Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2006 HCV 01365

BETWEEN	**OLINT CORPORATION LIMITED**	**1ST CLAIMANT**
AND	**DAVID SMITH**	**2ND CLAIMANT**
AND	**THE FINANCIAL SERVICES COMMISSION**	**DEFENDANT**

Lord Anthony Gifford Q.C. along with Mr. Christopher Dunkley and Mr. Huntley Watson instructed by Watson & Watson for the First and Second Claimants in Claim No. HCV 1365.

Mrs. Nicole Foster-Pusey and Mrs. Symone Mayhew instructed by the Director of State Proceedings for the Defendant.

Miss Daniella Gentles instructed by Livingston Alexander and Levy for Neil Lewis and Janice Lewis " t/a Lewfam Investments" in related Suit HCV 01357 OF 2006 -Neil Lewis and Janice Lewis t/a Lewfam Investments v. The Financial Services Commission.

Heard: 8th August and 3rd November 2006.

Mangatal J:

1. On the 8th of August 2006 I heard an application for a stay of execution of a Cease and Desist order made by the Defendant against the Claimants on 24th March 2006. The application on behalf of the Claimants is for a stay of execution until the 26 March 2007 or further order. Attorneys at Law for Lewfam, the Claimants in a related Suit HCV01357 of 2006, were with the consent of the parties allowed to watch these proceedings on behalf of Lewfam.
2. I took time to consider the application and I now deliver my decision and reasons.

2a. This is an interesting tough case. It involves amongst other issues the question of the meaning of "Securities" under the Securities Act of Jamaica. No decision has been brought to the Court's attention which precisely fits the factual situation involved. The case is concerned with foreign exchange trading on the internet and whether certain arrangements, relationships and investments amount to Security business. My decision will not involve absolute pronouncements. It is concerned with an interim application not a final one. My focus has to be on achieving justice until the substantive hearing scheduled for March next year.

Background

3. In his First Affidavit Mr. David Smith states that he is the Principal Member of a Private Members' Club which operates from offices at Shop 25A and Shop 23, 30 Dominica Drive, Kingston 5 in the Parish of Saint Andrew pursuant to a Private Members' Club Agreement as amended from time to time. Mr. Smith is also a director and the Principal shareholder of the First Claimant Co. "Olint" which offers customer service liaison services to club members and Overseas Locket International Corporation, a Panamanian Corporation situate and existing in Panama and which trades in foreign currencies on an international platform on behalf of the Club.

4. Mr. Smith states that on Friday March 3rd 2006 officers of the Defendant "the Commission" along with members of the Jamaica Constabulary Force "the J.C.F.", raided the club and premises at Shop 25A and this raid was repeated on March 6th 2006 at the club's premises at Shop No. 23. These raids were carried out pursuant to search warrants. A separate law suit was filed by the Claimants challenging/touching and concerning these search warrants and the search conducted. Various legal proceedings and correspondence followed.

5. The Commission is a body corporate established under the Financial Services Commission Act of 2nd August 2001, Act 9 of 2001. The Commission has a number of functions, duties and powers, including responsibility for the general administration of the Securities Act. Prior to the establishment of the Commission by virtue of the Financial Services Commission Act, there was a Securities Commission established pursuant to the Securities Act of 1993. By virtue of Act 8 of 2001, the Commission replaced and took over the functions of the Securities Commission.
6. On Friday 24th March 2006 the Defendants served Cease and Desist Orders on Olint, its principals and related entities. The terms of these Orders are discussed in detail below.
7. On March 27 2006 Olint's Attorneys Messrs. Watson & Watson wrote to the Commission indicating that their clients intended to appeal the Cease and Desist Order and indicated that they were applying to the Commission for a stay of execution of the Order. They had also indicated to the Commission that several legal Counsel were standing by for a hearing of the application for a stay. The Claimants' right to make an application to the Commission for a stay is conferred by sub-section 74(3) of the Securities Act.
8. The Commission then advised Messrs. Watson & Watson that written submissions should be submitted with regard to the application for stay of execution. On March 28 the Claimants' Attorneys provided the written submissions. The Commission considered the application on paper and, by letter dated March 30 2006, refused the application for the stay.
9. Olint and David Smith on 7th April 2006 gave notice of their intention to Appeal and have filed Appeals against the Commission's Cease and Desist Order. The Appeal is by way of Fixed Date Claim Form for relief pursuant to section 74 of the

Securities Act. The Claimants' Appeal, and that of Lewfam are fixed for hearing from March 26 2007 for five days.

10. Reference must be made to the terms of the Cease and Desist Order. There are a number of orders directed to different related parties but essentially they say as follows:

> *WHEREAS under Section 68(1)(b) of the Securities Act ("the Act") .....the Commission is empowered to conduct or cause to be conducted such investigation as it thinks expedient where it has reason to suspect that an offence under the Act has been committed.*
>
> *AND THAT by virtue of section 68 (1B)(a) of the Act, the Commission may issue a Cease and Desist Order on the conclusion of such an investigation if it is satisfied that the circumstances so warrant.*
>
> *AND WHEREAS pursuant to section 68(1)(b) the Commission has conducted investigation into the activities of Olint Corp./ David Smith et al , arising from its suspicion that, in breach of the Act, you were-*
>
> 1. *On a day to day basis and without a securities dealer's licence, carrying on securities business in contravention of section 7(1)(a) of the Act.*
> 2. *On a day to day basis and without a securities dealer's licence, holding yourself out as carrying out securities business in contravention of section 7(1)(b) of the Act.*
> 3. *On a day to day basis and without an investment advisor's licence, carrying on investment advice business in contravention of section 8(1)(a) of the Act.*
> 4. *On a day to day basis and without an investment advisor's licence, holding yourself out as carrying on investment advice business in contravention of section 8(1)(b) of the Act.*

AND WHEREAS having concluded its investigation, the Commission is satisfied that in the circumstances, a Cease and Desist Order should be made as the Commission believes that-

1. *Olint Corporation/David Smith et al, dealt in securities and through their operations, engaged in the participation of a profit sharing agreement in relation to foreign currency trading activities;*
2. *Olint Corporation/David Smith et al, issued investment contracts in relation to foreign currency trading activities;*
3. *Olint Corporation/David Smith et al, provided investment advice to potential investors in relation to foreign currency trading activities*

AND WHEREAS Olint Corporation/David Smith et al, were not licenced by the Commission to carry out the afore-mentioned activities;
And THAT the said activities are therefore unlawful;

NOW IT IS HEREBY ORDERED THAT Olint Corp./David Smith et al, their servants, agents and representatives including directors, officers and employees immediately ***CEASE AND DESIST*** *(unless and until the relevant licence is required) –*

(a) from carrying on securities business within the meaning of the Securities Act;

(b) from holding themselves out as carrying on securities business or investment advice business.

