

TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2009/006

**In The Matter Of The Financial
Services Commission Act, 2001**

And

**In the Matter of An Application
For a Protection Order**

BETWEEN:

KEVIN WHITTEN

**(in his own name and on behalf of all the shareholders of
Whitten Trust Company Limited)**

Appellant

and

FINANCIAL SERVICES COMMISSION

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins

Chief Justice

The Hon. Mde. Ola Mae Edwards

Justice of Appeal

The Hon. Mde. Janice George-Creque

Justice of Appeal

Appearances:

Mrs. Tana'ania Small-Davis, with her Ms. Tamara Cameron for the Appellant

Mr. Charles Flint, QC, with him Ms. Lynette Ramoutar for the Respondent

2010: January 11;
March 15.

Regulation of financial services – The Financial Services Commission- Administrative enforcement against a licensed company - Compliance directive – Application without notice for protection order – Whether instituted in violation of licensed company's legitimate expectation – rule 56.6 of CPR 2000 – Whether an abuse of court's process - The Financial Services Commission Act 2001, as amended, sections 36, 37 and 39

The respondent, the Financial Services Commission ("the FSC"), is the authority that regulates the financial services sector and the entities that are licensed to carry on business in that sector in the Virgin Islands. The Whitten Trust Company Limited ("the

company”) is a licensed company. The FSC is empowered under the **Financial Services Commission Act 2001** (“the FSC Act”) to institute a compliance inspection against a licensee to ensure compliance with financial services regulations. In so doing, the Commission may appoint an examiner to conduct a review of the accounts of a licensee, pursuant to section 36(1) of the **FSC Act**. The FSC may also apply to the court for a protection order against a licensee, pursuant to sections 37 and 39 of the Act.

The FSC subjected the company to a compliance inspection in March 2008. On 9th July 2008, the FSC issued a draft on-site Compliance Inspection Report in which certain adverse findings were outlined with respect to the company’s operations. On 18th November 2008, the FSC appointed Kroll (BVI) Limited (“Kroll”) as examiner to conduct an initial review of the company’s accounts. This was in order to establish whether there was evidence of the intermingling of clients’ funds with the appellant’s funds, and to identify any other concerns. Kroll produced its report on 28th November 2008 (“the Kroll Report”). The Report identified a number of anomalies which needed rectification.

The Enforcement Committee of the FSC considered the Kroll Report on 5th December 2008, the same date on which the FSC sent a final version of the Report from the compliance examiner’s inspection report (“the Compliance Inspection Report”) to the company. The cover letter to the Compliance Report informed the company of violations of financial services regulations and required the company to take remedial action by specific dates in early 2009. On 17th December 2008, however, without further reference to the company, the Commission, seemingly acting on the findings of the Kroll Report, applied to the court for a protection order against the company. The order, which was granted without notice, on 14th January 2009, appointed 2 administrators to take over and manage the affairs of the company. The order empowered the administrators to investigate various aspects of the operations of the company, including the apparent intermingling of the clients’ funds with the company’s funds, as well as other anomalies and concerns identified in the Kroll Report. The FSC issued a statement informing the public of the appointment of the administrators. The company applied to discharge the protection order on the ground that the FSC violated the company’s legitimate expectation by applying for the order before the expiration of the dates specified for the company’s remedial actions. The company complained that this and the hearing of the application for the protection order without notice to it (the company) was abusive of the court’s process.

The judge dismissed the company’s application. He held that while the FSC was duty bound to act fairly, the concept of legitimate expectation was not applicable since these were not judicial review proceedings. He held that the FSC acted fairly in the circumstances as it acted in the public interest in seeking the protection order. The company appealed.

Held: dismissing the appeal with the parties to make written submissions on costs:

1. Legitimate expectation arises in the context of applications for administrative orders but the court is empowered under rule 56.6 of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** to convert a civil claim that is substantially for an administrative order into judicial review proceedings. There

was no conversion in the present case. However, this did not matter inasmuch as representation and detrimental reliance, the elements that go to prove legitimate expectation also go to prove unfairness, which is an alternative ground of appeal.

