

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO.: ANUHCV2020/0235

IN THE MATTER of the Insurance (Supervision and Compliance) Regulations, 2019

IN THE MATTER of the decision of the Financial Services Regulatory Commission to direct the Superintendent of Insurance to issue a cease and desist order by letter dated 10th July 2020 to the 2nd Applicant

IN THE MATTER of an application for judicial review of the Insurance (Supervision and Compliance) Regulations, 2019 and decisions purportedly made pursuant to the said Regulations and seeking a quashing of the same to the extent that the said Regulations are ultra vires and decisions and action made pursuant to same are unlawful

IN THE MATTER of an application for an Administrative Order

BETWEEN

- (1) GEO. W. BENNETT BRYSON & CO. LTD.**
- (2) SCOTT KELSICK**
- (3) SELKRIDGE INSURANCE AGENCY LTD.**

Applicants

And

- (1) THE MINISTER TO WHOM RESPONSIBILITY FOR THE
FINANCIAL SERVICES REGULATORY COMMISSION IS
ASSIGNED**
- (2) SUPERINTENDENT OF INSURANCE**
- (3) FINANCIAL SERVICES REGULATORY COMMISSION**

Respondents

Appearances:

Dr. David Dorsett counsel for the Applicants

Ms. Joy Dublin and Ms. Rose-Anne Kim counsel for the First and Second Respondents

Laura Lee Riley of counsel for the Third Respondent

- [1] **Drysdale J:** This is an application for judicial review challenging (1) the decision taken by the Financial Services Regulator Commission (“the Commission”) to direct the Superintendent of Insurance to issue a cease and desist order against the second applicant, and (2) certain regulations issued by the first respondent under the Insurance (Supervision and Compliance) Regulations 2019.
- [2] On 13th June 2020, the applicants sought leave to apply for Judicial Review (“JR”) in these proceedings. Rohan A Phillip J, on 20th October 2020 granted the applicants leave to apply for JR having been satisfied that there is an arguable case for trial. By way of a Fixed Date Claim Form (“FDCF”) filed on 23rd October 2020 with its amendments being filed on 14th December 2020, the applicants commenced a claim for an administrative order by way of a declaration and Judicial review. The applicants sought several orders from this court which are summarized in the following, et al:
1. A declaration that regulation 3 of the Insurance (Supervision and Compliance) Regulations 2019 is ultra vires the Insurance Act.
 2. A declaration that the decision of the 3rd respondent to direct the 2nd respondent to issue a cease and desist order against the 2nd applicant was unlawful and accordingly null and void and of no legal effect.
 3. An order quashing the cease and desist order dated 10th July 2020.
 4. An order quashing regulations 3, 8, 11(6) (e) and 12(2) (a) of the Insurance (Supervision and Compliance) Regulations 2019.
 5. An order quashing the administrative penalties with respect to intermediaries under the Insurance (Supervision and Compliance) Regulations 2019.

Background

- [3] The applicants identify as insurance agents having been registered as the same under the Insurance Act 2007 (as amended) (“the Insurance Act”). As such, the applicants are classified as insurance intermediaries governed by Part V of the Insurance Act. The second respondent (“the Superintendent”) is appointed under section 4 of the Insurance Act and has the responsibility of general administration of the Insurance Act. The Insurance Act falls within the mandate of the third respondent, the Financial Services Regulatory Commission, a statutory body established under section 316 of the International Business Corporation Act, Cap 222 and continued under the authority of the Financial Services Regulatory Commission Act (as amended) (“the FSRC Act”). The third respondent regulates domestic insurance businesses in accordance with the Act.
- [4] The evidence before the court is that the applicant was registered under the Insurance Act up until the period ended 31st December 2019. Prior to that period, the applicant was endorsed by two registered insurers, one being Caribbean Alliance Insurance Company Limited (CAIC) which is a domestic insurer with its headquarters in Antigua and Barbuda for the January 2019 through December 2019 registration period. The registration of both agencies ended on the 31st December 2019 with the ability to submit an application for re-registration during January 2020 period. The second applicant had failed to submit a valid application for re-registration for the period January 2020 through December 2020. Consequently, the second applicant has not been registered as an insurance agent since the period ending December 2019.
- [5] The respondents allege that they unearthed evidence indicating that the second applicant subsequently engaged in unlawful activity. The evidence on behalf of the respondent is that upon advice from Caribbean Alliance Insurance Company Limited, the insurer, that the second applicant had recklessly exposed the insurer to risks by issuing certificates of insurance to members of the unsuspecting public in the insurer’s name without holding a valid

registration to carry out insurance business. In simpler terms, the second applicant continued to hold himself out to the public as the registered agent of the insurer and carried on insurance business as an intermediary on behalf of the insurer without registration¹.

[6] A series of correspondence ensued between the insurer and the second respondent which led the Superintendent to present to the Board of Directors copies of the documents received from the insurer². The Board of Directors having reviewed the documents submitted caused him to direct the Superintendent to issue a cease and desist order upon the second applicant³.

[7] As a consequence, the cease and desist order was issued to the second applicant on 10th July 2020. It is the agreed evidence before this court that the second respondent acted under the directives of the third respondent to issue the cease and desist order to the second-named applicant herein. The second applicant in paragraph 8 of his affidavit states that the order has severely negatively impacted his professional reputation, was draconian in effect and issued without affording him a fair hearing (or any hearing) prior to its imposition. This, the applicant states, failed to accord him natural justice.

[8] The respondents contend that the letter dated 10th July 2020 invited the second applicant to a meeting on 13th July 2020 where he would have been given an opportunity to be heard on the allegations. The second applicant, having received the cease and desist order, stated that owing to the order adversely affecting his business, he obtained legal advice and counsel to act on his behalf to contact the Commission with respect to the cease and desist order.

[9] It is the respondents' evidence that on 13th July 2020, approximately 30 minutes before the scheduled meeting the applicant's present attorney emailed

¹ See paragraph [20] of Claudette Richardson affidavit sworn 26th November 2020.

² See paragraph [11] of Cornel Hughes affidavit sworn on 14th January 2021.

³ Ibid.

an application for leave to apply for JR. Both the second applicant and his counsel in this matter attended the meeting indicating that legal action would ensue and failed to address the allegations levied against Mr. Kelsick and the meeting ended shortly thereafter. At trial, Mr Kelsick gave evidence which accords with the aversions of the respondent on this point.

[10] Thereafter, the second applicant filed an application seeking leave to apply for Judicial Review against the decision of the third respondent to instruct the second respondent to issue the cease and desist order, the implementation of regulations 3, 8, 11(6) (e), 12(2) (a), interim relief, et al. Regulation 8 concerns an extension of the “fit and proper requirements” to every person who is an employee of an entity registered as an intermediary. The regulations also made provisions for administrative penalties with respect to intermediaries.

[11] At the leave stage, counsel for the respondents conceded that the administrative penalties with respect to intermediaries under the Regulations and the extension of the "fit and proper requirements" to "every person who is an employee of an entity registered as an intermediary" under regulation 8 of the Regulations are to be quashed. Counsel for the applicants at trial requested that the court ought to grant an order reflecting the position of the parties' concession.

ISSUES

[12] Accordingly, the issues which fall to be determined are as outlined by Phillip J as follows:

- (1) Whether the issuance of the cease and desist order at the direction of the third respondent was unlawful, in all the circumstances of this case.
- (2) Whether the provisions of Regulation 3 of the Insurance (Supervision and Compliance) Regulations 2019 ultra vires the Insurance Act

- (3) Whether the provisions of Regulations 11 (6) (e) and 12 (2) (a) of the Regulations which requires insurance intermediaries to submit audited financials in support of an application for registration and or re-registration unreasonable and irrational?
- (4) Whether in the circumstances, the issue of the cease and desist order on the second applicant failed to accord him natural justice.

