JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 05965

In the matter of the Securities Act
In the matter of sections 25, 68 and 74 of the Securities Act and to all other powers thereunto enabling

BETWEEN	**LASCELLES, de MERCADO & COMPANY LIMITED**	**APPELLANT/APPLICANT**
AND	**FINANCIAL SERVICES COMMISSION**	**1ST RESPONDENT**
AND	**BLACK SAND ACQUISITION INC.**	**2ND RESPONDENT**

Mr. Allan Wood Q.C., Mr. Miguel Williams, and Mr. Gary Harris, instructed by Livingston, Alexander & Levy for the Appellant/Applicant.

Mrs. Symone Mayhew for the 1st Respondent.

Mr. John Graham and Ms. Annaliesa Lindsay, instructed by John G. Graham & Company for the 2nd Respondent.

Mr. Wentworth Graham, Chief Regulatory Officer, and Ms. Jónell Hermitt, watching proceedings for the Jamaica Stock Exchange.

Heard: 11, 12, 19, 20, October and 1, 14, and 30 November, 2011

SECURITIES ACT AND SECURITIES (TAKE-OVERS AND MERGERS) REGULATIONS, 1999 – RULES OF THE JAMAICA STOCK EXCHANGE – WHETHER RIGHT OF APPEAL OR JUDICIAL REVIEW-NATURE OF SECTION 25 PROCEEDINGS – TAKE-OVER BID CIRCULAR – DUTY TO TREAT WITH SAME STANDARD OF CARE AS PROSPECTUS – WHETHER SATISFACTORY PROOF THAT OFFEROR ABLE OR WILL BE ABLE TO IMPLEMENT THE OFFER IN FULL – TOM REGULATIONS 24, 16(1)(g), 14(3) – DUTIES OF PARTIES TO TAKEOVER TO PREVENT FALSE MARKET IN SHARES – WHETHER BONA FIDE OFFER –WHETHER ISSUE OF DISSATISFACTION BY

DIRECTORS OF OFFEREE BOARD TO BE DEALT WITH IN DIRECTORS' CIRCULAR

Mangatal J:

The Parties

[1] The Appellant/Applicant Lascelles de Mercado & Co. Limited "LdM" is a company duly incorporated under the Laws of Jamaica. LdM is a public limited company, quoted on the Jamaica Stock Exchange, "JSE". All dealings in its stocks and shares are subject to the provisions of the Securities Act and Regulations and to the Rules of the JSE.

[2] The 1st Respondent the Financial Services Commission "the FSC" is a body corporate established pursuant to the Financial Services Commission Act of 2001 "the FSC Act". The FSC has responsibility for supervising and regulating prescribed financial institutions, and part of its mandate is to supervise and regulate the securities, insurance and private pension industries. The FSC has responsibility for the general administration of the Securities Act of 1993 "the Act", and has the power to enforce the rules of the JSE whenever it considers it necessary to do so. The Act was amended in 2001 to substitute the FSC for its predecessor, the Securities Commission.

[3] By virtue of section 76 of the Act, the FSC, with the approval of the Minister of Finance, has power to make regulations as did its predecessor, the Securities Commission. In 1999, the Securities (Take-Over and Mergers) Regulations "the TOM Regulations" were passed. These regulations apply to take-overs, take-over bids, and mergers.

[4] The 2nd Respondent Black Sand Acquisition Inc "Black Sand" was incorporated on or about July 15 2011 in Saint Lucia as an international business company. Black Sand describes itself as a special purpose vehicle, formed for the purpose of undertaking a takeover bid transaction in respect of sufficient ordinary and preference shares in LdM to provide Black Sand with no less than 90% of the

issued and ordinary shares and 100% of the issued and outstanding preference shares of LdM.

THE PRESENT CLAIM

[5] The present case concerns Black Sand's Take-Over Bid Circular "Bid Circular" and certain decisions alleged by LdM to have been taken by the FSC in respect of this Bid Circular.

[6] I wish at the outset to express my sincere appreciation to the Counsel and Attorneys-at-Law who appeared in this matter, for the level of preparation, and the assistance they have provided to the Court. Counsels' combined diligent efforts were not able to uncover any previous local decision concerning the relevant issues, and so the thoroughness of the research and depth of reasoning exhibited have been particularly elucidating and helpful.

THE BACKGROUND TO THE CLAIM

[7] On or about the 28th of July 2008, CL Financial Group of Companies, operating out of the Republic of Trinidad and Tobago, acquired approximately 86 percent of the ordinary shares in LdM, priced at US $9.45 per ordinary stock unit. Two companies holding the majority of the issued preference shares passed to CL Financial for nominal consideration under a separate transaction once the ordinary share purchase was completed. The share capital of LdM consists of 96,000,000 ordinary stock units, 50,000 15 % preference stock units and 10,000 6% stock units. The total number of ordinary stock units under the control of CL Financial is 83,475,554 and of preference stock units, 58,288. CL Financial therefore controls approximately 92% of the voting rights in LdM.

[8] Capital was raised in Trinidad and Tobago and in Jamaica through US fixed rate notes "Notes" denominated in United States Dollars issued by CL Spirits Limited, a company incorporated under the laws of Saint Lucia. CL Spirits owns approximately 71 percent of the ordinary shares of LdM. All the shares held by the CL Financial Group of Companies, including the preference shares, were pledged as security for the Notes.

[9] The principal due under the Notes was due to be repaid on the 23rd of July 2011, however, up until the date when the Affidavit of Jane George, Attorney-at-Law and Company Secretary of LdM, was filed on the 18th of October 2011, CL Spirits had not made payment. Mrs. George further indicated that she was advised that CL Spirits had continued to negotiate with the holders of the Notes. She was further advised by Mr. Marlon Holder, Chief Executive of CL Financial Limited, that one course of action open to the noteholders was to foreclose and seize the underlying security.

[10] A few days after the default by CL Spirits, an offer by Black Sand was announced. The chairman of Black Sand is the Honourable William McConnell. Mr. McConnell had been the Group Managing Director of LdM up until the 30th of June 2011, having been so appointed from October 1994. Mr. McConnell was appointed a member of the Board of Directors of LdM in 1989. A press release stated that the offer would be formally launched on the 29th of July 2011.

[11] However, a Takeover Bid Circular “Bid Circular” was not officially released until the 4th of August 2011. Mrs. George in her Affidavit indicates that the price at which Black Sand had indicated its intention to purchase the ordinary shares was at a price significantly below that paid by the CL Financial Group of Companies in 2008.

[12] By letters dated the 8th of August 2011 Black Sand and the FSC were informed by Messrs. Livingston Alexander & Levy, Attorneys-at-Law for LdM, that they took the view that the Bid Circular did not comply with the TOM Regulations and the JSE Rules for a number of reasons. They specified in particular the following:

a. Paragraphs 34 and 35 included inaccurate and misleading information in regard to Carreras shares held by LdM being posted as available on the JSE when they were not;
b. The required proof that Black Sand had available funds to complete the transaction was not provided;
c. There was insufficient evidence as to the ownership structure of Black Sand.

[13] By letter dated the 11th August 2011, Messrs. Livingston Alexander & Levy wrote to the FSC, amongst other matters, seeking confirmation that the Bid Circular was not compliant, and reiterating their view that the time period for the issuance of the Directors' Circular ought not to be computed until there was full compliance by Black Sand. Further, that in the event that the FSC did not share those views, LdM formally requested an extension of time for issuing the Directors' Circular.

[14] The FSC responded to LdM's Attorneys by letter dated August 11 2011, indicating that they had areas of concern in relation to Black Sand's Bid Circular, and enclosing a copy of the FSC's letter to Black Sand outlining those concerns. The FSC also informed that they were sending a copy of the letter to the JSE so that they could note the FSC's concerns.

[15] The FSC's letter to Black Sand, so far as relevant reads as follows:

> *Dear Mr. McConnell:*
>
> ***Takeover Bid Circular for*** **(LdM)**
>
> *We have received an amended copy of the take-over bid circular provided by Mr. Trevor Patterson on 5 August 2011. The document has been reviewed in accordance with the Securities (Take-Overs & Mergers) Regulations, 1999 and it is believed that the following requires further clarification:*
>
> 1. *Paragraph 34(c) of the Take-Over Bid indicates that a sum similar to 74,263,144 shares in Carreras Limited has been posted as available for sale on the JSE. A check with the JSE reveals that no such posting exists. If you are in possession of evidence to the contrary please provide same, barring this please ensure that this paragraph is removed from your final document.*
> 2. *Regulation 24-Appendix 1(g) provides some detail on the proposed financial arrangements for the offer. Upon further consultation with our Legal Services Department, we are of the view that evidence of the arrangement should be provided such as an independent confirmation*

of the commitment by way of a letter of intent from Macquarie Capital (USA) to satisfy this requirement.....

(My emphasis).

[16] Mr. Gary Harris, Attorney-at-Law of Livingston Alexander & Levy, on the 12th of August 2011 attended a meeting with members of the FSC and informed of the non-compliance by Black Sand, the need for compliance, and the possibility of insider trading by Black Sand and/or its principals and advisors under section 51 of the Act. By letter dated 17th August 2011, Livingston Alexander & Levy also set out facts which LdM alleges support its allegation that there has been a breach of section 51 of the Act.

[17] By letter dated 13th September 2011 the FSC wrote to LdM indicating that it was in receipt of a letter dated September 12 from the Attorney-at-law acting for Black Sand enclosing the Supplement to the Take-Over Bid previously released, Supplement No. 1, and that the FSC had advised Black Sand that they had no further objection to the document. They further indicated that "it was expected that LdM's Directors' Circular should be released by September 20th 2011…." in compliance with the TOM Regulations.

[18] As the Supplement to the Bid Circular was not received until about 5 p.m., the deemed date of service on LdM as agreed by the FSC was the 14th of September 2011, and LdM was expected to release the Directors' Circular by the 21st of September 2011.

[19] In LdM's view, the Supplement to the Bid-Circular failed to cure the defects and its Attorneys-at-law wrote to the FSC to that effect by letters dated 13th and 14th September 2011.