2. By the communications of 5th December 2008, the FSC impliedly assured or represented to the company that it would have given the company time to take the remedial action within the specified timelines. However, the judge did not err in refusing to set aside the protection order, notwithstanding that it was given prior to the expiration of those timelines because the company neither pleaded nor provided evidence to prove that it had detrimentally relied on the representation.
3. In any event, the judge correctly found that the FSC acted in the public interest in the light of the company's egregious breaches of financial services regulations. The particular circumstances of the case did not preclude the FSC from proceeding to have the protection order issued without notice. The company suffered no prejudice thereby.

JUDGMENT

- [1] **RAWLINS, C.J.:** This is an appeal against an order of a judge of 5th February 2009, refusing to discharge a protection order that he issued on 14th January 2009 against the Whitten Trust Company Limited ("the company") appointing 2 administrators to oversee the affairs of the company. The respondent, the Financial Services Commission ("the FSC"), applied, without notice, to the court for the protection order under section 39 of the **Financial Services Commission Act 2001** ("the FSC Act"). The court issued the order. The company applied to discharge the order on the grounds that by applying for the order without notice, before the expiration of the dates specified for the company to remedy its breaches of financial services regulations, the FSC violated the company's legitimate expectation and abused the court's process. The judge dismissed the company's application on the ground that legitimate expectation did not arise because these were not judicial review proceedings. He also held that the FSC did not breach its duty to act fairly and did not abuse the court's process. The resolution of this appeal would be better appreciated by a detailed background to these proceedings.

Background

- [2] The FSC regulates the financial services sector in the Virgin Islands. Its regulatory powers are set out in various statutes, which include the **Company Management Act**, the **Bank and Trust Companies Act**, the **Proceeds of Criminal Conduct Act**, the regulations and subsidiary legislations made under these Act and the **Anti-Money Laundering Code of Practice, 1999**. Among other things, the FSC is to protect the public and investors against financial loss arising from insolvency, dishonesty, incompetence or malpractice by persons engaged in financial services business. It is also to protect and enhance the reputation of the Virgin Islands as a financial services center and reduce and prevent criminal and other unlawful activity in the sector. Its objectives are met through its licensing, supervisory and enforcement powers. It has a continuing responsibility to ensure the integrity, reputation, competence and capability of the sector.
- [3] The FSC is empowered to subject an entity that is licensed to carry on financial services to a compliance inspection to ensure that the licensee complies with financial services regulations. The FSC may institute enforcement proceedings against a licensee pursuant to section 37 of the **FSC Act**; if it thinks that the licensee is or is likely to carry on business in a manner that is detrimental to the public interest or to the interest of the licensee's clients, creditors or investors.¹
- [4] Under its enforcement powers, the FSC may require a licensee to take steps to protect its customers or creditors.² The FSC may issue a directive to a licensee restricting or prohibiting the type of business in which the licensee engages. The FSC may also take enforcement proceedings against a licensee who fails to comply with a directive.³ The FSC may also revoke or suspend a licence.⁴ In addition to its enforcement powers under section 37, the FSC may, under section

¹ Section 37(1)(a)(i)&(ii) of the FSC Act.

² Sections 37(2)(a) and 40(1) and (2) of the FSC Act.

³ Section 37(1)(a)(v) of the FSC Act.

⁴ Section 37(2)(a)&(b) of the FSC Act.

39, apply to the court for a protection order against a licensee.⁵ On that application, the court may, among other things, appoint an administrator to take over and manage the affairs of the licensee.⁶