ISSUE NO.1 whether the issuance of the cease and desist order at the direction of the third respondent was unlawful, in all the circumstances of this case

Applicants' submission

- [13] Counsel argues that section 5(1) of the FSRC Act delimits the function of the Commission. Pursuant to the FRSC Act, the Commission is to perform regulatory, collaborative, and advisory functions, and issuing a cease and desist order does not fall under the mandate of the Commission in keeping with its functions. Counsel states that the Commission 'can do such acts only as are authorized directly or indirectly by the statute creating it.' Consequently, the Commission cannot direct another public authority, namely, the Superintendent, to do what it (i.e., the Commission) cannot do on its behalf.
- [14] Further to his submission, counsel avers that section 4(1) of the Insurance Act prescribes the function of the Superintendent, which is to be responsible for the general administration of the Act. Learned counsel in citing section 4(3) of the Insurance Act underscored the words "in the performance of his functions under this Act" and proffered an interpretation of the section to mean that though the Superintendent is subject to the direction of the Administrator of the Commission and the Board, those directions must fit squarely within the four corners of the legislation and not at the whims and fancies of the Commission. Accordingly, the Superintendent's functions are prescribed by the Insurance Act and not by the directives/commandment of the Commission.
- [15] Counsel highlighted that the evidence before the court is that the Superintendent does not claim to have laboured under the Insurance Act in

issuing the cease and desist order, nor the regulations, instead have acted under the instruction of the Commission. It is counsel's aversion that the Commission has no statutory power to issue a cease and desist order; accordingly, the cease and desist order is unlawful, null and void. Counsel states further that, the second and third respondents have essentially asserted that the second applicant was engaged in criminal activity which triggered the issuance of the cease and desist order. The second applicant has denied any criminal wrongdoing, and to date has not been arrested or charged with any criminal offence. He is entitled to the presumption of innocence.

Respondents' submission

Submissions of the First and Second Respondents

- [16] Counsel for the first and second respondent argue that section 87 of the Insurance Act provides that the carrying on of insurance business is a restricted activity requiring insurance intermediaries to be registered in accordance with the Insurance Act. The first and second respondents agree that the third respondent is vested with the power to restrict activities which are not in compliance with the regulatory laws. Further that the third respondent has the power to direct the second applicant to cease and desist from actions which amounted to a breach of the Insurance Act. That the second respondent is a creature of statute and is subject to the direction of the third respondent. The cease and desist order issued by the second respondent was done on the instructions of the third respondent and was thus properly issued.
- [17] Counsel for the third respondent argues that the third respondent, by virtue of section 2 of the FSRC Act, has been charged with the authority of administering the Insurance Act. The second respondent, pursuant to section 4 of the Insurance Act, is clothed with the responsibility of regulating registered insurance intermediaries and licensed insurance companies. It is counsel's averment that pursuant to section 4(3) of the Insurance Act, the second respondent is "subject to the direction of the Administrator of the Commission and the Board". The terms "Commission" and "Board" is defined in section 2 of the Insurance Act. In reading section 2 of the FSRC Act conjointly with section 4 of the Insurance Act, the post of the second respondent is subject to the

superior authority of both the Office of the Chief Executive Officer and the Board of Directors of the third respondent.

Submissions of the Third Respondent

- [18] Counsel for the third respondent states that section 87 and section 90 of the Insurance Act restrict the carrying on of insurance business and assigns to the second respondent the power to determine the fitness and propriety of an applicant and the third respondent, the power to issue and cancel registrations. Section 91 (2) of the Insurance Act stipulates a certificate be valid for a period not exceeding one year as stated on the certificate and is renewable before the expiry of the original certificate. The second applicant last certification of registration expired on 31st December 2019, owing to the second respondent failing to submit a valid application for re-registration. Consequently, the second applicant has not been an insurance agent governed by Part V of the Insurance Act since 31st December 2019. Accordingly, the second applicant is not lawfully authorised to carry on business as an insurance agent.
- [19] Counsel for the third respondent submits that the effect of section 87 of the Insurance Act taken in conjunction with section 88 of the Insurance Act and section 5(2) of the FSRC Act, is that where the second respondent received and carefully examined evidence of the second applicant's wrongdoing of carrying on insurance business without valid registration or endorsement of an insurer, the second respondent has a statutory duty under the FSRC Act to prevent the second applicant from unlawfully carrying on insurance business. Counsel argues further that based on the provisions of section 5 of the FSRC Act, the third respondent as a part of its functions, has powers to regulate and supervise financial services business which are carried on in or from within Antigua and Barbuda. One of the regulatory functions is to ensure compliance with the regulatory laws, in this instance the Insurance Act.
- [20] Counsel states further, as such, the Board upon being informed of the wrongdoing, has the authority to instruct the second respondent to cause a cease and desist order to be issued to the second applicant for operating in contravention of section 87 of the Insurance Act. Counsel enjoins this court to

underscore **section 5 (2) (f)** of the **FSRC Act** and asks what is the true meaning of the language of the provision.

- [21] It is counsel's view that the types of actions which would be permitted under this provision must ordinarily include the authority to direct a licensee or registrant to refrain from carrying on any activity which is likely to offend paragraphs (a) to (e). Thus, it would certainly be within the ordinary authority of the third respondent, the power to issue a statement to the second applicant, who was unlawfully carrying on a restricted activity, to cease and desist from doing so. The third respondent has the lawful authority to issue cease and desist order against both registrants and non-registrants as a proportionate and rational action to protect the public and policyholders. The cease and desist order should not be quashed in the circumstances.

Law and analysis

- [22] Undoubtedly, the resolution of the issues at bar compels the engagement of statutory interpretation. Therefore, it is necessary to remind ourselves of the principles courts employ to determine the meaning and give effect to the statute(s) under scrutiny.
- [23] It is a well settled principle of law that statutes are official mandates issued by the legislative author, thus the customary approach of the courts is to seek the intention of the Legislature, which assimilates two aspects; the first aspect focuses on the meaning of the words used in the Legislation, whilst the second aspect pertains to the object, purpose, reason or spirit that permeates throughout the Legislation⁴.
- [24] It has been long established that as a general principle of application, the provisions of a statute are to be read as a whole. In an authority emanating from the British Virgin Islands, Hariprashad-Charles J in **Bebo Investments**

⁴ Statute Law Review 2021, Issue 2, June Articles Spinning Yarns From Moonbeams: A Jurisprudence of Statutory Interpretation in Common Law - Statute Law Rev (2021) 42 (2): 266

Limited v The Financial Secretary⁵ observed the following in paragraph 30 of the judgment:

“Another general principle of statutory interpretation is that every clause within a statute or act must be construed in the context of and with reference to the other clauses or sections of that statute. One section or section should not be interpreted without reference to the other sections. In the case of *Lincoln College*, it was held that in interpreting an act of Parliament one must “make construction on all the parts together and not of one part only by itself”.

[25] In adjudicating upon the validity of the cease and desist order, due consideration must be accorded to *sections 2, 5 (1), 5 (2)* of the FSRC Act, as well as *sections 4 (1), 4 (3), 87, 88, 90, and 91 (2)* of the Insurance Act. In scrutinising the provisions, it is crucial to bear in mind the overarching legislative framework delineated within the Acts. The object of the Insurance Act is clear and is succinctly articulated in the preamble of the Act, which endeavours to “make provision for regulating the carrying on of insurance business...”⁶ In like manner, the FSRC Act’s overarching objective includes the regulation of Financial Service Businesses within the State of Antigua and Barbuda.