AND WITHOUT LIMITATION TO THE FOREGOING

(c) from soliciting any new securities business and investment

advice business within the meaning of the Securities Act; and

(d)from taking on any new securities business and investment advice business within the meaning of the Securities Act.

This order shall take effect on this 24th day of March, 2006.

11. I now refer to relevant provisions of the Securities Act.

s.68(1)- The Commission may.....

(b) on its own initiative where it has reason to suspect that a person has committed any offence under any provisions of this Act or regulations or rules made hereunder.....

Conduct or cause to be conducted such investigation as it thinks expedient for the due administration of this Act.

s.69(1B)-On the conclusion of any such investigation the Commission may, if it is satisfied that the circumstances so warrant-

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

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

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

s.68(1C)- Any person aggrieved by a decision of the Commission under subsection (1B)(a) or (b) may, within fourteen days after the date of notification of the decision, appeal to a Judge in Chambers who make such order as he thinks fit.

s.74-Appeals under this Part.

74(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 a stay of execution, an application therefore may be made to a Judge in Chambers.

12. The central issue which will fall for determination on Appeal will be whether the Claimants' activities require to be licenced under the Securities Act and require regulation or fall within the jurisdiction of the Commission. However there are other important issues as well.

13. In relation to the application to this Court seeking a stay of execution of the Commission's order, Mrs. Foster-Pusey on behalf of the Commission has argued, and indeed, I do not think Lord Gifford Q.C. for the Claimants disputes this point, that the application before me is in the nature of a fresh application and it is appropriate for me to make such order as I view to be appropriate. The application before me is not an Appeal from the Commission's refusal of the application for a stay of execution and nor is it a review of what the Commission decided.

14. **APPROPRIATE PRINCIPLES FOR STAY**

15. The application for the stay of execution was for the most part argued before me by reference to cases and legal principles concerned with stay of execution of court judgments pending appeal. Reference was made to the classic case of **Wilson v. Church** No. 2 (1879) 12 Ch. D. 454, in which it was noted that

when a party is appealing, exercising his undoubted right of appeal, the court ought to see that his appeal if successful is not rendered nugatory."

In the Jamaican Court of Appeal decision of **Flowers Foliage and Plants of Jamaica and Jennifer Wright v. Jamaica Citizens Bank Limited** (1997) 34 J.L.R. 447, Rattray P. considered and applied the reasoning of Straughton L.J. in the English decision of **Linotype -Hell Finance Ltd. V. Baker** (1992) 4 All. E.R. 887, at 888 where it was stated:

" It seems to me that, if a Defendant can say that without a stay of execution he will be ruined and that he has an appeal with some prospect of success, that is a legitimate ground for granting a stay of execution."

16. It is to be noted that the Securities Act does not provide any guidance as to the principles to be applied when the Court is being asked to consider whether or not to grant a stay of execution of the Commission's Order. During the course of argument I raised with the parties the fact that in most of the decisions cited on stay of execution the court is looking at judgments of courts heard and argued by all parties on the merits. In such circumstances one of the underlying principles is that a successful party is not lightly to be deprived of the fruits of his judgment. In the instant case the Commission is a decision maker, as opposed to a successful litigant. The Claimants were not, prior to the Commission's decision to issue the Cease and Desist Order, afforded an opportunity of being heard by the Commission. There has thus not to date been consideration of full argument from each side. I accept Mrs. Foster-Pusey's submission that due weight should be given to the Commission's decision since it is exercising a statutory

right and statutory powers, and implicit in that is that the legislature considered that the Commission has a certain amount of expertise and understanding of the industry such as to allow the Commission to understand when the circumstances warrant such an Order. However, to my mind the Claimants in this case should not be saddled with having to demonstrate that that they will be ruined without a stay of execution. In my view, in this case we are considering a decision of a statutory body and not a judgment of a court and so, although the term "stay of execution" is used, the power which is given to the Commission, and subsequently to the Court if a stay is refused by the Commission, is really a power to stay or suspend the operation or execution of the decision of a public body. An application to suspend the operation of an executive decision which has already been made, or a decision of a body such as the Commission, has been said to be really in the nature of injunctive relief. I am of the view that the Privy Council decision emanating from Jamaica in **Minister of Foreign Affairs, Trade and Industry v. Vehicles and Supplies Ltd.** [1991] 1 W.L.R. 550, 556 is supportive of my reasoning. It seems to me that the appropriate principles to be applied are similar to those applicable to interim injunctive relief in judicial review applications. The Attorneys did not disagree with my analysis of the relevant principles. Indeed, in the Claimants written submissions, they submit that the situation here is different from a stay pending appeal of a judgment of the court, where all the facts are known and have been adjudicated. The Attorneys for the Commission indicated that if the test of interim injunctive relief was the appropriate one, the question of the public interest would be an important consideration to be taken into account in assessing the balance of convenience .

