THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

NEVHCVAP2023/0008

BETWEEN:

REGULATOR OF INTERNATIONAL BANKING

Appellant

and

[1] PETRODEL INVESTMENT ADVISERS (NEVIS) LIMITED
[2] MICHAEL J. PREST
[3] BANK OF NEVIS INTERNATIONAL LIMITED

Respondents

Before:

The Hon. Mde. Vicki Ann Ellis	Justice of Appeal
The Hon. Mde. Esco L. Henry	Justice of Appeal
The Hon. Mr. Gerard St. C. Farara	Justice of Appeal [Ag.]

Appearances:

Ms. Jean M. Dyer and Ms. Shyra I. W. Manners for the Appellant.
Ms. Nadia Chiesa for the 3rd Respondent.
No appearance for the 1st and 2nd Respondents.

2025: March 12;
2026: June 02.

Civil appeal – Judicial Review – Nevis International Banking Ordinance ('NIBO') – Nevis International Banking Regulations – Banking Regulator – Powers of Banking Regulator – Whether the Banking Regulator has the authority to issue cease and desist letter – Whether the Banking Regulator has the authority to impose fines and penalties – Deciding issue de novo - Costs – Good faith - Whether "liability" in section 30(8) of NIBO includes legal costs– Whether liability extends to conduct in purported performance of duty under NIBO

The Regulator of International Banking ('the Banking Regulator"/'the appellant') is a public officer in the Nevis Island Administration ('NIA') who is appointed by the Minister of Finance under the Nevis International Banking Ordinance ('NIBO') to regulate international banking on that island. Petrodel Investment Advisers (Nevis) Ltd. ('Petrodel') and the Bank of Nevis International ('BONI') are Nevis-incorporated companies, BONI holding an international banking licence under NIBO, Petrodel being a shareholder in BONI and Michael J. Prest ('Prest') is a director of both entities and CEO of BONI ('the respondents').

This appeal principally concerns the issuance by the Banking Regulator to BONI and Prest of letters in purported furtherance of his duties under NIBO.

The first in the series of letters issued to BONI was one dated 21st June 2021 addressed to BONI's Board of Directors and signed by the Banking Regulator. The subject line of the letter was 'Re: Appointment of Chief Executive Officer'. The Banking Regulator pointed out that the record of the NIA's Financial Services (Regulation and Supervision) Department ('FSR&S Department') revealed that no application was made, or subsequent approval was granted for Prest to occupy and perform the functions of director or other senior officer of BONI pursuant to section 22 of NIBO.

The next letter, dated 23rd June 2021, was issued by the Banking Regulator to Prest and Petrodel and, like the previous correspondence, was written on the FSR&S Department's letterhead. The letter indicated that it was issued pursuant to the Banking Regulator's duties under section 30 of NIBO and Schedule 6 of the Nevis Island Banking Regulations, 2015 ('NIBR'), and stated that it was considered prudent to restrict the activities of BONI's shareholder and ultimate beneficial owners ('UBOs') until further notice. In consequence, Petrodel and its UBOs were instructed to refrain from intervening in BONI's day-to-day operations and related activities, including by ceasing to issue instructions or orders to staff, making changes to the Board of Directors, issuing instructions or orders to the Board, or communicating with BONI's third-party service providers so as to influence action in respect of BONI. Prest was further directed to comply with, and secure the compliance of, the other UBOs with those instructions, and was reminded that, pursuant to section 15 of NIBO, BONI was prohibited from making significant changes to its shareholdings or transferring resources otherwise than in the ordinary course of business.

In a further letter dated 25th June 2021 to BONI's acting CEO, the Banking Regulator purported to impose additional fines and penalties totalling US$120,000.00 pursuant to section 30(4)(d) of NIBO and paragraphs 12(1) and (4) of NIBR for BONI's alleged continued failure to provide requested information concerning Prest's appointment as BONI's CEO. The letter stipulated that US$50,000.00 was payable on or before 25th June 2021, US$30,000.00 on or before 2nd July 2021, US$20,000.00 on or before 9th July 2021, and a further US$20,000.00 on or before 16th August 2021. It stated that the requests for information had originally been made on 30th October 2020, including a request that an application for Prest's approval as BONI's CEO be submitted on or before 6th November 2020, and that the fines were imposed as a consequence of BONI's inordinate delay in providing the requested information. BONI subsequently paid the sum of US$120,000.00, together with the requisite bank charges, before 13th August 2021.

By fixed date claim form, the respondents sought Judicial Review of the Banking Regulator's decisions to issue the 1) 23rd June 2021 letter restricting Petrodel's and Prest's activities as shareholder and director respectively; 2) 25th June 2021 imposition of fines and penalties of US$120,000.00 on the basis that they represent a gross overstatement of the sum due and payable by BONI. They sought orders (i) declaring the decisions to be ultra vires NIBO and NIBR (ii) quashing them and (iii) of restitution with interest.

The respondents advanced several grounds in support of the claim, including that: (a) the Banking Regulator lacked authority to issue the Orders dated 22nd and 25th June 2021; (b) the power to issue cease and desist orders resides exclusively with the Licensing Committee established under the Nevis Trust and Corporate Services Providers Ordinance 2021; (c) the Financial Services Regulatory Commission, under the FSRC Act, is the body empowered to issue such orders and may delegate certain statutory functions; and (d) the cease and desist orders, fines, and penalties of US$120,000.00 relating to sections 4(1)(c), 22, and 80 of NIBO were unlawful or inappropriate insofar as they concerned Prest's application and approval as BONI's CEO.

The Banking regulator refuted the respondents' claims that the fines and penalties were unlawful and that they were issued without the requisite authority under NIBO or otherwise.

The learned judge concluded that, although the 23rd June 2021 letter was addressed to Petrodel, its tenor indicated that it was also directed at Prest, as evidenced by the instructions issued to Petrodel as BONI's shareholder and its other UBOs. The judge further noted the parties' agreement that the Regulators' authority derived from the FSRC Act, under which the Commission was established to regulate financial services that are not governed by the Banking Act and empowered under section 29 to delegate certain functions to specified persons or bodies. However, he found that neither regulator held the requisite designation, appointment, or delegated authority under the FSRC Act. On that basis, the judge held that the Commission's power to issue fines could not be impliedly delegated to the Financial Services Regulator, particularly as the functions under review were decisional in nature and fundamental to the Commission's statutory powers. The learned judge ruled that the Banking Regulator was not authorized to: a) issue orders restricting the activities BONI's shareholder and its UBO ('cease and desist order') or (b) impose fines on BONI. The learned judge also awarded costs against the Banking Regulator.

The Banking Regulator appealed the learned judge's decision on two main grounds, the first being a tripartite attack on the quashing orders and the second, a criticism of the costs order. The grounds of appeal are as follows:

Ground 1 – The Quashing Decision

1. The Learned Judge in reaching his decision considered mistaken material, namely that "[e]veryone is agreed that the Regulators (sic) authority is derived from the Financial Services Regulatory Commission Act …", which influenced the conclusion reached;

2. The decision of the Learned Judge was clearly wrong as a matter of law because in reaching his decision he failed to have any or any sufficient regard and attach appropriate weight to the defence that the Banking Regulator had authority under NIBO to impose the fines and penalties; and

3. The learned judge was obliged to consider and determine whether the Banking Regulator had authority under NIBO to impose the fines and penalties and wrongfully and erroneously failed to do so.

Ground 2- The Costs Decision

1. The Learned Judge erred in the circumstances in making the costs order against the Banking Regulator.

Held: allowing the appeal in part, limited to the issue of costs and making the orders at paragraph 133 of this judgment that:

1. There was no consensus that the Banking Regulator's authority is derived from the FSRC Act. The Banking Regulator did not refer to any pleadings, affidavits, oral evidence or submissions from which this conclusion was drawn. The Banking Regulator did not in any way state that his authority derived from the FSRC Act. By stating that everyone agreed that the Regulators' authority derived from the FSRC Act and then determining the issues on that basis, the learned judge operated from a misguided and mistaken viewpoint which directly influenced the decision he reached.

2. An application for judicial review seeks an administrative order from the court, in respect of which the judge exercises a judicial discretion as to whether relief should be granted. In the present case, the learned judge was required to fully consider the Banking Regulator's defence, which turned on the provisions of NIBO and NIBR, and determine as a matter of law whether those provisions authorized the issuance of the directives and imposition of the fines contained in the 23rd June and 25th June 2021 letters to BONI. These were material considerations in assessing whether the Banking Regulator acted ultra vires, and the answers to those legal questions were central to the exercise of discretion on the judicial review application. It was therefore necessary for the judge to consider and interpret the relevant provisions in NIBO in their entirety. He made no mention anywhere in the judgment that the Banking Regulator was relying on NIBO and NIBR as the legislative source of his authority to issue the letters and that this was the nub of his defence. This constitutes a serious error by the judge in that he did not properly consider the Banking Regulator's defence or attach any weight to it. Having failed to do so, he did not take into account relevant considerations, namely whether the Banking Regulator had authority to issue the cease and desist order and impose fines under NIBO and the NIBR, and thereby erred in principle, rendering his decision plainly wrong in the making the quashing orders, the related declarations and costs award. Given that the issues on appeal involve no disputes as to the factual matrix and raise purely questions of law, this Court has the same capacity as the trial judge to

evaluate the competing legal arguments and render a decision on the merits and therefore ought to consider the Banking Regulator's defence and related issues *de novo.*

Rules 56.1(1)(c), 56.1(2) and 56.11(3) of the **Civil Procedure Rules (Revised Edition) 2023** applied.

3. It is not permissible to imply, in respect of the Banking Regulator, from the legislative framework in NIBO the power to impose fines and penalties. While section 84 of NIBO is very general and broad, the provision does not expressly confer on the Minister power to prescribe fines. However, section 21 of the Interpretation Act provides an express power to impose a penalty appropriately limited to the sum of two thousand five hundred dollars. In the circumstances, the Minister could by Regulation 12(4) have imposed a penalty of up to two thousand five hundred dollars for breach of the regulation. By prescribing a penalty of twice that amount he exceeded his authority. This is fatal to the legal efficacy of regulation 12(4) and by extension, the Banking Regulator's purported imposition of the fines and penalties of US$120,000.00 by letter to BONI dated 25th June 2021. Regulation 12(4) violates the separation of powers doctrine. It is ultra vires the regulation-making power conferred on the Minister by section 84 of NIBO and section 21 of the Interpretation Act and is therefore void. For all of these reasons, the Banking Regulator's reliance on Regulation 12(4) as authority to impose fines and penalties on BONI is misconceived. It is not maintainable that he was authorized to issue a cease and desist order or impose the US$120,000.00 in fines pursuant to section 30(4) of NIBO and Regulation 12(4) of NIBR. Accordingly, the Banking Regulator was not lawfully authorized by section 30(4) of NIBO and/or Regulation 12(4) of NIBR to issue cease and desist orders and impose fines and penalties on BONI.

   Sections 30, 35, 84 of the **Nevis International Banking Ordinance** Cap. 7.05 of 2014 of the Revised Laws of Saint Christopher and Nevis applied; **J. Astaphan & Co. (1970) Ltd. v Comptroller of Customs et al.** (1996) 54 WIR 153 followed; **Cerise Jacobs v Minister of Tourism and others** ANUHCVAP2019/0011 (delivered 24th May 2022, unreported) followed; Sections 21 and 37 of the **Interpretation Act** Cap. 1.02 of the Revised Laws of Saint Christopher and Nevis applied.