[20] On the 16th of September 2011, LdM filed and served on the FSC Notice and Grounds of Appeal with the Appeal Tribunal against the decision of the FSC effective as of the 14th of September 2011. The appeal came up for hearing on the 22nd of September 2011 before a Panel consisting of the Chairman the Honourable Mr. Justice Ian Forte QC. O.J., the Honourable Mr. Justice Ferdinand Algernon

Smith, O.J., and Mr. Winston Hay. By letter dated the 21st of September 2011, presented at the appeal hearing, and by way of oral submissions, the FSC indicated that an appeal did not lie to the Tribunal and that, accordingly, the Tribunal had no jurisdiction to hear LdM's appeal. The FSC in their letter referred to the Act, including section 74. Indeed, during their oral submissions, the FSC's Counsel expressed the view that the Act provides a general right of appeal to a Judge in Chambers, except for appeals of refusal or grant of licences or registration. Further, that LdM's right of appeal was to a Judge in Chambers pursuant to section 74 of the Act.

[21] After considering the matter, LdM's Counsel subsequently agreed with the submissions of the FSC, discontinued the appeal to the Tribunal, and filed an appeal to the Supreme Court by way of Fixed Date Claim Form.

THE COURT PROCEEDINGS

[22] The Fixed Date Claim Form which was originally filed on September 23 2011 naming the FSC as the sole respondent, was stated to be an appeal against the decision of the FSC, made on the 13th of September 2011, that-

> 2. *The Takeover Bid Circular issued by Black Sand Acquisition Inc.…is in compliance with the Securities Act Part IV and the Securities (Take-Overs and Mergers) Regulations 1999; and*
> 3. *There has been no infringement of Section 51 of the Securities Act.*

[23] The Fixed Date Claim Form also averred that section 74 of the Act conferred jurisdiction for the appeal.

[24] On the 26th of September 2011 my brother McIntosh J. granted ex parte a stay of the decisions of the FSC (as outlined above), until the determination of the appeal. The appeal was set down for hearing on the 10th of October 2011 in Chambers at 10:00 a.m. for one day.

[25] On the 5th of October 2011, the FSC filed an application which came on for hearing before me on the 6th of October 2011. In this application the FSC sought, amongst other relief, that the stay granted on the 26th September be set aside, that

the Fixed Date Claim Form be struck out, or alternatively, that the date for hearing of the Appeal be vacated, and a first hearing date, (or case management hearing), be set.

[26] On the 6th of October at the inter partes hearing of the FSC 's application, both the FSC's application, and the LdM's appeal hearing were fixed for the 11th of October for the day, the appeal having been rescheduled from the 10th to the 11th . Mr. John Graham also indicated that John Graham and Company appeared for, and would be representing the interested party Black Sand at the hearings, and would be supporting the FSC's application.

[27] On the 11th of October, I commenced the hearing of the FSC's application and I heard from both Mrs. Mayhew, on behalf of the FSC, as well as Ms. Lindsay, instructed by John Graham & Company, on behalf of Black Sand. One of the stated bases for the FSC's application to strike out the Fixed Date Claim Form, is that there was no reasonable ground for bringing the Claim/Appeal, as there is no statutory right of appeal under Section 74 of the Act in respect of the FSC's "decision"- Rule 26.3(1)(c) of the Civil Procedure Rules 2002 "the CPR". Evidently, the FSC's representatives now have a different view of the Law than had been expressed before the Appeals Tribunal. Further, that the issue of whether the Bid Circular was in compliance with the TOM Regulations is not an issue that falls for determination/adjudication by the FSC and that the FSC made no binding decision. Mr. Wood also commenced his submissions. During the course of the submissions, there was much discussion about section 25 of the Act. It was Mr. Wood's submission that the claim was correctly an appeal, but that in any event, the Court has other powers and jurisdiction under the Act, notably under section 25.

[28] On the 12th of October 2011, LdM's Attorneys-at-Law filed an Amended Fixed Date Claim Form, in which, essentially, they added claims pursuant to sections 68 and 25 of the Act, without abandoning the position that they were correct in appealing under section 74. Mrs. Mayhew and Ms. Lindsay both indicated that they had no objection to the amendment and agreed that the Court would have a certain type of jurisdiction under section 25 (though they were not

agreed upon the nature of that jurisdiction). However, they maintained that in so far as the claim was being made pursuant to sections 68 and 74 of the Act, those portions of the claim should still be struck out.

[29] Although the application was made in the face of an application to strike out, since there as no abandonment of the original claim as filed in the form of an appeal under section 74, and the other parties did not object to the amendment, there was no need for consideration of the applicability of any of the principles discussed in the Court of Appeal's decision in **Pan Caribbean Financial Services Ltd. and Jamaica Redevelopment Foundation Inc. v. Robert Cartade et al** S.C.C.A No 112 and 115 of 2008, upholding the decision of Brooks J. This decision, which I raised with the parties, discussed the question of whether, a party who seeks to amend in the face of a striking -out application, has to show that there is a real prospect of establishing the amended claim.

[30] Again in my view, very sensibly, and practically, all the parties agreed that there be no issue about Part 60 of the Civil Procedure Rules which deals with statutory appeals or appeals from tribunals, defined to include statutory bodies, and speaks to the holding of a first hearing for a Fixed Date Claim Form. In light of the appreciation that this matter needs to be determined urgently in the interests of all the parties concerned, in the interests of the shareholders of LdM and the public and the securities industry generally, it was agreed that the substantive hearing would be expedited. It was fixed to take place on the 19th and 20th October 2011. The parties further concurred that the FSC and Black Sand would not pursue the application to set aside the stay.

[31] It was later agreed also that the issues having to do with whether there was any infringement of section 51 of the Act, which has to do with prohibiting insider dealing with securities, and decisions of the FSC, if any, in relation to such matters, would be deferred for hearing at a later date. Mr. Wood Q.C. on behalf of LdM, in addition indicated that LdM would not be pursuing the ground which claimed that the Bid Circular did not comply with section 16(1)(k) of the TOM Regulations, on the basis that it did not contain a statement as to the intention of Black Sand regarding the employees of LdM and the continuation of the business. He also

indicated that LdM is not pursuing the complaint that the non-compliance is compounded by a statement that Black Sand is to have an unlimited amount of further extensions. These were set out at ground 4, and relief set out at (ii) (c), and ground 9 respectively of the Amended Fixed Date Claim Form. Grounds 11 and 12, and relief set out at (ii) (d) and (iii), all having to do with section 51 of the Act, have been deferred.

[32] On the 19th of October 2011, a Further Affidavit of Mrs. Jane George was filed, exhibiting among other documents, a Supplement No. 2 issued by Black Sand and delivered to LdM's offices on the 18th of October. Supplement No. 2 extends the Black Sand Offer to 4:30 p.m. on the fourteenth date after the Directors' Circular is published in a Daily Newspaper, or 4:30 p.m. on December 31st 2011, whichever is earlier. On the 19th of October 2011, after Mr. Wood Q.C. had completed his submissions, Mrs. Mayhew applied for leave to file a further Affidavit on behalf of the FSC. This, she indicated, was to fill a "gap in the evidence". She indicated that the FSC wished to file further Affidavit evidence to show that they had acted upon information which led them to be satisfied of the financial arrangements put in place by Black Sand, other than the Supplement to the Bid Circular enclosed under an electronic letter from Black Sand's Attorney-at-Law. However, although the FSC sought leave to file this further Affidavit evidence, they did not wish to disclose to LdM any of the information itself which they now claim to have considered. Mr. Wood objected strenuously, indicating that the FSC was "attempting to move the goalpost". Mr. Graham, on behalf of Black Sand, supported the FSC's application, and described the situation as "a procedural misfortune". I granted the FSC permission to file a further Affidavit by 4:00 p.m. on the 31st October 2011, limited to dealing with the basis upon which the FSC said that the Bid Circular now complied and that it was satisfied with the financial arrangements. However the order was made conditional upon disclosure of information and documents in the Affidavit. My written ruling of the 20th October deals with those issues and my reasons for allowing the FSC's application. Having made that ruling, the matter was adjourned for continuation on the 1st and 14th November 2011.

THE MATTERS PRESENTLY ARISING FOR SUBSTANTIVE ADJUDICATION

[33] A number of points have been taken by the FSC and Black Sand relating to the nature of the Court's jurisdiction, and challenging LdM's right to bring an appeal. There have also been issues as to whether LdM would only be entitled to certain of the relief sought under an application for judicial review. I therefore think it useful to set out the entire claim and grounds relevant to the issues presently under consideration. I have underlined the portions of the claim which were amended on the 12th of October 2011.

[34] The Amended Fixed Claim, which added Black Sand as a Second Respondent, states as follows:

> …
>
> "The Appellant/Applicant, Lascelles deMercado & Company Limited……(hereinafter called the "Appellant") brings this application to enforce compliance with the Securities (Take-Overs and Mergers) Regulation (s) 1999 and the Rules of the Jamaica Stock Exchange governing Take-Overs and Mergers and also by way of appeal against the decision of the 1st Respondent, the Financial Services Commission of 39 Barbados Avenue, Kingston 5, in the Parish of Saint Andrew, (hereinafter called "the Commission") made on the 13th of September 2011 that –
>
> 1. The Takeover Bid Circular issued by Black Sand Acquisition Inc. (hereinafter called "the Offeror") is in compliance with the Securities Act Part IV and the Securities (Take-Overs and Mergers) Regulation(s) 1999; and
> 2. …...
>
> The enactment which confers jurisdiction upon the Court are Sections 25, 68, and 74 of the Securities Act which inter alia provide that an aggrieved party can make application to the Court to enforce the Rules of the Jamaica Stock Exchange ("JSE") and for an appeal to lie to a Judge in Chambers from any decision, refusal, ruling or order of the Commission.
>
> The facts found by the Tribunal on the Grounds of Appeal are that the Tribunal made no specific findings of fact, but held on the information before it. The Offeror had complied with the regulations.

Findings of Law and Fact Challenged

1. Any finding of fact-

    (i) There was no specific finding of fact but nevertheless concluded on the information before it that there had been compliance with Part IV of the Regulations.

    (ii) ……

The following are the Grounds <u>to support the application-</u>

2. The original Takeover Bid Circular issued by Black Sand Acquisition Inc. did not comply with the Securities Act and the Securities (Take-Overs and Mergers) Regulations 1999, in that there was false and misleading statements in paragraph 35 of the Takeover Bid Circular in breach of Regulation 11 <u>and the JSE Rules General Principles paragraph 10;</u>

3. The Takeover Bid Circular did not comply with Regulations 16(1)(g)… and 24, <u>and the JSE Rules Appendix 1 paragraph 7(f)</u> ….in that it did not contain sufficient information that the Offeror was able to comply with same or that funds were available to complete the transaction;

4. …

5. It is evident that the original Takeover Bid Circular was non-compliant as Black Sand Acquisition Inc. after complaint from the Appellant issued on the 13th September 2011 a Supplement to the Offer in an endeavour to cure the defects therein.

