Then “financial services “means offering services in relation to securities under the SA. On Counsel’s description of the nature of WWPL operation that it was not offering any service to the public and the service it was offering was not financial, he argued. WWPL was not a prescribed financial institution and the FSC had no power to issue any Cease and Desist Order to it. He added there was no jurisdiction under the FSCA or the SA to issue any order or interfere with the business operation of the WWPL.
- [14] Counsel Mr. Langston Robinson responded that the FSCA is not relevant to the instant Cease and Desist Order. He submitted under the FSCA the FSC was wearing two hats: one for the FSCA and one for the SA.
- [15] A similar argument was rejected in the appeal against a Cease and Desist Order by Norma McIntosh J. (as she then was), in **Olint Corp. Ltd. and David Smith v. The Financial Services Commissions**, Appeal No. HCV 2006/ 01365 and **Neil Lewis and Janice Lewis (trading as LEWFAM Investment) v. The Financial Services Commission**. Appeal No. HCV 2006/ 91357, del. December 24,2007. The reason of the court was “The Commission has acted pursuant to the provision of the SA and not the FSCA and it was not necessary for the court to determine whether or not the Appellants are prescribed financial institutions as defined in the FSCA. This reason was upheld on appeal by the Court of Appeal in **Olint Corp. Ltd. and David Smith v. Financial Services Commission**, SCCA NO.6/2008, del. December 13, 2010 (per Harrison, J.A. at para [48] and [49]. The ground of appeals on jurisdiction based on this line of argument cannot stand.

## **Admissibility of Evidence**

[16] Counsel for the Appellant challenged the admissibility of the documentary evidence, Exhibit 2(a) to (J). in the affidavit of Mr. George Roper, Executive Director of FSC. But in the face of objection of Counsel Mr Langston Robinson that no challenge was made to this evidence at any pre-trial hearing he retreated on this submission. What the provision of sec 2(b)(i) of the FSCA shows is that it incorporates the provisions of the meaning of securities under the SA by reference.

## **Sufficiency of Evidence**

[17] In the alternative to the submission that the evidence the FSC relied on was inadmissible or in other words it had no evidence to rely on Counsel submitted that all of the exhibits in 2 did not prove or support any reasonable findings that WWPL was dealing in securities.

[18] The exhibits number 2 consist substantially of documentary evidence. A good portion of these were posted on the internet by a website purportedly operated by WWPL and its principal, the 2<sup>nd</sup> appellant Noel Strachan. Some of these were addressed to the public at large and others to individuals who responded to the general website information. (website- <http://worldpartner.com>). This website was closed down at the time of trial. There was no pleading or challenge at the hearing that either WWPL or its principal owned and or operated this website. What Counsel complained about is the authenticity of the documents flowing from it because it is not known who the maker of the documents was and the content of these could be altered. One feature of some of the documents is that they were unsigned and in blank. For example, Exhibit 2(E), The Partnership Application Form of WWPL soliciting partnerships. But no fact was put in issue about WWPL responsibility for the website. In these circumstances these exhibits were available to the FSC in their investigation and they are now admissible evidence for the court.

**[19]** In relation to the documents the FSC relied on in the affidavit of Mr. George Roper, Counsel say they are innocuous and not probative. Counsel treated these exhibits separately and independently of the whole evidence. The court consider these exhibits individually but also cumulatively.

**[20]** On examination of exhibit 2(E) I agree with Counsel for the FSC that there are clauses that point to a profit sharing joint or common enterprise as also an investment contract. That the enterprise is one involving securities and dealing in securities and fell within the regulatory supervision of the FSC. The Clauses are:

(a) Profit collection

(b) Roll Over/ Reinvestment

(c) Principal Investment

(d) Terms of Use and Agreement. It refers to the conditions. One of the conditions was the WWPL can at its sole discretion change the conditions. It means the promoter or principal partner has sole responsibility for the workings of the contract.

(e) Management of Partnership business. This shows that WWPL had total control how the partnership was managed. So the partners were solely dependent on the efforts Mr. Strachan and WWPL for making profit.

(f) The Risk. This disclose that the capital placed with the body was to make profit.

(g) Partnership Agreement. This disclose that the investment was a common enterprise.

**[21]** This clause must be considered with exhibit 2(C) which is the Frequently Asked Questions (FAQ) posted on the WWPL website where an answer was given that a person could double their principal in six months.

[22] Exhibit 2(D) is also a website posting by WWPL and specifically Mr, Strachan representation that he had the skill and expertise to offer partners so that they can obtain returns on their capital. Another website communication is exhibit 7 which introduce a team of professionals working with WWPL' Their experience and expertise were presented as competent personnel who could serve the partnership business. This shows the management service input in the partnership and the control over the venture.