4. Words and passages in statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the context of a relevant group of sections. In the context of the other words used in section 30(8) of NIBO, it is obvious that the legislature intended that the section would be interpreted and applied without regard to any contrary provision in any other law. The conduct protected from liability are acts or omissions of the Banking Regulator or any other person acting on behalf of the NIA in the course of discharging or purportedly discharging any function under NIBO or any such intended conduct. The language used in section 30(8) of NIBO is neither complex nor confusing, it declares that the Banking Regulator (and other functionaries) will not be legally responsible for any conduct undertaken by him either in the actual performance or intended or

supposed performance of any responsibility under NIBO, except where he acted in bad faith. It is pellucid and undisputed that by the issuance of the June 23rd and 25th letters the Banking Regulator thereby purported to discharge regulatory functions under section 30(4)(d) of NIBO and regulation 12(1) and (4) of NIBR. Therefore, having acted in good faith, in the purported performance by him of the stated functions under NIBO, he is not liable to pay any legal costs arising from the judicial review proceedings in the court below.

R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd [2001] 1 All ER 195 applied; **Sussex Peerage Case** (1844) 11 Cl & Fin 85 applied; **Anisminic Ltd v Foreign Compensation Commission** [1969] 2 AC 147 applied; **R (O) v Secretary of State for the Home Department, R (project for the Registration of Children as British Citizens) v Secretary of State for the Home Department** [2022 UKSC 3 applied; Section 30(8) of the **Nevis International Banking Ordinance** Cap. 7.05 of 2014 of the Revised Laws of Saint Christopher and Nevis applied; **Gordon v The Attorney General of Jamaica** [1997] UKPC 21 applied; **Capital Bank International Limited v Eastern Caribbean Central Bank and Sir K. Dwight Venner** Grenada Civil Appeal Nos. 13 and 14 of 2002 (delivered 10th March 2003, unreported) followed.

JUDGMENT

[1] **HENRY JA**: At the heart of this appeal are questions that touch on the perennial debate about the duty of cooperation between banking regulators and banks and its necessity for the preservation of a stable financial system. The issues raised bring into focus the overlapping duties of regulators and banks in promoting justice in banking regulation and a stable economy, by maintaining a balance between the exercise of regulatory authority on the one hand and accountability on the other hand.

[2] The Banking Regulator ('the appellant') is a public officer in the Nevis Island Administration ('NIA') who is appointed by the Minister of Finance under the **Nevis International Banking Ordinance**[1] ('**NIBO**') to regulate international banking on that island. By this appeal the Banking Regulator challenges certain orders in a judgment delivered by a learned judge of the St. Christopher and Nevis High Court on 10th February 2023 concerning the validity of regulatory decisions he made

[1] Cap 7.05 of 2014 of the Revised Laws of Saint Christopher and Nevis.

affecting Bank of Nevis International Limited ('BONI') an international bank operating in Nevis as well as its shareholder Petrodel Investment Advisers (Nevis) Limited ('Petrodel') and Michael J. Prest, its ultimate beneficial owner ('UBO'). In that judgment the judge ruled that the Banking Regulator was not authorized to: a) issue orders restricting the activities BONI's shareholder and its UBO ('cease and desist order') or (b) impose fines on BONI.

[3] The judge made the Quashing and Related Decisions[2]: quashing the Banking Regulator's decision 'to issue a Cease and Desist Order dated June 22nd 2021; and to impose 'fines of US$120,000.00 against BONI on 25th June 2021'; declared that the Banking Regulator had no authority to issue the referenced Cease-and-Desist Order and the fines; and ordered restitution to BONI of the fines of US$120,000.00 together with interest at the rate of 2½% from the 29th March 2022 to the date of judgment; and adjudged that BONI is entitled to interest on the judgment pursuant to the statutory rate. He ruled further that the Banking Regulator is liable to pay the respondents' costs ('the Costs Decision')[3].

[4] The Banking Regulator contended that by making the Quashing and Related Decisions the learned judge erred in law by not having regard to the legislative framework under which the Banking Regulator acted or purported to act, specifically **NIBO** and the **Nevis Island Banking Regulations** ('**NIBR**').[4] It was submitted that as a result the judge made blatantly wrong decisions that should be set aside.

[5] Essentially, the appeal principally concerns issuance by the Banking Regulator to BONI and Prest of letters in purported furtherance of his duties under **NIBO** and their validity, specifically, the (i) order of certiorari quashing the Banking Regulator's decision to issue the 23rd June 2021 letter restricting the activities of BONI's

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[2] At paragraphs 1, 2, and 4 of the judgment. Those orders were also set in an order dated 10th February 2023, at paragraphs 3, 4, 7, 8, 9 and 10 and correspond respectively with those in the judgment.

[3] At para 63 of the judgment. Paragraph 13 of the order dated 10th February 2023 provided for costs to be assessed if not agreed.

[4] S.R.O 2/2015 of the Revised Laws of Saint Christopher and Nevis.

shareholder and UBOs and the related declaration that he had no authority to do so;[5] (ii) order of certiorari quashing the Banking Regulator's decision to issue the 25th June 2021 letter imposing the fines of US$120,000.00 and the declaration that he had no authority to do so;[6] (iii) the restitution to BONI of the fine of US$120,000.00 with 2½% interest; (iv) interest at the statutory rate;[7] and the costs award.[8]

[6] BONI resisted the appeal, submitting that the judge made no errors in the exercise of his discretion in quashing the Banking Regulator's decisions. Therefore, the appeal ought to be dismissed with costs.

Factual Matrix

[7] So far as is relevant for purposes of this appeal, the underlying factual background is not in dispute. The claims arose following the issuance by the Banking Regulator to BONI and Michael J. Prest of two letters in purported furtherance of his duties under **NIBO**. Letters penned by the Regulator of the Financial Services (Regulation and Supervision) Department in the NIA ('Financial Services Regulator') featured in the court below and the letter of 22nd June 2021 was mentioned in the Banking Regulator's 25th June 2021 letter. Before detailing the contents of the letters, it is desirable to have an appreciation of the interplay among the parties by reference to their relationships.

[8] Petrodel Investment Advisers (Nevis) Ltd ('Petrodel') is the first respondent and Michael J. Prest is the second respondent. They were the first and second claimants in the proceedings in the High Court, while BONI was the third claimant. Petrodel

[5] Paras. 1 and 2 of the judgment.
[6] Para. 4(i) and (ii) of the judgment.
[7] Para. 4(iv) of the judgment.
[8] Para. 64 of the judgment.

and BONI are companies incorporated in Nevis.[9] BONI conducts international banking under licence issued pursuant to **NIBO**.

[9] Petrodel is a shareholder in BONI owning 600,000 ordinary shares. Mr. Prest is a director of both Petrodel and BONI. He is BONI's CEO. With no disrespect intended, I shall refer to him simply as 'Prest' for the remainder of the judgment.

The Claim in the High Court

[10] The Banking Regulator was one of five named defendants against whom the respondents filed a Fixed Date Claim Form ('FDCF')[10] in the High Court for judicial review of among other actions and certain decisions taken by the appellant. The lawsuit included claims against the appellant and other defendants (including the Financial Services Regulator Heidi-Lynn Sutton[11]) for breach of statutory duties and against the appellant for alleged misfeasance in public office in his personal capacity, neither of which is relevant to this appeal. Leave was granted to Petrodel and Prest by order of court dated 14th March 2022 to commence the judicial review proceedings. BONI was added as a claimant to the proceedings on 15th March 2022[12].

[11] The first in the series of letters issued to BONI was one dated 21st June 2021 addressed to BONI's Board of Directors and signed by Phil Jones, the Banking Regulator. The subject line of the letter was 'Re: Appointment of Chief Executive Officer'. Mr. Jones pointed out that records of the NIA's Financial Services (Regulation and Supervision) Department ('FSR&S Department')[13] revealed that no

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[9] Petrodel under the Nevis Business Corporation Ordinance Cap 7.01 - on 13th December 2011 – see Certificate of Incorporation bearing registration number C39591 at pg. 60 of the Amended Record of Appeal. BONI - under the Companies Act Cap. 335 – see Certificate of Incorporation evidencing incorporation on 29th April 1998 - pg. 61 of the Amended Record of Appeal. Continued under the Companies Act 1999. See Certificate of Continuance – pg. 62 of the Amended Record of Appeal.

[10] On 23rd December 2021 (pgs. 1-7 of the Amended Record of Appeal); re-filed on 29th March 2022 (with BONI added as a claimant). At pgs. 11 – 27 of the Amended Record of Appeal.

[11] In her professional and personal capacities.

[12] See Amended FDCF filed on 29th March 2022 – at pg. 8 of the Amended Record of Appeal bundle.

[13] Copied to the Banking Regulator and Permanent Secretary in the Ministry of Finance.

application was made or subsequent approval granted for Prest to occupy and perform the functions of director or other senior officer of BONI pursuant to section 22 of **NIBO**. He noted further that there were no records reflecting that Prest was approved to be CEO pursuant to section 4(1)(c) of **NIBO**. BONI was invited to submit an application for the appointment of a suitably qualified individual to serve as BONI's CEO without delay or for the appointment of a director.

[12] The second letter was sent by Heidi-Lynn Sutton dated 22nd June 2021.[14] It was also written on the letterhead of the FSR&S Department.[15] It was addressed to BONI and its Board of Directors. The subject line of the document was as follows:

> '**ORDER TO CEASE AND DESIST**
> Financial Services Regulatory Commission Act, Cap 21.10 ("FSRC Act")
> Nevis International Banking Ordinance, 2014 ("NIBO")
> Bank of Nevis International Limited ("BONI")'.

[13] In it, the Financial Services Regulator referenced the 21st June 2021 correspondence from the Banking Regulator 'outlining BONI's contravention of the provisions set out in **NIBO**.'. She confirmed the appellant's conclusion that BONI was in breach of **NIBO** by reason of its failure to appoint a suitably qualified individual as CEO in accordance with sections 4(1)(c), 22 and 80 of **NIBO** and that no record existed by which the Banking Regulator approved Prest's appointment as BONI's director or CEO. The letter was said to constitute a Cease and Desist Order against BONI pursuant to section 40(b)(iii) of the **FSRC Act.**[16] **BONI** was directed to immediately cease and desist from (a) holding out Michael Prest as being a director of BONI; and (b) holding out Michael Prest as BONI's CEO.

[14] The next relevant letter was one issued by the Banking Regulator, dated 23rd June 2021[17] addressed to Prest and Petrodel. Like the previous letters, it was penned on the FSR&S Department's letterhead. It signalled that the author was operating

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[14] At pgs. 78-79 of Amended Record of Appeal.
[15] Copied to the Banking Regulator and Permanent Secretary in the Ministry of Finance.
[16] At pg. 2, para. 4 of the letter – pg. 79 of Amended Record of Appeal.
[17] At pgs. 80 – 81 of Amended Record of Appeal.

pursuant to his duties under section 30 of **NIBO** and Schedule 6 of the **Nevis Island Banking Regulations, 2015** ('**NIBR**')[18]. In this regard, the Banking Regulator stated that he considered it prudent to restrict the activities of BONI's shareholder and UBOs until further notice. Petrodel and its UBOs were thereby instructed to refrain from intervening in BONI's day to day operations and related activities of BONI including to stop issuing instructions or orders to its staff (inclusive of senior management); to not make any changes to its Board of Directors; to not give any instruction or orders to its Board of Directors; and not to communicate with any of BONI's third party service provider so as to influence action in respect of BONI.

[15] Prest was directed to comply and secure the compliance of other UBOs with those instructions. The letter included a reminder that pursuant to section 15 of **NIBO**, BONI is not permitted to make any significant changes to its shareholdings or transfer resources otherwise than in the ordinary course of business. This letter is the subject of the certiorari orders and declarations at paragraphs 1 and 2 of the judgment.