[26] The court now turns its attention to the provisions of the FSRC Act. The FSRC Act provide for the Financial Services Regulatory Commission to be preserved and to continue in existence, and for incidental and connected purposes. In section 2 “Commission” means the Financial Services Regulatory Commission established under section 316 of the former Act. *Section 5* of the FSRC Act delineates the powers of the Commission. So far as is necessary to these proceedings, *section 5 (1)(b)* provides that “the principal function of the

⁵ BVIHCV2007/0151

⁶ Also see section 10 of the Interpretation Act which provides that the preamble to an enactment shall be construed as a part thereof intended to assist in explaining the purport and object of the enactment.

Commission are regulatory functions, namely to regulate and supervise financial services business carried on in or from within Antigua and Barbuda in accordance with this Act and the regulatory laws ...” *Section 5(2)* provides the following:

“In performing its functions and managing its affairs, the Commission shall—

- (a) Have regard to the requirements of a sound financial system in Antigua and Barbuda;
- (b) Have regard to the maintenance of market confidence, consumer protection and the reputation of Antigua and Barbuda as a financial centre;
- (c) Use its resources prudently for its efficient and economic operation;
- (d) Have regard to generally accepted principles of good corporate governance;
- (e) Comply with this and any other Act, including any regulations or directions made or given thereunder; and
- (f) have such ancillary powers as may be required to fulfil the functions set out in paragraphs (a) to (e).”

[27] In regard to the third respondent, the crux of the contention of the parties surrounds the expanse of the Commissioner's powers as assigned under **section 5** of the FSRC Act.

[28] Invariably, the courts in coming to a determination on interpretative questions often have recourse to internal aids of construction, which may include both enacting and non-enacting parts of the Legislation. The extent of the Commission's function under section 5 of the Act and particularly, section 5 (2) (f) must be interpreted in the context of the specific surrounding parts. The actions necessarily contemplated under section 5 (2) (f) of the FSRC Act to be employed by the third respondent must aid in fulfilling the functions of (a) to (e). That is clear from the language of the provisions. The question to be answered is whether a cease and desist order can serve the Commission to achieve any

one or all of its functions or manage any one or all of its affairs which may arise in relation from subsections (a) to (e).

- [29] This court pays particular regard to subsection (b) in the third respondent's function to maintain market confidence, consumer protection and the reputation of the financial sector. This section must also be read conjointly with section 5 (3)(b), for the purposes of this hearing, which reads in part:

"In performing its regulatory functions ..., the Commission shall, in addition to complying with the requirements of subsection (2)—

(b) recognise the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction;

- [30] For the purposes of these proceedings, in clear language, the provision reads that the Commission in performance of its regulatory function shall recognise the principle that a restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that restriction.

- [31] Section 5 (1) (b), section 5 (2) (a) to (e) and section 5(3) (b) are the controlling effects of the words "ancillary powers" as used in section 5(2) (f).

- [32] The interpretation advanced by counsel for the applicants that the "issuing of a cease and desist order does not fall under the mandate of the Commission" is implausible and puts a strain on the interpretation of the clear and unambiguous language used in the provisions.

- [33] If the interpretation advance by counsel were to be accepted, it would lend itself to an absurdity that the Commission can sanction the behaviour of licensees by cancelling their registration pursuant to section 94 of the Insurance Act, in

order to protect the Financial Service Businesses sector, however is not empowered by virtue of section 5 of the FSRC Act to issue a cease and desist order to a former licensee in order to prevent that person from holding himself out as having renewed and obtain the requisite license to engage in financial service businesses.

[34] This could not have been the intention of Parliament. This interpretation is ruinous to the Legislative framework and evidently subverts Parliament's intention. The clear import of section 5 (3) (b) is that the Commission can impose a restriction on the carrying on of an activity to further the objective of the Legislative framework. As intimated earlier, this court is of the considered opinion that a cease and desist order squarely falls within the ambit of "such ancillary" tools which may be employed by the Commission. Accordingly, the court finds that the third respondent is empowered to issue a cease and desist order.

[35] The court now turns its attention to the Insurance Act. *Section 4 (1)* of the Insurance Act empowers the Superintendent with the general administration of the Act. *Section 4 (3)* provides that the Superintendent shall, in the performance of his functions under this Act, be subject to the direction of the Administrator of the Commission and the Board. It has already been eloquently established by counsel for the respondents that the works assigned to the Minister are now work assigned to the Chief Executive Officer.

[36] Quite accurately, counsel for both parties articulate that by virtue of section 4(3), the second respondent is subject to the superior authority of both the Office of the Chief Executive Officer and the Board of the Commission. In clear language, the second respondent is subject to the superior authority of the third respondent.

[37] This court has considered the submissions by both counsel and is keen on the expression "whims and fancies" as used in the context by counsel for the applicant. It is agreed that the directions given to the second respondent must be in accordance with her duties. The court, however, does not find favour with

the interpretation contended by counsel that a cease and desist order does not fit within the four corners of the legislative mandate in light of the aforementioned object and purpose of the Legislations.

- [38] There is a public interest to be protected pursuant to *section 5* of the FSRC Act, the public must hold confidence in the office of the third respondent and the duties of the second respondent in protecting policyholders from harmful business practices. The cease and desist order achieves this mandate whilst offering the applicant an opportunity to establish his case before the relevant tribunal. In this regard, the cease and desist order is commensurate with the articulated objective and purpose of the Act and further comports with *section 5 (3)* of being proportionate to the benefits, considered in general terms, which are expected to result from the imposition of the restriction; general principles of public law. Moreover, in view of *section 93* in conjunction with *section 4(3)* of the Insurance Act, in applying *section 93* *mutatis mutandis* with the reasoning proffered earlier under *section 94* of the Insurance Act, it would be difficult, if not impossible to agree with the applicant's interpretation of the provisions without construing absurdity on the clear language of the provisions. The court is of the considered opinion that the third respondent has the authority to issue a cease and desist order. By extension, the third respondent was well within its powers to instruct the second respondent to issue the order.

ISSUE NO. 2 Whether the provisions of Regulation 3 of the Insurance (Supervision and Compliance) Regulations 2019 ultra vires the Insurance Act

Applicants' submissions

- [39] Counsel argues that the powers of the Superintendent are extensive, however, it does not go beyond that provided to her by Parliament in the Act. **Section 217 (1)(m)** of the Insurance Act which empowered the Board to make regulations that make provision generally for the effective implementation of the Insurance Act is not a power to vest the Superintendent with more powers than are granted to her under the Insurance Act.
- [40] Counsel avers that the Superintendent is a creature of statute and 'when natural persons hold a statutory office ..., their public law powers are limited to

those conferred on them by parliament” and not as may be conferred on them by the Minister in issuing regulations upon the recommendation of the Board. Counsel cited the authority ***Commissioner of the Independent Commission of Investigations v Police Federation***⁷ a Privy Council decision, where in paragraph 15 the court states:

“... A statutory corporation has only the powers conferred directly or indirectly upon it by Statute. ... Similarly, in public law, public officials are considered to have limited powers when they act in a public capacity even if they are natural persons. When natural persons hold a statutory office, their public law powers are limited to those conferred on them by Parliament. ...”

- [41] Counsel posits that it must be trite law that a public body can only do that which is authorised by positive law, ***R v Richmond upon Thames London Borough Council, ex p Watson***⁸ applied. If not so authorised, then the action by the public body is unlawful. The Act does not empower the Minister to invest the Superintendent with more powers than that given to her under the Act. Regulation 3 of the Insurance (Supervision and Compliance) Regulations 2019 (“the Regulations”) purports to give the Superintendent more powers than given to her under the Act. Thus, in the circumstances the action of the 1st respondent is unlawful and Regulation 3 must be declared unlawful and struck down. By extension, any action taken pursuant to the said regulation is invalid and liable to be quashed.