6. The Supplement could not cure the defects, as the Supplement made reference to statements in the original offer and consequently both will have to be read together which will only confuse the shareholders to whom the offer is being made, hence further non-compliance;

7. The Supplement did not cure the defects concerning Regulations 16(1)(g) and 24, <u>and the JSE Rules Appendix 1 paragraph 7(f)</u> but merely compounded same as the information contained therein that this could only be determined after due diligence by a third party which certainly is not within the ambit of Regulation 24, hence the Supplement did not cure this defect;

8. The Supplement failed to cure the false and misleading statement in paragraph 35 which still subsists;

9. ……
10. In an endeavour to comply with Regulations 16(1)(g), 24, and the JSE Rules Appendix 1 paragraph 7(1)(f) the Circular makes reference to a third party which is not a financier but a broker, who hopes to find the money, after the third party has done due diligence which is unrealistic in this takeover;
11. …
12. ….
13. The Financial Services Commission has therefore erroneously and wrongfully held that there has been compliance with the Regulations and held that the Appellant must comply with the timetable therein by issuing its Directors Circular by the 21st day of September 2011 despite the clear non-compliance by Black Sand Acquisition Inc;
14. The Appellant is not under any legal obligation pursuant to the Regulations to issue a Directors Circular until there is compliance. Hence the Financial Services Commission has again erred as a matter of law by issuing a time table in accordance with the Regulations for the Appellant to comply with same despite the continuing breaches by the Offeror;
15. The Commission having held that the Offeror has complied with Part IV of the Regulations, the Claimant /Appellant pursuant to Regulation 18(1) has seven (7) days within which to issue a Directors Circular containing a recommendation as to the acceptance or rejection of the offer which must comply with the particulars specified in Regulation 19. The circular shall be delivered to each shareholder by prepaid post or by delivery to its shareholders last known address and be published in at least one daily newspaper in Jamaica and immediately prior to the publication and sent to shareholders.
16. The Appellant contends that it is under no obligation or duty to issue such a circular to its shareholders unless it has all the material and relevant information in full compliance with Part IV of the regulation. The Appellant also prays that the Court will exercise its discretion and grant a stay of proceedings until this application/appeal is determined.

The Appellant/Applicant therefore prays for the following relief:

(i) A declaration that the Takeover Bid Circular issued by Black Sand Acquisition Inc. to acquire and purchase the shares of Lascelles de Mercado & Co. Ltd. the Claimant/Appellant, does not comply with Part IV of the Securities (Take-Overs and Mergers) Regulation(s) 1999, is in breach of Regulations 16 (1)(g) and … and 24 and the Jamaica Stock Exchange Rules Appendix 1 paragraph 7(f) .....;

(ii) An Order that the Offeror issues a Take-Over Bid Circular which complies with Part IV of the regulations and the Rules of the Jamaica Stock Exchange namely-

(a) A statement which does not contain misleading information in breach of Regulation 11;

(b) A statement (containing) that complies with Regulations 16(1)(g) and 24 and the Jamaica Stock Exchange Rules Appendix 1 paragraph 7 (f) that the Offeror has funds available to effect payment in accordance with the cash offer being made;

(c) ……

(d) ……

(iii) …….

(iv) That the Appellant is not under any obligation to issue a Director's Circular until this appeal/application is heard and determined. "

THE COURT'S JURISDICTION

WHETHER RIGHT OF APPEAL-WHETHER APPLICATION OUGHT TO HAVE INSTEAD BEEN BY WAY OF JUDICIAL REVIEW

[35] Mrs. Mayhew on behalf of the FSC submitted that there was no right of appeal pursuant to section 74. She submitted that the right to appeal to a judge in chambers is enshrined in section 74 of the Act. However, it is limited and does not apply to all decisions, rulings or orders of the Commission. Section 74, she submitted, only gives a right to appeal to a judge in chambers in cases in which "such an appeal is provided for" by the Act or regulations. She submitted that the

right of appeal to a judge in chambers only exists where a particular section says so. Examples of such appeals, she submitted, were as provided for in sections 68 and 22(5) of the Act. Counsel referred to the fact that there are other appeals provided for under the Act, in relation to the FSC Appeal Tribunal, and not to a judge in chambers, notably under sections 11 and 23(2) of the Act. Ms. Lindsay supported Mrs. Mayhew in these submissions. When I asked Mrs. Mayhew whether the effect of the FSC having expressed the completely opposite view before the Tribunal, and LdM having acted upon that view expressed amounted to some sort of estoppel, she stated that it did not, and if the view expressed by Counsel before the Tribunal was wrong, it was just plain wrong. Mr. Wood in response to my query conceded that the FSC's position taken earlier could not confer jurisdiction on the Court, but could estop the FSC from taking such procedural points.

[36] At first Mrs. Mayhew sought to argue that, in expressing itself on the 13th of September 2011, as being satisfied that the financial arrangements made by Black Sand to ensure that the funds required to carry out the offer were adequate and available pursuant to Regulation 24 of the TOM Regulations, the FSC were merely expressing an opinion, or providing guidance, and had made no decision. However, on the 1st of November, Mrs. Mayhew, (in my view quite correctly), departed from the earlier view expressed, and conceded that the FSC had made a decision pursuant to Regulation 24, and that in fact that Regulation clearly requires the Commission to make a decision. She conceded that such a decision would be justiciable, however, she submitted that it could only properly be challenged by way of judicial review. The Court could therefore only assume jurisdiction to review the FSC's decision, and would only exercise such jurisdiction and discretion if satisfied of the type of grounds of illegality, irrationality or procedural impropriety that concern the Court when exercising its supervisory jurisdiction over inferior tribunals. In other words, she submitted that the decision of the FSC could not be examined by this Court on the merits, and challenge could only be mounted in respect of the decision-making process. Parliament having established the specialist body the FSC to make decisions in respect of the Securities industry, the Court has no power to vary or reverse the FSC's decision and only has the limited functions available on judicial review. The importance of resolving this issue of

whether there is a right of appeal or whether the applicant would have to proceed by way of judicial review is that whereas an appeal can look at the merits of the FSC's decision, judicial review would not.

[37] All are agreed that Section 22(5) is not relevant here because it refers to an appeal to a judge in chambers in respect of reviews by the FSC of disciplinary action taken by the JSE, or by the FSC against JSE member dealers. As regards, section 68 which LdM relies upon, I agree with Mrs. Mayhew's submission that this section is inapplicable and does not, as Mr. Wood sought to argue, confer any jurisdiction on the Court in the instant case. This is because subsection 68(1C) which allows an aggrieved person to appeal to a judge in chambers, only applies to situations where the FSC, after an investigation, takes the active steps referred to in subsections 68 (1B) (a) or (b), i.e. issues a written warning or a cease and desist order, or suspends or cancels a licence or registration granted under the Act. None of these actions have been taken in this case. I cannot agree with Mr. Wood that this section is also applicable where the FSC has failed to take such action when it ought to have done so.

[38] However, I disagree with the construction of section 74, and the Act as a whole, advanced by Mrs. Mayhew and Ms. Lindsay in respect of the question of the conferral of a right of appeal to a judge in chambers.

[39] Section 74 provides as follows:

> *……*
>
> *(Appeal under this Part).*
>
> *74-(1) In those cases in which such an appeal is provided for by this Act or by regulations made under it, an appeal shall lie to a Judge in Chambers from any decision, refusal, ruling or order of the Commission.*
>
> *(2) Notwithstanding that an appeal lies under this Act or regulations made under it from any decision, refusal, ruling or order of the Commission and subject to subsection (3) such decision, refusal, ruling or order shall be binding upon the appellant unless-*

(a) within fifteen days of the receipt of the notification of the decision,refusal, ruling or order he serves on the Commission notice of his intention to appeal therefrom setting forth the grounds of appeal; and

(b) within fifteen days after serving the notice he files his appeal with the Registrar of the Supreme Court and prosecutes the same with due diligence.

(3)The Commission may upon application, stay execution of any decision, refusal, ruling or order of the Commission, subject to such terms and conditions as it may specify, and where the Commission refuses an application for such stay of execution, an application therefore may be made to a Judge in Chambers.

(4) On an appeal the appellant and the Commission as respondent may appear personally or be represented by an attorney-at-law.

(5) An appeal from the determination of a Judge in Chambers shall be to the Court of Appeal the decision of which shall be final.

(6) On an appeal a Judge in Chambers or the Court of Appeal, as the case may be, may confirm, reverse or vary any decision, refusal, ruling or order made or given by the Commission.

(My emphasis).

[40] It is clear to me that section 74 does confer a general right of appeal from any decision, refusal, ruling or order of the FSC. Section 74 appears in the "Miscellaneous" Part of the Act as does Section 68. However, section 68 deals with Investigations. The right of appeal dealt with in section 68(1C) is a specific right conferred after the FSC has taken either of the steps set out in section 68(1B) (a) or (b) after investigation. Section 22(5) appears in the Part of the Act dealing with the Stock Exchange.

[41] It is fairly obvious that Mrs. Mayhew and Ms. Lindsay's argument that section 74 only applies to situations where the Act expressly confers a right to appeal to a judge in chambers, such as section 68 (1C) and 22 (5) cannot be correct, because each of those sections requires the appellant appealing to the Supreme Court to do different things, and within different time periods. For example, in section 22(5), the person must appeal within thirty days after being notified of the FSC's decision.

In 68 (1C), the person must appeal within fourteen days of the date of notification of the FSC's decision. Both of those subsections deal with particular types of decisions of the FSC. However, in section 74, an appeal lies not only from decisions of the FSC, but also in respect of refusals, rulings or orders. Under this section, however, it is within fifteen days of the receipt of notification that notice of intention to appeal setting out the grounds of appeal must be served on the FSC, and then fifteen days after serving the notice he must file the appeal with the Registrar of the Supreme Court. Neither section 22(5) nor 68(1C) require any notice of intention to appeal, setting out grounds of appeal. Sub-Section 74 (1) only speaks about cases in which "such an appeal is provided for by this Act or by regulations made under it" in contradistinction to other cases of appeal provided for in the Act, such as appeals to the Appeal Tribunal. The draftsman could have made this issue a lot clearer.