[16] In yet another letter dated 25th June 2021,[19] to BONI's acting CEO,[12] the Banking Regulator purported to impose further fines and penalties totalling US$120,000.00 pursuant to section 30(4)(d) of **NIBO** and paragraph 12(1) and (4) of **NIBR** for BONI's alleged ongoing failure to provide requested information relative to Prest's appointment as BONI's CEO. Of that amount US$50,000.00 was to be paid on or before 25th June 2021; US$30,000.00 on or before 2nd July 2021; US$20,000.00 on or before 9th July 2021 and US$20,000.00 on or before 16th August 2021.

[17] The request for information was said to have been made on 30th October 2020 (for an application to be submitted on or before 6th November 2020 for Prest to be approved as BONI's CEO). Further, it was asserted that the fine was imposed as a

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[18] At first paragraph of the letter – pg. 80 of the Amended Record of Appeal.

[19] At pgs. 84 – 85 of the Amended Record of Appeal.

result of BONI's inordinate delay in providing the information. BONI paid the fine of US$120,000.00 before 13th August 2021 together with the requisite bank charges.

[18] The Banking Regulator defended the issuance of the orders. He has maintained that he was duly authorized to make the decision restricting BONI's activities as well as impose the fines and penalties.

[19] In the FDCF, the respondents sought Judicial Review of the Banking Regulator's decisions to issue the 1) 23rd June 2021 letter restricting Petrodel's and Prest's activities as shareholder and director respectively; 2) 25th June 2021 imposition of fines and penalties of US$120,000.00 on the basis that they represent a gross overstatement of the sum due and payable by BONI. They sought orders (i) declaring the decisions to be ultra vires **NIBO** and **NIBR** (ii) quashing them and (iii) of restitution with interest.[20]

[20] The respondents advanced several grounds as the basis for the claim. Among other things, they pleaded that a) the Banking Regulator had no authority to issue the 23rd June 2021 or 25th June 2021 Orders;[21] b) the power to issue cease and desist orders rests solely with the Licensing Committee established under the **Nevis Trust and Corporate Services Providers Ordinance 2021;**[22] c) the Financial Services Regulatory Commission is authorized under the **FSRC Act** to issue cease and desist orders to regulated entities and can delegate some of its statutory functions either wholly or partially (except the power of delegation);[23] and d) cease and desist orders, the fines and penalties of US$120,000.00 related to sections 4(1)(c), 22 or 80 of **NIBO** are not lawful or appropriate, related as they are to Prest's application and approval as BONI's CEO.

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[20] See paras. 4, 9, 10 and 13 of the reliefs sought in the FDCF – pgs. 6 and 7 of the Amended Record of Appeal.
[21] Para. 28 of FDCF – pg. 14 of Amended Record of Appeal.
[22] Para. 30 FDCF – pg. 14 of Amended Record of Appeal.
[23] Para. 33 FDCF – pg. 15 of Amended Record of Appeal.

[21] The Banking Regulator refuted the respondents' claims that the fines and penalties were unlawful and that they were issued without the requisite authority under the **NIBO** or otherwise. He filed affidavits denying liability.[24]

The Learned Judge's Decision

[22] As regards the 23rd June 2021 letter from the Banking Regulator, the learned judge concluded that while it was addressed to Petrodel it was also directed at Prest based on its tenor. He reasoned that this was signalled by the mere fact that it purported to instruct Petrodel as shareholder of BONI's shares and its other UBOs to do certain things. He reasoned that this would not have been necessary if the intended addressee was Petrodel and not Prest.

[23] The judge noted that everyone (presumably all parties) agreed that the Regulators' authority is derived from the **FSRC Act**. Further, that Parliament established the Commission under the **FSRC Act** to regulate the provision of all financial services in the jurisdiction that are not governed by the Banking Act. Additionally, the Commission is authorised by section 29 of the **FSRC Act** to partially or wholly delegate some of its regulation functions and powers to the chairperson, a commissioner, director, the licensing committee or any other committee designated by the Commission and neither regulator holds such a designation, has been appointed as a director under section 8 of the **FSRC Act** nor has been appointed by the Commission pursuant to section 5(2) to carry out its functions and manage the affairs of an operational department.

[24] The learned judge ruled that on the facts and the law, it was not open to the court to find that the Commission's functions to issue fines was implicitly delegated to the Financial Services Regulator, particularly in view of the fact that the nature and character of the functions being reviewed were not executive and/or executive but were decisional and constituted the core of and fundamental to the powers vested

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[24] See the affidavits of Phil Jones Banking Regulator filed on 31st August 2022 (pgs. 134 – 146, 148 – 154 and 159 - 161 of the Amended Record of Appeal).

in the Commission.[25] He cited in support of his determination the learning from the treatises **Commonwealth Caribbean Administrative Law**[26] and **Judicial Review**[27] and the dissenting pronouncement of Lord Bridge in the case of **Provident Mutual Life Assurance Association and Derby City Council** that:

> 'If the necessary appointment of a responsible officer under Section 151 involves the necessary delegation of an undefined range of statutory functions of the authority there must be room for endless debate and uncertainty as to what the range of functions comprises. I cannot believe this was what Parliament intended.'[28]

[25] Addressing the position of the Banking Regulator separately, the judge opined that the argument for implied regulation in his case is considerably weaker than the Financial Services Regulator's. He found that the former 'was not authorized to levy fines or issue letters which restricted the activities of Petrodel, the shareholder of BONI.'

[26] Rejecting the Banking Regulator's contentions, he concluded that contrary to the appellant's argument, the court could not rely on the Latin maxim *omnia praesumuntur rite esse acta* for the presumption that something which should have been done was in fact done. Further, he held that in this instance, the appellant could derive no benefit from the legal principle adumbrated in **Carltona Ltd v Commissioner of Works**[29] that the acts of governmental departmental officials are synonymous with the actions of the minister in charge of that department.

[27] Consequent on those findings, the judge made the declaration that the Banking Regulator had no authority to fine BONI. He quashed the Banking Regulator's decision to impose a fine US$120,000.00 ('the fine') against BONI by letter dated 25th June 2021; ordered restitution of the fine and interest on the judgment.

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25 At para. [33] of the judgment.

26 Eddy Ventose, *Commonwealth Caribbean Administrative Law* (Routledge 2013).

27 Supperstone, Goudie and Walker *Judicial Review* (LexisNexis Butterworths 2017) at para. 7.42.

28 [1981] 1 W.L.R. 173 at 183.

29 [1943] 2 All E.R. 560.

[28] It is important to note that in making the orders at paragraph 4 of his judgment, the learned judge lumped together as 'the Banking Regulators', both the Regulator of Nevis Financial Services Department ('the Financial Services Regulator') and the Banking Regulator as the originators of the impugned letters. Likewise, in formulating his appeal the Banking Regulator included as orders appealed, certain parts that are unrelated to him. While it is possible and perhaps likely that the Regulators may have collaborated in their actions towards BONI, it is common ground that the Financial Services Regulator and the Banking Regulator issued individual letters and orders to BONI. Accordingly, it is imperative that any perceived or actual overlap in their and the judge's treatment of the letters be clarified at the outset to put the appeal in context. This will become evident from the factual matrix.

[29] One glaring overlap in such treatment appears in the order of certiorari relative to the cease and desist orders (paragraph [4] (i) of the judgment). It reads:

> '[4] BONI are entitled to orders for:
>
> (i) Certiorari quashing the decisions of the Regulator of International Banking and the Regulator of the Nevis Financial Service Department, collectively referred to as ("the Regulators") to issue a Cease and Desist Order **dated June 22, 2021**, and fines of EC$10,000.00 and US$120,000.00 against BONI on June 25th, 2021;' (Emphasis added)

[30] It is a matter of record and not in dispute that the Financial Services Regulator issued a cease and desist order by letter dated 22nd June 2021; however, the Banking Regulator's letter by which he purported to restrain the activities of BONI's shareholder and UBO was dated 23rd June 2021. To the extent therefore that the quoted order (above) was intended to relate to the Banking Regulator's 23rd June 2021 letter, it missed the mark. However, it is noted, that paragraph 1 of the judgment contains the order of certiorari in respect of the 23rd June 2021 letter.

[31] Those details assume greater significance because in its notice of appeal, the Banking Regulator included the following in the details of the judgment appealed against:

"**DETAILS OF THE JUDGMENT APPEALED**

i. The Banking Regulator appeals against paragraphs 1, 2 and 4 of the judgment of Justice Patrick Thompson Jr delivered on 10th February 2023 whereby he -

… (a) quashed the decision of the Banking Regulator to issue the letter dated June 23rd 2021 which restricted the First and Second named Respondents from intervening in the day-to-day operations of the Third named Respondent ("BONI");

(b) **quashed the decision of the Banking Regulator to issue a Cease-and-Desist Order dated 22 June 2021** and fines and penalties [sic] of US$120,000.00 against BONI on June 25th 2021".[30] (Emphasis added)

[32] As emerged more clearly from the factual background, the Banking Regulator's reference to a letter dated 22nd June 2021 (in paragraph (b)) although it reproduces the substance of paragraph [4](i) of the judgment is not reflective of the factual narrative. The sequence of events outlined earlier has hopefully simplified the issues.

[33] As regards the Quashing and Related Decisions, the Banking Regulator issued the letter dated 23rd June 2021 restricting BONI's shareholder and UBOs from intervening in BONI's day to day operations; and the letter dated 25th June 2021 imposing fines and penalties [sic] of US$120,000.00 against BONI. The other letters were sent by the Financial Services Regulator who, although a defendant in the lower court, is not a party to this appeal. It follows that to the extent that the Banking Regulator makes mention in his appeal of the letters issued by the Financial Services Regulator and related decisions by the judge, or purports to appeal from those orders and declarations, those decisions (against the Financial Services Regulator) cannot be and are not the subject of appeal before the court in this case and are therefore disregarded.

[30] At pgs. 279 – 280 of the Amended Record of Appeal.

Grounds of Appeal

[34] The appellant advanced two main grounds of appeal, the first being a tripartite attack on the quashing orders and the second, a criticism of the costs order. The grounds of appeal are:

Ground 1 -

(1) The Learned Judge in reaching his decision considered mistaken material, namely that "[e]veryone is agreed that the Regulators (sic) authority is derived from the Financial Services Regulatory Commission Act …", which influenced the conclusion reached;

(2) The decision of the Learned Judge was clearly wrong as a matter of law because in reaching his decision he failed to have any or any sufficient regard and attach appropriate weight to the defence that the Banking Regulator had authority under **NIBO** to impose the fines and penalties; and

(3) The learned judge was obliged to consider and determine whether the Banking Regulator had authority under **NIBO** to impose the fines and penalties and wrongfully and erroneously failed to do so.

Ground 2 - The Costs Decision

The Learned Judge erred in the circumstances in making the costs order against the Banking Regulator.

[35] Following oral arguments on the hearing date, the parties were directed to lodge and exchange on or before 28th March 2025, further submissions on four discrete issues that were not argued in the lower court, namely:

> "i. with respect to the application of regulation 12 (4) of the **Nevis International Banking Ordinance**, 2014 ('**NIBO**') addressing whether the power to impose fines and penalties can be implied from the scheme of the legislation in light of the broad legal principles governing the interpretation of coercive penalty provisions;

ii. with respect to the application of regulation 12 (4) of **NIBO** - does the **St. Kitts and Nevis Interpretation Act** affect the interpretation of regulation 12 (4) of **NIBO** and to what extent;

iii. (a) can the broad regulation making power under section 84 of **NIBO** be said to confer on the minister the power to prescribe administrative fines and penalties under the regulations;
(b) did the minister comply with the established rule making powers when he purported to make regulation 12.4;

iv. (a) with respect to costs and the application of section 30 (8) of **NIBO** whether the terminology 'any liability' is sufficiently broad to include liability to pay legal costs in legal proceedings;
(b) properly construed, does section 30(8) of **NIBO** oust the exercise of the discretionary jurisdiction of the Court to award costs."[31]

[36] The parties each filed their further submissions on 28th March 2025. The legal arguments advanced in response to the first three questions are relevant for the purpose of determining whether the judge failed to have regard to relevant considerations as contended in the first ground of appeal. The submissions with respect to the fourth question will inform the decision on the costs issue (the second ground of appeal). The several aspects of the first ground of appeal overlap therefore they are suitably addressed together.