16. In **De Smith, Woolf and Jowell, Judicial Review of Administrative Action,** 5th Edition, paragraph 17-011- 17-013, discussing interlocutory injunctive applications in judicial review proceedings, the learned authors discuss the fact that although the test to be applied in determining whether or not to grant an interlocutory injunction in an application for judicial review is said to be broadly similar to that applied in private law proceedings, there are some important differences in practice. The guidelines laid down in the oft-cited case of **American Cynamid Co. Ltd. v. Ethicon**[1975] A.C. 396 are discussed. The authors then continue:

The plaintiff having shown that there is, at the least, a serious issue to be tried, the court will then consider whether it is just and convenient to grant an interim injunction. This involves the court deciding whether there is an adequate alternative remedy in damages, either to the plaintiff seeking the injunction or the defendant in the event that an injunction is granted against him. The availability of a remedy in damages to the plaintiff will normally preclude the grant to him of an injunction. Even if damages are available, they may not be an adequate remedy. If there is doubt about either or both the plaintiff's and/or the defendant's remedy in damages the court will proceed to consider what has become known as the "balance of convenience". The factors to be taken into account will vary from case to case.

The nature of public law litigation will often require there be some modifications of the usual guidelines for the exercise of the court's discretion at the interlocutory stage. First, questions as to the adequacy of damages as an alternative remedy will usually be less relevant. In judicial review, there will often be no alternative remedy in damages because of the absence of any

general right to damages for loss caused by unlawful administration per se. It follows that in cases involving the public interest, for example, where a party is a public body performing public duties, the decision to grant or withhold interim injunctive relief will usually be made not on the basis of adequacy of damages but on the balance of convenience test. In such cases, the balance of convenience must be looked at widely, taking into account the interests of the general public to whom the duties are owed.

Another difference from private law proceedings is that in judicial review, there is less likely to be a dispute of issues of fact. Where the only dispute is as to law, the court may have to make the best prediction it can of the final outcome and give that prediction decisive weight in resolving the interlocutory issue.

Other factors that may be taken into account in determining the balance of convenience include the importance of upholding the law of the land and the duties placed on certain authorities to enforce the law in the public interest.

17. The case cited for most of these propositions is the of the House of Lords in **Rv. Secretary of State for Transport ex parte Factortame Ltd** [1991] 1 A.C. 603.

18. At pages 659D. to 660E Lord Bridge of Harwick stated:

A decision to grant or withhold interim relief in the protection of disputed rights at a time when the merits of the dispute cannot be finally resolved must always involve an element of risk. If, in the end, the Claimant succeeds in a case where interim relief has been refused, he will have suffered an injustice. If, in the end, he fails in a case where interim relief has been granted, injustice will have been done to the other party. The objective which underlies the principles by which the discretion is to be guided

must always be to ensure that the court should choose the course which, in all the circumstances, appears to offer the best prospect that eventual injustice will be avoided or minimized.....

If the applicants were to succeed after a refusal of interim relief, the irreparable damage they would have suffered would be very great. That is now beyond dispute. On the other hand, if they failed after a grant of interim relief, there would have been a substantial detriment to the public interest resulting from the diversion of a very significant part of the British quota of controlled stocks of fish from those who ought in law to enjoy it to others having no right to it. In either case, if the final decision did not accord with the interim decision, there would have been an undoubted injustice. But the injustices are so different in kind that I find it very difficult to weigh the one against the other.

If the matter rested there, I should be inclined to say, for the reasons given by Lord Goff of Chieveley, that the public interest should prevail and interim relief be refused. But the matter does not rest there. Unlike the ordinary case in which the court must decide whether or not to grant interlocutory relief at a time when disputed issues of fact remain unresolved, here the relevant facts are all ascertained and the only unresolved issues are issues of law...In the circumstances I believe that the most logical course in seeking a decision least likely to occasion injustice is to make the best prediction we can of the final outcome and to give that prediction decisive weight in resolving the interlocutory issue.

19. Spry's work **The Principles of Equitable Remedies**, 5th Edition, 1997, pages 466-467 in the chapter dealing with interlocutory injunctions, the learned author states:

..... where there is, not a conflict in the evidence as to matters of fact, but rather a dispute as to questions of law, the preparedness of the court to determine those questions depends

on their difficulty and on the balance of convenience, regard being had both to the consequences of granting or refusing relief and also the relevant circumstances. Even where in a particular case the court is not disposed to decide a difficult question of law on an interlocutory application, it is often found that the risk of injury to the plaintiff is such that interlocutory relief should be granted. But usually the court does not regard any matters of law in dispute as so difficult that it should decline to consider them if this may affect its decision, and hence it may be prepared to adopt a view, which is treated as merely provisional; and both that conclusion and the degree of confidence with which it has been reached may be duly taken into account in determining whether the balance of justice favours the grant of interlocutory relief.

20. Applying the principles to the case before me, there are clearly very serious and important issues to be tried and determined. I will revert to the issues later. As with many other public law cases, I find that damages would not be an adequate remedy for any party. I therefore turn to look at the balance of convenience generally. Where other factors appear to be evenly poised, it is a Counsel of prudence to preserve or maintain the status quo. In this case preserving the status quo would in my view mean preserving the state of affairs which existed before the issue of the Cease and Desist Order, and therefore would be in favour of the stay or suspension of the Commission's Order.

21. There would be serious injustice to the Claimants if interim injunctive relief were to be refused now and they were to succeed at trial. Citizens would have been prevented from exercising their right to carry on certain activities affecting their income and property, activities which the Claimants say the Club has been carrying on undisturbed for a period of over 2

years. To an extent, there would have been a serious interference with the Claimants' and their club members', who are affected parties, freedom of association and their general civil liberties. It is not only the effect on the Claimants that the court must consider, but also their members. In interlocutory injunctive relief applications courts take into account quite routinely, prejudice to third persons, for example, the effect that restraining the operation of a business will have on employees of the business. In particular, citizens have the right to go about their business, arranging their affairs as it suits them, provided they are not running afoul of the law. I note that in paragraph 5 of his Affidavit of Urgency which Mr. Smith swore in support of the application for a stay before the Commission, Mr. Smith states that before Olint was incorporated and before foreign currency trading activities as a group commenced, he sought and received legal advice to the effect that the activities contemplated were not unlawful and did not fall within the regulatory scope of either the Bank of Jamaica or the Commission. Clearly a lot of thought, time, skill, finances and energy have been invested by the Claimants in this enterprise. If at the end of the day the Claimants succeed and are refused interim relief, the activities of the club and their members would have been paralyzed and the reputation of the club potentially damaged in what is clearly a time-sensitive operation. In such an operation it is vital that there be no erosion of confidence among the members. Whilst it is not clear to me what level of financial losses the Claimants would suffer(since they say that it is other persons' money that is being invested), and the Order of the Commission does not claim to restrict the Claimants' own foreign currency trading activities(as opposed to those on behalf of the members pursuant to arrangements), it would seem that

the members stand to loose significant sums of money as a result of being prevented from accessing an arrangement whereby they receive the benefit of the Claimants' expertise in foreign exchange trading activities. However the Claimants say that the members are able to invest and trade for themselves and in fact do so. To some extent therefore that would in theory reduce such losses that the members would suffer, although it appears doubtful that that is the main way in which the trading takes place.

