

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006 HCV 3763

IN THE MATTER OF THE SECURITIES ACT  
AND  
IN THE MATTER OF THE FINANCIAL  
SERVICES COMMISSION ACT

BETWEEN	THE FINANCIAL SERVICES COMMISSION	CLAIMANT
AND	OLINT CORP	1 <sup>ST</sup> DEFENDANT
AND	DAVID SMITH	2 <sup>ND</sup> DEFENDANT
AND	OVERSEAS LOCKET INTERNATIONAL CORP	3 <sup>RD</sup> DEFENDANT

Lord Anthony Gifford Q.C., Mr. Christopher Dunkley and Mr. Huntley Watson instructed by Watson and Watson for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Applicants.

Mrs. Symone Mayhew and Miss Kalacia Clarke instructed by the Director of State Proceedings for the Claimant/Respondent.

Miss Daniella Gentles/ Mr. Ransford Braham observing proceedings for Lewfam.

HEARD: 16 November and 20 December 2006

**Mangatal, J:**

1. This is a claim brought by the Financial Services Commission "the Commission" seeking declaratory relief against the Defendants. The claim was brought by way of Fixed Date Claim Form and was filed on the 25 October 2006. These are the orders sought:

1. *A Declaration that on a day to day basis up to March 24 2006, the 1<sup>st</sup> and/or 2<sup>nd</sup> and /or 3<sup>rd</sup> Defendants issued securities in the form of certificates of interest or participation in profit sharing agreements and/or investment contracts.*
  2. *A Declaration that on a day to day basis up to March 24 2006, the 1<sup>st</sup> and/or 2<sup>nd</sup> and /or 3<sup>rd</sup> Defendants:*
    - (a) *carried on a securities business by dealing in securities in the form of investment contracts without a licence under section 7(1)(a) of the Securities Act;*
    - (b) *carried on a securities business by dealing in securities in the form of profit sharing agreements without a licence under section 7 (1) (a) of the Securities Act;*
    - (c) *held themselves out as carrying on a securities business without a licence under section 7 (1)(b) of the Securities Act to do so;*
    - (d) *carried on investment advice business by providing investment advice in relation to securities without an investment advisor's licence under section 8 (1)(a) of the Securities Act;*
    - (e) *held themselves out as carrying on investment advice business without an investment advisor's licence under section 8(1)(b) of the Securities Act.*
2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have applied for the following orders:
- (a) An Order that the Claim Form be struck out as being an abuse of the process of the court or likely to obstruct the just disposal of the proceedings; and/or
  - (b) A Declaration that the court should not exercise its jurisdiction to try the claim; and/or
  - (c) An Order that the proceedings be stayed.

3. The Grounds for the Application are as follows:
1. That the granting of the Declarations sought would prejudice the fair trial of any criminal proceedings which might be instituted following a complaint made to the Director of Public Prosecutions by the Claimant, and/or would usurp the jurisdiction of the criminal courts.
  2. That the Commission having made Cease and Desist Orders against the Defendants, which Orders are subject to a pending appeal, no proper or useful purpose is served by granting the declarations sought herein.
  3. That the Claimant having made such Cease and Desist Order pursuant to section 68(1B) of the Securities Act, it has no lawful power to institute civil proceedings as well.

#### **BACKGROUND**

4. On the 24<sup>th</sup> March 2006 the Commission issued Cease and Desist Orders against the Defendants.
5. The Commission issued the Cease and Desist Orders pursuant to Section 68(1B)(a) of the Securities Act. In the body of the Cease and Desist Orders the Commission refers to the investigations which it carried out arising from its suspicions that the Applicants were carrying on business and holding themselves out as carrying on business which was in breach of certain sections of the Securities Act.
6. The Cease and Desist Orders recite that having concluded its investigation, the Commission is satisfied that in the circumstances, a Cease and Desist Order should be made "as the Commission believes that-
  1. *Olint Corporation/David Smith, et al, dealt in securities and through their operations, engaged in the participation of a profit sharing agreement in relation to foreign currency trading activities.*