Appellant's Submissions

Fount of Regulators' Authority

[37] The Banking Regulator's central argument on appeal is that the judge conflated the issues and did not have regard to the legislative framework under which he acted and this led him to rule erroneously that the Banking Regulator did not have jurisdiction to restrict the activities of BONI's shareholder and director or impose the fine and penalties.

[38] The Banking Regulator argued that he made no concession in the lower court that his authority to impose fines was derived from the **FSRC Act**. It was submitted that

[31] Certificate of Result of Appeal dated 12th March 2025.

the judge erred by failing to consider and/or attach appropriate weight to the defence that under **NIBO** the Banking Regulator had authority to restrict BONI's activities and impose the fines. He argued that this was the import of his evidence as chronicled in his two affidavits filed on 31st August 2022 and further, he did not resile from this contention at trial.

[39] He submitted that to the extent that there was no concession that the **FSRC Act** was the legal basis for issuing the restriction of activities order and imposing the fines, the judge erred by not considering the evidence adduced by him, in particular, the letters dated 23rd and 25th June 2021. He pointed out that both letters contain no reference to the **FSRC Act** but instead indicate that the Orders and fines were made pursuant to **NIBO** and **NIBR**. Further, no evidence was led that he had purported to act pursuant to the **FSRC Act**.

[40] It was submitted that the judge overlooked the argument that by virtue of section 30 of **NIBO** and Schedule 6 of **NIBR** the Banking Regulator is vested with authority to issue the restricted activity letter and to impose the fine of US$120,000.00. The Banking Regulator argued that the judge erred in two material respects. Firstly, by conflating the issues and secondly, by disregarding and/or failing to consider and apply his mind to the evidence and arguments presented regarding the legislative basis of his authority. As a result, the judge erred by failing to examine whether **NIBO** and/or **NIBR** conferred the relevant authority on the Banking Regulator to issue the impugned decisions. The judge thereby failed to properly exercise his judicial discretion and was plainly wrong in making the quashing orders, the related declarations and costs award.

Validity of Restriction Orders and Fines

[41] The Banking Regulator averred that pursuant to section 22(5) of **NIBO,** BONI was required to seek the Banking Regulator's prior approval before it appointed Prest as BONI's director and/or its CEO. Similarly, it was noted that section 30(2) of **NIBO** empowers the Banking Regulator to ensure the proper compliance of licensees with

the legal provisions and to use the powers conferred upon him by **NIBO** to fulfil his duty.

[42] He averred that section 30(3) and (4) of **NIBO** and regulation 12 of **NIBR** confer certain specific powers on him in relation to securing compliance with the statutory provisions. Accordingly, being faced with BONI's gross non-compliance he issued the order on 23rd June 2021 restricting BONI's activities "… to facilitate [a] safe and sound international banking business for BONI". He also imposed a fine and penalty of US$120,000.00 to achieve regulatory compliance.

[43] It was submitted that regulation 12(4) of **NIBR** conferred authority on the Banking Regulator to impose an administrative penalty and provides in this regard:

> "(4) A Licensee who contravenes this regulation is liable to a penalty of $5,000.00 and $500.00 for each day in default."

[44] It was submitted further that it was the Banking Regulator's duty to ensure that BONI (and those who control it) adhere to the regulatory requirements under which BONI operates, and the safeguards established to protect users of the financial services. The Banking Regulator contended that the legislative provisions underpinning his authority are intended to protect customers from financial risk and fraud.

Regulation 12(4) of NIBR

[45] As to whether it can be inferred from the scheme of **NIBO** that regulation 12(4) vests the Banking Regulator with power to impose fines and penalties, the Banking Regulator submitted that this Court's pronouncement in **Telecommunications Regulatory Commission v Cable & Wireless (BVI) Limited**[32] is instructive. He highlighted the pronouncement of Carrington JA (Ag.) who opined in that decision that in construing certain words appearing in the enforcement provisions of the Telecommunications Act of the Territory of the Virgin Islands:-

> "[24] Parliament is expected to say what it means and mean what it says. The first recourse in determining the meaning of a statutory provision

[32] BVIHCVAP2016/0013 (delivered 30th May 2018, unreported).

should be to the grammatical meaning of the words used and their context. If the grammatical meaning of the words used is clear and the context does not lead to the conclusion that the words used may have more than one meaning or a different meaning from the natural grammatical meaning, then effect should be given to the clear grammatical meaning as disclosing the intention of Parliament in using them.

[25] When considering the context of words in an enactment, one has to consider the enactment as a whole, and not only the section in which the words under consideration appear, as well as all facts relevant to the subject matter of the Act that are before the court, including any commentary supplied by the drafters of the Act. The ultimate aim of the court is to arrive at what **Bennion on Statutory Interpretation** refers to as an informed interpretation of the legislation under consideration. **Bennion on Statutory Interpretation** suggests that this is arrived at in two stages:

> "What may be called first stage of interpretation arises when the enactment is first looked at. Here a provisional view may be formed, perhaps that the meaning is clear. Or it may appear at the first stage that the enactment is grammatically ambiguous or vitiated by semantic obscurity. In all three cases it is necessary to go on and apply the informed interpretation rule. Thereafter, at second stage interpretation, a final view on legal meaning is formed."'[33]

[46] Reliance was also placed on **Financial Services Commission v Harneys Insurance Management Services,**[34] in which it was noted that in applying 'the informed interpretation rule' the court must first consider the nature of the relevant legislative provisions. In that case, Ellis J (as she then was) in construing section 20(4) of the **Anti Money Laundering and Terrorist Financing Code of Practice** remarked[35] that the common law principle of strict construction of penal statutes is entrenched in our jurisprudence and was usefully expressed by the Privy Council in **The Gauntlet.**[36]

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[33] BVIHCVAP2016/0013 (delivered 30th May 2018, unreported) at paras. [24] and [25].
[34] BVIHCV 2017/0175 (delivered 10th January 2019, unreported).
[35] At para 33.
[36] (1872) LR 4 PC 184 at page 191.

[47] The Banking Regulator argued that the words used in Regulation 12(4) are not vague and/or ambiguous but rather address a specific situation and type of conduct. It was submitted that as a provisional view the grammatical meaning of Regulation 12(4) is that a failure by a licensee to furnish information and data required and/or requested by the Banking Regulator for the proper discharge of his functions and responsibilities carries the penalty of law.

[48] The Banking Regulator contended further that BONI's failure to provide the due diligence information requested by successive banking regulators constituted gross non-compliance for which an administrative fine and penalty were properly imposed. He reasoned that in the premises, the thing administratively charged by him, i.e. BONI's failure to provide the due diligence information in respect of its CEO to facilitate his approval, is within the words and the spirit of Regulation 12(4) of **NIBR**. Therefore, BONI cannot say and cannot be heard to say otherwise.

[49] It was accepted that Regulation 12(4) is silent as to the identity of the holder of the statutory power to impose such administrative penalties. However, it was submitted that this was not fatal, since, it having been established that '...the thing brought is within the words and within the spirit' of Regulation 12(4), the Regulation now falls to be construed like any other instrument, in identifying the intended holder of the statutory power therein. The Banking Regulator contended that it therefore matters not that **NIBO** is a penal statute once it has been shown that the thing charged is within the words and the spirit of Regulation 12(4). He argued that the Court in determining this issue must read the words of Regulation 12(4) in the context provided by **NIBO** as a whole. In so doing, it must be mindful that such context will include not only other enacting provisions of the same statute and the existing state of the law but also the mischief that a court can, by those and other legitimate means, discern what the statute was intended to remedy.

[50] Another argument advanced by the Banking Regulator is that it can be inferred from Regulation 11 of **NIBR** that Regulation 12(4) was also intended to provide an

alternative means of enforcement to those vested in the Minister, without recourse to a court. The **Harneys Insurance Management Services** case was referenced to support this contention, where Ellis J opined: '[t]his means of enforcement is quite useful because the delay and costs of court proceedings are thereby avoided and decisions are ultimately made by officials who are better acquainted with the purposes of the relevant regulations.'

[51] It was submitted further that the provision was not intended to create a criminal penalty but rather to allow for enforcement action against errant licensees in the form of administrative penalties to maintain the integrity of the international banking system in Nevis. The Banking Regulator reasoned that this inference is strengthened by three key markers. Firstly, the words 'commits an offence and is liable on conviction' do not appear in Regulation 12(4) unlike in the other provisions within **NIBO** which create criminal offences (namely sections 6(2), 15(11), 16(2), 17(4), 21(3), 28, 29(3), 31(3), 32(4), 71(4), 76, 77(1), 77(2), 78(1) and 79). It was noted that the words used are '…contravenes this regulation is liable to a penalty…'. Further, imprisonment is not made a consequence for breach of Regulation 12 as in the other sections which create criminal offences and set out criminal penalties.

[52] Secondly, as a matter of law, criminal penalties do not accrue daily. Notably and relatedly, Schedule 4 to the Regulations which codifies the fixed penalties payable under Regulation 11, is the only other provision that allows for penalties to accrue daily where the default continues.

[53] Thirdly, all of the sections in **NIBO** which create criminal offences, prescribe the maximum fines payable, in accordance with section 37 of the **Interpretation Act**[37]. It was submitted that Regulation 12(4) does not, because it was intended to create an administrative (and not a criminal) penalty. It was pointed out that learned counsel for BONI conceded at the hearing that '[i]t is in the administrative realm and not in the criminal realm'.

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[37] Cap. 1.02 of the Revised Laws of Saint Christopher and Nevis.

[54] The Banking Regulator submitted that in considering the context of the Regulation it is useful to note that the Minister and the banking regulator are the only functionaries granted enforcement powers under **NIBO** to ensure the continued integrity of the international banking sector in Nevis. However, the Minister is not empowered by any of the provisions within **NIBO** to impose fines and penalties as this is a power reserved for the Banking Regulator - under Regulation 11. He argued that in the circumstances, it can be implied on a fair reading of **NIBO** as a whole to give efficacy to Regulation 12(4), that it was intended that the Banking Regulator should be the holder of the statutory power conferred thereby. Such a construction ensures that inferentially Regulation 12(4) works in synergy with the rest of **NIBO** to the effect that the Banking Regulator has the power to take enforcement action under the legislative framework. The Court was urged '…not to find or make any doubt or ambiguity in the language of [Regulation 12(4) of **NIBO**], where such doubt or ambiguity would clearly not be found in the same language in any other instrument'.

Interpretation Act – Applicability to Regulation 12(4)

[55] On the strength of his submissions that Regulation 12(4) is administrative and not punitive in nature, the Banking Regulator contended that it is clear from the words used in and the context in which section 37 of the **Interpretation Act** appears (including sections 35, 36 and 39) that it regulates only criminal penalties and does not affect the interpretation of Regulation of 12(4) of **NIBR**. He reasoned that the draftsman did not intend that section 37 of the **Interpretation Act** would apply to regulatory administrative penalties.