22. On the other hand, if the Claimants failed after a grant of interim relief, what is the injustice that would occur? In that regard, the question is not so much what hardship or prejudice the Commission would suffer. Since the Commission can readily be viewed as having the interests of the public at heart, the question is: Would there be substantial detriment to the public? The Commission says that there is the potential for such detriment. I accept that unlicenced entities that ought to be licenced may represent a threat to customers and potential customers since amongst other matters, such entities are not, or may not, compulsorily be operated in compliance with safeguards established to protect users of financial services. This includes the risk of no adequate safeguard to ensure sufficient capital in the case of failure of the entity. Since there is no supervision by a regulatory entity, there may be nothing readily to hand about the soundness of the entity, its principals, its accounts and operations in general. In addition, I accept that the potential for unwitting involvement in money laundering schemes is there, although it is not immediately clear to me whether that potential arises from the nature of security business, or whether it arises from the nature of foreign currency trading, or from any other circumstances which are not the direct issue involved here. I

have also given consideration to the duty placed upon the Commission to uphold the law in the public interest. The Commission has certain prescribed minimum requirements which applicants for licences under the Securities Act must meet, including solvency and liquidity requirements and can require such information as it thinks necessary in its capacity as the regulatory body for the industry. I daresay that strictly speaking the Commission has those duties to the public to ensure that safeguards are maintained and owes those duties even to potentially exposed factions of the public who profess not to desire that protection. It is not part of the Commission's function to wait until a catastrophe or financial fall-out has occurred.

23. However, I cannot help but think that the degree of need and urgency for protection are watered down when persons such as the members of the club in this case go on record declaring in essence "Thanks for your paternal protection, Commission, but I can take care of myself". The image that springs to mind is that of a knight in shining armour rushing out to rescue a damsel in distress when in point of fact the damsel is not in distress at all; quite the contrary.

24. In my judgment, the injustices, or risk of injustice are not evenly poised. Whilst the hardships are serious but yet different in kind, they do not appear to have the same degree of probability of occurrence. Although the interests of the public at large must be taken into account in general and constitute a special factor for consideration in the balance of convenience, it seems to me that the detriment to the public is merely apprehended by the Commission, and there is not much concrete evidence before the court to suggest that these fears may materialize or cause harm. The Claimants' operation is in relation to a club, and they have

not opened their doors to the public generally. Whilst the fact that the operation is a club may not mean that the activities do not fall within the remit of the Commission, it does mean that the apprehended danger is not of the same order as it would be in relation to an entity offering, for example, financial services to the general public at large. Secondly, and perhaps more importantly, although in paragraph 5 of his Affidavit Mr. Wynter says that there have been complaints and that one customer of Olint complained about the length of time which it took for Olint to respond to requests for withdrawals and the threatening manner in which those requests were dealt with, there is not before the court anything definite which the public will suffer, or anyone for that matter, if the stay were granted now and the Claimants should prove unsuccessful at trial. The club members say that they appreciate the high risks involved and that they are investing money they can afford to risk. In addition, in his Affidavit of Urgency put before the Commission, Mr. Smith indicates his credentials as a foreign exchange trader. Mr. Smith does not appear to be some upstart trader who has appeared on the foreign exchange trading scene overnight and nor has that been suggested. He has worked with the Bank of Jamaica and Jamaica Money Market Brokers as an international currency trader. Mr. Smith has not been reticent in indicating that he has had vast experience, and success, in foreign currency trading. Whilst past performance does not ensure future results, Mr. Smith also refers to what is in essence a liquidity mechanism by which a float is maintained in a local account to cover the club's anticipated pay outs and he states that funds are wired from a brokerage house to top up the float when necessary.

25. On the other hand, the Claimants and their members if enjoined from carrying out what is obviously a highly profitable, time-

sensitive operation, will have suffered tangible injustice. The rights of citizens to order their business affairs, income and property as they choose, and to associate within the ambits of the law are important rights worthy of preservation and defence, quite separate and apart from financial losses that may be suffered. All told, I think that the injustices on either side are potentially serious ones, but the degree of probability that they will actually occur to either side is, when measured on the balancing scales of justice, weighted more heavily on the side of the Claimants and their members. The extent of the uncompensatable disadvantages to the parties do therefore in my judgment differ appreciably.

26. I find some support for my views on the indefinite nature of the potential hardship to the public on the facts of the instant case in Spry's work on **Equitable Remedies** at pages 500-501, although of course each case must turn on its own facts. Here the learned author discusses the relevance of considerations of prejudice to third persons or the public generally when an interlocutory injunction is sought against a public authority.

Considerations of this kind may be relevant, but only on the same basis that the interests of third persons or the public may be relevant in every application for interlocutory relief.....

In cases where the plaintiff is otherwise entitled to an interlocutory injunction, but it is maintained by the defendant that the grant of the injunction would have an undue adverse effect on third persons or the public generally, these latter considerations are not ordinarily decisive. Commonly it is found in such cases that prospective detriment to the plaintiff is substantial and direct, whereas prospective hardship or inconvenience to third persons or to the public if the interlocutory

injunction is granted will be indefinite and remote and even speculative."(my emphasis).

27. The unresolved issues for determination on the Appeal are mainly of law.

In his First Affidavit David Smith states that the principal objects of the customer service company Olint are:

(a) providing a facility whereby Club members funds may be used to engage in the practice of hedging margins in currency trading using on-line facilities;

(b) providing a facility via which Club members can access the information in their accounts held overseas.