- [5] The company is a licensed company. It obtained a general trust license in May 1999, for the purpose of carrying on trust business. This is now a class 1 trust license. A company so licensed can act as a professional trustee, protector or administrator of a trust settlement; manage or administer a trust or settlement; and manage a trust company.⁷ Very high standards of trust and confidence are placed on such trust licensees. Correspondingly, they are subjected to very strict regulatory and compliance obligations.
- [6] The FSC subjected the company to a compliance inspection in March 2008. For the purpose of the compliance inspection, the company made its management accounts for the preceding 6 months of operations available to the FSC. The company also made its financial statements for the years ended 31st December 2000 through 31st December 2004 available to the FSC.⁸
- [7] On 9th July 2008, the FSC issued a draft on-site Compliance Inspection Report in which certain adverse findings were outlined with respect to the company's operations.⁹ This Report revealed various contraventions of financial services regulations by the company. These included changes of place of business, as well as changes of solicitors and auditors of record and the removal of a director without the required notification to the FSC. There were also changes to the ownership structure, the removal of senior officers, and the inclusion of a subsidiary without prior approval from the FSC. The company failed to file audited statements for about 6 years. Its internal controls and compliance procedures were not tested through self-assessment as financial services regulations require.

⁵ Section 39(1)(a) of the FSC Act.

⁶ Section 39(2)(b) of the FSC Act.

⁷ See the Bank and Trust Companies Act, 1990, of the Laws of the Virgin Islands.

⁸ Pursuant to section 17C of the Banks and Trust Companies Act 1990, it is a statutory requirement that trust companies file audited financial statements. The Company failed to file audited statements.

⁹ See pages 10-11 of the oral judgment and Table 1 at paragraph 24 of the First Affidavit of Kenneth Baker.

The company did not have a register of inquiries or register of reports. No staff training was undertaken as the **Anti-Money Laundering Code** requires. Due diligence was deficient in some cases and the company had not obtained indemnity insurance.

[8] The cover letter to that draft Report stated, among other things:

“Having completed the assessment of the findings of the Commission’s review of the License-holder, we have prepared the attached draft report, which highlights the areas that we believe have or may give rise to regulatory risk, or will encourage best practice.”

The cover letter invited the company to submit any comments that the company wished the FSC to take into consideration before finalizing the Report. The company provided comments in a letter dated 21st July 2008. It stated that it had commenced remedial work on areas of concern raised in the Report.¹⁰

[9] On 18th November 2008, the FSC, acting under section 36(1) of the **FSC Act**, appointed Kroll (BVI) Limited (“Kroll”) as examiner to conduct an initial review of the company’s accounts. This was in order to discover any evidence of intermingling of clients’ and company’s funds and to identify any other matters of concern. On 28th November 2008, Kroll produced its report (“the Kroll Report”).

[10] The Kroll Report identified a number of matters which required rectification to bring the company into compliance with financial services requirements. For example:

- (1) There was a difference of \$818,000 between the value of investments and client account liabilities as at 28th February 2008.
- (2) There were a number of substantial anomalies in the profit and loss account for the period to 28th February including an unexplained transfer of \$2.1 million.
- (3) There was a balance sheet insolvency with a net deficit of \$174,000.

¹⁰ See page 88 of the Record of Appeal.

(4) There was evidence of the company's inability to maintain the minimum net capital requirement of \$250,000.

(5) There was an apparent inter-mingling of company and clients funds, with the latter being used to finance the company's trading.

[11] The Enforcement Committee of the FSC deliberated on the Kroll Report on 5th December 2008, the same date on which it sent the final version of the inspection report ("the Compliance Inspection Report") to the company. The Compliance Inspection Report covered the issues which arose from the compliance inspection, but not the findings of the Kroll Report.

[12] The Compliance Inspection Report, made observations on various aspects of the company's operations. In each section in which it gave a rating "Unsatisfactory" or "Room for Improvement", the FSC identified the remedial action required and specified the time by which the remedial action was to be taken. The earliest remedial date was 30th January 2009 and there were later dates.

[13] The cover letter to the Compliance Inspection Report informed the company of the various violations of regulations designed to regulate the financial services sector. The letter stated, among other things:

"... the Licensee should take note of areas assessed which may be deemed priority issues (i.e. contraventions of relevant financial services legislation, such as Events requiring prior approval, Internal Testing and Staff education and training), as such priority issues must be addressed by, and confirmation of the undertaking of the corrective action provided by, the Board of Directors. Failure to address the corrective actions of these priority issues, as well as other areas rated within the report, may give rise to enforcement action being taken by the FSC."