Scope and Legitimacy of Minister's Power to Prescribe Administrative Fines and Penalties

[56] In relation to the Minister's power to prescribe administrative fines and penalties, it was submitted that the breadth of the general power under section 84 of **NIBO** is

such as to empower the Banking Regulator to prescribe administrative fines and penalties under Regulation 12(4). This argument was premised partly on section 21(b) of the **Interpretation Act** which states:-

> "'PROVISIONS AS TO SUBSIDIARY LEGISLATION
> **General provision with respect to power given to any authority to make subsidiary legislation etc.**
> 21. Where any Act confers power on any authority to make or issue any instrument (that is to say, any regulation, rule, by-law, proclamation, order, form or notice) the following provisions shall, unless the contrary intention appears, have effect with reference to the making, issue and operation of such instrument—
>
> …(b) there may be annexed to the breach of any regulation, rule, by-law or order such penalty not exceeding two thousand five hundred dollars as the authority making the regulation, rule, by-law or order may think fit…'".

[57] It was submitted that section 21(b) allows criminal penalties to be attached to any regulation. Further, this follows best practice as stated in **Thornton's Legislative Drafting**[38] where the learned author noted that this entails specific provision being made empowering delegated legislation to include penal sanctions where there is no general power, such as is commonly found in the more modern interpretation statutes. The Banking Regulator argued that in the circumstances, applying that concept to the case at the appeal bar, there ought to be nothing objectionable to administrative penalties being attached to the breach of Regulation 12 of **NIBR**. He added that it cannot be said therefore that the Minister breached the traditional rule which restricts delegated legislation to procedure and detail.

Respondents' Submissions

Fount/Scope of Regulators' Authority

[58] BONI accepted that there was no common ground between it and the Banking Regulator that the latter's authority is derived from the **FSRC Act.**[39] It added that in

[38] Professor Helen Xanthaki, *Thornton's Legislative Drafting* (5th edn, Bloomsbury Professional 2013) at para 15.48.
[39] Para. 24 of BONI's written submissions filed on 30th December 2024.

any event the judge's finding regarding consensus on that point was not material to the essential findings in respect of the Banking Regulator.

[59] It was submitted that the essential question before the lower court was whether the Banking Regulator had the authority to sanction BONI as he purported to do, and more specifically, whether the FSRC had delegated such statutory authority to him. It followed therefore, that even if the parties had mistakenly agreed that the **FSRC Act** governed the ability to issue the restricted activity orders or impose the fines, the issues remained twofold, namely whether:

(1) the power of delegation existed as between the FSRC and the Banking Regulator and

(2) any such power was validly and sufficiently exercised by the Banking Regulator.

[60] BONI accepted that the Banking Regulator was appointed pursuant to section 30 of **NIBO**. It submitted that section 30(2) sets out the Banking Regulator's duty while subsection (3) outlines his express powers. It argued that those powers generally concern investigation into the affairs of entities regulated under **NIBO** and do not include the power to sanction a licensee, whether by issuing a cease and desist order or restricting the activities of a licensed entity regulated under **NIBO**. Those powers BONI contended, are by virtue of section 35 of **NIBO**, vested in the Minister responsible for Finance in the NIA.

[61] In addition, Schedule 6 of **NIBR** merely sets out the rules governing examination and supervision of international banks and confers no authority on the Banking Regulator to restrain the activities of a licensee. It follows that even if the learned judge erred by not considering the scope of the Banking Regulator's authority under **NIBO** and **NIBR** the Banking Regulator simply had no authority to issue the restriction of activities letter, as only the Minister was vested with such power under **NIBO**.

Regulation 12(4) of NIBR

[62] As to whether the power to impose fines and penalties can be implied from the scheme of the legislation, BONI contended that this Court affirmed the principle that Parliament must maintain legislative control over power delegated to another person or functionary by imposing controls over the exercise of such power. This Court's judgment in **Cerise Jacobs v Minister of Tourism and another**[40] (on appeal from Antigua) was cited in support. There, this Court stated:

> "Parliament can effectively maintain legislative control over delegated power by circumscribing the delegated power or authority. Indeed, it is settled law that this circumscribing can be done by sufficiently limiting the delegated power."

[63] It was submitted that as stated in **Cerise Jacobs** (at paragraph [72]) where reliance was placed on **Bennion on Statutory Interpretation**, that the judiciary maintains the right to superintend legislation that confers delegated power on a functionary. As exemplified in **Damian Kelsick v Kerstin Petty (In her capacity as Director General of the Financial Services Department) and another,**[41] where the court determines that a provision in delegated legislation goes beyond the scope of the statutory power pursuant to which it was purportedly made, that provision will be held to be invalid.

[64] BONI argued further that by section 35(1)(c)(g) and (2) of **NIBO**, Parliament empowered the Minister to impose sanctions for breach of its provisions including where a licensee commits a breach of any duty or obligation imposed on it by **NIBO**. It was submitted that in this case, the Banking Regulator purported to levy penalties and fines of US$120,000.00 in respect of breaches for which the Minister was expressly authorized by Parliament to apply sanctions, thereby acting in excess of authority.

[40] ANUHCVAP2019/0011 (delivered 24th May 2022, unreported) at para. [93].

[41] SKBHCV2014/0119 (delivered 12th November 2018, unreported) at para [12].

[65] Additionally, it was noted that pursuant to section 84 of **NIBO** the Minister is granted regulation-making power to give effect to its provisions and in relation to any matter that needs to be prescribed under **NIBO**. Further, by sections 28, 76, 77 and 78 of **NIBO** offences were created for non-compliance with specific provisions. BONI reasoned that Parliament did not by section 84 of **NIBO** authorize the Minister to sub-delegate his regulation-making power.[42] Likewise, Parliament did not empower the Minister to create and impose fines and penalties, therefore, on the authority of **Cerise Jacobs**, regulation 12(4) of **NIBR** goes beyond the scope of the power delegated to the Minister in respect of making regulations, and should be found to be invalid.

Interpretation Act – Applicability to Regulation 12(4)

[66] BONI submitted that in view of the cap of $2,500.00 stipulated in section 21(b) of the **Interpretation Act** as the maximum penalty that may be prescribed in any regulation made pursuant to a regulation-making power in any Act, the maximum penalties set out in regulation 12(4) of **NIBR** run afoul of section 21(b) of the **Interpretation Act**. Consequently, even if a penalty may properly be imposed pursuant to regulation 12(4), it may not in any event exceed $2500.00.

Scope and Legitimacy of Minister's Power to Prescribe Administrative Fines and Penalties

[67] As to the scope of the Minister's power under section 84 of **NIBO**, BONI argued that the broad regulation making power cannot be said to confer on the Minister the power to prescribe administrative fines and penalties under **NIBR**. It was BONI's further contention that the Minister exceeded the scope of his delegated authority in purporting to make Regulation 12(4) which permits the imposition of a penalty and fine for a licensee's failure to provide information requested by the Banking Regulator.

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[42] See paragraphs 8 and 9 of the Respondent's further submissions filed on 28th March 2025.

[68] BONI did not address the Court's question as to whether the Minister complied with the established rule-making powers when making regulation 12(4).

Validity of Banking Regulator's Appointment

[69] Regarding the Banking Regulator's contention that **NIBO** authorized him to impose penalties, BONI accepted that the Banking Regulator is empowered by regulation 11 of the **NIBR** to levy a penalty in respect of any offence specified in Schedule 4. It noted however, that the Banking Regulator did not rely on that provision as a basis for imposing the fine of $120,000.00. Instead, he purported to rely on section 30(4)(d) of **NIBO** and regulation 12(1) and (4) of **NIBR** to do so. It was submitted that the penalty prescribed by regulation 12(4) is the sum of $5000.00 with a further $500.00 for each day in default. BONI argued that the Banking Regulator provided no explanation as to why a fine of $120,000.00 was being imposed or how it was calculated, even when pressed under cross-examination. Accordingly, the judge was entitled to find that the Banking Regulator had exceeded his jurisdiction and to quash the decision to impose the penalty.

Appellant's Rejoinder

[70] In response, the Banking Regulator submitted that in light of BONI's acknowledgement that the parties were not agreed that his authority was derived from the **FSRC Act** it is fair to conclude that the judge erred by proceeding on this mistaken belief and failed to engage with the provisions of **NIBO** and **NIBR**. It was submitted that this is fatal. Therefore, those issues now fall to be determined by this Court.

[71] It was submitted further that the judge made no findings as to whether BONI has breached section 22(5) of **NIBO** because he misunderstood the Banking Regulator's defence and/or case and therefore failed to consider the evidence and arguments in relation to **NIBO**. This issue must therefore be determined at this level. The Banking Regulator contended further that there is therefore no merit to BONI's

contention that the fine was excessive and in any event this issue did not arise in the lower court.

Discussion

[72] Leaving aside the costs issue for the moment, the crux of the Banking Regulator's contentions on appeal is that the judge erred in law and in the exercise of discretion in that he failed to consider **NIBO**, the material legislative framework on which his defence was founded, or to determine whether **NIBO** empowered him to act as he did (ground 1(ii) and (iii)). Further, that the judge made this error because he concluded erroneously that all parties were agreed that the **FSRC Act** was the legal basis from which the Banking Regulator derived his authority to issue the impugned decisions in the 23rd June and 25th June 2021 letters (ground 1(i)). I will consider them in turn.

Ground of appeal 1(i) – Was there agreement that the Banking Regulator's Authority derived from the FSRC Act

[73] This issue is a short one. At paragraph [20] of his judgment, the judge states:

> "Everyone is agreed that the Regulators (sic) authority is derived from the Financial Services Regulatory Commission Act ("the Act"). The long title to the Act is a well known aid …".

He did not refer to any pleadings, affidavits, oral evidence or submissions from which this conclusion was drawn. In their submissions before this Court as summarized earlier, the Banking Regulator and BONI agree that there was no such consensus at the trial in the High Court.

The Record Confirms that there was no such Concord Among the Parties

[74] For purposes of this ground of appeal, it matters not what the other parties contended in the lower court on this issue. What matters is whether the Banking Regulator represented to the court that he relied on the **FSRC Act** as the legal basis for issuing the directives and fines in the 23rd June 2021 and 25th June 2021 letters.

Having examined the record, I am satisfied that the Banking Regulator did not in any way state that his authority derived from the **FSRC Act**. I am satisfied that even if he is right about absence of authority under the **FSRC Act,** by stating that everyone agreed that the Regulators' authority derived from the **FSRC Act** and then determining the issues on that basis, the learned judge operated from a misguided and mistaken viewpoint which directly influenced the decision he reached. This brings me to the question of whether the judge was required to consider **NIBO** and **NIBR** in his deliberations.

Ground of appeal 1(ii) and (iii) – Relevance of NIBO

[75] An application for judicial review seeks an administrative order from the court.[43] In considering and determining such an application, the judge exercises judicial discretion which will inform whether relief is granted.[44] As I understand it, the Banking Regulator's attack on the judge's orders is two-pronged. Firstly, it is that the judge failed to have regard to material considerations, namely **NIBO** and the immunity from costs liability in section 30(8) of **NIBO** and consequently wrongly exercise his discretion to make the quashing orders. Secondly, that in awarding costs the judge overlooked or misinterpreted the inbuilt exemption in section 30(8) of **NIBO** and thereby erred as a matter of law. This Court must therefore determine whether the judge erred in the exercise of discretion vis-à-vis the failure to consider **NIBO** and whether he erred as a matter of law in relation to the interpretation of section 30(8).