28. Mr. Smith states that Club members are required to be personally known to and vouched for by at least one of the principal members who must recommend them for membership. Participation in the Club is a closed membership, with all of the members being readily identifiable as being known to other members.

29. The private Club has been, according to Mr. Smith, in existence for a period of approximately two years three months. Initially the members comprised just himself and his brother and a few friends operating without any written agreement although the service company was incorporated sometime later as the Club grew cumbersome to operate. They recognized that more structure needed to be introduced to its operations so they incorporated a company to service members. They also opened a club-house, employed staff to service the members and sought to register formally with the Revenue authorities with a view to complying with all their legal obligations.

There are a number of other Affidavits filed by other Club members in which the members indicate, amongst other matters, that they do not wish to be protected by the Commission as they are quite cognizant of the risks involved and are well-acquainted with what the Club is involved in. Members have also expressed the view that the Commission has intruded on the Club's and its affiliates' affairs in violation of the members' constitutional right to associate freely and to do what they want with their private property.

30. The Claimants' position is that they have done nothing unlawful or which requires regulation by the Commission.

31. In his Affidavit in response, Mr. Brian Wynter, Executive Director of the Commission, in paragraph 5, states that for a number of months the Commission was in the process of investigating the operations of Lewfam and Olint/ Overseas Locket International Corp/David Smith et al. The investigations revealed a connection between Lewfam and Olint. The Commission also acquired intelligence on the operations of both entities and the persons connected to them. Apart from their own investigations and intelligence, the Commission received information and complaints from various sources and through various means. These sources included customers of Lewfam and /or Olint and also public bodies. One customer of Olint complained about the length of time it took for Olint to respond to requests for "withdrawals" and the threatening manner in which he was treated on making such a request.

32. I will point out at this time that when the application came on for hearing before me Lord Gifford Q.C. on behalf of the Claimants submitted that the portions of this paragraph where no sources

of information were named should be struck out on the grounds of hearsay. He referred to Rule 30.3 of the Civil Procedure Rules 2002 "the C.P.R.".

33. I agree with Mrs. Foster-Pusey's submissions in support of her response that the section of the paragraph ought not to be struck out. Paragraph 5 of Mr. Wynter's Affidavit does establish that the Commission was at first acting in an investigative role. In the same way that police officers acting in an investigative role are entitled to refer to information gathered in the process of investigation, the Commission is entitled to refer to information that comes to its attention in the course of an investigation. Mrs. Foster-Pusey makes the point that persons in the course of an investigation do not necessarily want their names revealed, and further, that the Commission is not a customer, and is not saying that what customers said is true. The Commission is merely saying that this is what a customer reported to it and that is the nature of an investigation. I agree with this reasoning and I therefore refuse the application to strike out any aspect of paragraph 5 of Mr. Wynter's Affidavit.

34. Going back to Mr. Wynter's Affidavit, he continues that as a result of the information garnered through the various means and from different sources the Commission suspected that Olint and Lewfam had committed or were committing offences in breach of sections 7 and 8 of the Securities Act. Search warrants were acquired and executed and items seized and returned. The Commission concluded its investigations into the matter and at the end of its investigations the Commission was strengthened in its view that Olint and Lewfam , individually and together, were carrying on securities business and/or also carrying on investment advice business.

35. Mr. Wynter states that Lewfam claimed to operate what they termed a "private members club". In this Club various persons pooled their respective funds and the pooled funds were handed to Neil and Janice Lewis who then handed the funds over to David Smith and/or Olint Corporation for the purposes of currency trading. There are two accounts with David Smith and/or Olint both in the name of Neil A. Lewis.

36. Mr. Wynter states that the Commission's understanding is that the Currency trading involved speculating on the increases and decreases of the value of currencies against each other in order to make a profit. David Smith and/or Olint offered their skill for these purposes. The owners of the funds did not trade in the currency themselves but relied on David Smith and/or Olint to do so.

37. The Lewfam entity represented by Neil and Janice Lewis was just one set of persons (with over eight hundred participants) on whose behalf David Smith and/or Olint traded in foreign currency. The Commission's investigations revealed that Olint and/or David Smith's purported foreign currency trading was carried out on behalf of approximately 1800 persons. Neither entity was in possession of a licence under the Securities Act.

38. According to Mr. Wynter, foreign currency trading is an activity regulated by the Bank of Jamaica. There may be nothing objectionable in respect of an individual using their own personal funds to trade in foreign currency. However, the Commission is not responsible for and has no expertise in relation to the regulation of foreign currency trading in Jamaica.

39. The regulatory issue in question in relation to the Commission and the Securities Act comes into play where that individual does foreign currency trading using other persons' money and the persons are relying on the skill of the individual to bring them

profit. Such an individual or entity is required to be licenced under the Securities Act. The entry into such an arrangement with the individual and the encouraging of persons to enter into such an arrangement are both regulated activities.

40. Mr. Wynter further states that the Commission considered all the material arising from the investigation and was satisfied that the circumstances warranted the issuing of the Cease and Desist Order.

41. Among the matters considered by the Commission in relation to Olint in particular were the following:

(a) The company was entering into customer agreements with persons in Jamaica in which sums provided by individuals would be invested and used as a "margin for taking margin leverage speculative currency positions". As the investigation progressed the document originally entitled "Customer Agreement" was renamed "Private Club Member Agreement". Mr. Wynter says that the securities business involved was the issuing of investment contracts to persons.

(b) Olint was managing very large sums of money on behalf of individuals.

(c) The interest rate being provided on the investments was extraordinarily high at times exceeding 10% per month (that is 120% per annum).

(d) Olint was not being supervised by any regulatory entity with the result that no one could speak to the soundness of the entity, its principals, its accounts and its operation in general. Urgent action was therefore required to protect the public.

LEGAL ISSUES

42. A number of legal issues will arise at the hearing for resolution. Amongst those that I see are the following:

(a) Did Olint Corp./David Smith et al, carry on securities business, deal in securities business, and engage in investment advice business which requires them to be licenced under the Securities Act?