Respondents’ submissions

The First and Second Respondents submissions

⁷ [2020] UKPC 11

⁸ [2001] QB 370 at 385B.

- [42] Counsel for the first and second respondents argue that regulation 3 does not extend the powers second respondent and that the ability to issue a cease and desist order is not outside the Insurance Act. Counsel argues that one of the primary reasons for the enactment of the Insurance Act is to regulate the carrying on of insurance business. Accordingly, the authority to instruct a person who is not in compliance with the Insurance Act to cease such unlawful activity is inherent in the administration of the provision of the Insurance Act.

The Third Respondent submissions

- [43] Counsel for the third respondent in rebuttal argues this point to the contrary and asserts that the third respondent is empowered under **section 217(m)** to implement regulations to facilitate the proper supervision and regulation of the insurance sector, in keeping with the objective of the Insurance Act. Particularly, the third respondent submits that in order for the second respondent to carry out her duties effectively, as prescribed by **section 4** of the Insurance Act, there are certain tools which the second respondent will need to utilise.
- [44] Counsel argues that *regulations 3 (a) and (b)*, authorize the second respondent to require the registration of persons pursuant to **section 87** of the Insurance Act. Regulations 3 (c), (e), (f), (g), (h) and (j) facilitates the function of maintaining financial stability, market confidence and consumer protection in accordance with **section 5 (2) (a) and (b)** of the **FSRC Act**. Sections 39, 54 and 97 of the Insurance Act empower the second respondent to apply Regulation 3 (d), and the second respondent's authority to impose Regulation 3 (i) can be found in furtherance of her responsibilities under sections 90, 93 and 94 of the Insurance Act. Counsel submits that the ability to utilise the tools under Regulation 3 is within the ambit of the Insurance Act and the FSRC Act.

Law and analysis

- [45] To effectively resolve this issue, examining the doctrine of “ultra vires” within context is necessary. The doctrine of ultra vires in its simplest term is an action taken “beyond the scope, or in excess of a legal authority”. In the decision of **Pigeon Island Development Company Limited v The Landings Unit Plan**

No. D2/207 et al⁹, St Rose-Albertini, J. [Ag] embarked on an analysis of the doctrine. In so doing, the learned judge relied on definitions elicited from Halsbury's Laws of England and Stair Memorial Encyclopaedia. In paragraphs 43 and 44, the learned judge stated the following:

“[43] **Halsbury's Laws of England** explains the doctrine of ultra vires this”

‘349. Doctrine of ultra vires.

A power to do something extends only to that thing; so a purported exercise of the power that extends to a different thing is to that extent not an exercise of the power at all and in so far as it purports to depend on the power, it is void as being ultra vires ...’

[44] **Stair Memorial Encyclopaedia** explains the application of the doctrine as follows:

“ ... In its broadest sense, the ultra vires doctrine refers to the whole body of law relating to the grounds on which an action or decision of a public authority may be subject to judicial review, including defects of procedure and breach of natural justice. In a much narrower sense, the ultra vires doctrine refers to the rule that a public authority acts ultra vires if it embarks on an activity or enterprise which ex facie is outside its legal capacity ...”

- [46] It is a long-established principle of law that a public authority is a ‘creature of statute’. This enduring principle dictates that the functions and powers exercised by the authority are delineated by the statute that created it. Consequently, a public authority cannot lawfully exceed the powers granted to it by statute. Any action taken beyond the scope of the statutory powers is outside the authority’s legal jurisdiction and accordingly unlawful or invalid. This principle serves to ensure accountability, adherence to legal frameworks,

⁹ SLUHCM2020/0028 formerly SLUHCM2018/0068

and the proper exercise of powers by such authorities in the interest of maintaining legality and upholding the rule of law.

- [47] In **Caribbean Commercial Bank (Anguilla) Limited v Starry Benjamin**¹⁰ Peirara CJ, in determining whether the Commercial Bank as a statutory body acted ultra vires the provisions of the Eastern Caribbean Central Bank Agreement Act “ECCBA”, by terminating the employment of the respondent, stated the following in paragraphs 12:

“[12] ... The central bank cannot exercise in respect of [Caribbean Commercial Bank] or indeed any other financial institution powers which are beyond the remit given by the statute, in this case, the ECCBA. The Central Bank being a creature of statute with various powers provided for by statute is confined in the exercise of its powers “to the four corners of the statute”. If it goes beyond the powers contained in its enabling statute it will be acting ultra vires.

- [48] It is worth mentioning that the jurisdiction of the court extends beyond solely assessing the legality of decisions made by statutory authorities in the exercise of their adjudication powers. The concept of acting “ultra vires” extends to the realm of formulation of subordinate legislations. As in the instant case, where the validity of a Regulation is in question, it is the duty of the court to meticulously scrutinise the said regulations. Should it be established that the regulations are ultra vires, the court is empowered to declare the regulation(s) invalid as being ultra vires the Principal Act.

- [49] An illustrative example of subordinate legislation being ultra vires is found in **Damien Kelsick v Kerstin Petty et al**¹¹. In that case Ventose, J, in deciding whether the Minister in making the Companies Order acted outside its powers conferred under sections 240 and 244 of the Companies Act of

¹⁰ AXAHCVP 2014/0009

¹¹ SKBHCV2014/0119

the Federation of Saint Christopher and Nevis, at paragraph [9] of the judgment cited the authority of *F Hoffmann-La Roche & Co AG v Secretary of State of Trade and Industry* [1975] AC 295 Lord Diplock (at p. 365) which states:

‘... in constitutional law, a clear distinction can be drawn between an Act of Parliament and subordinate legislation, even though the latter is contained in an order made by a statutory instrument approved by resolutions of both Houses of Parliament. Despite this indication that the majority of members of both houses of the contemporary Parliament regard the order as being for the common weal, I entertain no doubt that the courts have jurisdiction to declare it to be invalid if they are satisfied that in making it the Minister who did so acted out with the legislative powers conferred on him by the previous Act of Parliament under which the order purported to be made; and this is so whether the order is ultra vires by reason of its contents (patent defects) or by reason of defects in the procedure followed prior to its being made (latent defects).’

- [50] The learned judgement in paragraph [10] of the judgment, went on to rely on the authority of *R (Public Law Project) v Lord Chancellor (Office of the Children's Commissioner intervening)* [2016] AC 1531, where he cited with approval Lord Neuberger's explanation at [23] of instances in which subordinate Legislations will be held invalid, which states that:

‘Subordinate legislation will be held by a court to be invalid if it has an effect, or is made for a purpose, which is ultra vires, that is, outside the scope of the statutory power pursuant to which it was purportedly made. In declaring subordinate legislation to be invalid in such a case, the court is upholding the supremacy of Parliament over the Executive. That is because the court is preventing a member of the Executive from making an order which is outside the scope of the power which Parliament has given him or her by means of the statute concerned. Accordingly, when,

as in this case, it is contended that actual or intended subordinate legislation is ultra vires, it is necessary for a court to determine the scope of the statutorily conferred power to make that legislation.’

[51] The authorities that echo similar sentiments within the jurisdiction are replete. The principle extrapolated from the above is that the court is empowered to strike down subordinate legislations that are ultra vires. The clear import from Lord Diplock’s pronouncement in **Secretary of State of Trade and Industry** is that Courts are empowered to deem subordinate legislation ultra vires by reason of ‘its contents, or whether it has the effect or is made for a purpose which is ultra vires’.