"Where indicated, the FSC expects remedial action to be undertaken within the specified timescales and looks forward to hearing from you in relation to such issues in due course. In the meantime, should you wish to discuss any aspect of the report, please do not hesitate to contact the FSC."

"The Licensee is also advised to note that, based on the seriousness of the contraventions cited within the report, the FSC may conduct a follow

up onsite inspection of the Licensee's operations, which may occur with or without notice."

- [14] When the FSC applied for the protection order on 17th December 2008, it had, in effect, embarked upon the court proceedings before the expiration of the dates which the FSC specified for remedial action. The FSC had made no further reference to the company after it sent the Compliance Inspection Report.
- [15] The court issued the protection order on 14th January 2009, appointing Messrs. Ian Trumper and Ian Thompson of FTI Forensic and Litigation Consulting, London, as joint administrators of the company. The order conferred wide powers on them to take over and manage the affairs of the company. The order also empowered the administrators to investigate the operations of the company. They were to investigate the apparent intermingling of the clients' and the company's funds and failure by the company to follow proper accounting procedures. The administrators were also to examine any director or officer of the company; investigate any concerns; recover assets of the company wherever located and implement remedial action in the company's operations.
- [16] The company was informed of the protection order and the appointment of the administrators on 15th January 2009. On 19th January 2009, the FSC informed the company that it (the FSC) had revoked its approval of the company's director and senior officers by reason of the appointment of the administrators.¹¹ On 20th January 2009, the FSC issued a public statement on the appointment of the administrators and of their powers under the protection order.¹²
- [17] On 21st January 2009, the company applied to discharge the protection order on the ground that by applying for it, the FSC abused its discretion and violated the company's legitimate expectation. The basis for this latter contention was that, by its cover letter of 5th December 2009 and the terms of the Compliance Inspection Report, the FSC represented to it (the company) that it would not have instituted

¹¹ See Tab G (II) page 94 of the Record of Appeal.

¹² See Tab G (II) pages 95-97 of the Record of Appeal.

court proceedings unless the company failed to take the remedial actions within the periods specified.¹³ The company also contended that the FSC abused the court's process by making the application without notice.

[18] On 5th February 2009, after an *inter partes* hearing, the application to discharge was dismissed and the protection order confirmed, with a few amendments. In his oral judgment, the judge stated that while the issue whether the FSC acted fairly towards the company arose for consideration, legitimate expectation did not arise because it is only relevant in judicial review proceedings. The judge further held that the FSC did not act unfairly by seeking the order and did not abuse the process of the court by proceeding without notice.

[19] The protection order was subsequently amended to curtail the powers of the administrators. This court granted leave to Mr. Kevin Whitten, the company's majority shareholder,¹⁴ to appeal in his own name and on behalf of the company against this decision.

The appeal – legitimate expectation

[20] This is ground 1 of the appeal. The company challenges the judge's finding that legitimate expectation is not applicable because these are not judicial review proceedings. The appellant contends that although legitimate expectation is a public law principle, it is justiciable in any proceeding where an action by a public authority is challenged. He insisted that, accordingly, the judge erred in not considering legitimate expectation.

[21] There was a time when the failure to institute an administrative or judicial review claim as such was fatal. The prerogatives and other civil claims did not mix. That stricture was changed by rules of practice. Accordingly, rule 56.6 of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** ("CPR 2000") contemplates that even where a matter is not filed as an application for judicial

¹³ See generally pages 16-17 of the transcript of the judgment, pages 27-28 of the Record of Appeal.

¹⁴ Mr Whitten holds 249,999 of the Company's shares in his own name and 1 share is held by a nominee company. Mr. Whitten also owns the nominee company.

review, the court could proceed as if it were so filed if the claim is substantially an administrative claim. Rule 56.6 states as follows:

“56.6 (1) This rule applies where a claimant issues a claim for damages or other relief other than an administrative order but where the facts supporting such claim are such that the only or main relief is an administrative order.

(2) The court may at any stage direct that the claim is to proceed by way of an application for an administrative order.