(b) Did Olint Corp./David Smith et al, deal in securities and through their operations, engage in the participation of a profit-sharing agreement in relation to foreign currency trading activities?

(c) Did Olint Corporation/David Smith et al, issue investment contracts in relation to foreign currency trading activities?

(d) Did Olint Corporation/David Smith et al, provide investment advice to potential investors in relation to foreign currency trading activites?

(e) Did the Commission err in finding that the circumstances warranted the issue of a Cease and Desist Order?

(f) Did the Commission act in breach of the principles of natural justice in taking a decision which has prejudiced the Appellants' rights to associate with fellow citizens in pursuit of a regularly organized and legitimate activity, in the absence of the Appellants and without first giving to the Appellants an opportunity to be fairly heard in defence of their rights of association and/or property?

(g)Did the Commission act outside its lawful remit if the Claimants are not prescribed financial institutions within the meaning of the Financial Services Commission Act?

(h)There are two separate powers which the Commission has to issue Cease and Desist Orders, under the Securities Act and under the Financial Services Commission Act. In those circumstances:

(i) Did the Financial Services Commission Act impliedly repeal the Securities Act?

(ii) Should the Commission have acted under the Financial Services Commission Act since the Commission believed the Claimants' activities were unlawful?

(iii) Where there are two powers to act in a manner interfering with the business of an individual should the Commission elect the power that provides for the principles of natural justice?

Issues42 (a) to (e)

43. The Claimants refer to the definition of "securities" set out in the Securities Act and to one of the definitions of "financial services' in the Financial Services Commission Act involving securities. They submit that the common thread running through all the items in the definition of "securities" in the Securities Act is that the Act is intended to cover the dealing in various kinds of negotiable instruments. In his Second Affidavit in response to Mr. Wynter's Affidavit, Mr. Smith maintains that it was not the intention of Parliament that the Commission should assume dominion over all investment type activities. He emphasizes the important point that the Minister is given under the Securities Act specific power to prescribe certain matters to be securities (sub-section 2(c). The Claimants also say that they do not offer any service to the public, so that the Commission has no jurisdiction to take measures against them.

44. The Commission's Attorneys submit that the fact that the establishment is a private members' Club does not mean that it falls outside the regulatory remit of the Commission. What is important is the true nature and extent of the activity being carried out. They submit that there is a prima facie case that the Claimants are carrying on securities business, dealing in

securities and engaging in investment advice business which requires them to be licenced under the Securities Act. They refer to the Act's definition of "investment advice business" and "securities" as including "certificates of interest or participation in any profit sharing agreement" and also "investment contracts" for securities. "Deal" "Dealer" and "Dealer's representative" are also defined.

45. Mrs. Foster-Pusey referred to two decisions from the United States in relation to securities and investment contracts and also to an Australian case dealing with securities and investments. She also referred to the document entitled "Customer Agreement" which the Commission came across in the course of its investigations into the Claimants' activities. This document was renamed "Private Club Member Agreement" and is the same document in substance. The submission continues that prima facie the Claimants issued investment contracts as there was a common enterprise by which members hand over moneys to be invested by the Claimants and the members use and rely on the expertise of Mr. Smith/Olint to make profits for them.

46. Having looked at the relevant Statutes, such case law as was cited, the relevant Agreements, and all the other evidence about which there is little factual contest, it seems to me that these are complex questions of law which need to be fully ventilated. It would in my estimation be difficult, and indeed imprudent, to proffer a prediction on the outcome of this aspect of the matter without full argument. I am unable to say that prima facie I see the case one way or another at this juncture. This case involves foreign exchange trading on the internet. As Mr. Watson said in his letter to the Commission dated March 21 2006 in relation to the securities industry, "this is a dynamic area, existing in a changing global environment. Definitions require constant

revision to remain relevant and the Minister is actually given powers to prescribe new areas of regulated activity." Whilst I appreciate that in novel factual situations, courts often have to determine issues by way of analogy, at the same time, no case has been cited to date speaking even tangentially to the question whether or not foreign exchange trading on the internet or otherwise, pursuant to any relationship or arrangement, constitutes a security. Of course if such a case is cited the Court will have to examine any underlying legislation closely and compare it with ours, but undoubtedly such cases would be useful. I rather doubt that this is the first time ever in a country where there exists a regulatory regime for the securities industry, that an activity such as, or similar, to that involved in this case has occurred. I think that the point is well-taken by the Claimants that we are, at least in our jurisdiction, in untested waters. Overseas Locket International Corporation is a Panamanian Company and is the party named in the Members Club Agreement(not Olint or David Smith). There is a provision in the Members Club Agreements purporting to make the law of Panama the governing law of the Agreement. I expect that these are yet other points of law which may have to be considered by the Court in March next year. In all the circumstances I decline to express any view on these aspects of the matter without the benefit of comprehensive argument. I am not able to express my views at this time with any degree of confidence and thus such views cannot assist me, muchless be a decisive factor, in determining where the balance of justice lies. In any event, the factors of hardship as I have said before do not appear to be evenly balanced.

Issues 42(f) to (h)

47. The Claimants submit that there are two powers under which the Commission can make cease and desist orders, but that the provisions relating to them conflict:

(1) the power under section 68(1B)(a) of the Securities Act, which is exercisable if the Defendant is satisfied that the circumstances warrant. This power can be exercised without notice.

(2) The power under section 8 of the Financial Services Commission Act, which is exercisable if the Defendant believes that a relevant condition exists. This power may only be exercised after notice has been given setting out the grounds relied on, and a hearing has been held. The Claimants go on to point out that there is a limited power to issue a temporary cease and desist order under paragraph 5, but only if the situation is likely to endanger the financial position of the institution or the interests of its customers. Thus, the Claimants submit, full provision is made for the basic rules of natural justice to be observed.

48. The Claimants contend that it was unlawful for the Commission to act under the Securities Act and not to give notice under the Financial Services Commission Act, since

(1) where two statutes conflict, the later statute is deemed to have impliedly repealed the conflicting provisions of the earlier statute. The Claimants say that the Financial Services Commission Act is the later Statute.