[52] As this court understands it, there is no dispute that the Minister lacks the authority to extend the power of the Superintendent. It appears that both parties are in general agreement that such authority is not sanctioned by section 217(1) (m) of the Insurance Act. The dispute surrounds the content of the regulations, and whether by its language, regulation 3 purports to extend the powers of the second respondent. It is pellucid that in the circumstances, the interpretation of the statute and an examination of regulation 3 is necessary.

[53] The powers of the Superintendent can be gleaned from a plain and ordinary reading of the enacting parts of the Insurance Act or by the necessary implications of both the enacting and non-enacting parts of the Act. A cardinal principle of statutory interpretation is that a statute must be read as a whole and be given such ‘broad and liberal’ construction to give effect to the true intention of Parliament.

[54] In the seminal decision of **Pepper v Hart**¹² the House of Lords articulated the modern approach to statutory interpretation known as the purposive approach. The House of Lords stated the following:

¹² [1992] 3 WLR 1032

“The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of the legislation and is prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.”

[55] The court now embarks on a juxtaposition of the relevant provisions. Regulation 3 (a) and (b) require the registration of insurance intermediaries, or of any person engaging in any activity that is substantially the same as intermediaries. Section 88, requires an application for registration of insurance intermediaries to be made to the Superintendent. On a careful reading ascribing the plain and ordinary meaning of the language used in the provisions, this court does not find that regulations 3 (a) and 3(b) extend the powers of the Superintendent. Accordingly, the court finds regulations 3 (a) and (b) lawful.

[56] Regulation (d) requires a licensee or registrant under the Act to supply information or give an explanation of any payment made to any persons within the jurisdiction. Section 39 empowers the Superintendent to require an affiliate of a registered company to provide relevant information or documents for assessing compliance with the Act and the company's financial status. Section 54 empowers a Superintendent to ask a registered company to provide information about its insurance business, including documents and records as specified by her. Section 97 empowers the Superintendent to request information about the business of registered insurance intermediaries and requires the production of relevant books, records, or documents as specified. There is no need for an elaborate dissection of this part. In light of the clear language in the provisions, the court does not find that regulation 3 (d) extends the powers of the Superintendent. Accordingly, regulation 3 (d) is not ultra vires the Act.

[57] Regulation 3 (i) empowers the Superintendent to refuse, suspend or revoke the registration of an intermediary. Section 90 empowers the Board to direct

the Superintendent to conditionally or unconditionally register insurance intermediaries. Section 93 gives the Superintendent the authority to propose to cancel the registration of a person for certain classes of insurance business, with the approval of the Board, through written notification. Section 94 gives the Board the authority to cancel the registration of a person. It is clear that the Superintendent is empowered under the act to refuse or cancel a license. The ability to suspend a license arguably, is an incidental power of the Superintendent. The court has difficulty in concluding that Regulation 3 (i) has extended the powers of the Superintendent in that regard.

[58] Regulation 3 (c) enables the Superintendent to issue a cease and desist order, regulation 3 (e) requires the Superintendent to establish and issue guidelines for basic education and training standards for all persons carrying on business as an insurance intermediary and for persons employed with insurance intermediary. Regulation 3 (f) requires the Superintendent to establish and issue guidelines for proper market conduct, regulation 3(g) requires the examination of the location of registered offices, regulation 3 (h) empowers the Superintendent to issue directives from time to time and regulation 3 (j) direct the termination of a contract between an insurer and an intermediary where it is in the interest of public so to do. Section 5 (2)(a) and (b) mandates the Commission to have regard to the requirements of a sound financial system and the maintenance of market confidence, consumer protection and the reputation of the financial centre.

[59] Regulation 5 has been discussed previously, for brevity the court will not re-examine the provision. It is clear and goes without argument that the powers in regulations 3 (c), (e), (f), (g), (h), (j) are powers which can properly be exercised by the third respondent in furtherance of his duty. Conversely, however, the court is of the opinion that the powers in the aforementioned regulations are not powers which are given by the second respondent in the Insurance Act. It is not to say that these powers cannot be carried out by the second respondent, however, the court interprets that these powers are to be exercised on the prior approval of the Minister. Which seemingly, operates as

a check and balance of the authorities within the sector. The Court is of the opinion that this interpretation accords with the true Intention of Parliament.

[60] These in effect, are new powers which are conferred upon the second respondent, that are absolute. The court cannot countenance conduct which is ultra vires the powers of a statutory authority merely because it is more convenient on the part of the authority, so to do. The effect of section 5 of the FSRC is clear by the language used. These powers are justified within the function of the third respondent by powers assigned under section 5 and do not extend to assign powers absolute to the second respondent.

[61] In **Caribbean Commercial Bank (Anguilla) Limited v Starry Benjamin** ¹³ Pereira CJ, stated the following in paragraph [13] of her judgment:

“It is not the function of the Court to legislate or to fill some convenient gap which, in hindsight, may be viewed by a party as being deficient, but rather to interpret the language that parliament has used to express its will. Where the language used is clear, the court must apply it. ...

[62] Accordingly, the court finds that regulations 3 (c), (e), (f), (g), (h), (j) as they stand, are ultra vires the Insurance Act. The court has jurisdiction to set aside or disregard an invalid part of an enactment. Ventose, J in **Damien Kelsick v Kerstin Petty et al**¹⁴ in paragraph [14] stated the following:

“The Court of Appeal of England and Wales accepted the following principles (at 1524-1525) as applicable:

Unless the invalid part is inextricably interconnected with the valid, a court is entitled to set aside or disregard the invalid part, leaving the rest intact.

If the enactment, with the invalid portion omitted, is so radically or substantially different a law as to the subject matter dealt with by what

¹³ AXAHCVP 2014/0009

¹⁴ SKBHCV2014/0119

remains from what it would be with the omitted portions forming part of it as to warrant a belief that the legislative body intended it as a whole only, or, in other words, to warrant a belief that if all could not be carried into effect the legislative body would not have enacted the remainder independently, then the whole must fail.”

[63] The court considers that the invalid part of Regulation 3 is not so inextricably connected with the valid part. The court, therefore, set aside regulations 3 (c), (e), (f), (g), (h), (j) for being ultra vires. The remaining subparagraphs under Regulation 3 remain intact.

[64] It is worthy to mention for clarity that the cease and desist order was issued from the directives of the third respondent, thus remains lawful and the quashing of regulation 3 (c) does not have the effect of invalidating the cease and desist order dated 10th July 2020.

ISSUE NO. 3 Whether the provisions of Regulations 11 (6) (e) and 12 (2) (a) of the Regulations which requires insurance intermediaries to submit audited financials in support or an application for registration and or re-registration unreasonable and irrational?

Applicants' submissions

[65] Insurance companies registered under Part III of the Insurance Act and Associations of underwrites registered under Part IV of the Insurance Act are required to provide audited accounts pursuant to sections 44 and 83(4)(a) respectively. Pension funds registered under Part VII of the Act are required to submit audited accounts pursuant to section 193(2)(a) of the Insurance Act. Counsel posits that there is no provision which mandates the applicants to submit audited reports to the Superintendent. The effect of the said regulations is to mandate the applicants to submit documents they are not required to keep under the Act. Hence in the circumstances, the said regulations are unreasonable and irrational.