[76] At the appellate level, the Court's role in reviewing the exercise of the judge's discretion is to decide whether the decision was plainly wrong. It is settled law that a determination is palpably wrong, if in arriving at that decision, the judge erred in principle by failing to take into account relevant considerations or by giving them too much or too little weight or by having regard to irrelevant ones and as a result of such error made a determination that exceeded the generous ambit within which

[43] Civil Procedure Rules (Revised Edition) 2023 ('CPR'), rule 56.1(1)(c) and (2).
[44] CPR 56.11(3)

reasonable disagreement is possible. This formulation of this well-known legal principle was adumbrated by Sir Vincent Floissac in **Dufour v Helenair Corporation**[45] and has been recited in many judgments of this Court. While the appellate court is entitled to interfere with a lower court's exercise of discretion, it does so in exceptional cases and will not lightly substitute the judge's discretion with its own simply because it would have made a different decision.[46]

[77] It is trite law that in reviewing a lower court's decision on a point of law the appellate court is concerned with ascertaining whether the judicial officer identified and applied the correct legal principles. It would disturb the lower court's ruling on a question of law only if satisfied that the judge erred in law in enunciating and applying the applicable legal principles to the evidence: **Michael Joseph v Indira Hariprashad Charles et al.**[47] I bear those principles firmly in mind in consideration of the remaining grounds of appeal.

[78] In this case, the learned judge had to fully consider the Banking Regulator's defence which turned on the provisions of **NIBO** and **NIBR**. He was required to decide (i) whether those provisions authorized the Banking Regulator to issue the directives and impose the fines as contained in the impugned 23rd June 2021 and 25th June 2021 letters to BONI; and (ii) if they were, he had to interpret and apply those provisions in arriving at his ultimate conclusion. Those were eminently material considerations in assessing whether the Banking Regulator acted ultra vires the applicable legislative scheme in issuing the 23rd June and 25th June 2021 letters. The answers to those legal questions were central to the exercise of discretion on the judicial review application.

[79] In the appeal at bar, the central issue was whether the Banking Regulator is authorized by law to issue to BONI the directives in his 23rd June 2021 letter or

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[45] (1996) 52 WIR 188.
[46] See Edy Gay Addari v Enzo Addari BVIHCVAP2005/0002 (delivered 27th June 2005, unreported).
[47] SLUHCVAP2023/0028 (delivered 4th May 2026, unreported).

impose the fines set out in his 25th June 2021 letter. The Banking Regulator asserted in his pleadings and evidence that he is so authorized by **NIBO.** It is axiomatic that the Banking Regulator's defence including the provisions in **NIBO** (and by extension **NIBR**) were germane to the resolution of the dispute and needed to be examined and interpreted to decide that question. It follows ineluctably therefore that it was necessary for the judge to consider the Banking Regulator's defence in its entirety including the provisions of **NIBO** to ascertain whether his actions were authorized and thereby protected from judicial sanction.

[80] The judge summarized the Banking Regulator's defence at paragraph [19] of the judgment. He stated simply:

> "[19] Counsel for the Defendants resisted these arguments and submitted that the Regulators[48] were authorized to do as they had done and that BONI was not entitled to an order for damages for misfeasance in public office or breach of statutory duty."

He made no mention anywhere in the judgment that the Banking Regulator was relying on **NIBO** and **NIBR** as the legislative source of his authority to issue the letters and that this was the nub of his defence. In fact, the sole reference to his defence is paragraph [19]. Likewise, the only piece of legislation considered in the judgment is the **FSRC Act** which on the evidence, was advanced by the Financial Services Regulator, and not the Banking Regulator as the legal basis for the regulatory action set out in the letters. This constitutes a serious error by the learned judge in that he did not properly consider the Banking Regulator's defence or attach any weight to it.

[81] Having failed to properly consider the Banking Regulator's defence, the learned judge did not have regard to relevant considerations, namely whether the Banking Regulator had authority under **NIBO** and **NIBR** to issue the cease and desist order and impose fines. He thereby erred in principle and, as a result, his decision in relation to the Banking Regulator is therefore flawed and is plainly wrong as a matter

[48] Referring jointly to the Banking Regulator and the Regulator of Banking Services.

of law in making the quashing orders, the related declarations and costs award. For the foregoing reasons, I would allow grounds of appeal 1(ii) and (iii) on this basis.

Remit or Re-consider

[82] However, that is not the end of the matter. In the circumstances, this Court has to decide whether to remit the judicial review application for consideration by another judge or whether to consider it *de novo* at this level. The issues that arise for consideration do not entail any disputes as to the factual matrix and wholly involve questions of law. This Court therefore has the same capacity as the trial judge in evaluating the competing legal arguments and rendering a decision on the merits. Accordingly, I am of the considered view that it is appropriate for this Court to consider the Banking Regulator's defence and related issues *de novo* and make its own determination. In doing so, it is critical to examine the further submissions filed by the parties after the hearing. I proceed to do so in the succeeding paragraphs.

Delegated Legislation – Minister's Remit

[83] The provisions invoked by the Banking Regulator are sections 30(2), (3)(a) and (4)(d) of **NIBO** and Regulation 12(1) and (4) of **NIBR**. So far as relevant, section 30 provides:

> '**Regulator of International Banking**.
> **30**. (1) The Minister shall appoint a public officer to be known as the Regulator of International Banking and another person to be known as the Deputy Regulator of International Banking to assist the Regulator of International Banking, to regulate International Banking under this Ordinance.
>
> (2) The Regulator shall have the duty to ensure the proper compliance of Licensees with the provisions of this Ordinance and shall use the powers conferred upon him by this Ordinance to fulfill his duties.
>
> (3) The Regulator shall have power to—
>
> > (a) supervise the Licensees licensed by the Minister under this Ordinance;

(b) examine or cause an examination to be made of each Licensee from time to time in order to ascertain whether or not the Licensee is in a sound financial condition and that the requirements of this Ordinance have been complied with by the Licensee in carrying on international banking business;

(c) assist in the investigation of any contravention of this Ordinance that he has reasonable grounds to believe has or may have been committed by a Licensee or any of its directors, officers or senior management;

(d) to examine accounts and audited financial statements of a Licensee;

(e) to examine and make recommendations to the Minister with respect to applications for licences.

(4) In the performance of his duties under this Ordinance and to verify compliance with the provisions of this Ordinance by a Licensee, **the Regulator is entitled at all reasonable times**—

(a) to have access at its registered office to such books, records, vouchers, documents, cash, securities and other information on a Licensee as may be specified by the Regulator;

(b) to require the directors, officers and auditor of a Licensee to provide information and explanations of the condition and affairs of the Licensee;

(c) to request any relevant information, matter or thing from any person who the Regulator has reasonable grounds to believe is carrying on international banking business in Nevis in contravention of section 6;

(d) **to request any relevant information, return or certificate from Licensee <u>either annually or on a regular basis</u>**;

(e) to request from any person information or expert advice relevant to the duties of the Regulator and to provide to the person assurances regarding the confidential treatment of the information or any other assurances as the Regulator may reasonably provide.' (Emphasis added)

[84] The Regulations were made by the Minister pursuant to section 84 of **NIBO** which provides:

> "**Regulations**.
> **84**. The Minister may make regulations that are necessary for the carrying into effect of this Ordinance and in respect of acts, matters or things that are required by this Ordinance to be prescribed."

[85] Regulation 12(1) and (4) of the **NIBR** states:

> "(1) Subject to Section 30(4)(d) of the Ordinance, a Licensee shall furnish to the Regulator at such time and in such manner as specified by the Regulator, information and data as the Regulator may require for the proper discharge of his functions and responsibilities. …
>
> (4) A Licensee who contravenes this regulation is liable to a penalty of $5,000.00 and $500.00 for each day in default."

[86] Section 35 of **NIBO** is also relevant. It empowers the Minister to suspend or revoke a Licensee's licence or impose other sanctions for a Licensee's breach of its provisions. The material provisions state:

"**Breaches and sanctions**.

> **35**. (1) Where the <u>Minister</u> is satisfied, **on the recommendation of the Regulator that a Licensee**—
> (a) …;
> (b) has failed to comply with a condition of its licence;
> (c) **is in breach of any duty or obligation imposed upon it by this Ordinance** or …;
> (f) in the opinion of the Minister is carrying on business in a manner that is detrimental to the public interest or to the interest of its depositors; …
> (j) has committed an offence under this Ordinance,
> the Minister may revoke or suspend the licence of the Licensee.
>
> (2) **In addition to the powers conferred on the Minister under subsection (1), <u>the Minister</u> may also**—
> (a) issue a written warning to the Licensee;
> (b) …;
> (c) **issue a cease and desist order** that requires the Licensee or the person responsible for the management of the Licensee to cease or desist from the practice or violations specified in the order; or …" (Emphasis added).

[87] The foregoing provisions reveal that the legislative scheme conceptualized and enacted by Parliament reserved for the Minister the express authority to sanction Licensees for the 'breach of any duty or obligation imposed on it by **NIBO**'. Sanctions ranged from lesser measures including the issuance of a cease and desist order (s. (2)(c)) or the suspension or revocation of the banking licence issued under **NIBO** to a Licensee (s. 35(1)(c)).

[88] There are no express provisions in section 30 that confer authority on the Banking Regulator to either issue cease and desist orders or impose penalties in the form of administrative fees or fines. As I understand the Banking Regulator's submissions, such authority is to be inferred from the joint operation of section 30(4)(d) and Regulation 12. The force and merit of the Banking Regulator's submission assumes necessarily that the Minister did not exceed his authority when he purported by Regulation 12 to prescribe a penalty for contravention of its provisions and that the Banking Regulator was thereby authorized as the relevant authority to impose the fine. Before addressing those assumptions, it is necessary to consider whether Regulation 12 is a coercive penal provision by which an offence is created.

[89] The **Interpretation Act** is instructive regarding the effect of a provision that prescribes a penalty. Section 37(2) states:

> "**Penalties prescribed to be maximum penalties.**
> **37**. (1) …
> (2) Whenever in any law a penalty is set out in any section the same shall mean and be construed as meaning that any contravention of the section whether by act or omission shall be <u>an offence against that law</u> and shall, unless the contrary intention appears, be punishable by a penalty not exceeding the penalty stated."

The word 'law' is defined in section 2 to include 'any Act, Ordinance, Act of the Imperial Parliament and any subsidiary legislation or rule of court made or given under the authority of any law;'.

[90] The import of section 37(2) of the **Interpretation Act** is pellucid. It makes plain that an offence is created in any law enacted in the Federation, including Regulations,

where a penalty is prescribed for contravention of that law. Accordingly, the Minister by Regulation 12(4) of **NIBO** purported inter alia to create an offence and prescribe the penalty for the failure by a Licensee to furnish the Banking Regulator at such time and in the specified manner, with information and data as required by him for the proper discharge of his functions and responsibilities (Regulation 12(1)). Other breaches that attract the stipulated penalty are described in sub-regulation (2).