[42] In my judgment, LdM do have a right of appeal pursuant to section 74 in respect of the FSC's two decisions, contained in the letter dated September 13 2011, which took effect on the 14th of September 2011. The FSC made the decision that they had no further objection to Black Sand's Bid Circular, and further, that it was expected that LdM should now issue its Directors' Circular by the 21st of September 2011. The inference to be drawn from the FSC's decisions is that the Take-over Bid Circular was now compliant. In my judgment, this right of appeal exists whether we classify what the FSC decided as being decisions, or as being rulings of the FSC. LdM has acted in compliance with the timelines and specifications set out in section 74 of the Act and the appeal is properly before the Court.

QUESTION OF JUDICIAL REVIEW

[43] It is to be noted that in **Lowell Lawrence v. the FSC** [2009] UKPC 49, cited by Mrs. Mayhew, and the unreported decision of **ICWI Investments Ltd. et al v. the FSC**, a judgment of the Full Court, delivered December 19 2003, which I brought to the attention of the parties, the Courts there considered applications for judicial review in respect of decisions or actions of the FSC. However, there is no indication in either of these decisions that the Court's jurisdiction can only be invoked by way of judicial review. It is also clear to me that there may well be

decisions, rulings, refusals or orders made by the FSC in respect of certain matters or parties, where a person aggrieved may not have so direct a connection with the subject matter of the decision, ruling, refusal or order as to qualify as an appellant. Yet that person, if affected, or having sufficient interest in the subject matter of the application, may have a right to apply for judicial review.

[44] Having reached my decision that LdM does have a right of appeal under section 74, it is not strictly necessary for me to address Mr. Wood's further alternative argument to do with the application being one that seeks declarations, and therefore that there is nothing in the Rules requiring LdM to seek leave to apply for judicial review. Rule 8.6 of the CPR states that the Court may make a declaratory judgment whether or not any consequential relief is or could be claimed. Further, in Part 56 of the CPR, which deals with administrative law, a party can apply for declarations against a public body and such an application will be considered an application for an administrative order, and not an application for judicial review. I therefore agree with Mr. Wood that, even if there were no right of appeal under section 74, LdM could nevertheless seek certain declarations from the Court. However, in the instant case, LdM is also seeking orders and directions from the Court, and based upon the grounds set out for bringing the claim, I agree with Mrs. Mayhew that this is not LdM's strongest position upon which to rest.

SECTION 25 OF THE ACT-NATURE OF THE RELIEF THAT CAN BE OBTAINED UNDER THIS SECTION

[45] The marginal note to section 25 of the Act bears the heading "Enforcement of business rules, etc., by the Court". Section 25 states as follows:

> *25.-(1) Where a person who is under an obligation to comply with or enforce the business rules or listing rules of a recognised stock exchange fails to comply with or enforce any of those business rules or listing rules, as the case may be, a Judge of the Supreme Court may act in accordance with subsection (2).*
>
> *(2) For the purposes of subsection (1) the Judge may, on the application of the Commission, the recognised stock exchange or a person aggrieved by the failure and after giving to the person aggrieved by the failure and the person against whom the order is sought an opportunity of being heard, make*

an order giving directions to the last-mentioned person concerning compliance with or enforcement of those business rules or listing rules.

(3) For the purposes of this section, an issuer that is, with its agreement, consent or acquiescence, included in the official list of a recognised stock exchange, or an associate of such an issuer, shall comply with the listing rules of that exchange to the extent to which those rules purport to apply in relation to the issuer or associate, as the case may be.

[46] Sonia Nicholson, the Senior Director of the FSC, in her Affidavit filed on the 18th of October 2011, referred to and exhibited two letters from the JSE dated September 14 and September 19 2011, in which the JSE indicated that it has no further objection, having received the Supplement, and indicating that the JSE expected to receive the Directors' Circular by latest September 21 2011. It is clear that the JSE have taken the same position as the FSC.

[47] Ms. Lindsay, on behalf of Black Sand had originally contended that section 25 confers a right of judicial review on an applicant or person aggrieved. Mrs. Mayhew, on behalf of the FSC, whilst indicating that LdM can rest comfortably under section 25 as conferring jurisdiction on the Court, submitted that whereas LdM could claim relief against Black Sand pursuant to this section and seek directions from the Court, insofar as the applicant LdM is saying that a decision of the FSC is wrong, then that ought to be challenged by way of an application for judicial review. It was Mrs. Mayhew's contention that section 25 does not involve judicial review.

[48] First off, I can say that I disagree that an application by LdM under section 25 in relation to the FSC is in the nature of judicial review. The right to apply to the Courts by way of judicial review is not a right that is dependent upon a statutory basis. It is the process by which the Supreme Court exercises supervisory jurisdiction over inferior tribunals. Judicial review is a discretionary remedy that protects the rights of private citizens against abuse by public bodies carried out in their decision-making processes in matters involving public law issues. In my judgment, section 25 confers a completely different and salutary power on the Court to enforce the business or listing rules of the JSE. It provides a broad

spectrum and direct right for an applicant to come to the Court and seek relief on the merits. The section recognises the importance of parties who engage in business on the stock exchange being able to obtain direct and expeditious access to the Court for directions preventing breach by anyone, or a failure by the JSE or the FSC to enforce the business or listing rules of the JSE. By its wording it is clear that this section is placed in the Act in recognition of the broader base that dealings on the stock exchange involve; it is acknowledging that these matters concern the general public in respect of publicly listed shares, and not only shareholders in private companies. It is noteworthy that this section also grants the FSC and the JSE, the regulators, the right to come straight to the Court for a remedy against infringement of the business and listing Rules. It is really a very powerfully-worded section under which the Court has authority to give directions to a party concerning compliance with, or enforcement of the rules. “Directions” is a wide term, which in my view includes, but is not limited to orders in the nature of declarations, and injunctive relief, both prohibitory and mandatory.

[49] In this particular case, the applicant LdM can apply for the relief it is seeking against Black Sand directly under section 25. However, in my judgment, it can also apply for the relief it is seeking against the FSC not only by way of appeal under section 74, but also under section 25 as well. This is because in this case, the TOM Regulations, are substantially mirrored in the **Jamaica Stock Exchange Rules, Appendix 1, Take-overs and Mergers and General Principles**. Therefore, the matters about which LdM complains in respect of the TOM Regulations and the Act, can also be complained about in respect of the JSE and the FSC’s handling of the JSE Rules or failure to enforce them. The advantage of the section 25 application is that it allows the Court to deal directly with the party that is allegedly infringing the Regulations and Rules directly, and not just as a party affected by an appeal against the decision/ruling of the FSC. This allows the Court to act with the type of speed, efficiency, and flexibility which commercial transactions on the Stock Exchange involving the public and market forces demand. This is clearly the type of application fit for the Commercial Court, where the Court has flexible powers – see for example, Rule 71.8 of the C.P.R. that even allows the Commercial Court to dispense with statements of case.

[50] I would just add that this application, whilst receiving a very quick hearing and resolution by ordinary standards, has taken longer than I think is desirable in cases of this nature. This was largely because there were no local precedents or guidance in this area. Indeed, no previous applications under this section have been brought to my attention. In addition, many procedural and jurisdictional objections were taken, and these points also lengthen proceedings. I trust that in the future, similar matters filed pursuant to section 25 of the Act may be dealt with far more quickly. As Mrs. Mayhew, Counsel for the Regulator observed in her submissions, Take-over Bid transactions are time-sensitive. A balance must be struck between ensuring that all pertinent and relevant material is put before the Court and arriving at a speedy resolution of the issues.

[51] Importantly, in this case TOM Regulation 14(3) states that the board of an offeree company shall satisfy itself that the offeror company is, or will be able, to implement the offer in full (my emphasis). Appendix 1 Rule 4 of the JSE Rules governing take-overs and mergers, states that a board (of an offeree company) so approached is entitled to be satisfied that the offeror company is, or will be, in a position to implement the offer in full. It is my judgment, that separate and apart from LdM's challenge to the FSC's decision as to its satisfaction with the financial arrangements under TOM Regulation 24, or its right of appeal under section 74 in relation to the FSC's decision, section 25 allows LdM to approach the Court directly in relation to the matters which LdM itself claims not to be satisfied about, as required by the TOM Regulations and the JSE Rules. Whilst reference to Regulation 14(3) and Rule 4 of the JSE Rules were referred to in argument, I note that there is no direct relief claimed by LdM in respect thereto. However, in so far as LdM is claiming that it is not under any legal obligation to issue the Directors' Circular until there is compliance, I understand them to be importing a consideration of Regulation 14(3) and its JSE equivalent into these particular deliberations.

[52] In sum, I am therefore of the view that the Court has ample power to deal with the application/appeal before it. Section 68 is not applicable in this case. However, leaving aside that section which is not necessary for consideration of an appeal, since section 74 of the Act applies, there is no jurisdictional ground upon

which the Claim should be struck out. Section 25 also confers a broad and flexible jurisdiction upon the Court.

[53] I now turn to a consideration of the substantive complaints.

FSC'S POSITION IN RELATION TO THE SUBSTANTIVE ISSUES

[54] In accordance with my ruling on the 20th of October 2011, the FSC, on the 31st of October 2011, filed a further affidavit of Rohan Barnett, the Executive Director of the FSC. In this Affidavit, Mr. Barnett indicated that upon reviewing a letter from Mr. John Graham, Attorney-at-Law for Black Sand dated August 18 2011, enclosing a copy of a letter from Macquarie Capital dated July 22 2011, to Mr. McConnell ,as well as an extract from the text **Corporate Finance : Law and Practice by Timothy E. Stock LLB (Longmans London),** and the additional statements in the Supplement, the FSC was satisfied with the arrangements by Black Sand to ensure that the funds required to carry out the offer were adequate and available pursuant to TOM Regulation 24. Further, that the statements regarding the arrangements were also adequate for the purposes of TOM Regulation 16(1)(n) and for the purposes of the TOM Regulations generally.

[55] Mr. Barnett indicated that the FSC had also considered its previous practice with other take-over bids in particular the takeover of LdM itself by Angostura and Bank of Nova Scotia "BNS"'s takeover of Dehring Bunting and Golding. He stated that in both of these takeovers, both the FSC and the JSE had accepted "Highly Confident" statements in the bids from the offeror companies in relation to their financial arrangements to carry out the offer. Accordingly, the FSC acted in accordance with its previous standards when it accepted the financial arrangements presented by Black Sand for the offer.