(3) Where the appropriate administrative order would be for judicial review the court may give leave for the matter to proceed as if an application had been made under rule 56.3.

(4) If the court makes an order under paragraph (2) it must give such directions as are necessary to enable the claim to proceed under this Part.”

[22] The proceedings in this case commenced as an application for a protection order. This culminated in the application of 21st January 2009, as amended on 26th January 2009, to discharge that order. The main issues raised in the discharge application contemplate administrative relief based on legitimate expectation and abuse of power. There was no claim for an administrative order. The court did not convert the application as such pursuant to rule 56.6. I am not aware of any case in which legitimate expectation arose outside of an application for an administrative order or judicial review.

[23] In my view, it did not matter greatly that the judge did not consider legitimate expectation, inasmuch as the salient issue that he considered was whether to set aside the protection order on the ground that it was obtained unfairly by the FSC. This is because a finding of unfairness is a sub-set of the equitable doctrine of estoppel. On this concept the court was required to determine whether in the circumstances of the case it would be inequitable or unconscionable to permit the FSC to resile from an assurance that it gave to the company.

Fairness and legitimate expectation

[24] Legitimate expectation, a common law concept, has developed as a species of natural justice. Legitimate expectation found early authoritative exposition by the Judicial Committee of the Privy Council in **Attorney General of Hong Kong v Ng Yuen Shiu**.¹⁵ In this case the Privy Council firmly established that a public authority is bound to follow a procedure which it promised to follow or which it held out to a member of the public so long as that procedure did not conflict with the authority's statutory duty. **Ng Yuen Shiu** established that a public authority has a duty to observe the rules of natural justice and to act fairly towards members of the public. The Privy Council stated that it is unfair or inconsistent with good administration for a public authority to act outside of the expectations which are created by some statement or undertaking made by it.¹⁶ Further elucidating statements may be found, for example, in **Regina v Inland Revenue Commissioners, Ex. p. M.F.K Underwriting Agents Ltd. and Others**¹⁷ and **Kent Garment Factory Ltd. v Attorney General and Another**.¹⁸

[25] In **Ex. p. M.F.K. Underwriting Agents**, Lord Bingham LJ stated:¹⁹

"In so stating these requirements I do not, I hope, diminish or emasculate the valuable, developing doctrine of legitimate expectation. If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness." [Emphasis added].

In **Kent Garment Factory**, George C stated²⁰ that the legitimate expectation:

"... is a concept that is based on the desirability of, and indeed the necessity for, propriety and good faith on the part of a public official or authority towards a citizen, not to depart from a course of action which the

¹⁵ [1983] 2 AC 629.

¹⁶ See page 638F-G.

¹⁷ [1990] 1 WLR 1545.

¹⁸ (1991) 46 WIR 177, Court of Appeal, Guyana.

¹⁹ At page 1569.

²⁰ At page 187C.

latter has been led to believe or expect would be pursued or adopted and which departure would adversely affect his property or liberty, without due and adequate notice and, if appropriate, being permitted an opportunity to be heard.”

[26] There are also elucidating statements by the English Court of Appeal in **Regina v North and East Devon Health Authority, ex parte Coughlan**²¹ concerning the nature of the concept of legitimate expectation. Those statements are, in my view, helpful for the purpose of the present case, particularly because they speak to the protection of a substantive legitimate expectation, which Mrs. Small-Davis claims on behalf of the company.

[27] In **ex parte Coughlan**, Lord Woolf MR adumbrated 3 possible outcomes or categories of legitimate expectation that may arise from a promise or representation made to a person by a public authority. These are (1) that the public authority is required to bear in mind its previous policy or representation, giving it the weight that it thinks right, on the basis of *Wednesbury* reasonableness, before deciding to change it; (2) that the expectation created a duty to consult prior to taking action or making a decision, and (3) where the promise or representation induced a legitimate expectation of a substantive, rather than a procedural benefit, frustration of such expectation by the public authority taking a different course will amount to an abuse of power.²² The Master of the Rolls further elaborated category 3 relating to a substantive expectation in paragraph 59 of the judgment, by stating:

“... most cases of an enforceable expectation of a substantive benefit (the third category) are likely in the nature of things to be cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract”.