[23] When one put these exhibits together, there was evidence before the FSC in its investigation which could reasonably cause them to be satisfied that WWPL was issuing and dealing in securities without a licence and registration to do so. The documentary disclosed WWPL:

- (a) Made offer and inducement to the public.
- (b) To enter in to a profit sharing agreement
- (c) To invest capital or united states dollars.
- (d) To obtain interest income or return or profit,
- (e) They would use their skill to trade in the foreign currency market
- (f) The investor was dependent on them to secure the profit,
- (g) There was a common enterprise between the investor and WWPL

These activities encompass three of the meaning of securities and dealing in securities:

1. Participating in a profit sharing agreement.
2. Investment contract.
3. Managing investment in securities. **(Australian Securities Commission v. McNamara, (2005) FCA 1005)**

4. Certificate of interest. I refer to Defendant written submission (p.14 and submission in notes of evidence, p.123-124). Counsel Mr. Langston Robinson submitted the receipts and statement to the individual investor by the website indicate the receipts were Certificate of participation in a profit sharing agreement. He finds support in the Judgment of McIntosh, J. in **Olint**. This is a different interpretation of Certificate of Interest as it joins certificate of interest with Certificate of Participating in a profit sharing agreement. In my view the these two are separate.

**[24]** I refer to Defendant written submission (p.14 and submission in notes of evidence, p.123-124). Counsel Mr. Langston Robinson submitted the receipts and statement to the individual investor by the website indicate the receipts were Certificate of participation in a profit sharing agreement. He finds support in the Judgment of McIntosh, J. in **Olint**. This is a different interpretation of Certificate of Interest as it joins certificate of interest with Certificate of Participating in a profit sharing agreement. In my view the these two are separate.

**[25]** In my view a receipt of payment by itself is not a Certificate of interest. However, the receipts "Worldwise Partner Receipt" along with website statement to individual investor and supporting USD cheques amount to a Certificate of interest. Exhibit 2 (h) are examples of these documents. This is another piece of evidence of which satisfy the definition of "securities" and this was available to the FSC in their investigation before they issued the CDO.

### **Meaning - Securities**

**[26]** This leads to an examination of what is the meaning of securities and dealing in securities and security business under the Securities Act. This is where Mr. Langston Robinson takes up his submission in response that the FSC had no jurisdiction. Counsel referred to section 2, the interpretation provision of the Securities Act the relevant meanings are:

***“2 (1) provides as follows:***

***“securities business” means a business of dealing in securities.***

***“securities” means***

- (a) Debentures, stocks or bonds issued or proposed to be issued by a government;***
- (b) Debentures, stocks, shares, bonds or promissory notes issued or proposed to be issued by a company or unincorporated body;***
- (c) Documents or writings commonly known as securities or as the Minister may prescribe from time to time by order;***
- (d) Rights or options in respect of securities;***
- (e) Certificates of interest or participation in any profit sharing agreement;***
- (f) Collateral trust certificates, preorganization certificates, or subscriptions, transferable shares, investment contracts, voting trust certificates or certificates or deposit for securities.***

***“deal”, in relation to securities, means acquire, dispose of, subscribe for or underwrite the securities, or make or offer to make, or induce or attempt to induce a person to make or offer to make, an agreement.***

- (a) for or with respect to acquire, disposing of, subscribing for a underwriting the securities;***
- (b) the purpose or purported purpose of which is to secure a profit or gain to a person who acquires, disposes of, subscribes for or underwrites the securities or to any of the parties to the agreement in relation to the securities;***
- (c) for or with respect to managing investments in securities;***

***“dealer” means a person who carries on the business of dealing in securities whether as principal or agent;***

***“dealer’s representative” means a person employed by, acting for or by arrangement with, a dealer, who performs for that dealer, any of the dealer’s functions (other than work ordinarily performed by accountants, clerks or cashiers) whether paid by way of salary, wages, commission or otherwise;***

***“ Commission” means the Financial Services Commission established under section 3 of the Financial Services Commission Act.***

***Section 68 – Provides for the issuing of a cease and desist order.***

***Section 74 – Provides for an appeal from any decision, refusal or ruling made by the Commission either under the Act or any regulations made under the Act.”***

## **Investment contract**

**[27]** As sec. 2(1)(f) of the SA defines “security” to include investment contracts but there was no definition of investment contracts in the SA itself the court had to consider its meaning. Again in the Court of Appeal decision **Olint** (supra) it upheld the learned judge’s decision in that case that the majority US Supreme Court decision, **Securities and Exchange Commission v. Howey Co.**, 328 U.S. 293 (1946) on the meaning of investment contract was applicable as 1933 US Securities Act include investment contract as one of the meanings of securities similar to the SA. Harrison, J.A. accepted the **(Howie)** test formulated by Murphy, J. to determine whether an instrument qualifies as an “investment contract” for the purposes of the Securities Act. The factors were:

1. investment of money due to
2. an expectation of profit arising from
3. a common enterprise
4. which depends solely on the efforts of a promoter or third party.