[66] Counsel argues that the Latin maxim “expressio unius est exclusion alterius”, in English, which translates to mean “express enactment shuts the door to further implication” has always been a general rule of construction¹⁵. It is trite law that stating a thing expressly ends the possibility that something inconsistent with it will be implied. If Parliament desired for insurance agents to submit audited accounts to the Superintendent, it would have been easy for Parliament to have stated it. It is not to be assumed that Parliament somehow made a mistake with the Act. The Act must be taken and dealt with as is, until and unless amended. Counsel, in support of his argument, submits the authority of **Richards v McBride**¹⁶ where Grove J states at 122 the following:

No one in construing a statute or any other literary production could put such a construction on the words unless by supposing they were a mistake. **But we cannot assume a mistake in an Act of Parliament.** If we did so, we should render many Acts uncertain, by putting different constructions on them according to our individual conjectures. The draftsman of this Act may have made a mistake. If so, the remedy is for the legislature to amend it. But we must construe Acts of Parliament as they are, without regard to consequences, except in those cases where the words used are so ambiguous that they may be construed in two senses, and even then we must not regard what happened in Parliament, but look to what is within the four corners of the Act, and to the grievance intended to be remedied, or, in penal statutes, to the offence intended to be corrected.

[67] It is counsel's averment that if the Act does not require insurance agents to maintain audited accounts, the requirement to maintain audited accounts cannot be imposed by the side wind of Regulations issued by the Minister.

Respondents' submissions

¹⁵ *Blackburn v Flavelle* (1881) 6 App Cas 628 at 634, *Whiteman c Sadler* [1910] AC 514 at 527.

¹⁶ (1881) 8 QBD 119

The First and Second Respondents submissions

- [68] Counsel submits that the second respondent in fulfilment of her regulatory and supervisory duties to ensure that insurance agents comply with the statutory requirements is clothed with authority to seek such necessary information which includes audited financials from which a determination of compliance may be made. The second respondent is required to ensure that persons conduct insurance business lawfully, competently and efficiently.
- [69] Counsel cites section 4(1) of the Insurance Act and states that it provides that the Second Respondent is responsible for the general administration of the provisions of the Act and the Regulations which fall within the mandate of the Commission. Further section 88 of the Insurance Act authorizes the Second Respondent to request an applicant to furnish any additional information or other document in respect of an application for registration and re-registration. This authority to request information to assess financial stability is extended to affiliates of the insurance company, inclusive of intermediaries, in section 39 of the Insurance Act.
- [70] Further to their argument, counsel submits that section 88 of the Insurance Act empowers the second respondent to request additional information or documents from applicants for registration and re-registration. It is counsel's view that this information helps the second respondent to assess the financial stability of insurance companies in the jurisdiction. Sections 35 to 39 of the Insurance Act require insurance entities to maintain any necessary books, records, and documents to demonstrate financial stability. Counsel posits that the second respondent has the authority to demand this information from insurance entities and their affiliates, which is extended to intermediaries by virtue of section 39 of the Act.
- [71] Counsel also references section 97 (1) of the Insurance Act, which provides that the Superintendent may request information related to an insurance intermediary's business from the registered person, their employer, or principal. Further as per section 97 (2), the Superintendent can require the production of books, records, or other documents concerning the business that may be

specified. Counsel also contends that section 93 of the Insurance Act authorizes the second respondent to cancel the registration of an insurance intermediary under certain circumstances, which includes the reason that “he has become an undischarged bankrupt” all of which require an analysis of the financial statements of the insurance intermediary. Counsel argues that of relevance is the ground for cancellation, pursuant to section 93 (f) of the Insurance Act which mandates the required financial statement within one month’s period, failure of which, without reasonable excuse, warrants a cancellation.

[72] Counsel posits that it is evident from the Act that entities engaged in the insurance business must maintain proper books, records, including financial statements. The second respondent, in fulfilling her duties, is not constrained to rely solely on the financial information provided by the assessed person, and it would be irrational to suggest that the second respondent cannot seek an independent auditor’s assurance on the accuracy of the financial information so provided.

[73] Counsel submits further that sections 95 and 97 ought to be read conjointly, which permits the second respondent to ensure insurance agents are conducting business for which it is registered, competently and efficiently, as required by sections 90 and 93 of the Insurance Act. Thus in ensuring that insurers comply with the Act the second respondent is clothed with the authority to seek such necessary information which includes the financials from which a determination of compliance may be made.

The Third Respondent’s submissions

[74] The submissions on this issue of the third respondent were very similar to that already explored by the first and second respondent and for brevity will not be duplicated hereunder. In addition to those submissions Learned counsel for the respondents resisting the relief sought of the applicant states that insurance intermediaries are not solely governed by Part V of the Act. There exists the Insurance (Supervision and Compliance) Regulations 2019 (“the Regulation”)

and the FSRC Act and by virtue of section 39 of the FSRC Act, they are governed by the same rules and regulations as a registered insurer.

- [75] Further, section 4 (1) of the Insurance Act assigns responsibility to the second respondent for administering the Insurance Act. Pursuant to section 90 of the Insurance Act, the second respondent's statutory duty, is to ensure that insurance businesses are conducted lawfully, competently, and efficiently. All individuals conducting insurance business are bound by the Insurance Act, which mandates that such persons carry on insurance business in a lawful manner.
- [76] Counsel further contends that factors which must be considered in determining fitness and propriety for registration are set out in Part V of the Insurance Act and it cannot therefore be said that Regulations 11 (6)(e) and 12 (2) (a) are unreasonable or irrational. The function of audited financials is to establish certain financial facts through a qualified third party. This is important as an insurance agent acts on behalf of a registered insurance company and therefore the Second and Third Respondents must have means of determining whether the registrant has been carrying on business in a manner consistent with the requirements of the granted registration.

Law and analysis

- [77] Section 217 (1) (m) affords the Minister the discretion to make regulations it deems fit for the effective implementation of the Insurance Act. The applicant contends the decision of the body to implement regulations 11 (6) (e) and 12(2) (a) on the grounds of unreasonableness and irrationality. Unreasonableness in judicial review refers to a legal standard used to assess the decision making process and outcomes of administrative bodies, or government agencies. Administrative bodies subsume statutory authorities and the general principles in determining the reasonableness of its decision are applicable.

[78] The courts, in reviewing the decision or actions of an administrative body consider whether that decision or action falls within a range of possible outcomes that are reasonable. The courts are reluctant to fetter the discretion of the authority unless it is proven that the decision or end result is “a perversely unreasonable exercise of the power conferred by the statute”.

[79] The oft-cited authority on “unreasonableness” in legal discourse is the seminal case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation**¹⁷ which gave rise to the concept of the “Wednesbury reasonableness” principle. In this case, the court established the principle that a decision can be considered unreasonable if it is “so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

[80] An illustrative view of the applicability of this principle can be found in the authority of **Grenada Technical and Allied Workers Union**¹⁸ where Price Findlay J, as she then was, at paragraph [40] of her judgment cited with approval the Blenman JA from Graham Aldous and John Alder’s “Applications for Judicial Review Law & Practice.”

“The notion of ultra vires extends beyond the notion of exceeding the wording of a statutory provision. Thus the exercise of discretion may be ultra vires because a body has no power to do something in a particular way. This may conveniently be referred to as ultra vires unreasonableness although, in fact, it covers a number of vitiating factors. The classic explanation of unreasonableness in this context is to be found in the speech of Lord Greene MR in *Associated Provincial Picture Houses Ltd. v Wednesday Corpn.*:

... A person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters

¹⁷ [1948] 1 KB 223.

¹⁸ GDAHCV2010/0370

which are irrelevant to what he has to consider. If he does not obey these rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short v Poole Corpn* gave the example of the red-haired teacher dismissed because she had red hair. This is unreasonable in one sense. In another, it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

This dictum has become as well-known as to be referred to as the *Wednesbury Principle*. This second category of ultra vires includes:

1. Decisions taken in bad faith;
2. Decisions made without consideration of relevant matters (including the fettering of discretion by adopting rigid rules of policy, or by agreement, or improper delegation);
3. Decisions made taking into account irrelevant matters;
4. Decisions which no reasonable authority could come to; and
5. Decisions taken without regard to procedural requirements including the rules of natural justice."