BLACK SAND'S POSITION IN RELATION TO THE SUBSTANTIVE ISSUES

[56] Most of the evidence filed on behalf of Black Sand has to do with the deferred aspects of the claim as it relates to the alleged infringement of section 51 of the Act. Thus, the Affidavits of Mr. William McConnell and Mr. Marcus Richards, Managing Director of Greystone Capital Partners, will be of greatest relevance when those issues as to insider dealings are being dealt with at a later date.

However, the Take-Over Bid Circulars in relation to LdM by Angostura and in relation to Dehring Bunting and Golding by BNS, upon which Mr. Barnett relies, were already exhibited to the Second Affidavit of Mr. McConnell filed on the 18th of October 2011. Indeed, the letter from Black Sand's Attorneys dated 18th August 2011, which is part of the information which the FSC states that it had regard to, expressly responds to the FSC's request in letter dated August 11 2011 for more evidence regarding the financial arrangements, by referring to these two Take-over Bids. The FSC was asked to have regard to them. The letter from Black Sand's Attorneys closes by saying "We bring the foregoing to your attention only to emphasize that a higher standard should not be imposed on Black Sand simply because its bid is unsolicited. Indeed, it ought to be the reverse having regard to the fact that Black Sand does not have access to pertinent information within LdM."

[57] I will deal with grounds 2, 6 and 8 first.

Ground 2 – The original Bid Circular issued by Black Sand did not comply with the Act and the TOM Regulations, in that there were false and misleading statements in paragraph 35 of the Bid Circular in breach of Regulation 11 and the JSE Rules General Principles paragraph 10

Ground 6-The Supplement could not cure the defects, as the Supplement made reference to statements in the original offer and consequently both will have to be read together which will only confuse the shareholders to whom the offer is being made, hence further non-compliance.

Ground 8 – The Supplement failed to cure the misleading statements in paragraph 35 which still subsists.

[58] Section 50 of the Securities Act states that a person shall not make or pursue a take-over of a public company except in accordance with such rules in respect thereof as the Commission may prescribe.

[59] When the Act, TOM Regulations, and the Companies Act are read together, as well as the JSE Rules, it is clear that each document issued or statement made by Black Sand in relation to the offer, as in the case of a Prospectus, must satisfy the highest standards of accuracy. See in particular TOM Regulation 11, sections 44, 45 and 47 of the Companies Act, and sections 46 and 52 of the Act. Also

Appendix 1, Rule 10 of the JSE Rules General Principles. Section 47 of the Companies Act states that a statement included in a prospectus shall be deemed to be untrue if it is misleading in the form and context in which it was included.

[60] LdM's complaint under this head concerns the reference in the original Bid Circular at paragraph 34(c) to a holding of 74,263,144 ordinary shares by LdM in Carreras as having been posted as available for sale on the JSE when that is not so. They state that while in the Supplement this offending statement is stated to be withdrawn, paragraph 35 also contains misleading statements relying on the matters in Paragraph 34(c) which have been proved to be untrue and misleading. Paragraph 35 goes further by referring to the possible sale of the Carreras shares, as if not only have the shares been posted, but that that they may possibly have already been sold.

[61] In my judgment, having regard to the high standard of accuracy required in the Bid Circular conveying information to the shareholders, it is not sufficient, and it is confusing, to issue a Supplement which requires the original Bid Circular containing the offending statements to be read in conjunction with the Supplement. Mrs. Mayhew, on behalf of the FSC submitted that if the Board of LdM still has misgivings about misleading statements, it can address this issue in the Directors' Circular. I think that would add yet another dimension of confusion. Not only would the shareholders have to read the original Bid Circular containing the faulty information, but they would have to read the Supplement, and then the Directors' Circular. That seems to me to be a very circuitous way in which to exorcise untrue and misleading statements. Whereas a Supplement may be appropriate where additional information is being provided (see for example the Australian Corporations Act 2001's discussion of Supplementary Bidder's Statement), where it is sought to make corrections to information that if not corrected would be misleading and/or untrue in respect of material matters, it seems to me that it would be more appropriate to have the whole original Bid Circular withdrawn, and a completely new Circular presented omitting altogether the offending passages. It is confusing to raise or retain an untrue or misleading statement in order to dismiss it, by saying it is withdrawn. The Act and Regulations do not specify the manner in which corrections should be made. However, in my view having a Supplement

attempt to cure the defects does not accord proper weight to the seriousness with which the Law treats untrue or misleading statements.

[62] It is also clear that in so far as paragraph 35 of the Bid Circular contains a reference to "the possible sale of the Carreras shares", it too contains misleading and untrue statements. Further, contextually, in so far as paragraph 35 contains expressions of opinion based upon a statement as to "the possible sale of Carreras shares" such opinions could not be soundly based. In so far as paragraph 35 contains or invites conjecture on the part of shareholders premised upon "the possible sale of the Carreras shares", any such conjecture would lack reasonable foundation. Overall, the effect would be misleading, because the shares were as a factual matter, confirmed by the JSE, not to have been posted on the JSE, much less possibly sold. This paragraph ought to be reworded, removing the offending reference entirely as opposed to restating it and then withdrawing it.

[63] In my view, in their letter dated August 11th 2011, the FSC had the right idea in requiring that paragraph 34(c) be removed from the final document. Where the FSC appear to have fallen down is in accepting the Supplement to be read with the original document as equating to "ensuring that this paragraph is removed from your final document" (my emphasis). The FSC ought to have gone further and required that the offending portions of paragraph 35 also be withdrawn. As the Regulator, the FSC has to itself apply a high standard of care in ensuring that the Bid Circular meets the standard of care required of a prospectus. There is a great need to be vigilant. Indeed, the Attorneys for Black Sand seem to have been quite prepared to revise the Bid Circular completely since they stated to the FSC in their letter dated August 18 2011 with regard to the misstatement about the Carreras shares "our client will … readily publish a correction either by way of a Supplement to the Takeover Circular or by way of a revision. Please confirm whether we should state:

(i) that the previous statement that the Carreras shares were posted for sale on the JSE is inaccurate and that the shares are not being offered for sale, or

(ii) any other remark regarding the matter as you deem fit

(my emphasis).

[64] I cannot trace any evidence that the FSC responded to this specific query, save for the FSC indicating on the 13th of September 2011 that the Supplement was in order. It seems to me, that the ball, so to speak, was in the FSC's court, and they dropped it. The law requires a lot more of the FSC. The FSC is not simply a Registry; it is a regulator of the Securities Industry. Earlier in the proceedings, the FSC appear to have given its Attorneys instructions that it was only offering an opinion about the Bid Circular, and that all that TOM Regulation 15 requires of the FSC is that it receive a copy of the Bid Circular. In the FSC's earlier written submissions, before conceding that it had made a decision under Regulation 24, and indeed further conceding that the Regulation requires it to make a decision, at paragraph 18 it was submitted "The Regulations do not contemplate the Commission approving the Bid Circular and it is submitted that in receiving a copy of the Circular, the Commission acts more as a registry than a body to approve and/or adjudicate the contents of the Bid Circular. Furthermore the receipt and review by the Commission does not trigger anything under the Regulations….."

[65] Yet in its letter to Black Sand's Attorneys dated August 24 2011 which was only put before the Court as an exhibit to Mr. Barnett's Second Affidavit, the FSC states "Please be advised that the Financial Services Commission ("FSC") does not consider the Take-over Bid Circular to be final until our concerns have been sufficiently addressed. Further, the timeline for receipt of the Directors' Circular shall be within seven days of the final take-over bid circular." I must say that I agree with Mr. Wood that it is remarkable, (indeed the word he used was "alarming") that the FSC regarded itself as simply a registry in relation to the Bid Circular. Section 4(1) of the Act makes the FSC responsible for the general administration of the Act. Section 4(2) of the Act empowers the FSC to enforce the Rules of the JSE. In my judgment, the Act, Regulations, and the JSE Rules must be given a broad and purposive construction which is protection of all shareholders and the public that trades in securities. This is the responsibility of the Regulators and it calls for a robust approach.

[66] In any event, in exercise of the powers under section 25, I shall direct the Attorneys for Black Sand to remove the offending statements and comments in

paragraph 35. I also note that in Appendix 1 (j) (iii) of the original Bid Circular the statement in paragraph 34(c) is repeated. The Supplement does not address that reference and therefore that subparagraph also has to be removed from any Final Document.

[67] Grounds 3, 5, 7, and 13-16 can conveniently be addressed together. I have not restated 14-16 as they are by and large covered in 13.

3. **The Takeover Bid Circular did not comply with Regulations 16(1)(g) and 24, and the JSE Rules Appendix 1 paragraph 7(f) in that it did not contain sufficient information that the Offeror was able to comply with same or that funds were available to complete the transaction;**
5. **It is evident that the original Takeover Bid Circular was non-compliant as Black Sand Acquisition Inc. after complaint from the Appellant issued on the 13th September 2011 a Supplement to the Offer in an endeavour to cure the defects therein.**
7. **The Supplement did not cure the defects concerning Regulations 16(1)(g) and 24, and the JSE Rules Appendix 1 paragraph 7(f) but merely compounded same as the information contained therein that this could only be determined after due diligence by a third party which certainly is not within the ambit of Regulation 24, hence the Supplement did not cure this defect;**
13. **The Financial Services Commission has therefore erroneously and wrongfully held that there has been compliance with the Regulations and held that the Appellant must comply with the time table therein by issuing its Directors Circular by the 21st of September 2011 despite the clear non-compliance by Black Sand Acquisition Inc.**

[68] This is really at the heart of LdM's complaints in relation to this aspect of the matter. The relevant regulations and the JSE Rules are as follows:

Regulation 16(1)(g):

Part IV. The Take-Over Bid Circular

Contents of take-over bid circular

16-(1) The take-over bid circular shall contain the following information-

…..(g) where the shares in the offeree company are to be paid for in whole or in part in cash, details of the arrangements that have been made to ensure that the required funds are available to carry out the offer;

Regulation 24:

Consideration wholly or partly in cash

24. Where an offer indicates that the consideration therefore may be paid partly or wholly in cash, the offeror shall make arrangements to the satisfaction of the Commission and of a recognised stock exchange for ensuring the adequacy and availability of the funds required to effect payment in full as indicated in the offer.