He continued as follows in paragraph 71 of the judgment:

“... when a promise is made to a category of individuals who have the same interest, it is more likely to be considered to have binding effect than a promise which is made generally or to a diverse class, when the

²¹ [2001] QB 213.

²² See paragraph 57 at page 241H-242C.

interests of those to whom the promise is made may differ or, indeed, may be in conflict...”.

[28] Thus it may be that where a promise or assurance is made directly or specifically to a company, as is alleged in the present case, the promise or representation would be of the highest binding effect, as Mrs. Small-Davis submitted.

[29] These statements from the cases show a clear parallel between the doctrine of legitimate expectation in public law and estoppel in private law, which informed the judge’s consideration of fairness in the present case. Legitimate expectation and fairness are kindred principles in public law and private law, respectively, proved on the same elements - representation or promise and reliance and detriment or, detrimental reliance as it is referred to in **Oxfam v Her Majesty’s Revenue and Customs**,²³ for example. In my view, therefore, even if the learned judge erred in holding that legitimate expectation was not applicable because these were not judicial review proceedings, this would not by itself provide a basis for allowing this appeal on ground 1.

[30] It is therefore noteworthy that grounds of appeal 2, 3 and 4 state that, in the alternative to ground 1, the judge should have held that the FSC was estopped from taking enforcement action before the expiry of the times specified for remedial action by the company. It is my view that inasmuch as the elements of representation and detrimental reliance are common to the proof of legitimate expectation and estoppel, the determination of grounds 1, 2, 3 and 4 of the appeal hinges on considering these 2 elements.

Representation

[31] The transcript of the oral judgment shows that the learned judge found that the specified deadlines for remedial action contained in the communication of 5th December 2008 amounted to a binding representation. The judge said that, by the directives contained therein, the “FSC did give certain representations to the

²³ [2009] EWHC 3078 (Ch.), see especially from paragraph 49.

company that it would not have proceeded to enforcement action” before the specified deadlines for the company’s remedial actions.²⁴ This is borne out in the words of the cover letter which stated:

“Failure to address the corrective actions of these priority issues, as well as other areas rated within the report, may give rise to enforcement action being taken by the FSC”.

[32] The judge correctly decided that the FSC made a binding assurance or representation to the company. In any event, neither party in these proceedings appealed that finding. In my view, however, it is necessary to identify the “enforcement action” to which the FSC’s communication spoke, inasmuch as the **FSC Act** provides various enforcement options.

[33] Mr. Flint, QC, learned counsel for the FSC, stated that the **FSC Act** contemplates a distinction between enforcement action, which is an administrative process within the purview of the FSC pursuant to section 37 and an application for a protection order under section 39. This latter is within the court’s discretion and is based on the court’s assessment of the public interest. This was the basis on which learned counsel submitted that there can be no legitimate expectation that could fetter the court’s right to make an order under section 39(2). He said that a protection order is made by the court, not by the FSC, and it is only made if the court considers it necessary. He insisted that a decision by the court to issue a protection order is not an exercise of an enforcement power by the FSC, but the exercise of a judicial discretion, which is not amenable to legitimate expectation.

[34] I doubt that these submissions are critical in the present appeal. In the High Court, the company did not challenge the exercise of discretion by the court in granting the protection order. It challenged the action by the company in bringing the application for the order allegedly in violation of the FSC’s assurance that it may institute enforcement action, protection order proceedings, for example, only if the company did not meet the directives given by the FSC on 5th December 2008. On appeal, the appellant challenges the judge’s refusal to set aside the

²⁴ See page 16 of the transcript of the judgment, (page 27 of the Record of Appeal) lines 16-24.

protection order, on the ground, among others, that the judge erred in not finding that the FSC breached its legitimate expectation.