[91] In deciding whether the Minister strayed outside of his regulation making remit, it is important to emphasize that a fundamental pillar of a state's democratic governance is that Parliament may delegate some of its law-making power to any functionary. It is settled law that such delegation is not inconsistent with the separation of powers doctrine. See: **J. Astaphan & Co. (1970) Ltd. v Comptroller of Customs et al.**[49] This principle has been recited numerous times by this Court including in **Cerise Jacobs v Minister of Tourism and others**.[50] An imperative corollary to this principle is that a functionary who is granted power to make subsidiary legislation may be empowered to create criminal offences and impose penalties for breach thereof. However, as explained in **J. Astaphan & Co**. Parliament must take care in delegating such powers to retain effective control over the exercise of the power, be it by setting out a guiding policy, guidelines or otherwise circumscribing the rule-making authority. The court ruled:

> "If the Legislature delegates or transfers its legislative power to the Executive and does so without circumscribing the power or without prescribing guidelines or a policy for its exercise, the Legislature should be deemed to have surrendered or abdicated the power."[51]

[92] In **J. Astaphan & Co. Ltd**, the Court was concerned with whether by section 27(4) of the **Customs (Control and Management) Act** of the Commonwealth of Dominica the Legislature had delegated or transferred its legislative power of taxation to the Executive. The subsection authorised 'the proper officer' at the Customs Department to estimate the amount of duty that was payable on the

[49] (1996) 54 WIR 153.
[50] ANUHCVAP2019/0011 (delivered 24th May 2022, unreported) per Blenman JA, at para. [63].
[51] At pg. 6.

importation of items where the importer was unable to supply complete information to make a perfect entry. The subsection under consideration read:

> "(4) For the purposes of subsection (3), the specified sum shall be an amount estimated by the proper officer to be the duty payable on such goods, together with such further sum as the proper officer may require, that further sum being not less than one half of the estimated duty."

[93] Chief Justice Sir Vincent Floissac who penned the judgment in **J. Astaphan & Co. Ltd** opined:

> "If the "further sum" authorised by section 27(4) of the Customs (Control and Management) Act is intended to be by way of additional tax or duty, the Legislature of Dominica has delegated or transferred its legislative power of taxation to the Executive. This the Legislature has done without prescribing a maximum sum or otherwise circumventing the delegated or transferred power and without prescribing guidelines or a policy for the imposition of the "further sum."
>
> In these circumstances, section 27(4) of the Customs (Control and Management) Act amounts to a surrender or abdication by the Legislature of Dominica of part of its legislative power. Accordingly, to the extent to which section 27(4) empowers the proper officer arbitrarily and illimitably to impose that "further sum", section 27(4) is inconsistent with the basic principle of separation of powers **and is** unconstitutional and **void to that extent**."[52] (Emphasis added)

[94] The learned Chief Justice did not limit his commentary to the legislative element of the provision. He made the observation that legislation which confers power to determine and impose a specific sanction on an alleged wrongdoer constitutes the person making that determination a judicial officer. He said:

> "… assuming that the appellant committed an offence and that the further sum is a penalty, the question of the basic principle of separation of powers recurs. Admittedly, the power to prescribe a fixed or mandatory punishment or a range of discretionary punishments for a criminal offence is a legislative power constitutionally vested in the Legislature. But the power or discretion to select and inflict a punishment which is subjectively considered to be appropriate to the circumstances of a particular case is a judicial power or discretion which is constitutionally vested in the Judicature and which

[52] At pgs. 6 – 7.

> cannot legislatively be vested in, usurped by or transferred to the Legislature or the Executive."[53]

[95] Ultimately, he concluded:

> "Accordingly, if the further sum authorised by section 27(4) of the Customs (Control and Management) Act is intended to be a penalty, section 27(4) is inconsistent with the basic principle of separation of powers. The "further sum" is not a fixed universal sum. Section 27(4) confers a power or discretion on the Executive (i.e. the proper officer) to decide what that sum should be in the particular circumstances of a particular case. If the further sum purports to be a penalty, the power or discretion to inflict the appropriate penalty is a judicial power or discretion which cannot be legislatively transferred to the Executive."[54]

[96] While the issue in the instant case does not involve the purported levying of a tax or duty, and there are differences in the factual matrices, there are compelling parallels between the circumstances of this case such that **J. Astaphan & Co. Ltd**. must inform the resolution of the dispute in this matter. The principle propounded in **J. Astaphan & Co. Ltd** that the Legislature is duty bound to circumscribe any delegation of its legislative function to levy a tax, duty or impose a penalty, is relevant and applicable for present purposes, where the appellant is facing a greater jeopardy (i.e. a regulatory sanction). Even more telling is the recognition of and pronouncement that the legislature is prohibited from transferring to the executive the power to impose penalties for the commission of offences, a decidedly judicial function that is reserved exclusively for the judiciary.

[97] In fact, if further authority is needed, Floissac CJ went on to make the point in **J. Astaphan & Co. Ltd,** quoting from the Privy Council's judgment in **Norton v Public Service Commission**[55] that delegated authority to impose a fine must be expressly granted. He recited approvingly Lord Ackner's pronouncement:

> "Section 8(1) and (4) of the Constitution make it clear that there is no power to fine, unless there exists a law which gives power to impose a fine for breach of that law. Before such a fine can be enforced, the breach of that

[53] At pgs. 8-9.

[54] At pgs. 9.

[55] (1988) L.R.C. 944, (an appeal from the Supreme Court of Mauritius).

> law has to be established in the courts. Accordingly, it must follow that the power given to the Public Service Commission to "exercise disciplinary control" does not include the power to inflict a fine. In the result, regulation 41(1), in so far as it provides for punishment by the infliction of a "fine", is ultra vires the Public Service Commission."'

[98] By section 89(1) of the Mauritius Constitution, the Public Service Commission ('PSC') was empowered to appoint public officers and to 'exercise disciplinary control over persons holding or acting in such offices'. Section 118 authorized the PSC to make regulations 'for regulating and facilitating the performance by the Commission of its functions'. Pursuant to its regulation making power the PSC made a set of regulations including regulation 41(1), the relevant portion of which provided:

> "The following punishments … may be inflicted on any public officer as a result of proceedings under this Part – (h) fine."

[99] Consequent on the conclusion of disciplinary proceedings against the appellant Norton, the PSC imposed a fine on him pursuant to regulation 41(1)(h). He filed a constitutional motion in the Supreme Court of Mauritius for an Order of certiorari to quash the decision to fine him. The Board agreed that regulation 41(1)(h) was unconstitutional and void. Lord Ackner explained:

> "The appellant's submissions are simple and in their Lordships' opinion, correct. The powers of the Commission are derived, not from the regulations, but from the Constitution itself. The Public Service Commission has no more power than that conferred upon it by the Constitution."

[100] Extrapolating from **J. Astaphan & Son Ltd**., and **Norton** and applying the foregoing principles to the case at the appeal bar, on the authority of **J. Astaphan & Son Ltd,** I am of the considered opinion that it is not permissible to imply (in respect of the Banking Regulator) from the legislative framework in **NIBO** the power to impose fines and penalties.

[101] Additionally, while section 84 of **NIBO** is very general and broad, contrary to the principle outlined in **Norton** that the power to impose a fine must be expressed, the provision does not expressly confer on the Minister power to prescribe fines.

[102] However, as noted earlier, the express power to impose a penalty is set out in section 21 of the **Interpretation Act** appropriately limited to the sum of two thousand five hundred dollars. This limitation satisfies the requirement for the inclusion of a clear policy directive or prescription to circumscribe the Minister's power to create administrative fines or penalties in line with the learning **J. Astaphan & Son Ltd.** that such express limitations are a prerequisite of delegated authority to impose fines, levies, taxes or create penalties. In the circumstances, the Minister could by Regulation 12(4) have imposed a penalty of up to two thousand five hundred dollars for breach of the regulation. By prescribing a penalty of twice that amount he exceeded his authority. This is fatal to the legal efficacy of regulation 12(4) and by extension, the Banking Regulator's purported imposition of the fines and penalties of $120,000.00 by letter to BONI dated 25th June 2021.

[103] Essentially therefore, in letter and spirit, Regulation 12(4) violates the separation of powers doctrine. It is simply *ultra vires* the regulation making power conferred on the Minister by section 84 of **NIBO** and section 21 of the **Interpretation Act** and is therefore void. For all of these reasons, the Banking Regulator's reliance on regulation 12(4) as authority to impose fines and penalties on BONI is misconceived. It is not maintainable that the Banking Regulator was authorized to issue a cease and desist order or impose the fines of US$120,000.00 pursuant to section 30(4) of **NIBO** and regulation 12(4) of **NIBR**. For all of these reasons, I would hold that the Banking Regulator was not lawfully authorized by section 30(4) of **NIBO** and/or Regulation 12(4) of **NIBR** to issue cease and desist orders and impose fines and penalties on BONI as he purported to do by his 23rd June and 25th June 2021 letters to BONI and his decisions. Although the judge did not consider **NIBO** and arrived at his decision by merely examining the **FSRC Act**, the consideration of **NIBO** ultimately yielded the same outcome.

Costs

Appellant's Submissions

[104] It was submitted that section 30(8) of **NIBO** exempts the Banking Regulator from 'any liability' in respect of any action taken by him in the discharge of his responsibilities in good faith. The Banking Regulator contended that it is well established that exclusion or ouster clauses in statutes are ordinarily to be accorded a literal (as distinct from a liberal) interpretation. Citing **The Prime Minister of the Commonwealth of Dominica et al v Hector John**[56] he argued that they must be treated as meaning what they say and no more. Further, that the authorities make clear that the central test for this Court is to ascertain the intention of the legislature in drafting section 30(8).

[105] It was submitted further that it is well accepted that where the words of a statute are clear, a court must give effect to the intention of Parliament as manifested in those words even if the result is yielding up of its jurisdiction. He reasoned that the language "...no liability shall attach…" in section 30(8) of **NIBO** cannot be plainer as to its meaning. It cannot be said to be vague or ambiguous.

[106] The appellant pointed out that "No" is defined by the Cambridge Dictionary as meaning "not any; not one; not a"; and "liability" as meaning "the state of being legally responsible for something". Accordingly, the words used in section 30(8) are wide enough to cover any form of liability including liability for costs. The Banking Regulator contended that given the grammatical meaning of section 30(8), the NIA and/or he are to be shielded and insulated from liability where has acted in good faith in the discharge or purported discharge of a function under NIBO. There is to be an absence of any legal financial obligation or responsibility in such circumstances. In his view, Parliament intended that liability by no means should be applicable to the NIA and/or him in such circumstances. The lower court ought to have yielded its discretionary costs jurisdiction which was circumscribed by

[56] DOMHCVAP 2013/0006 at para. 21 per Pereira CJ (as she then was).

legislative will in this situation where it essentially found that the Banking Regulator was well intentioned and had in perfect good faith misconstrued the applicable law. It follows that the costs order ought to be set aside.

[107] He argued that the costs award should be set aside whether he prevails on appeal or not. Section 30(8) of **NIBO** was invoked to justify setting aside the costs order even if the appeal is dismissed or if this Court concludes that the Banking Regulator acted in good faith in issuance or purported issuance of the cease and desist orders or the imposition or purported imposition of the fines. The Banking Regulator argued that subsection (8) expressly absolves him of any and all liability 'for anything done in the discharge or purported discharge of any function under this Ordinance unless it is shown that the act or omission was not done in good faith.' Accordingly, no costs award should be made against him unless it is shown that he acted in bad faith.

[108] He argued further that in view of the judge's ruling (at paragraphs 57, 59 and 60 of the Judgment) that he was not acting in bad faith, the judge erred by making the costs order as he had no discretion to do so. His decision to award costs is therefore plainly wrong.

[109] The Banking Regulator's alternative argument was that there ought to have been no costs order made against him in the lower court since BONI's gross non-compliance warranted regulatory action as its wilful defiance if left unchecked had serious implications for the integrity of the international banking sector in Nevis. His focus was to ensure the safety of the international banking sector and protect all those who deal with BONI. In the premises, he ought not to be penalized in such circumstances, if acting in good faith he misconstrued his powers. BONI's wilful defiance ought not to be sanctioned by this Court through the upholding of the costs order.

Respondent's Submissions

[110] BONI countered that the Banking Regulator cannot be said to have discharged or purported to discharge a function under **NIBO** by issuing the cease and desist orders and imposing the fines since the law assigned no such function to him. He therefore cannot rely on section 30(8) of **NIBO** to evade the costs award occasioned by these legal proceedings because he was acting outside the scope of his duty, functions and power.