2. *Olint Corporation/ David Smith, et al, issued investment contracts in relation to foreign currency trading activities;*
3. *Olint Corporation/ David Smith, et al , provided investment advice to potential investors in relation to foreign currency trading activities.*

*AND WHEREAS Olint Corporation/ David Smith, et al, were not licenced by the Commission to carry out the aforementioned activities;*

*AND THAT the said activities are therefore unlawful...*

7. It was at a meeting of the Commission's Board on the 22<sup>nd</sup> March 2006 that a decision was reached that the Commission should issue Cease and Desist Orders against the Defendants. It was also decided that the Commission's investigation file should be referred to the Director of Public Prosecutions "the D.P.P." for his ruling on the matter.
8. In paragraph 21 of his Affidavit sworn to on the 24 October 2006, Mr. Wynter, the Executive Director of the Commission, indicates that the material gathered in the course of the investigation has been submitted to the Office of the Director of Public Prosecutions for a determination as to whether criminal charges should be laid against Olint and its principals.
9. Pursuant to Section 68 (1C) of the Securities Act, the Applicants have filed an Appeal against the Commission's decision to issue a Cease and Desist Order. That Appeal is by way of Fixed Date Claim Form in Claim No. 2006 HCV 01365 and the Appeal has been fixed for hearing for 5 days commencing March 26 2007.
10. The D.P.P. has not yet made a ruling in relation to the file submitted by the Commission.

11. It is useful to examine the relevant provisions of the Securities Act at this juncture.
12. Section 7- (1) A person shall not –
  - (a) carry on a securities business; or
  - (b) hold himself out as carrying on a securities business, unless he is in possession of a dealer's licence to do so granted under this Act.
- (2) Subsection (1) shall not apply to-
  - (a) a person who is an exempt dealer within the meaning of subsection (3) of section (2); or
  - (b) a transaction on a particular occasion by a person who does not hold himself out as dealing in securities on a day to day basis.
- (3) A person who contravenes subsection (1) shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding two million dollars or to imprisonment for a term not exceeding three years or to both such fine and imprisonment.

#### Section 8.

8-(1) Subject to subsection (2), a person shall not-

- (a) carry on investment advice business ;or
- (b) hold himself out as carrying on an investment advice business,

Unless he is the holder of an investment adviser's licence granted under this Act.

Subsection (1) shall not apply to –

- (a) such persons or categories of persons as may be prescribed;
- (b) a transaction on a particular occasion by a person who does not hold himself out as giving investment advice on a day to day basis.

- (3) *A person who contravenes subsection (1) shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding one million dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.*

**Re Ground 1- whether grant of declarations would prejudice the fair trial of any criminal proceedings which might be instituted following complaint to D.P.P. and/or would usurp the jurisdiction of the criminal courts.**

13. A number of cases have been cited and are discussed below.
14. Where a competent court of criminal jurisdiction has made a final decision on certain issues against the intending Claimant, the initiation of proceedings in a civil court for the purpose of mounting a collateral attack on identical issues, whilst it may not be inconsistent with the literal application of procedural rules, may amount to an abuse of the process of the court where the intending Claimant had a full opportunity of contesting the decision in the criminal court -the House of Lords decision in **Hunter v. Chief Constable of West Midlands and another** [1981] 3 All. E.R. 727.
15. Where criminal proceedings have already started, it is not a proper exercise of judicial discretion for a judge in a civil court to grant the defendant in the criminal proceedings a declaration that the facts alleged by the prosecution did not in law prove the offence charged. This is because to make such a declaration would be to usurp the function of the criminal court without binding it, and may well prejudice the criminal proceedings- **Imperial Tobacco Ltd. v. The A.G.** [1980] 1All E.R. 866.
16. Where no criminal prosecution has been commenced, and none is contemplated in relation to past activities, although the Attorney