(2) The Commission acted on a belief that the Claimants' activities were unlawful. Therefore the situation had arisen as set out in section 8 of the Financial Services Commission Act and the Defendant was bound to give notice in accordance with the Third Schedule.

(3) Where there are two powers to act in a manner which interferes with the business of an individual, one which provides for the principles of natural justice and the other does not, the Defendant is bound to elect that which provides for the principles of natural justice.

49. Mrs. Foster-Pusey responded to the submissions advanced on behalf of the Claimants in relation to the two separate powers in the hands of the Commission and submitted that it is clear that Parliament sought to maintain the two different powers and they deal with different subject matter.

50. As to the question of the exercise of the Commission's powers under the Securities Act, and not under the Financial Services Commission Act, the Privy Council decision in **Century National Bank Ltd. V. Davies and others** (1998)52 W.I.R. 361 (Lord Steyn at 368g) emphasizes that the starting point in considering the nature of the remedy of an appeal in a Statute is to focus on the language and context of the statute. In **Century National** the Board of the Privy Council considered the wording of Paragraph 2(1) of Part D of the Jamaican Banking Act. That paragraph stated that a bank which is served with a notice by the Finance Minister of a notice of the Minister's intention to temporarily manage the bank, may, within ten days after the date of service, appeal to the Court of Appeal and that court "may make such order as it thinks fit". In the instant case on hearing the appeal by a person aggrieved by the Commission's decision, a Judge of the Supreme Court may also "make such order as he thinks fit". The Judge may confirm, reverse or vary any decision, refusal, ruling or order of the Commission.

51. At page 368h Lord Steyn in delivering the judgment of the Board stated:

Paragraph 2(1) of Part D is cast in language of width and generality. Prima facie any issue regarding the service of the notice is within the scope of the right of appeal.....It is plainly competent for the bank to contend on such an appeal that the notice was invalid for procedural or substantive reasons. And the Court of Appeal would be bound to rule on the merits of such contentions. Thus the bank could have appealed on the ground that the Minister gave no prior notice of his intention and that the Minister resolved to assume temporary management in circumstances when that was under the statute an inappropriate remedy, leaving it to the Court of Appeal to rule on the merits or demerits of those arguments. Indeed every complaint, substantial or insubstantial, advanced by the appellants before the Privy Council could have been raised before the Court of Appeal by way of an appeal under paragraph 2(1) D

In the **Century National** case the Privy Council also ruled that the remedy of a right of Appeal under the section was an exclusive remedy. Having provided for a speedy general right of appeal, there could be no question of leaving open a right to a private law action of challenge.

52. The **Century National** decision in my view supports the view that the appeal should properly consider both substantive and procedural issues. However, save that the reasoning in that case would suggest that when looking at the question whether a remedy is an exclusive one, one must look at the language and context of the statute in considering whether it is practical that other remedies are left intact, I'm not entirely sure how the

court hearing the Appeal under the Securities Act will come to decide whether the Commission should have acted under another Act.

53. Be that as it may, my preliminary view is that Parliament has allowed the two Acts to co-exist along with the Commission's two sets of powers. The two Acts do not deal with identical matters as the Securities Act is not dealing with prescribed financial institutions whereas the Financial Services Commission Act is. The Financial Services Commission Act deals with prescribed financial institutions and deals with the Commission's general powers and duties whereas the Securities Act deals with the Commission's specific powers and duties in relation to securities. Since the Securities Act has not been repealed or struck down, then the Commission in my provisional view prima facie would seem entitled to exercise powers under it. Lord Gifford Q.C. cited the Privy Council decision of **Owens Bank Ltd. V. Cauche**(1988) 36 W.I.R. 221. However, in that case, which was an appeal from the judgment of the Court of Appeal of Saint Vincent and the Grenadines, the Board of the Privy Council(see page 226d-Lord Ackner) confirmed that there is no such rule that where there is an irreconcilable inconsistency between two provisions of the same Statute the later prevails(my emphasis). The Board reiterated that where such an inconsistency exists, the courts must determine as a matter of construction, which is the leading provision and which must give way to the other. That principle can in my judgment hardly likely be applicable here where we are dealing with two different Statutes dealing at certain points with different subject matter, one specific in relation to some matters and the other general.

54. The use of the word "believes" in the Commission's Cease and Desist Order will not to my mind make it likely that a judge hearing the Appeal, assuming the point can be dealt with in this way and in this Appeal, will find that this precluded the Commission acting under section 68(1B) of the Securities Act, particularly since one of the preambles to the Order recites that whereas "by virtue of Section 68(1B) of the Act, The Commission may issue a Cease and Desist Order on the conclusion of the investigation if the circumstances so warrant". Further, the words that appear in the phrase in which the word "believes" appears are as follows:

> "AND WHEREAS having concluded its investigation, the Commission is satisfied that in the circumstances, a Cease and Desist Order should be made as the Commission believes that- ...".

55. In the **Century National** decision, the Board discussed and reiterated that there are certain limitations in relation to questions of procedural fairness and natural justice. At pages 370j to 371 d Lord Steyn stated:

That leads to the appellants' related argument that the notice given on the 10th July 1996 was in breach of standards of procedural fairness. Counsel for the appellants argued that at the very least the Minister should have given the bank an opportunity to make representations to the effect that it would be wrong to assume temporary management rather than present a winding-up petition. He invokes a common law principle which is a cornerstone of administrative law in the United Kingdom and in Jamaica. Nevertheless, the limitations of that principle must be borne in mind. In ***Wiseman v. Borneman*** *[1971] A.C.297 at page 308 Lord Reid states:*

"Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."

56. Mrs. Foster-Pusey has submitted that the element of natural justice is preserved in the Securities Act by the provision of an appeal to a Judge of the Supreme Court- section 68(1C) and the other provisions outlined in section 74 of the Act.

57. The Claimants in their submissions say that where there are two powers which allow the Commission to interfere with an individual's business, the Commission should elect the one where provisions of natural justice prevail. No authority has been cited for that proposition but it does seem to me that that is a point to be developed at the full hearing. In addition, although this has not been directly raised before me, as it concerns provisions in the Securities Act, I consider it appropriate to comment.