[81] The rationale behind the high threshold requirement is the recognition that administrative bodies are entrusted with discretionary powers and decision-making authority in carrying out their functions. The court acknowledged that administrative bodies are often in the best position to make informed decisions, given their expertise and knowledge of the specific area in which they operate. In **Anne Hendricks Bass v Director of Physical Planning et al**¹⁹ Ramdhani J [Ag], in paragraph 27 of his judgment cited the Nottingham County Council case where he stated the:

¹⁹ NEVHCV2016/0014

The Nottingham City Council case was about a policy and economic decision made by the Secretary of State and approved by the House of Commons. In particular, it related statutory guidance made by the Secretary of State and then approved by the House of Commons which was to inform expenditure in relation to local authorities. Some of these authorities complained that 'the burden which the guidance imposes on some authorities, ... is so disproportionately disadvantageous when compared with its effect on others that it is a perversely unreasonable exercise of the power conferred by the statute on the Secretary of State. The authorities complained that the guidance was *Wednesbury* unreasonable. In rejecting this complaint, Lord Scarman stated:

"But I cannot accept that it is constitutionally appropriate, save in very exceptional circumstances, for the courts to intervene on the ground of 'unreasonableness' to quash guidance framed by the Secretary of State and by necessary implication approved by the House of Commons, ... Such an examination by a court would be justified only if a *prima facie* case were to be shown for holding that the Secretary of State had acted in bad faith, or for an improper motive, or that the consequences of his guidance were so absurd that he must have taken leave of his senses... This view of the language of the statute has inevitably a significant bearing on the conclusion of 'unreasonableness' in the *Wednesbury* sense. If, as your Lordships are holding, the guidance was based on principles applicable to all authorities, the principles would have to be either a pattern of perversity or an absurdity of such proportions that the guidance could not have been framed by a bona fide exercise of political judgment on the

part of the Secretary of State. And it would be necessary to find as a fact that the House of Commons had been misled: for their approval was necessary and was obtained to the action that he proposed to take to implement the guidance.'

- [82] In paragraph [29], the learned judge observes the use of the word “irrationality” in Provincial Picture. The paragraph reads:

‘... As Lord Diplock stated in the Civil Service Unions case:
20. The second ground is irrationality, which was a concept developed in the Court of Appeal decision **Associated Provincial Picture Houses Ltd v Wednesbury Corporation**. In'-:Coming to a decision of irrationality the court is entitled to investigate whether the local authority took into account relevant matters or came to a conclusion so unreasonable that no reasonable authority could ever make it.'

- [83] As the Minister is duty-bound to act reasonably, it is pellucid that the court must assess whether the implementation of the regulations is consonant with reasons that exist within the ambit of his powers. Statutory rules of construction serve as a guide or signpost to the intention of Parliament. If the application of a rule of construction leads to absurdity or undesirable results, then the rule fails to align with the true intention of Parliament and lacks legal efficacy.

- [84] Against this backdrop, maxims should not be taken as strict rules binding on the Courts. This court has difficulty accepting learned counsel's application of the “expressio unius est exclusion alterius” maxim. Prima facie, the rule seemingly serves to aid in interpretation, however, in light of the surrounding provisions which have been exhaustively outlined above and in light of the purpose of the legislative scheme, to strictly apply the maxim will be to offend the intention of Parliament.

- [85] The court finds the argument proffered by counsel for the third respondent attractive. I pay particular regard to section 88 of the Insurance Act, which grants the second respondent the authority to request additional information or documents for registration. Moreover, insurance entities are required to ‘maintain any necessary books, records, and documents to demonstrate financial stability.’ It would be implausible to argue that the Superintendent or the Commission are restrained from requesting audited financial reports from insurance intermediaries in light of the language used in the Legislation. This is employed as a measure to demonstrate financial stability.
- [86] In assessing reasonableness, the court cannot impose its own subjective views or decisions; it is therefore constrained to determine whether the action adopted by the Commission to implement regulations 11 (6)(e) and 12(2)(a) falls outside the boundaries within which reasonable disagreement allows, considering the object and purpose of the insurance scheme.
- [87] Regulations 11 (6) (e) and 12 (2) (a) do not exceed the range of reasonable options available to the Minister for the effective implementation of the Act. It cannot be inferred, through an interpretive lens employing the purposive approach, that the requesting of audited financial statements from insurance intermediaries was never contemplated by the Act. Moreover, there has been no claim that the Minister ignored relevant factors or took into account irrelevant factors in making the decision to implement the regulations.
- [88] In adopting the words of Lord Scarman, it cannot be accurately stated, that the consequence of the regulations implemented by the Minister ‘is so absurd as that he must have taken leave of his senses’ or that there is a ‘pattern of perversity or absurdity of such proportions that the guidance could not have been framed by a bona fide exercise’ of judgment on the part of Minister. Furthermore, the decision cannot be deemed as ‘irrational’ in the sense that no reasonable authority could have reached the same conclusion.
- [89] The provisions in the Act did not “shut the door” on the possibility of insurance agents or insurance intermediaries being required to produce an audited

financial statement. Although the challenged regulations make the submission of such a statement mandatory, which was not explicitly mandated by the Act, the court does not find this requirement to be beyond the bounds of reasonableness. Furthermore, this court does not find that the regulations do not serve the effective implementation of the Act.

- [90] Mere disagreement with the regulations or the existence of alternative reasonable option, without more, is not enough. This court's jurisdiction to fetter the discretion of the Minister is triggered only when it is determined that the regulations are so unreasonable, that no reasonable statutory body, acting reasonably, could have implemented them. The court does not so find. Based on the foregoing, the application to quash regulations 11 (6) (e) and 12 (2) (a) for being unreasonable and irrational is refused.

ISSUE NO. 4 Whether in the circumstances, the issue of the cease and desist order on the second applicant failed to accord him natural justice

- [91] The point taken in relation to this issue by counsel for the applicants is a short one. Briefly stated counsel contends that Mr Kelsick was not afforded any natural justice as the decision to issue a cease and desist order against him was made without first affording him a chance to be heard. It is counsel's view that the decision was 'wholly unreasonable and fundamentally unfair' for the Commission to impose the sanction of a cease and desist order, which is draconian in effect, and after the bite of the sanction has been felt, to then say to him "Come in" so that he may be heard. Having already executed a punishment the hearing could only have been seen as a formality. The adverse decision had already been made.

- [92] Counsel argues that there is an indispensable right to fairness, and cited the dicta of the Privy Council in **Manning v Ramjohn**²⁰ to bolster his position. Where in that case, in paragraph [39] the PC opined on the importance of

²⁰ [2011] UKPC 20

permitting a party to properly advance his case before adversely acting against him.

- [93] Counsel advance that the onus is on the Commission to show that the imposition of the cease and desist order, prior to giving Mr Kelsick a chance to be heard, was of the rare occasions where advance action before hearing from the party affected was wholly justified. The Commission, it is respectfully submitted, has not discharged the heavy onus placed on it.