General in the United Kingdom is entitled to seek the assistance of the civil courts in upholding the criminal law, where he sought a declaration regarding the criminality of future conduct the civil court would have regard to the danger of usurping the criminal courts' jurisdiction and the function of the jury in a future criminal trial if the civil court declared whether future conduct would be criminal-**A.G. v. Able**[1984] 1All E.R. 277. At page 284f Woolf J. (as he then was) stated:

*There are, however, differences between this case and other cases where declaratory relief has been granted in aid of the criminal law. Declarations are being sought that certain conduct is criminal, not that certain conduct is not criminal. The declarations are addressed to future distributions of the booklet and it is a real possibility that if a declaration is granted but, despite this, further distributions take place, there could be a criminal prosecution. This makes it particularly important that this court should bear in mind the danger of usurping the jurisdiction of the criminal courts.*

17. Where no criminal proceedings exist, and the issue is not confined to the question whether there has been the commission of a criminal offence, the courts may be prepared to grant declaratory relief- **Royal College of Nursing of the United Kingdom v. Department of Health and Social Security** [1981] 1 All E.R. 545.
18. Where there are criminal proceedings and civil proceedings arising from the same set of events, it is a matter for the discretion of the court whether to stay the civil proceedings. The court will weigh the competing considerations and balance justice between the parties. A Plaintiff in the civil proceedings has a right to have its civil claim decided and it would be for the Defendant to show why that right should be delayed. The Defendant had to point to a real and not merely a notional risk of injustice. What

had to be shown was the causing of unjust prejudice by the continuance of the civil proceedings. The continued co-existence of both the criminal and civil proceedings does not affect the defendant's entitlement to the presumption of innocence and the heavier onus of proof on the prosecution in the criminal proceedings-Privy Council Appeal No. 95 of 2002 - **Panton v. F.I.S.** delivered 15 December 2003. In the **Panton** case the civil proceedings were commenced before the criminal proceedings and both sets of proceedings arose out of the same events. As did the criminal proceedings, the civil proceedings contained substantial allegations of fraud, and in the civil claim there was a substantial claim for monetary relief. It is not mentioned in the judgment whether there was in the civil proceedings a claim for declaratory relief and if so, in what terms.

19. In very rare circumstances the court may exercise its jurisdiction to restrain criminal proceedings where civil proceedings raising substantially the same questions of law have been commenced-**Thames Launches Ltd. v. Trinity House Corporation** [1961] 1 All E.R. 26, as discussed by Lord Lane at page 883 b-e of the **Imperial Tobacco** case.

*In April 1960 the plaintiff took civil proceedings by way of an originating summons in the Chancery Division against the Defendant. Six months later, two summonses against the plaintiff's servant were issued out of the magistrate's court on an information laid by a servant of the defendant. These summonses raised substantially the same questions of law as did the originating summons...Buckley J. on the plaintiff's application held that he had jurisdiction to stay the criminal proceedings, and further, that it would in the circumstances be proper for him to do so because the criminal proceedings were vexatious. Buckley J. stated:*



*Jurisdiction of that kind, in my judgment, is very clearly a jurisdiction which must be exercised with the greatest care; and this court, I think, would be very slow to interfere with the course of criminal proceedings unless it was clear that the issues in the civil proceedings and the criminal proceedings really raise in substance the same issue and that if the civil proceedings succeeded the criminal proceedings must necessarily fail.....In other words, the court must be satisfied that to allow the criminal proceedings to be proceeded with pending the decision of the civil proceedings would be vexatious.*