JSE Rules, Appendix 1, paragraphs 7(f) and 16:

7. Contents of the Take-Over Bid Circular

The circular must state:

Where the shares in the offeree company are to be paid for in whole or in part in cash, details of the arrangements that have been made to ensure that the required funds are available to carry out the offer.

….

16. Consideration wholly or partly in cash

Where consideration for an offer is expressed to be effected partly or wholly in cash the offeror shall make arrangement to the satisfaction of the Exchange ensuring the adequacy and availability of the funds required to effect payment in full as indicated in the offer.

[69] In the original Bid Circular, at paragraphs 9, Appendix 1 (g) and (j) it is stated as follows:

<u>Financial Commitments</u>

9. The Offeror <u>is highly confident</u> that suitable financial arrangements will be entered into by the Offeror for payment of the Offer Price in respect of Lascelles Shares tendered in response to the Offer. The Offeror has received US $102 million in equity commitments from a group of sophisticated investors and expects to receive a further US$270 million in commitments for debt financing from an international bank(s). The Offeror is

therefore <u>highly confident</u> that it will have the requisite financial resources to complete the transaction….

Appendix 1(g)

The financing required to complete the Offer will be provided by a mix of equity and debt financing. With respect to the equity financing, legally binding commitments have been received from our regional (Caribbean) and international investor group. Our investor group is comprised of sophisticated equity investors who have made equity commitments totalling US $102 million and as such Black Sand has made arrangements with an international financial insititution Macquarie Capital (USA) Inc., who has communicated that it is <u>highly confident</u> (based on publicly available information and conditional, amongst other items, upon due diligence) in its ability to provide a further US$270 million in financing from its own resources and a syndicate of other international lenders. The Offeror is therefore satisfied that the requisite funds will be available to carry out the offer.

……(j) Lascelles parent company, CL Financial, is currently in severe financial distress and currently owns, directly or through subsidiaries, shares in Lascelles constituting approximately 92 % of the Voting Rights of Lascelles. Most, if not all, of those shares have been charged to secure indebtedness of the CL Financial Group to noteholders in Trinidad & Tobago(approximately US$240 million) and banks and noteholders in Jamaica (approximately US$102 million).

(my emphasis).

[70] In the Supplement to the Bid Circular, it was stated, amongst other matters, under the headings "Additional Information" and "Due Diligence", that:

<u>Additional Information</u>

…..

(f) Trading Activity: Black Sand is a special purpose vehicle formed for the purpose of undertaking the transaction. It has not undertaken any other business activity or transaction. Accordingly it has no trading history or financial statements.

Due Diligence

....in paragraph (g) of Appendix 1 to the Original Takeover Bid Circular it was stated that Black Sand had made arrangement with Macquarie Capital USA Inc. ("Macquarie") pursuant to which Macquarie confirmed in writing to Black Sand that, subject to due diligence, it was highly confident of its ability to provide and/or raise US$270 million on behalf of Black Sand to complete the Offer. In light of that due diligence requirement of Macquarie and Black Sand's own stipulation that it be allowed to undertake a due diligence on the Company (LdM) *as a condition precedent to acceptance (see paragraph 7 (e)(xi)) it is the intention that a due diligence exercise into the affairs of the Company and its subsidiaries shall be conducted prior to acceptances of tendered Lascelles shares by Accepting Shareholders.*

THE FSC'S SUBMISSIONS

[71] Mrs. Mayhew has argued that the Regulations and Rules require the details of the arrangements to ensure that the required funds are available to carry out the offer. She submits that therefore, unless there are no details of arrangements it would not be correct to say that there is no compliance with this section. She states that the FSC has indicated its satisfaction, and the JSE by its letters indicating that it has no further objection to the Bid Circular and the Supplement suggests that it is also satisfied with the arrangements. She submits that the test is a subjective one, since it is the FSC and the JSE in whose judgment the arrangements have to be satisfactory. However, she accepts that the standard to be applied by the decision-maker must be reasonable.

[72] It was submitted that the arrangements made by Black Sand and accepted by the FSC were consistent with the standards normally applied by the FSC. In both the Angostura and the BNS Bid, the FSC accepted the "highly confident" statements of other offeree companies on their ability to fund the bid. Mr. Barnett has indicated that the FSC considered its past practice. Mrs. Mayhew submitted that if the FSC were now to apply a higher standard the FSC would be changing the rules unlawfully and she submitted that would no doubt breach legitimate expectations of stakeholders in the industry as to the usual applicable standards.

[73] It was further argued that the FSC as the regulator is at liberty to set the relevant standards. She submitted that the FSC's acceptance of "highly confident" statements is in accord with other standards internationally. Reference was made to two cases from the United States: **Hartmax Corporation v. A Robert Abboud Spencer Hays and others** 326 F 3d 862 United States Court of Appeals Seventh Circuit, and **Newmont Mining Corporation v. T Boone Pickens** 56 USLW 2304, Fed Sec L Rep 93,519L. In both of these cases Mrs. Mayhew submitted that the court approved "highly confident" statements in relation to financing of bids.

[74] As regards the requirement for the offeree Board of LdM to be satisfied, Regulation 14(3), Mrs. Mayhew suggested that if the Board is not satisfied, then one must consider the remedies open to it. She submitted that, in view of TOM Regulation 5, the LdM Board should not act in a way that would serve to frustrate the offer, whether intentionally or not. She submitted that the non-satisfaction of the Board with the arrangements does not invalidate the Bid. However in acting in the interests of the shareholders of the company, the target board should advise the shareholders in their Director's Circular, which is required by the law within 7 days of receiving the Bid Circular, of its dissatisfaction, and leave the matter to the shareholders to make a decision.

BLACK SAND'S SUBMISSIONS

[75] Ms. Lindsay has submitted that a starting point for the court's consideration is TOM Regulation 5. Appendix 1, General Rule 3 of the JSE Rules is similar. Regulation 5 states:

Approval by shareholders of board's actions

5. Where

(a) a bona fide offer has been communicated to the board of an offeree company ; or

(b) The board has reasonable cause to believe that such an offer is likely to be made;

The board or any member or members thereof shall not, at any time thereafter, take any action, whether directly or indirectly, in relation to the

company's affairs, without the approval in general meeting by the company's shareholders, which could effectively result in-

(i) any such offer being frustrated; or

(ii) the company's shareholders being denied an opportunity to decide on its merits.

[76] Ms. Lindsay submitted that, notwithstanding the opinion of LdM, Black Sand has issued a bona fide offer. Further, that given the guidance it has received from the FSC, together with acting on the directives of the FSC in issuing the Supplement to the Bid Circular, an inference can be drawn that the FSC and indeed, the JSE, have treated the Bid Circular as a bona fide offer directed to LdM's shareholders. This, Counsel argued, brings into question the action now started by the Board of LdM, without any stated evidence that this action has been brought with the approval of LdMs shareholders.

[77] As regards LdM's complaint as to the adequacy of the information provided, Ms. Lindsay points to the evidence that correspondence passed between the FSC and Black Sand in that regard. Following on that, the FSC indicated that it was now satisfied of those matters. It was submitted that a perusal of similar funding requirements in other bids that were made to the satisfaction of the FSC and the JSE shows that the FSC's position was reasonable and consistent in the circumstances. Further, that it would be dangerous for the Court in those circumstances to second guess the regulators, and thereby substitute its own opinion in this context.

[78] Both Mrs. Mayhew and Ms. Lindsay indicated that the Court should have in mind that it is well recognised that litigation can be used to frustrate a Bid. Reference was made to **Weinberg and Blank on Take-Overs and Mergers**, 5th Edition, paragraphs 4-7114 to 4-7138. Whilst Mr. Wood objected to any suggestion that this action was being brought with the intention of frustrating the Bid since there is no such material before the Court, Mrs. Mayhew qualified her submission. She stated that the FSC is not saying that this action has been brought to frustrate the Bid, but rather, that the Court must consider whether the <u>effect</u> is to frustrate

the Bid. It is the FSC's position that all of the matters being complained of by LdM can be addressed in the Directors' Circular.

[79] Ms. Lindsay also made reference to LdM's Press Release of August 11 2011, and its letters to the FSC dated August 8 and 11 2011. In one of the letters LdM spoke of the Valuation Report being prepared and in the Press Release, LdM indicated its intention to circulate a Directors' Circular "in short order". It also indicated that it would provide in the Directors' Circular further details of the manner in which the Bid Circular failed to comply with the Law and is misleading. She submits that in so far as LdM is seeking to obtain relief under the Court's equitable jurisdiction, it has not come with clean hands since the law requires it to issue the Directors' Circular, LdM told the public it was prepared to issue it, and instead of producing the Circular, LdM has come to Court. Black Sand, on the other hand, has, she submits, done everything that the Act and Regulations, and that the Regulators have required of them.

[80] In my judgment, the Court can, and should, examine the matter on its merits. Whilst all due respect is to be accorded to the FSC's decision that it is satisfied with Black Sand's arrangements that the funds required to carry out the offer were adequate and available, if that decision is faulty or erroneous, or arrived at on an inadequate or erroneous basis, then this Court having appellate jurisdiction, can reverse or vary the FSC's decision or ruling. Further, under section 25 of the Act the Court has wide powers enabling it to ensure that the JSE Business Rules are enforced. Further, in so far as the Regulations provide that the board of LdM shall satisfy itself that Black Sand is, or will be able to implement the offer in full, indeed, the JSE General Rule 4 states that the Board "is entitled to be satisfied", I have to examine on its merits, the question of whether the material provided by Black Sand evidencing the arrangements demonstrates that it is, or will be able to implement the offer in full. In examining that question, I will have to pay due regard to any standards that obtain in the industry with regard to Bid Circulars, and the nature of the evidence that will satisfy the test. However, I also have to ensure that the appropriate and relevant standard is being applied. I have to ensure that we are comparing apples with apples, and not apples with oranges, so to speak. Further, in so far as the cases or learning from other jurisdictions can provide assistance, I

will have to ensure that the most analogous situation is compared, since Counsel have not been able to find any decisions that deal with Regulations or Rules on all fours with this case. Further, it seems to me that Mrs. Mayhew is correct that the test of satisfaction is subjective in the sense that it is the FSC and the JSE that are required to be satisfied. LdM also has to be satisfied too. However, both the FSC and the JSE on the one hand, and LdM cannot be correct. The decision of satisfaction that the offeror company is, or will be able to implement the offer in full, is either wrong or right, either reasonable or unreasonable in light of the details, evidence and information produced. To that extent there must be some objective standard by which the arrangements can be assessed.