58. Section 4(3)(a) (i) of the Securities Act states:

(3). For the purposes of this Act the Commission shall-

(a) carry out such investigations and examinations in relation to the securities industry-

(i) as it considers necessary for the purpose of ascertaining whether the provisions of this Act are being complied with;.....

59. Section 4(4) of the Securities Act states:

4(4). The Commission may hear orally any person who, in its opinion , will be affected by an investigation under this Act, and shall so hear the person if a written request for a hearing has been made by the person showing that he is an interested party likely to be affected by the result of the investigation.(my emphasis).

60. Whilst I appreciate that the Law Suit in relation to the search warrants HCV 0817 OF 2006 may have intervened between the search and the issue of the Cease and Desist Order, the Claimants first ground of Appeal is that:

The Commission acted in breach of the principles of natural justice in that it took a decision which has prejudiced the Appellants' rights to associate with fellow citizens in pursuit of a regularly organized and legitimate activity, in the absence of the Appellants and without first giving to the Appellants an opportunity to be fairly heard in defence of their rights of association and/or property.

61. It seems to me that the letter written by Lisa Mae Gordon, Attorney at Law on behalf of the Claimants, dated March 21 2006, before the Commission's Cease and Desist Order, and indeed, evidence of the tone of other supplications made on behalf of the Claimants during the searches and by way of correspondence, on any reasonable interpretation, arguably amount to requests to be heard and requests of dialogue before the Commission. In her letter Miss Gordon wrote without prejudice to the litigation about the search and in relation to certain notices placed by the Commission in the print media subsequent to the search warrant suit commenced by the Claimants, the articles being headed "Be Cautious in Making Financial Investments":

Notwithstanding my clients rights in law, we believe that your Notice presents an opportunity for us to engage with the FSC, again without prejudice to the litigation at hand, to be guided and/or directed as to where the F.S.C. believes this activity ought to be conducted whilst allowing us the opportunity to respond and where appropriate to reform.

If the FSC's remit is to bring otherwise errant industry players into conformity then kindly forward to us a package containing your policies rules and regulations in this area for our consideration. Hopefully we can engage in meaningful dialogue to bring some agreement and comity to what we presently believe on our reading of the relevant law and regulations, unless otherwise shown, is an untested area. If an application for a licence provides a solution to the impasse we are prepared to give it every serious consideration.

62. To the same effect is the letter from the Claimants' Attorneys Watson & Watson to the Attorney-General's Department dated March 21 2006, before the issue of the Cease and Desist Orders:

..... Given this awareness and the manner in which investigations of this nature are generally carried out, we wish to re-emphasize:

(1)Our clients are disappointed that they were never given the opportunity through a consultative process to work with your Commission to better understand their activities as this would enable their enquiries to commence in a much more organized and efficient manner without harm to them

(1)Our clients are willing to cooperate with any further investigations as the prevailing view in the Financial section, certainly prior to the raids were that their

operations were unregulatable. If your client's position on this or indeed ministerial policy is undergoing change our clients would like to participate in the process of reform and not be excluded to their detriment.

63. The terms of section 4(4) show that under the Securities Act in certain circumstances natural justice suggests, and in fact demands, the right to an oral hearing even before we get to natural justice protection in the form of an appeal from a decision by the Commission to issue a Cease and Desist Order. The terms of this provision may also impact on a substantive question to be determined on Appeal, being the question whether the circumstances did warrant the issue of a Cease and Desist Order. Under section 68(1B)(a) the Commission can issue a written warning instead of a cease and desist order, as the circumstances require. Natural justice dictates that if a written request for an oral hearing is made, the Commission must hear from the affected party, even where, for example, the person appears to be a schemer, or appears to be uncooperative or stubborn. Even without a written request the Commission may hear a party who will be affected by an investigation. I appreciate that some argument may be made that the Appeal relates to the Commission's decision to issue the Cease and Desist order, and not to the investigation. However, this is a matter of concern which may have to be addressed in some forum at some point and which may be linked to the Claimants' 1st natural justice ground of Appeal. The courts are quite capable of flexibility where appropriate in order to allow for real and pertinent issues to be dealt with.

64. In the event that I am wrong about the principles to be applied in considering the application for a stay of execution of the Commission's Cease and Desist Order, and if the relevant principles are those applicable to stay of execution of judgments pending appeal as opposed to applications for interim injunctive relief in judicial review, then the onus would be on the Claimants to show that without a stay they will be ruined and that the Claimants have an appeal with some prospect of success.

65. In the **Linotype-Hell Finance** decision having stated that the unsuccessful Defendant must show that he has an appeal with some prospect of success, Lord Justice Staughton went on to state that in the case before him there was an arguable appeal. I think that the appeal in the instant case is certainly arguable. It is an Appeal which has real prospects of success and involves the determination of very important and novel issues of law.

66. Whilst there is evidence to suggest that the Cease and Desist order has had some adverse effects on the Claimants and club members, there is no evidential basis on which I could properly say that I am satisfied that without a stay of execution of the Commission's decision, the Claimants or their members will be ruined. As I have said above, I do not think that it is appropriate or just to mount a hurdle of proving ruination in the path of the Claimants' Appeal. The appropriate considerations revolve around relative hardship on the parties and the balance of convenience, and do not call for a higher onus on the Claimants of showing that they will be ruined if a stay is not granted. Although the right to this interim relief arises under the Statute, interim relief is a discretionary remedy, and the discretion must be exercised with the overriding objective of doing justice between the parties, within the framework of the Statute and appropriate case law.

67. In all the circumstances, I am of the view that granting a stay of execution of the Commission's Cease and Desist Order is the course that appears to offer the best prospect that eventual injustice will be avoided or minimized. I therefore grant a stay of execution of the Commission's Cease and Desist Orders, in respect of the Claimants until the 26 March 2007 or until further order. The stay is granted on condition that there shall be no increase in the membership of the Club as of this date until 26 March 2007 or until further order. Costs are to be costs in the Claim.