**Resolution of the Issues**

20. It is clear that an important distinguishing feature of this case is that no criminal proceedings have yet been commenced. A referral of the matter by the Commission to the D.P.P. does not amount to the commencement of criminal proceedings. By virtue of the Constitution of Jamaica it is the D.P.P. (SECTION 94 (3)(a) who is empowered when he considers it desirable to institute and undertake criminal proceedings against any person in respect of any offence against the laws of Jamaica. The D.P.P. is not subject to the direction or control of any person or authority in the exercise of these powers (section 94(6) ). The Board of the Privy Council recently dismissed an appeal against the decision of our Court of Appeal Civil Appeal No. 39/2003 **Leonie Marshall v. The D.P.P.** in which the D.P.P.'s constitutional powers are well-discussed. The Commission cannot compel the D.P.P. to commence criminal proceedings and so there is no certainty that the referral will result in the commencement of criminal proceedings.
21. The fact that there have been no criminal proceedings commenced yet means that a number of the concerns and principles discussed in some of the cases cited above have no

applicability here. Were it not for the decision in A.G. v. Able I would have been of the view that the fact that there are at present no existing criminal proceedings would bring an end to the argument about usurpation of the jurisdiction of the criminal courts.

22. However, A.G. v. Able bears close examination. Although on the facts of that case the court decided that the declaration in relation to the criminality of future conduct was inappropriate because there might be a criminal prosecution in relation to future actions, it seems to me that the mischief which the court was seeking to avoid may arguably arise where declarations are sought in civil proceedings in relation to past conduct where "there is a real possibility that there could be criminal proceedings"-Woolf J. In that case the A.G. had decided not to prosecute for past actions because it was felt that the persons involved in the subject Committee were respectable persons who held strong and genuine beliefs. The decision not to prosecute was also influenced by the fact that a genuine dispute existed as to the precise ambit of the law. If the same declarations had been sought for whatever reason in civil proceedings in relation to the past conduct, where there might yet have been criminal proceedings, it appears to me doubtful whether Woolf J. would have granted the declarations sought. In the instant case, the fact of the referral of the matter to the D.P.P. by the Commission suggests that there is a real possibility that there could be a criminal prosecution. Does it make any qualitative difference that in A.G. v. Able where the court came to the view that criminal proceedings could be brought that it was the prosecuting authority seeking the declarations, whereas here, it is the Commission seeking declarations (as opposed to the D.P.P. to whom the file has been referred)? Does it make any difference

that the real possibility of a criminal prosecution in the present case relates to past conduct as opposed to future conduct? I have struggled with these questions, but in the final analysis, it seems to me that it makes no meaningful difference. Both situations mean there is a real possibility of criminal proceedings being brought and there may therefore arguably be a risk of usurping the jurisdiction of the criminal courts.

23. In the **Royal College of Nursing**, another decision of Woolf J. but in which declaratory relief was granted, there is nothing in the judgment to suggest that criminal proceedings were contemplated or that there was any real possibility that they could be brought.
24. When I examine the **Panton** case, I note that although in that case there were co-existing criminal and civil proceedings, the case was not discussed along the lines of usurpation of the criminal court's jurisdiction and none of the authorities which are discussed above were referred to. This is perhaps because of the way the case was argued and the fact that the main issue was whether there existed in Jamaica a rule to the effect that civil proceedings should be stayed when criminal process arising out of the same events are also pending, or whether it is a matter of discretion depending on competing considerations. Furthermore, it does not appear that the principal relief being sought in the **Panton** decision was declaratory in nature. In addition in **Panton**, the civil proceedings were the first to be filed and not the criminal.
25. In my judgment the issue therefore turns on the nature and purpose of the declaratory relief sought in this case. When one looks at sections 7 and 8 of the Securities Act, it seems clear to me that each of these provisions is concerned with the law from two angles. The one is from the regulatory purview of the Commission whereby licensing is required, and the other is

concerned with the creation of a criminal offence. I accept that there are issues to be determined from a regulatory perspective in a civil context as opposed to questions of criminal liability and penal sanctions. Even if there is some degree of overlap on the issues, this would be a matter contemplated in the legislative provisions themselves, and would not prevent the Regulator of the Securities industry from approaching the court for its determinations.