[81] In my judgment, if the arrangements do not demonstrate that the offeror company is, or will be in a position to implement the offer in full, then such an offer could not be classified as a bona fide offer. Hence, litigation brought by the Board of LdM asking the Court to decide whether these arrangements are satisfactory, such proceedings being brought and prosecuted with due diligence, as these proceedings have been, provided they are brought bona fide in what the directors consider is in the best interests of the company, would not, in my view amount to a breach of regulation 5. Part and parcel of whether an offer is bona fide, must, it seems to me, be whether the offeror is in a position, or will be in a position, to implement the offer in full. In the decision of the English Take-over Panel, **Corporate Resolve PLC Focus Dynamics PLC**, decided February 2001, cited by Mr. Wood, it was pointed out that (at page 7), the announcement of an offer is a highly significant event for the offeree company and will usually affect its share price. In addition, if an offer subsequently has to be withdrawn because the offeror does not in fact have the ability to implement the offer, a false market in the shares in the offeree company is likely to have been created. In that case the advisers to the offeror company, as well as the directors of the offeror company were severely criticized. This was because Corporate Resolve's own resources were inadequate to finance the offer. In such circumstances it was said that the onus on the adviser confirming availability of finance for an offer was particularly high. In such circumstances it was necessary as a minimum to have an irrevocable and effective commitment from a party upon whom reliance could reasonably be placed.

[82] The JSE Rules, Appendix 1, general Rule 4 states:

4. It must be the object of all parties to take-overs or mergers to use every endeavour to prevent the creation of a false market in the shares of an offeror or offeree company. The Exchange shall request information from brokers or the other parties to a take-over to ensure that these principles are adhered to. (My emphasis).

TOM Regulation 6 is to the same effect.

[83] It would therefore seem that preventing the creation of a false market in its shares is a matter with which the Board of Directors of an offeree company may be legitimately concerned. Indeed, the General Principle 4 above states that it should "use every endeavour" to prevent this occurrence of a false market. In my judgment, without there being evidence presented of any other motivation, and albeit this litigation has been brought in respect of a hostile take-over Bid, litigation and seeking the court's guidance would be encompassed in the "every endeavour" which the Board is permitted to use.

[84] At paragraph 1501 of the **Halsbury's Laws of England, 5th Edition, Volume 15**, under the heading "Director's obligations in the context of takeover bid or possible bid", it is stated:

It has been long established under company law that a director occupies a fiduciary position towards the company of which he is a director, but it is equally well established that he owes no fiduciary duty towards any individual shareholder in the company.

[85] At paragraphs 4-7121 and 4-7122 of the **Weinberg and Blank, 5th Edition** it is stated:

4-7121-It would now appear to be the case that, save in circumstances where the Panel consent is given to proceed otherwise, directors may only bring and continue litigation against an offeror company where shareholder approval to such litigation is obtained. It would also appear to be the case that no distinction is to be drawn between the bringing of litigation as a tactic, and the bringing of litigation because the company considers that a substantive wrong has been done to it.

There is no need for shareholder approval to be obtained in respect of litigation which cannot have the effect of frustrating an offer which has been made. Moreover, there is no requirement that such approval be sought as a precondition to the bringing of litigation. It appears to be the Panel's view that such approval ought only to be sought once the bid has reached a mature stage, thus making it easier for shareholders to resolve the issue whilst in possession of all relevant facts. The Panel's approach is sensible and practical. Were it to be a condition that shareholder approval be obtained prior to commencing litigation, it is unlikely that litigation could ever be effectively used in the course of a bid given the obvious need for speed in bringing such an action. (My emphasis).

[86] The 4th Edition of Weinberg and Blank, paragraph 2482 makes the point that it would be impractical to require shareholders to sanction a court application before it was made. It is stated:

However, this is an impractical solution because litigation normally needs to be instituted with speed and it would be difficult accurately to convey to shareholders the merits and demerits of a legal position together with an assessment of the chances of success without considerable delay and expense, including obtaining the opinion of counsel. In essence, shareholders would probably decide on the merits of the bid rather than the merits of the litigation. Furthermore, the directors of the offeree company may in some circumstances have a legal duty to initiate litigation and it would be wrong for the Panel to try to oust that jurisdiction.

[87] In paragraphs 4-7131 and 4-7132 of the 5th Edition, the learned authors in any event make practical points about companies which are effectively controlled by their directors, which I am of the view may apply in this case. They state:

4-7131- The directors of a company facing a takeover bid which they have not solicited may have strong personal reasons for wanting to oppose it and to do everything possible to avoid its being successful. The directors' freedom to act in this way is significantly constrained by the Code and the legal framework of their fiduciary responsibilities. …

4-7132….

The shareholders in companies which are effectively controlled by their directors must accept that in respect of any offer the attitude of the Board will be decisive.

[88] At paragraphs 4-7134 and 7135 it is pointed out that in relation to the interests of the company, if there is a conflict between the interests of future shareholders and the short-term and long-term interests of present shareholders, it seems clear that future shareholders "are non-starters". The powers of management delegated to directors of a company must be exercised by them "bona fide in what they consider-not what a court may consider-is in the interest of the company…"per Greene M.R. in **Re Smith & Fawcett** [1942] Ch. 304, 306. Thus, this duty of honesty and good faith is in fact the primary duty of a director.

[89] It is plain that that the original Bid Circular was not considered to be compliant by the FSC as it indicated certain inadequacies and flaws in its letter to Black Sand dated August 11th 2011. Indeed, Mr. Barnett's letter to Black Sand's Attorneys pointed to the necessity of dealing with the FSC's concerns and requests for further information, as the Bid Circular would not be considered by the FSC to be final until the concerns were addressed. Clearly the FSC considered the problems identified to be important. As regards Regulation 24, the FSC indicated that evidence of the arrangement should be provided "such as an independent confirmation of the commitment by way of a letter of intent from Macquarie Capital to satisfy this requirement." Black Sand issued a Supplement with a view to correcting and supplementing the original Bid.

[90] Mr. Wood referred me to **Weinberg and Blank on Takeovers and Mergers** 5th Edition, By Consultant Editor Laurence Rabinowitz, a number of paragraphs including 4-2008, 4-2010, and 4-3026. At paragraph 4-2008, it is stated that when an offer is put to the Board of the Target, "the target's board is entitled at that stage to require to be satisfied that the offeror is or will be in a position to implement the proposed offer in full; this comfort will normally be given in the form of an assurance from the Offeror's financial adviser".

At paragraph 4-2010 it is stated:

4-2010. The Offeror may well ask the board, if it is sympathetic to the idea of some form of takeover or merger, to disclose to it its up-to-date trading figures or other relevant financial or trading information, in order to enable suitable terms to be agreed. The board of the Target is under no obligation to disclose to a potential offeror any information at all, and normally, neither an offeree board nor its advisers should disclose to an outsider or a single shareholder any information which is not made available to all shareholders of that company.

(My emphasis).

[91] Mr. Wood argued that, in so far as the financial arrangements with Macquarie Capital are subject to due diligence in respect of LdM, the Board is under no obligation to disclose information to Black Sand. The Supplement did not therefore cure the defects but merely compounded it.

[92] Mr. Wood also referred to the English Takeover Panel's Statement in **The Proposed Offers By Luirc Corp for Merlin International Properties Limited**, decided in May 1991. On the 28 February 1991 the Boards of Luirc and Merlin announced the terms of recommended cash offers to be made by Fininvest on behalf of Luirc for Merlin. The announcement contained the following statement:

"Information on the Offeror.

The Offeror is a newly formed company incorporated in the British Virgin Islands with a nominal capital and is wholly owned by Estonia Venture Inc., a company also with a nominal capital incorporated in Switzerland. Monies will be loaned to the Offeror for the purposes of the offers by Bonaventure Investments Limited which is itself a wholly owned subsidiary of Sonnaire Finance SA whose controlling director and shareholder is Mr. Peter Borgas and Fininvest Corporate Finance has confirmed that sufficient monies will be available to the Offeror to satisfy the offers in full. The Offeror has not traded."

Fininvest was unable to satisfy the Panel Executive that funds would be irrevocably available to satisfy the offers in full and accordingly the Executive consented to the offeror withdrawing the offers.

[93] On the last page of its Statement the Panel stated:

General Principle 3 states:

"An offeror shall only announce an offer after the most careful and responsible consideration. Such an announcement should be made only when the offeror has every reason to believe that it can and will continue to be able to implement the offer: responsibility in this connection also rests on the financial adviser to the offeror."

Compliance with this General Principle is of great importance. The announcement of an offer is always highly significant for the offeree company and will usually affect its share price. If the offer is subsequently withdrawn, at the very least a false market in the shares in the offeree company is likely to have been created.

The Executive's view is that, <u>when a financial adviser is acting for a newly created offeror, such as an off-the-shelf overseas company, the standard of care required under General Principle 3 clearly has an additional dimension. In short, the only way in which such an offeror and its financial adviser can be sure that funds will be available is to have an irrevocable commitment from a party upon whom reliance can reasonably be placed, for example a bank, at the time of the announcement of the offer.</u>

(My emphasis).

[94] Mrs. Mayhew has sought to argue that the cases cited by Mr. Wood are of limited applicability because the Panel in England have express adjudicatory powers and whereas in the English Rules third party confirmation is required, we do not have that under our Regulations and Rules. She submitted that here it is for the Commission to be satisfied.