- [35] However, I agree with Mr. Flint's submission that there was an implied representation by the FSC not to embark upon proceedings, by way of an application for a protection order, prior to the deadlines for the company's remedial actions. There was no expressed promise or assurance. I am also inclined to agree with Mr. Flint that the implied representation was, in effect, a mere promise or assurance by the FSC not to apply for a protection order prior to the expiration of the dates by which the company was directed to take remedial actions. In my view that implied assurance was operative unless matters additional to those covered in the Compliance Inspection Report were subsequently discovered.

Detrimental reliance

- [36] The judge did not expressly consider detrimental reliance. However, he raised it obliquely when he stated that there was no evidence that the company took any steps to remedy the breaches in order to implement the directives of the FSC. In effect, the company did not detrimentally rely on the representation.
- [37] The issues of detriment and reliance were discussed recently by the Privy Council in **Theresa Henry and Marie Ann Mitchell v Calixtus Henry**²⁵, albeit in the context of proprietary estoppel. Their Lordships referred to the discussion in **Gillett v. Holt**²⁶ by Lord Walker of Gestingthorpe (Robert Walker LJ, as he then was). They noted²⁷ the following statements from the judgment in **Gillett v. Holt**:
- “37... in the course of the oral argument in this court it repeatedly became apparent that the quality of the relevant assurances may influence the issue of reliance, that reliance and detriment are often intertwined, and that whether there is a distinct need for a ‘mutual understanding’ may depend on how the other elements are formulated and understood. Moreover the fundamental principle that equity is concerned to prevent

²⁵ [2010] UKPC 3.

²⁶ [2001] Ch 210.

²⁷ In paragraphs 37 and 38 of their Lordships' Judgment.

unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round.”

38. Later in his judgment, under the heading ‘Detriment’, Lord Walker said this (ibid. p.232A-F):

“ ... There is one passage in the judgment of Lord Denning MR in *Greasley v. Cooke* ... which suggests that any action in reliance on an assurance is sufficient, whether or not the action is detrimental. In *Watts v. Storey* [[1983] CAT 319] Dunn LJ (who was a party to the decision in *Greasley v. Cooke*) explained Lord Denning MR’s observations as follows:

‘Nor, if that passage from Lord Denning MR’s judgment is read as a whole, was he stating any new proposition of law. As the judge said, it matters not whether one talks in terms of detriment or whether one talks in terms of it being unjust or inequitable for the party giving the assurance to go back on it. It is difficult to envisage circumstances in which it would be inequitable for the party giving an assurance alleged to give rise to a proprietary estoppel, i.e. an estoppel concerned with the positive acquisition of rights and interests in the land of another, unless the person to whom the assurance was given had suffered some prejudice or detriment.’

‘The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances. Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded – that is, again, the essential test of unconscionability. The detriment alleged must be pleaded and proved.” [Emphasis added]

[38] It was for the company to plead and prove detrimental reliance. It is instructive that the judge stated as follows in his oral judgment:²⁸

“WTC (the company) at the inter partes hearing gave affidavit evidence by Mr. Kevin F. Whitten, ... Mr. Whitten in essence confirmed the evidence of Mr. Baker of the FSC with regards to the compliance inspection that was carried out. He stated that on the 21st of July 2008, WTC provided their comments in relation to the draft on-site report. The letter gave a number

²⁸ At pages 12-13 of the transcript of the judgment (pages 23-24 of the Record of Appeal).

of excuses for non-compliance with the requirements of that relevant legislation. It noted that in relation to the breach of compliance regarding the ongoing operation of the company with one director, that Mr. Whitten mentioned its intention to obtain the approval of Mr. Paul Bushell, yet Paul Bushell had been proposed as a director of the company since the 8th of May 2008 and that the FSC had responded to this proposal on the 22nd of May, 2008. The response asked for information pertaining to the proposal in order for the FSC to consider the application to approve Mr. Bushell's appointment. On the date of the hearing of this application before this court, WTC had not provided the information as was evident from Mr. Whitten's lack of knowledge of even this process. The response of WTC by its letter dated 21st July 2008, was in my opinion wholly unsatisfactory."

[39] Even at the time of the *inter partes* hearing the company had provided no evidence that it had taken any serious steps, as against promises, to appoint a second director in compliance with financial services regulations and the FSC's directive.