26. I accept Mrs. Mayhew's submission that the declarations sought do not seek the determination of the Defendants' guilt in a criminal context. In addition, the Commission's decision to issue a Cease and Desist Order, inherently involves the question whether the recipient of the order issued or dealt with or held himself out as dealing with securities. The very fact that under section 68 (1C) of the Securities Act a person aggrieved by the Commission's decision may approach the civil court by way of an appeal, contemplates the civil court being seized of the issues set out in the declarations sought herein. This is so even if the civil court ultimately resolves the appeal on other grounds, without making an express determination of those issues.
27. When I look at the principles to be gleaned from the cases discussed, and the facts and underlying legislation involved in the instant case, it appears to me that this is a case like that of **The Royal College of Nursing** where the court was prepared to grant the declaratory relief sought because no criminal proceedings yet exist and the issue is not confined, indeed is not necessarily concerned at all, with the issue of whether there has been the commission of any criminal offence. There is here only a notional injustice because criminal proceedings have not yet been brought, and it is the Regulator that is approaching the court for declarations in respect of matters which it is required and

empowered to deal with and regulate under the Securities Act. In any event, even where there is a co-existence of criminal and civil proceedings this does not affect a Defendant's entitlement to the presumption of innocence and the heavier onus of proof on the prosecution in criminal cases.

28. Mrs. Mayhew has on behalf of the Commission submitted that there are issues to be determined from a regulatory perspective which may be more appropriately dealt with in a civil context. I agree that there are issues in this case that would seem to be more appropriate for determination by a civil court. Whilst the law confers certain powers on prosecuting and regulatory authorities, and in the case of the former those powers are by and large wide and unfettered, the way in which these powers are exercised impacts heavily on the level of confidence and trust which individuals repose in the system's handling of their rights. I noted with interest the approach taken by the prosecuting authority in **A.G. v. Able** not to prosecute for past acts because there existed a genuine dispute as to the ambit of the law. To be contrasted is the situation in the **Imperial Tobacco** case where, although the House of Lords came to the view that the declaration sought ought not to be granted because of the existing criminal proceedings, the prosecution proceedings came in for some criticism by Lord Lane at page 882 d-j. Lord Lane expressed some sympathy for the citizens' application to the commercial court for declaratory relief and I find his comments instructive :

*The history of this prosecution is unhappy. Disregarding, as one must, the possibly deleterious effects of smoking, this lottery, as Lord Denning rightly observed, was light entertainment and also was good advertising. No one was likely to complain about the light entertainment but the good advertising was another matter. A 39%*

increase in the sales' of the respondents' King Size cigarettes meant that rival concerns would be suffering a corresponding drop. Hence the first complaint from a trade rival; hence the initiation of proceedings. Given that the Director of Public Prosecutions was convinced (rightly as it transpires) that the promotion of this lottery was an offence, nevertheless the following matters should have been clear to him. First, that so far as the public was concerned (as opposed to rival tobacco companies) this lottery could hardly be said to be causing any harm to anyone. Secondly, whatever views he might have had about its illegality, there was ample room for the opposite view to be honestly held by others. Thirdly, that the Respondents' had taken skilled advice and did honestly hold the opposite view. Fourthly, that if the scheme was brought to a premature end the financial loss to the respondents was likely to be considerable.....It seems as though everything was being done which might inject venom into a situation where plainly no venom was necessary or justified. Putting it as charitably as possible, it was a maladroit performance. It was not surprising that the respondents took the action that they did and sought a declaration.

29. The emphasis in the above passage is mine as I have discussed some not dissimilar features of this case in my judgment in relation to an application for a stay of execution in the Appeal Claim No. 2006 HCV 01365 delivered 3<sup>rd</sup> November 2006 generally, and particularly at pages 14, 26, 27, and 35.

**Ground 2-the Claimant having made a cease and desist order against the Defendants, which orders are subject to a pending Appeal, no proper or useful purpose is served by granting the declarations sought herein.**

30. It is a correct statement of the law that a court will not grant a declaration where such a declaration will serve no useful purpose.