The learned judge said that an investment contract came to mean a contract or scheme for “the placing of capital or laying out money in a way intended to secure income or profit from its employment”.

**[28]** Based on the analysis of the law and evidence in Paras [12] to [14] and [16] herein I hold there was evidence before the FSC during their investigation that WWPL was issuing securities.

## Natural Justice

- [29] Counsel Mr. Huntley Watson argued the first ground of appeal that the FSC in their investigation breached the principle of natural justice or fairness. He contends the FSC issued a CDO to WWPL without giving the company or its managing director a hearing and therefore the CDO should be set aside. Counsel Mr. Langston Robinson argued on the authority of **Olint** in the Supreme Court and the Court of Appeal that the scheme of the FSCA had two stage appeal to a person aggrieved with a CDO and therefore the requirements of natural justice was satisfied.
- [30] Counsel Mr. Langston Robinson referred the court to the Privy Council decision from Jamaica, **Huntley v. The Attorney General** 31 JLR 643. This decision addressed the issue whether a person convicted and sentenced to death was deprived of a fair opportunity to present his position under the statutory provisions of the amended Offences against the Person Act, 1992 that allowed a single Judge of the Court of Appeal to classify a murder conviction as capital or non-capital and as a result whether the convicted person would be sentenced to death or life imprisonment. The court held the convicted person who was not given an opportunity to comment at the classification exercise was not deprived of his right to fairness because the statute granted a right of appeal to the convicted person from the judge's classification and he allowed to present his position there. (c/f reference to **Lloyd and Ors. v. McMahon** [1987] 1 All E. R. 1118.
- [31] Then in the House of Lords decision **Wiseman and Anor. v. Boreman and Other.**, [1969] 3 All E. R. 275 absence of a procedure for the affected party to make representation before the Commissioners of Inland Revenue took a decision in relation to him did not mean there was breach to a fair process to warrant the common law supplementing a procedure. The reason was at that preliminary stage the decision maker could give a decision as the statute provided for an appeal where full representation was available. Some of their Lordship held there was no



difference in principle so far as the rules of natural justice is concerned between decisions which are final and those which are not.

[32] Another aspect of this ground of appeal is that section 4(4) of the SA provided that the Commission may grant an oral hearing to a person affected by an investigation. Further, the Commission shall give an affected person a hearing if they make a written request. None of this process was afforded the WWPL Counsel for the Commission response was that WWPL did not make a written request for a hearing. I am not entirely satisfied that this response fully addresses the point that there was some unfairness to WWPL.

[33] In addition, WWPL argued the FSC failed to follow the process under sec. 8 of the FSCA and the third schedule of the Act. The relevant portion of the section provide that before the FSC issue a CDO it ought to serve a notice on the institution with a statement of facts of the allegations against it. Counsel Mr. Langston Robinson response was that section 8 did not apply and the Commission was free to choose the procedure they adopted. Again I am not persuaded this answer meet the principle of fairness this provision enshrines. In my view the FSC does not pay due regard to the principle of fairness by conveniently choosing a process. The process that best serve the principle of fairness should be employed. In the stages of appeal is still available to the affected party to fairly represent his interest.

#### **Prejudice to Third Party Interest.**

[34] In grounds 5 and 6 of Appeal Counsel for WWPL contend that the CDO placed the assets and or funds of third party partnerships at considerable risk of depreciation. He argued these partnerships needed unimpeded access to its overseas traders which WWPL provided and was hindered by the CDO.

[35] If one takes the other position that WWPL was acting as a customer liaison provider to an overseas trader, then WWPL would be an agent or a representative in this activity. WPPL would still remain a dealer. A dealer means a person who carries on the business of dealing in securities whether as principal or agent. On

this construct there is no third party. Only two parties are transacting. They are WPPL and the investor. WWPL construct an artificial partnership of investors and thereby introduce this concept of a third party. This notion is not supported by the evidence. Even assuming there were separate investor partnerships WWPL role would still be that of an agent. Any affected or interested party such as a purported third party partnership would be the proper party to complain about prejudice to third party rights not the WWPL. Thus the argument that FSC acted unlawful by issuing the CDO to WWPL as it prejudices third party rights cannot stand.

## **Conclusion**

**[36]** On the facts the WWPL at the time of the hearing was granted a variation of the CDO permitting them to settle accounts with investors. In my view they were winding down operation. The circumstances were that there were several complaints from members of the public that WWPL was not able to honour their obligation to pay any return on investment or to refund investors' capital. Whatever was left of WWPL business was overtaken by the force of circumstances from the time of hearing.

Grounds 2,3 ,4, 7, 9 10 Dismissed. (Jurisdiction).

Grounds 1 and 8 Dismissed (Natural Justice).

Grounds 5 and 6 Dismissed (Prejudice Third party rights).

Cease and Desist Order Financial Services Commission Confirmed