[40] In relation to the indemnity insurance, the judge stated as follows:²⁹

"With regard to professional indemnity insurance, WTC's response was that it had obtained applications to obtain professional indemnity insurance. The letter is replete with statements and good intentions of what the WTC was going to do to comply with the requirements of the various pieces of legislation."

[41] The learned judge continued:³⁰

"... when the WTC filed its application to set aside the order granted by this court, it did not put forward any evidence to indicate that from the time of the compliance inspection it had actually actively sought to remedy the contraventions of its obligations and that it had communicated this to the FSC and that as such, the FSC had acted improperly or unfairly in its actions taken against it. The affidavit of Mr. Whitten is also replete with WTC's good intentions of endeavoring to comply with the contraventions of the regulations but nothing of any substance was put forward to show that anything was actually done to meet the compliance requirements. At the *inter partes* hearing of the application, WTC relied on its affidavits filed on the 21st of January and 26th of January, 2009. In Mr. Whitten's Second Affidavit, he stated that WTC had immediately begun to implement remedial action to address the concerns raised in the report. As I stated earlier, no evidence of actually implementing those concerns were

²⁹ At page 13 of the transcript of the judgment (page 24 of the Record of Appeal) lines 9-15.

³⁰ At pages 13-15 of the transcript of the judgment (pages 24-26 of the Record of Appeal) lines 23-2.

produced. No evidence of professional indemnity insurance was produced. No evidence of the appointment of a second director was produced. No evidence of the audited financial statements for the outstanding years was produced. The only evidence was that of the production of the Anti-Money Laundering Manual submitted for the Financial Investigation Agency in November of 2008. Not even this was communicated to the FSC.”

[42] The judge was quite correct in these findings, based on the evidence in the case. The company did not plead or adduced evidence to prove that it had detrimentally relied upon the assurance or representation that the FSC’s communication of 5th December 2008, impliedly made to the company. In the premises, I would hold that grounds 1-4 of this appeal fail.

[43] Additionally, in my view, it was not critical that the FSC’s Enforcement Committee decided on 5th December 2008, to embark upon court proceedings, having communicated the dates for remedial action by the company on the same date. The communication was based on the Compliance Inspection Report, while the decision to embark upon court proceedings was based on the findings contained in the Kroll Report. I agree with the judge’s finding that, given the egregious nature of the breaches outlined in the Kroll Report, and regulatory statutory duties with which the FSC is charged, the FSC acted properly in all of the circumstances in the public interest to protect the clients of the company.

Abuse of the court’s process by proceeding without notice

[44] Ground 5 of the appeal challenges the decision that the findings of the Kroll Report provided a sufficiently urgent basis to justify the FSC’s proceeding, without notice, and the court’s decision to grant the protection order on those proceedings.³¹ It is my view that the judge was correct, particularly because the company suffered no prejudice thereby. Whilst the procedure of moving the court without notice must be confined to its proper use, there is no reason to believe that the decision would have been different on an *inter partes* hearing. I would also dismiss ground 5 of the appeal, and thereby, all of the grounds of the appeal.

³¹ See from line 20, page 16 of the judgment to the end of page 18 (pages 27-29 of the Record of Appeal).

[45] I note that the judge did not make a costs order in the judgment. There is no specific appeal against this by either party. It is noteworthy, however, that the appellant seeks costs in the appeal as well as costs in the court below. The parties made brief submissions before this court on the issue of costs. I think that this court can benefit from fuller written submissions. Accordingly, counsel for the parties are invited to file and serve submissions on costs within 21 days of the date of the delivery of this judgment.

Summary of order

[46] In summary, the appeal against the decision of 5th February 2009, by which the judge refused to set aside a protection order that he issued on 14th January 2009 is dismissed. Counsel for the parties shall file and serve submissions on costs within 21 days of the date of the delivery of this judgment.

Hugh A. Rawlins
Chief Justice

I concur.

Ola Mae Edwards
Justice of Appeal

I concur

Janice George-Creque
Justice of Appeal