[95] In my judgment, the Regulations and JSE Rules, although not identical to the English Rules, in particular General Principle 3, do follow the position in England, where the offeror must be, or will be able to implement the offer in full. Indeed, TOM Regulation 6 and JSE General Principle 4 place an onus on the Offeror to ensure that a false market in the Offeree Company's shares is prevented. In my judgment, this clearly implies that the Offeror should satisfy itself, and take every reasonable step to ensure, that it is able or will be able to implement the offer in full. This is similar to the English General Principle 3. This is unlike the Australian position as set out in the Corporations Act of 2001, considered in **<u>Goodman</u>**

Fielder Limited 03 [2003] ATP 14, cited by Mrs. Mayhew. Similarly, in the two US decisions, **Hartmax Corporation** and **T. Boone Pickens**, the U.S. Securities and Exchange Commission "the S.E.C." appear to have taken the view, and interpreted new rules to mean that the announcement of tender offers with something less than fully committed financing was specifically contemplated-paragraph 27 **Hartmax**. In the **T. Boone Pickens** case, the majority appear to have come to the view that the relevant Act, the Williams Act was silent as to when financing arrangements must be made in relation to the disclosure requirements and that these were within the SEC's discretion. At paragraph 8 it was stated that the issue in the case was whether a letter expressing that Drexel was "highly confident" that it could arrange the financing was adequate. In a powerful dissenting judgment, Pregerson, Circuit Judge, disagreed with the majority and stated that the Williams Act expressly requires that an offeror disclose, at the outset of the tender offer, its "source of funds" and if the funds are to be borrowed "a description of the transaction and the names of the parties thereto". The learned Judge expressed the view that the Pickens Group's offer plainly does not comply with the straightforward requirements of the statute and the implementing regulations. At paragraph 51 of the dissenting judgment it is stated:

> *51. This court ordinarily defers to an enforcement agency's interpretation of a statute and its implementing regulations. However, in light of the SEC's inconsistent interpretation of the language of its regulations and the requirements of the Williams Act, such deference is inappropriate.*

[96] Whilst I appreciate that the English Rules make express provision for third parties to advise on the satisfactoriness of the offer, I do not think that this affects the principles to be gleaned from the **Corporate Resolve** and the **Luirc Corp for Merlin** case, i.e. that where the offeror's own funds are inadequate to finance the offer, or the offeror is a newly created company such as an overseas off-the-shelf company, there must be an irrevocable commitment from a party upon whom reliance can be placed, for example a bank. The financial advisors as well as the offeror were held liable to this standard.

[97] In any event, when one looks back at what the FSC asked Black Sand for in letter dated August 11 2011, the FSC was itself seeking an independent

confirmation of the commitment from a financial institution. It was there stated "Regulation 24- Appendix 1(g) provides some detail on the proposed financial arrangements. Upon further consultation with our Legal Services Department, we are of the view that evidence of the arrangement should be provided such as an independent confirmation of the commitment by way of a letter of intent from Macquarie Capital (USA) to satisfy this requirement."
(My emphasis).

[98] A perusal of the letter from Macquarie Capital in my judgment indicates that it is not a letter of commitment, which is what the FSC asked Black Sand to provide. So even by its own standards and requirements, the FSC failed to follow through in obtaining the necessary proof. The letter from Macquarie is dated July 22 2011, which is a date that preceded the Takeover Bid. The letter is not issued in respect of that Bid. Further, it speaks of Black Sand having the intention to enter into a transaction to acquire no less than 86.89% of LdM whereas the Bid Circular speaks to 90%. The last two paragraphs on page 2 of the letter are particularly telling. They state:

> *This letter does not constitute a legally binding obligation or commitment by Macquarie Capital to provide or arrange, or to offer to provide or arrange, the Term Loan Facility or to provide any financing for the Proposed Transaction. Any such obligation on the part of Macquarie Capital will exist only upon the execution of a final, written underwriting, purchase or placement agent agreement, or commitment letter or loan agreement, as the case may be, in form and substance satisfactory to Macquarie Capital, and then only in accordance with the terms and conditions thereof. Macquarie Capital's views herein are expressed on the basis of the facts and circumstances that exist on the date hereof and do not take into account any changes that may occur after the date hereof. Macquarie Capital is under no obligation to update, revise or reaffirm statements made in this letter.*
>
> *This letter is rendered to Black Sand solely for your use in connection with your decision to make an indicative proposal with respect to an acquisition of Target and does not confer any rights or remedies on any party, including*

any other party to the Proposed Transaction or any financing sources for the Proposed Transaction. ……

[99] In my judgment, the Bids by Angostura and BNS are not a proper basis for comparison. In relation to Angostura and BNS, both were well established publicly traded companies listed on the Stock Exchange in Trinidad and Jamaica respectively. They had a track record, and Audited Financial statements so that their asset base and worth could be substantiated or objectively verified in relation to their capacity to meet the Bid. Financial assurances were given and accepted by these Bidders. Black Sand on the other hand is a private company incorporated in Saint Lucia weeks before the Bid Circular was issued. It has no Financial Statements, audited or otherwise. It has no trading history. Black Sand has not held itself out as itself having adequate funds to meet the Bid in full. Whilst there are claims of equity commitments from "sophisticated investors" such as Pan-Jamaican Investment Trust Ltd, and Octavian, no details have been provided of those commitments. There are no irrevocable commitments by an entity upon which reliance could be placed, such as a Bank. The Macquarie Capital letter is not a commitment, or a letter of intent, which is what the FSC had asked for.

[100] The Extract from **Corporate Finance: Law and Practice** which was sent to the FSC by Black Sand's Attorneys does not assist Black Sand because in that document Baring Brothers which was a member of the Securities Commission, the financial advisor, was providing its recommendation that it was satisfied that the necessary financial resources were available to the Offeror for it to implement the Offer in full. Baring was here making a formal legal representation, which in part depends on its own reliability and reputation, and which carries legal consequences. This was completely different from the Macquarie Capital letter.

[101] In Jamaica we have regulations that carry the force of law. They must be applied, and they cannot be overridden or disregarded by reference to any preceding practice or any preceding treatment of other offers if the situations are not comparable. In my judgment, the principles to be gleaned from the **Corporate Resolve** and **Luirc Corp for Merlin** cases are logical and common sense statements of standards for commercial behaviour. Plainly an entity with no

previous track record, no proof of adequate means to meet the offer itself in full, has to place before the Regulator and the Offeree company a firm and irrevocable commitment by an entity upon whom reliance can reasonably be placed. I think that an analogy can be drawn with the importance of financial statements and viability in relation to acceptance of undertakings in conveyancing practice and in relation to undertakings as to damages and the provision of bonds in interim injunction applications. Put another way, if an offeror is a newly formed off shelf company, has no financial statements, and has not produced any irrevocable commitments for funds which the entity does not itself have, on what proper basis could it be said that there is satisfactory proof that the offeror is, or will be able to implement the offer in full? The weight to be attached to a statement of "high confidence" of ability to raise the funds or meet the required payments must depend upon the financial reliability of the entity/entities making the statement. In my view, the FSC erred in treating the information and documentation furnished by Black Sand as satisfactory of the requirements of Regulation 24. On the other hand, LdM took the correct position in maintaining that it was not satisfied as required by Regulation 14(3).

[102] However, there is also another fundamental way in which the documents considered by the FSC show how the Supplement failed to properly inform the public. The Supplement only mentions that due diligence is required by Macquarie Capital of LdM. It does not inform that Macquarie also require due diligence investigations of Black Sand itself, and requires that it be satisfied of Black Sand's capital and equity structures. I entirely agree with Mr. Wood that if Macquarie is not yet satisfied of the ownership structure and equity commitments of this newly formed special purpose Saint Lucia incorporated company, it is difficult to see how the FSC could find satisfactory comfort in Macquarie's letter as to the financial arrangements.

[103] In my judgment, LdM's submission is also correct that the FSC failed from the outset to consider whether there are adequate funds available from the "sophisticated private equity investors" as there was no request for proof in relation to this US $102 million. This is a not inconsiderable sum which also coincides with the amount that Black Sand states is the approximate amount owed by the CL

Financial Group to noteholders in Jamaica. The Regulations require that there be sufficient cash resources available to the bidder to satisfy the offer in full.

[104] In my view, it is not sufficient for the Board of LdM to deal with its dissatisfaction with the financial arrangements by Black Sand in the Directors' Circular. If the Bid Circular was allowed to just go ahead and the Board simply point out the deficiencies in the Directors' Circular, whilst that would allow for the shareholders to consider the offer, if the Bid still ends up being withdrawn subsequently, as stated in **Luirc Corp for Merlin** case, at the very least a false market in the shares in the offeree company would be likely to have been created. The interests of shareholders in considering an offer are not the same as the interests of the company in preventing a false market for its shares. This appears to be one of those situations where the problem should be identified and dealt with in the shortest possible time line. Indeed, the JSE Rule Appendix 1, General Principle 4, states that all parties to takeovers are to use every endeavour to prevent the creation of a false market in the shares of an offeree company.

[105] I agree that the Board of the Offeree Company ought not to be required to deal with the matter in a Directors' Circular, because a compliant offer does more than just trigger the obligation on the part of the Directors to issue the Circular. Under Regulation 5, a compliant, bona fide offer, does place immediate restrictions on the Directors' management powers, under Regulation 5. Whilst it is true that as Ms. Lindsay pointed out, LdM's Directors had previously indicated that they would be issuing the Directors' Circular, I do not think that this prevents them from approaching the Court for directions. Indeed, they had also been asking the FSC to confirm that they would not have to issue the Directors' Circular until the Bid Circular was compliant. There is no evidence of any detrimental reliance upon LdM's statements.

[106] I further accept the evidence of Mrs. Jane George in paragraph 18 of her Affidavit filed on October 18 2011 that "The issuing of a Directors' Circular involves the company in considerable effort and expense. It is not in the interests of an orderly market, that anyone, irrespective of their means, can launch a bid for a listed company, which Bid has no committed funding and require the company to

issue a Directors' Circular. Given the requirements placed on a company during an offer period, this would allow mischief-making and market manipulation, preventing a company's board from fulfilling its mandate given by its shareholders." The costs and effort also involve the preparation of a Valuation Report and appointment of legal and other professional advisors in compliance with the Regulations and Rules.

[107] I therefore grant the following relief:

(i) A declaration that the Takeover Bid Circular issued by Black Sand Acquisition Inc. to acquire and purchase the shares of Lascelles de Mercado & Co. Ltd. the Claimant/Appellant, does not comply with Part IV of the Securities (Take-Overs and Mergers) Regulation(s) 1999, is in breach of Regulations 16 (1)(g) and 24 and the Jamaica Stock Exchange Rules Appendix 1 paragraph 7(f);

(ii) Black Sand is directed to withdraw the Take-over Bid Circular released on the 4th August 2011, along with the Supplements dated the 13th of September 2011 and the 18th of October 2011. This Direction is stayed until the 7th of December 2011;

(iii) It is Declared that the Claimant/ Appellant is not under any obligation to issue a Director's Circular in response to the Take-Over Bid Circular released on the 4th of August 2011, and as supplemented on the 13th of September 2011 and 18th of October 2011;

(iv) Liberty to apply;

(v) The deferred issues inclusive of costs, are adjourned for a date to be fixed by the Registrar.