However, I accept the Commission's arguments that it is clearly useful for the Commission to seek to obtain express orders from the Court as to whether the activities that it alleges that the Defendants are engaged in constituted trading in securities and whether the Defendants issued securities in the form of investment contracts and profit-sharing arrangements.

31. I also accept the arguments advanced on behalf of the Commission that as the Appeal raises procedural as well as substantive issues, there may well be no express determination of the substantive issues, and hence the usefulness of the present Claim. I therefore reject this second ground as well.

**Ground 3-That the Claimant having made such Cease and Desist Orders pursuant to section 68(1B) of the Securities Act, it has no lawful purpose to institute civil proceedings as well.**

32. The relevant provisions of section 68 of the Securities Act are as follows:

*68-(1) The Commission may-*

*.....(b) on its own initiative where it has a reason to suspect that a person has committed an offence under any provisions of this Act or regulations or rules made hereunder or has been guilty of fraud or dishonesty in relation to a dealing in securities, conduct or cause to be conducted such investigation as it thinks expedient for the due administration of this Act.*

*(1B) On the conclusion of any such investigation the Commission may, if it is satisfied that the circumstances so warrant-*

*(a) issue a written warning or a cease and desist order, as the case may require, to the person concerned;*

(b) in accordance with section 9(6) or section 10(4), as the case may be, suspend or cancel any licence or registration granted under this Act; or

(c) institute civil proceedings in its own name or on behalf of any other person.

(1C) Any person aggrieved by a decision of the Commission under subsection (1B)(a) or (b) may, within fourteen days after the date of notification of the decision, appeal to a Judge in Chambers who may make such order as he think fit.

33. Lord Gifford Q.C. has argued on behalf of the Defendants that the use of the word "or" underlined in section 68 (1B) is disjunctive and signifies that if the Commission uses its powers at (a) and/ or (b) , it cannot invoke (c).

As stated in **Re Diplock** [1941] 1 All E.R. 193,200 by Sir Wilfred Greene M.R., and by Chief Justice Bowman in the Canadian decision of **Linda Russell v. R.** 2001 Can L. II 423(T.C.C.) , the word "or" is prima facie disjunctive " in the absence of some restraining context" and that "it should not be treated as conjunctive without good reason". In relation to this section of the Securities Act, as Bowman C.J. said (at paragraph 20), I doubt that irreparable damage would be done to the scheme of the Act if I interpreted "or" as disjunctive. Nor do I think that one interpretation as opposed to another leads to absurdity.

Having said that, it appears to me that without more, the word "or" in section 68(1B) is being used in the sense in which it is used in ordinary parlance, which is disjunctive. However, based on the view that I have come to in relation to the meaning of the term "civil proceedings" in subsection (c) , I find it unnecessary to make a determination as to whether the "or" is disjunctive or conjunctive. In addition, I make no ruling as to the proper grammatical and/or statutory interpretation of the interrelationship of sub-sections (a) and (b).



34. I am of the view that the construction which the Defendants Attorneys' are placing on the term "civil proceedings" in section 68(1B) (c ) is too broad and that the sense in which the term falls to be construed is in a narrow contextual manner, meaning civil proceedings that would be similar in nature and in effect to the powers of the Commission in (a) and (b). An example of that type of proceedings would be an application for injunctive relief.
35. The Commission is a body corporate which can sue or be sued in its own name (section 28 of the Interpretation Act). It does seem sensible and logical that as a Regulator of the securities industry the Commission should be able to approach the court in order to obtain clarification of issues relative to parties and situations the Commission seeks to regulate. It also seems reasonable that the Commission should be able to seek the court's input as to its jurisdiction and the scope of its regulatory terrain. I therefore have no conceptual difficulty in accepting that the authority to approach the court for such determinations supplements rather than alternates with its statutory power to issue cease and desist orders.
36. In all the circumstances and for the reasons outlined above, I dismiss the application on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to strike out or stay these proceedings.