Respondents' submissions

- [94] Oral submissions were advance by counsel for the respondents at trial refuting the applicants' averments. Particularly counsel for the third respondent submits that there was a dispute between Caribbean Alliance and Mr Kelsick in relation to outstanding premiums. Counsel posits that the communication among Caribbean Alliance, the Superintendent and the Commission evidenced by way of letters and other documentation that Mr Kelsick has been engaging in activities where he is accepting premiums, deducting commissions, settling claims and assigning risks to the insurer. This conduct is in contravention of section 87 and section 88 of the Insurance Act. In light of this information, the third respondent was of the opinion that there is a need to take immediate action to curtail the damage already been done.
- [95] Counsel argues further that the letter issued on 10th July 2020 requested a meeting with the second applicant on 13th July 2020. This letter gave Mr Kelsick the opportunity to be heard. In cross-examination, Mr Kelsick by his own admission stated that he opt not to participate in the meeting. Counsel states that the question of natural justice is whether a right has been infringed, and advances that the second respondent, had no right after the expiration of his license, to conduct business as an insurance intermediary.

Law and analysis

- [96] Counsel for the applicant proffered the authority of **Manning v Ramjohn** to aid in the determination of this issue. The court finds that the authority is apt in the circumstances and expresses gratitude to counsel for the extract in his submission, which will be reproduced in full. The dicta of the Privy Council in

Manning v Ramjohn at [39] on the importance of permitting a party to properly advance his case before adversely acting against him is as follows:

“... A characteristically illuminating statement of the law appearing in Bingham LJ's judgment in *R v Chief Constable of the Thames Valley Police Ex p Cotton* [1990] IR LR 344 (para 60) deserves to be more widely known. While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this:

1. Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance.
2. As memorably pointed out by Megarry J in *John v Rees* [1970] Ch. 345 at p402, experience shows that that which is confidently expected is by no means always that which happens.
3. It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.
4. In considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.
5. This is a field in which appearances are generally thought to matter.
6. Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied.”

[97] These are the uncontroverted evidence as the court finds them.

- (1) Correspondence ensued among Caribbean Alliance, the second respondent and the third respondent. The correspondence yielded the

result of the Superintendent on the instruction of the Commission, issuing a cease and desist order against the second named applicant.

(2) The cease and desist order dated 10th July 2020 contained the following:

- (i) An outline of the allegation laid against the second applicant;
- (ii) The section which alleged has been contravened;
- (iii) The to issue the order;
- (iv) The documents relied upon which purportedly disclosed that “ the second applicant whilst not being registered to carry on insurance business in accordance with Part V of the Insurance Act, accepted and assigned risk to the Insurer in excess of thirty-two million Eastern Caribbean Dollars (EC\$32,000,000); settled "claims" approximating seventy-seven thousand Eastern Caribbean Dollars (EC\$77,000); and deducted "commission" approximating one hundred and sixteen thousand dollars (EC\$116,000) from monies collected from the public intended for the insurer.” Et al.
- (v) An outline that he is the only one that is privy to the order.
- (vi) The need for urgency to act in the interest of the public.
- (vii) A date to discuss the matters raised on 13th July 2020 at 10:00 am at the Commission’s office. Failing which, the authority would issue a public notice relating to unlawful actions; post a cease and desist order on the door of his office; seek the assistance of the Commissioner of Police to close the office; and make formal reports to lawful authorities for investigation.

(3) The second applicant, by his own admission, stated that he showed up at the meeting but did not participate.

(4) The second applicant, under cross-examination, stated that he has not held a license to operate as an insurance intermediary since December 2019.

(5) In paragraph [21] of Claudette Richardson’s affidavit, which went unchallenged by the applicants, the attorney for the second applicant was advised of allegations that the applicant was engaging in insurance

business without a registration, which counsel expressed his ignorance on the matter and will communicate with his client.

- [98] The court notes the advancement made by counsel for the draconian effect of the cease and desist order was meted on the second applicant which arrested his right to be heard in contravention of natural justice.
- [99] The 10th July 2020 Order, in effect, serves as a warning to not carry on business without registration, which also afforded the applicant the opportunity to prove his case, failing which the draconian step of publishing a cease and desist order on the door, notifying the public and calling the relevant authority will be implemented. There is a paucity of evidence as to whether those steps were in fact taken. Be that as it may, those points were not advanced at trial. The court does not hold the view that the order was draconian and this certainly was not established by the applicants.
- [100] The court finds that given the circumstances that prevailed, the nature of the insurance scheme and the effect of the 10th July Order, the Order would fall in the category of “great rarity”. The order was issued on a Friday of the week, requesting the applicant to put his case the following Monday of the new week. The order instructs not to carry on unlawful activity, the applicant was notified and given a reason and afforded the opportunity to prove his case. Furthermore, the applicant slept on those rights when he arrived at the hearing to serve a claim for JR proceedings.
- [101] This court finds that in the circumstances and contrary to the applicant counsel’s aversion, the commission has discharged the onus that the imposition of the cease and desist order, prior to giving Mr Kelsick a chance to be heard, was of the rare occasions ‘where advance action before hearing from the party affected was wholly justified’. Accordingly, the court does not find a breach of natural justice.

Damages

- [102] For completeness, the court will go on to briefly consider damages.

[103] Seemingly the applicants have abandoned this issue, as it was not argued in their submissions however, in paragraph 8 Mr Kelsick's affidavit, the applicant states that the order has severely negatively impacted his professional reputation, and was draconian in effect. Interestingly, the applicant states in paragraph [6] of his affidavit dated 13 July 2020 that he has lost business on account of the standoff between himself and Caribbean Alliance which has prevented him from registering as an insurance agent and as a result has had to shed business and direct clients to other agents.

[104] As previously stated, there has been no evidence to support their aversion that as a result of the cease and desist order dated 10th July 2020, the applicant has incurred a loss. Moreover, given that the cease and desist order was privately given to the applicant, the court has great difficulty in finding that the issuance of the order was injurious to the reputation of the second applicant. Additionally, quite accurately stated by counsel for the respondent, that the issuance of the cease and desist order could not have affected the second applicant's ability to carry on insurance business for which he had no lawful registration.

[105] Based on the foregoing, the court does not find that the applicants are entitled to damages.

Costs

[106] According to CPR 56.13(6) the general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application. The applicants have been somewhat successful in this matter and were able to persuade the court that certain regulations should be quashed. This is demonstrative that the case was not frivolous or vexatious and as such any failings in the entirety of the case should not count as an opportunity for a costs award against them. Further all parties having had a measure of success it would be improper to order costs and instead the appropriate action is to allow parties to each bear their own costs.

Conclusion

[107] The Court, therefore, makes the following orders:

- (1) Regulations 3 (c), (e), (f), (g), (h), (j) of the Insurance (Supervision and Compliance) Regulations 2019 are ultra vires the Insurance Act 2007 and hereby quashed.
- (2) A declaration that Regulations 3 (a), (b), (d), and (i) of the Insurance (Supervision and Compliance) Regulations 2019 are ultra vires the Insurance Act 2007 is refused.
- (3) An order quashing the cease and desist order issued by the 2nd Respondent to the 2nd Applicant by letter dated 10th July 2020, is refused.
- (4) Regulation 8 and the administrative penalties with respect to intermediaries of the Insurance (Supervision and Compliance) Regulations 2019 are hereby quashed.
- (5) An order quashing regulations 3, 11 (6) (e) and 12 (2) (a) of the Insurance (Supervision and Compliance) Regulations 2019, subject to order no. 1 is refused.
- (6) There shall be no order as to damages.
- (7) No order as to costs.

PS: The judgment was delivered on the 27th July 2023 with reasons to be given on the said day. Due to administrative issues, the court's reasons were not sent to counsel on the day the court's order was pronounced. In the interest of fairness and preserving both parties' right of appeal, and in keeping with the original intention of the court, the judgment takes effect from the date of reissue, that is on the 13th October 2023

**Jan Drysdale
High Court Judge**

By The Court

Registrar