Construction of 'any liability'

[111] BONI did not in its further submissions address the question as to whether the term 'any liability' is sufficiently broad to include liability to pay legal costs. It focused on the issue of whether section 30(8) of **NIBO** ousts the court's jurisdiction to award costs.

Section 30(8) – Immunity from liability

[112] On the question of ouster, BONI relied on the authority of **In the Matter of the Banking Act No. 19 of 2005 and another v V. Nazim Burke (Minister of Finance in the Government of Grenada) and another**[57] for the proposition as stated in **Anisminic Ltd v Foreign Compensation Commission**[58] that where a statute purports to oust the court's jurisdiction, clear words are required.

[113] It was submitted that if Parliament intended that section 30(8) of **NIBO** would oust the court's inherent jurisdiction to order costs, it should have made such intention plain on the face of the provision. As drafted and enacted, the language of section 30(8) is not clear and is reasonably capable of having two meanings, namely, that the intended breadth of the provision could reasonably either include or exclude legal costs from the meaning of 'liability'.

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[57] GDAHCVAP2010/0025 (delivered 17th June 2014, unreported).
[58] [1969] 2 AC 147 at 170.

[114] It was also BONI's contention that even if the terminology 'no liability' is found to be sufficiently broad to include the liability to pay legal costs, it must be construed strictly. On such interpretation, the terminology must be interpreted to preserve the court's inherent jurisdiction to order costs. BONI proposed that the further submissions serve as the impetus to elicit through this Court a legislation 'rethink' by Parliament following consultation on the intended effect(s) of the legislation which BONI believes are being misused by the Banking Regulator and 'weaponised' over a protracted period to its great and continuing detriment.

Discussion

[115] It is fitting to start this part of the decision with the words used in section 30(8). They are:

> '(8) Notwithstanding the provisions of any other law, **no liability** shall attach to the Administration, the Regulator or any person acting on behalf of the Administration or the Regulator **for anything done in the discharge or purported discharge of any function under this Ordinance** unless it is shown that the act or omission was not done in good faith.' (Emphasis added)

[116] The critical question raised by this ground of appeal is whether Parliament intended the term 'any liability' to include legal costs and thereby effectively ousted the court's jurisdiction to award costs against the Banking Regulator and the NIA, for anything done or said to be done under **NIBO** by the Banking Regulator in the discharge or purported discharge of his functions under the statute, otherwise than in bad faith. In other words, is the effect of the provision to confer a blanket immunity from liability on the Banking Regulator?

[117] The parties are at variance as to the meaning of the words 'any liability'. In construing statutory provisions, the court applies rules of statutory interpretation as necessary to determine what meaning Parliament intended to convey by using those particular words. Reference has already been made to some of the leading authorities from this Court. It is helpful to consider compelling judicial pronouncements from other courts.

[118] As stated by Lord Nichols in **R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd**:

> "The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. … Thus, when courts say that such-and-such a meaning "cannot be what Parliament intended", they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning."[59]

[119] Where the provision is capable of only one meaning and there is no ambiguity or controversy as to its meaning, the court would apply the plain meaning rule in which the natural and ordinary or grammatical meaning is applied as the legal meaning. Otherwise, the court applies the basic rule of statutory interpretation: **Sussex Peerage Case**[60]. This is referred to in **Telecommunications Regulatory Commission v Cable and Wireless (BVI) Limited** as 'the informed interpretation rule'.

[120] The learned authors of **Halsbury's Laws of England** describe the basic rule of statutory interpretation thus:

> "The basic rule of statutory interpretation has two branches. It is taken to be the legislator's intention: (1) that the enactment is to be construed in accordance with the interpretative criteria, which are the general guides to legislative intention laid down by law; and (2) that, where these conflict, the problem is to be resolved by weighing and balancing the factors concerned.[61]"

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[59] [2001] 1 All ER 195 at 216.
[60] (1844) 11 Cl & Fin 85
[61] Vol. 96 (2024) para. 650.

[121] The basic rule was considered in **R (O) v Secretary of State for the Home Department, R (project for the Registration of Children as British Citizens) v Secretary of State for the Home Department.** Lord Hodge explained:

> "(a) Words and passages in a statute derive their meaning from their context. **A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained.** There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd [at pg. 217]: 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'
>
> (b) External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity.
>
> (c) Statutory interpretation **involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered**."[62] (Emphasis added)

[122] The cited authorities from this Court and elsewhere are consistent and are therefore borne firmly in mind. In the case at the appeal bar, disparate meanings argued for by the parties are each capable of applicability to section 30(8) of **NIBO**.

[62] At paras. 29 - 31.

Accordingly, the plain meaning rule must give way to the basic rule of statutory interpretation in this case.

[123] Taken in the context of the other words used in section 30(8) it is obvious that the legislature intended that the section would be interpreted and applied without regard to any contrary provision in any other law. Further, the conduct protected from liability are acts or omissions of the Banking Regulator or any other person acting on behalf of the NIA in the course of discharging or purportedly discharging any function under **NIBO** or any such intended conduct.

[124] The language used in section 30(8) of **NIBO** is neither complex nor confusing. The Merriam Webster Dictionary defines 'liability' as 'the state of being legally responsible'. 'Attach' needs no definition. Another word for 'discharge' is 'performance'. 'Purported' as defined in the Merriam Webster Dictionary simply means 'supposed' or 'intended'. In simple terms therefore, section 30(8) declares that the Banking Regulator (and other functionaries) will not be legally responsible for any conduct undertaken by him either in the actual performance or intended or supposed performance of any responsibility under **NIBO**, except where he acted in bad faith.

[125] In **Gordon v The Attorney General of Jamaica**[63] the Board considered the House of Lords decision in **Newell v Starkie** ((1919) LXXXIII J.P. at page 113) in which the court was concerned with section 1 of the Public Authorities Protection Act 1893 and specifically the words 'any act done in pursuance, or execution, or intended execution … of any public duty'. At page 117 of that judgment Lord Finlay stated:

> "… the Act necessarily will not apply if it is established that the defendant had abused his position for the purpose of acting maliciously; in that case he has not been acting within the terms of the statutory or other legal authority; he has not been bona fide endeavouring to carry it out. In such a state of facts he has abused his position for the purpose of doing a wrong, and the protection of this Act, of course, never could apply to such a case."

[63] [1997] UKPC 21.

Although the language under consideration in that case is not exactly the same as in **NIBO**, its substance and the interpretation accorded by the House of Lords approximates to that in the paragraph preceding this one.

[126] In **Capital Bank International Limited v Eastern Caribbean Central Bank and Sir K. Dwight Venner**[64] this Court was concerned with certain immunity provisions enacted under Article 50 of the **Eastern Caribbean Central Bank Agreement Act 1983** ('**ECCB Agreement Act**') which among other things, conferred immunity on the Governor from legal process with respect to acts performed by him in his official capacity, except where such immunity is waived. Noting that both counsel accepted that the immunities were absolute this Court concluded that as regards the Governor, he is immune from legal process once he acts in his official capacity, unless such immunity is waived. Although not a relevant issue for present purposes, it is worth noting that the Court considered further whether the immunity provision offends the constitutional concept of proportionality and ruled that it did not.

[127] Of relevance to this case, is that in the **Capital Bank** case the Court thought it necessary to comment on the utility of immunity provisions. It adopted the learning of the European Court of Human Rights (EHRR) in **Fayed v United Kingdom**[65] where the immunity provision in article 6(1) of the European Convention on Human Rights was under consideration. Importantly, it stated that while it is necessary for governments to enact legislation to regulate certain commercial activities, thereby ensuring good management practices, among other things, a fair balance had to be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. This court concluded that similarly, the immunity provisions in the **ECCB Agreement Act** have legitimate objectives such as the necessity of furthering the public interest in protecting the currency, the financial system and economies of the participating territories.

[64] Grenada Civil Appeal Nos. 13 and 14 of 2002 (delivered 10th March 2003, unreported).
[65] (1994) 18 EHRR 393.

[128] Although the **Capital Bank** and **Fayed** decisions are not exactly on point with this case, the learning is instructive. It points to the requirement for the court to consider the underlying aims of ouster clauses qua immunity provisions when construing them. Their pronouncements mirror the observations of Cory J, (albeit to different effect) mentioned earlier. Having regard to all of the circumstances of this case, I am of the considered opinion that a similar assessment must be conducted with respect to the provisions of **NIBO** in arriving at a proper construction of section 30(8). It is pellucid that **NIBO** was enacted by the legislature with the over-arching objective of ensuring that the international banking legislative framework within Nevis complies with the highest regulatory standards domestically, regionally and internationally, especially in view of the demands of a rapidly evolving global financial landscape characterized by the ubiquitous, rigid external scrutiny with the inherent potential to attract country-specific sanctions for deviation from standards by market participants.

[129] The Banking Regulator's evidence that he was motivated by those objectives when he issued the June 23rd and 25th letters, that he was in effect issuing cease and desist orders pursuant to section 30 of **NIBO** and Schedule 6 of **NIBR** and imposing fines under section 30(4)(d) of **NIBO** and regulation 12(1) and (4) of **NIBR** was not contested. It is pellucid and undisputed that by the issuance of the June 23rd and 25th letters he thereby purported to discharge regulatory functions under section 30(4)(d) of **NIBO** and regulation 12(1) and (4) of **NIBR**. The learned judge ruled that he acted in good faith in doing so. No appeal has been filed against that ruling.

[130] It follows that pursuant to section 30(8) of **NIBO** the Banking Regulator is absolved of any and all liability (including legal costs) that flowed from his purported discharge of statutory functions under section 30(4)(d) of **NIBO** and regulation 12(1) and (4) of **NIBR** through issuance by him of the June 23rd and 25th letters. Legal costs by their nature constitute a legal responsibility. Liability for such costs are therefore caught by the broad exemption conferred under section 30(8) of **NIBO**. Accordingly,

I am satisfied that the learned judge erred in not construing section 30(8) to such effect and by awarding costs against the Banking Regulator.

[131] I would hold that the Banking Regulator having acted in good faith in the purported performance by him of the stated functions under **NIBO**, is not liable to pay any legal costs arising from the judicial review proceedings in the court below. This is because section 30(8) of **NIBO** exempts him from any liability that may accrue to him, save where he acted in bad faith. I would accordingly allow this ground of appeal.

Costs

[132] The parties each secured a measure of success on appeal. Usually, costs would be apportioned among the parties commensurate with such success. However, having regard to the earlier ruling on the costs issue, the only permissible order is that each party to bears his or its own costs.

Disposition

[133] Accordingly, I would make the following orders:

(1) The appeal is allowed in part limited to the issue of costs.

(2) The orders of the learned judge at paragraphs 1, 2, 4 and 62 of his judgment dated 10th February 2023 are affirmed. The orders at paragraphs 3, 4, 7, 8 of the order dated 10th February 2023 are affirmed. As regards the appellant only, the orders at paragraphs 9 and 10 of the order dated 10th February 2023 are affirmed.[66]

(3) The order of the learned judge at paragraph [64] of his judgment dated 10th February 2023 is set aside and substituted by an order that each party shall bear its or his own costs.

(4) Each party shall bear his or its own costs of this appeal.

[66] The second and third sentences of sub-paragraph(2) and the second sentence in footnotes 2 and 3 are inserted post-delivery of this judgment, those references having been inadvertently omitted.

[134] The Court is grateful to counsel for their submissions. The delay in completion of the judgment was unavoidable and is regretted.

I concur.
Vicki Ann Ellis
Justice of Appeal

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar