

JERSEY / JUDGMENT

Anchor Trust -v- JFSC 17-March-2006

[2006] JCA 040 (17 March 2006)

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COURT OF APPEAL 17 March 2006 Before : J. P. C. Sumption Q. C. (President) Dame Heather Steel G. C. Vos Q. C. Between Anchor Trust Company Limited Appellant And Jersey Financial Services Commission Respondent Mr Barry Shelton appeared for the Appellant Company. Advocate J. D. Kelleher for the Respondent.

judgment

Vos JA:

Introduction

1. On 1 st February 2001, Anchor Trust Company Limited ("Anchor") applied for registration under Article 9 of the Financial Services (Jersey) Law 1998 (the "1998 Law") to conduct trust business. 2. On 4 th March 2005, the Chairman of the Jersey Financial Services Commission (the "Commission") wrote to Anchor informing it, that pursuant to its powers under Article 8 of the 1998 Law, the Board of the Commission had decided to refuse Anchor's application for registration. 3. On 9 th March 2005, Anchor filed notice of appeal to the Royal Court against the Board's decision. 4. On 23 rd March 2005, the Chairman of the Commission, Colin Powell, wrote to Anchor's advocate giving reasons pursuant to Article 11(2) of the 1998 Law for its decision to refuse Anchor's application for registration to conduct trust business. 5. The Royal Court heard oral evidence from Mr Colin Powell, Chairman of the Commission, on the 19 th July 2005. 6. On 27 th October 2005, the Royal Court (M. C. St. J. Birt, Deputy Bailiff, with Jurats Le Cornu and Morgan) delivered a 71-page Judgment (the "Judgment") dismissing Anchor's appeal against the Commission's refusal to register Anchor. 7. On 25 th November 2005, Anchor filed its Notice of Appeal to this Court on the following three grounds:- (i) That the Royal Court failed to follow the procedural approach set out in its previous judgment in Interface Management Limited v. Jersey Financial Services Commission

- [2003] JLR 254. (ii) That the Royal Court failed to take relevant matters into account or took irrelevant matters into account in reaching its decision. (iii) Having regard to the all the circumstances of the case, the Royal Court's decision was one which no reasonable tribunal properly directing itself, could reach. 8. From the time it filed its Notice of

Appeal, Anchor has been represented by Mr Barry Shelton, one of Anchor's directors, in person. 9. On 25 th January 2006, Anchor filed amended further and better particulars of its grounds of appeal (the "Amended Grounds"), explaining and elaborating the first two of the three grounds set out above. 10. On 21 st February 2006, Anchor filed a supplemental Notice of Appeal complaining that there was a presumption that the Deputy Bailiff was affected by bias. The complaint was that Mr Colin Powell and Mr Richard Pirouet, respectively the Chairman and Deputy Chairman of the Commission, who dealt with Anchor's application, comprised 2 of the 3 members of the Pay Review Board, which recommended that the Deputy Bailiff should receive a 15% salary increase in June 2002. The 1998 Law 11. It is important to keep the core legislative provisions closely in mind before one comes to consider the history of Anchor's application. 12. Article 7 of the 1998 Law prohibits the carrying on unauthorised financial service business. Article 7(4) makes it a criminal offence to carry on financial service business in Jersey, without being a 'registered person'. 13. Article 8 of the 1998 Law makes provision for the way in which applicants may apply to be registered under Article 9 of the 1998 Law. 14. In particular, Article 8(3) provides that an application under Article 8(1)(b) shall: "contain or be accompanied by such information and documents as the Commission may require, relating to the applicant and the applicant's business, to persons who are principal persons in relation to the applicant and verified in such manner as the Commission may require". 15. Article 8(4) provides that: "At any time after receiving an application and before determining it the Commission may, at its discretion, by written notice order the applicant or any person who is or is to be a principal person in relation to the applicant to provide such additional information or documents as the Commission reasonably requires for the determination of the application, verified in such manner as the Commission may require, and such requirements may differ as between different applications". 16. Article 8(5) also provides that: "the Commission may by written notice require the applicant or any person who is to be a principal person in relation to the applicant to provide a report by an auditor or accountant, or other qualified person approved by the Commission, on such aspects of any information and documents required by or under paragraph (3) or (4) as the Commission may specify". 17. Article 8(6) provides a further positive disclosure obligation on the applicant by providing that while an application is pending, an applicant who either "(a) determines to bring about any alteration in, or (b) becomes aware of any event which may affect in any material respect, any information or documents supplied by the applicant to the Commission in connection with the application shall forthwith give written notice of that matter to the Commission". 18. Article 9(1) provides that the Commission "may either register a person with or without attaching conditions under Article 10(2) or may refuse to register a person". 19. Article 9(3) provides the following grounds on which the Commission may refuse to register a person:- "(a) having regard to the information before the Commission as to the - (i) integrity, competence, financial standing, structure and organization of the applicant, (ii) persons employed by or associated with the applicant for the purposes of the applicant's business or who are principal persons in relation to the applicant, (iii)

description of business which the applicant proposes to carry on, the Commission is not satisfied that the applicant is a fit and proper person to be registered; (b) the applicant has at any time and whether or not in relation to the application, in any case where information was required under this Law in any connection - (i) failed to provide any such information, or (ii) provided to the Commission information which was untrue or misleading in any material particular; ... (d) the applicant or any person employed by or associated with the applicant for the purposes of the applicant's business has been convicted - ... (ii) of any offence involving dishonesty; (e) it appears to the Commission, as a result of information provided in pursuance of requirements of or under Article 8, or information otherwise obtained, that - ... (ii) in order to protect the reputation and integrity of Jersey in financial and commercial matters, ... the applicant should not be registered; or (f) the Commission has reason to believe that at any time there has been a failure on the part of the applicant to follow a Code of Practice issued under Article 19".

20. Article 9(5) provides that "where, under this Article, the Commission refuses to register a person or revokes a registration it shall give notice in writing to the applicant or registered person concerned". 21. Article 10 provides that Economic Development Committee may, on the recommendation of the Commission, prescribe conditions applicable to registered persons, and that the Commission may attach conditions to any particular grant of registration under Article 9. 22. Article 11(2) provides that "where the Commission ... acting under Article 9, refuses to register a person or revokes a registration ... the applicant ... may require the Commission to furnish him or her within 14 days with a statement in writing of its reasons for that decision". 23. Article 11(3) then gives the basis of the appeal of the Royal Court. It provides as follows:- "Any person aggrieved by such refusal ... may appeal to the Court ... within one month from the date on which notice in writing has been given to the person under Article 9(5) or, as the case may be, under Article 10(3) on the ground that the decision of the Commission was unreasonable having regard to all the circumstances of the case " (emphasis added). 24. Article 32(4) gives the Commission power to require registered persons to provide the Commission with an accountant's report, and Article 33(1) gives the Commission power to appoint a competent person to investigate and report. Both Articles list the matters into which such reports can be required as including a registered person's financial services business and the integrity, competence, financial standing and organisation of that person. These Articles were applied to Anchor as an applicant for registration. What is not appealed

25. The Royal Court dealt at paragraph 3-15 of its Judgment with the dispute between the parties as to the proper test that it should have applied on an appeal to the Court under Article 11(3). In brief, the Royal Court reviewed the relevant authorities and held (leaving the question of vires aside) that:- (i) The Court should look at the correctness and fairness of the procedure in order to decide whether the proceedings of the decision-maker were in general sufficient and satisfactory; and (ii) The Court should look at the merits of the decision, on the basis that an appeal should be allowed if the decision of the Commission was wrong " to such an extent that the Jurats would categorise it as unreasonable ". In other words, it was not necessary for the Appellant to go so far as to

establish Wednesbury unreasonableness. 26. We do not understand these holdings to be questioned. Instead, Anchor's submissions concentrated on (a) the procedural approach adopted by the Commission, and (b) the reasonableness of the Board's decision. The approach adopted by the Royal Court 27. Anchor's Amended Grounds and written Case went through the judgment of the Royal Court making criticisms of particular findings in particular paragraphs. The Commission's written Contentions deal with these criticisms in turn. 28. Some of the criticisms of the Royal Court's judgment are directed at paragraphs that set out findings of the Commission or other matters of historical record. In these circumstances, it is appropriate to mention the way in which the Royal Court's judgment approached the statutory appeal that was before the Royal Court. In outline, the Deputy Bailiff:- (i) Resolved the question as to the proper test to be applied on such a statutory appeal (which I have already said is no longer disputed), in paragraphs 3-15. (ii) Dealt with the procedural history of the application, in paragraphs 16-27. (iii) Set out the concerns that the Executive had recorded in their 'Minded to Refuse' letter dated 13 th September 2004, which subsequently formed the basis of the main grounds relied upon by the Board, in paragraphs 28-42. (iv) Set out at length the detailed reasons advanced by the Board for refusing Anchor's application in its letter of reasons dated 23 rd March 2005, at paragraphs 43-64. (v) Dealt with Anchor's procedural grounds of appeal in paragraphs 66-119. (vi) Dealt with Anchor's contention that the Board's decision was unreasonable in paragraphs 120-187. (vii) Concluded that the Board had not acted unfairly towards Anchor, and that its decision was not unreasonable, and dealt with some ancillary matters in paragraphs 188-190. The substance of Anchor's appeal 29. As I have said, Anchor's amended Grounds deal with various specific grounds advanced before the Royal Court in relation to (a) procedural unfairness and (b) unreasonableness. 30. In the course of oral argument, I suggested to Mr Shelton that his main points could be collected under the 18 headings set out below. The Court gave Mr Shelton an opportunity to consider whether there were any further points upon which he placed particular reliance. He did not identify any such further points. The Court also asked Advocate John Kelleher, who appeared for the Commission, to identify any further points that could be made on Anchor's behalf, since Mr Shelton was appearing in person. He too was unable to pinpoint any such further points. 31. In these circumstances, the 18 headings, which follow, can be taken as the main issues raised by Anchor on this appeal. That is not to say that there are not other less significant points raised in Anchor's Amended Grounds or Anchor's written Case. I should say, however, that I have considered all the points raised in Anchor's written documents, and do not regard any of the ones not mentioned in the following list, as of sufficient substance to affect my overall view of the merits of the appeal. To mention them all in this judgment would have lengthened it needlessly, since I am satisfied that there are no other points that could possibly affect the outcome of the appeal. [By way of example, some of the points made in Anchor's written Case are no more than criticisms of matters that the Royal Court was reciting in relation, for example, to the Executive's concerns as set out in the Minded to Refuse Letter (for example paragraphs 2.2 and 2.3). Other points draw fine distinctions or make detailed criticisms, which have no real

consequence for the integrity of the Royal Court's decision (for example paragraphs 2.6.1 and 2.6.2)]. 32. The 18 headings, each of which was expressly addressed by Mr Shelton in oral argument, may be summarised as follows:- Grounds concerning procedural unfairness (i) Failure to proceed on the basis that the Commission was acting as a quasi-judicial tribunal. (ii) Mrs Hatton's alleged request to the Inspector to improve his report. (iii) The Executive's failure to disclose the Inspector's Report early enough, and to assist Anchor generally. (iv) The Executive's reliance on the letter dated 1 st September 2004 from Acting Detective Inspector Troy to Jersey Financial Crimes Unit. (v) The Court's failure to accept the suggestion that the Inspector lacked competence, and was aggressive and biased in interview. (vi) The Board should have gone back to Anchor after receipt of the legal advice allowing it a further opportunity to respond. (vii) The Board's delay in providing reasons for its decision. (viii) The Board and the Chairman were insufficiently experienced and biased, and treated Anchor generally unfairly. (ix) The Deputy Bailiff was biased in that he had been awarded a pay rise by a Pay Review Board of which the Chairman and Deputy Chairman were 2 of the 3 members. Grounds concerning the Board's unreasonableness (x) The Court made a perverse finding that Mr Shelton was aware of Mr Marshall's inappropriate dealings with cash in relation to Mullen Investments Limited. (xi) The allegations concerning the 'know your client' requirements and the transfer of money to Moscow, concerning Browham Trading Limited. (xii) The allegations concerning the 'know your client' requirements in relation to Air Sofia Europe Limited. (xiii) The Court made a perverse finding in rejecting Mr Gidley's evidence that he had checked the 15 Suspicious Transaction Reports (STRs). (xiv) The Court made perverse findings in relation to Mr Dimsey, because Anchor did disclose its relationship with Mr Dimsey, and he had anyway paid his debt to Society, and posed no threat by his association with Anchor. (xv) The Court should have held that Mr Shelton's explanation for failing to disclose his désastre was satisfactory. (xvi) The Court should not have accepted that Mr Shelton had behaved in an uncooperative, sarcastic and offensive manner with the Inspector. (xvii) The Court should not have accepted that Mr Shelton had failed to cooperate with the police in relation to Mr Adderson. (xviii) The Board's decision was generally unreasonable. The test on appeal 33. Mr Shelton accepted in oral argument that the Respondent's advocates had properly set out the test to be applied on this appeal in their written contentions. 34. It is, therefore, common ground that an appellate Court will not differ lightly from a trial court's finding of specific fact, especially when this turns on the credibility of witnesses. The appellate Court is, however, entitled to draw different inferences from specific facts found by the lower Court. It is only in exceptional circumstances that the Court of Appeal will reject the conclusions of a lower Court, which has had an opportunity to see and hear witnesses giving evidence. The Court of Appeal must be convinced that the decision on the facts was wrong in order to reverse it. 35. Anchor's Amended Grounds raise predominantly factual issues, albeit that most of the evidence was written rather than oral. The Court of Appeal is obviously in as good a position as the Royal Court to evaluate written factual evidence. Even in relation to factual points arising from written evidence, however, the Court of Appeal will still not overturn a

decision of the Royal Court unless it is convinced that the decision was wrong. The only significant legal point raised by Mr Shelton is Ground 1, namely that the Commission ought to have adopted a quasi-judicial procedure. 36. I shall deal first with Anchor's 9 main grounds concerning procedural unfairness, and then with Anchor's 9 main grounds concerning the Board's unreasonableness. Procedural unfairness Ground 1: Failure to act as quasi-judicial tribunal 37. Anchor contends that the Commission ought to have acted, in its decision-making, as a quasi-judicial tribunal, that it failed to do so, and that the Royal Court failed to identify this important reason why the procedure adopted by the Commission was unfair to Anchor. Anchor also submits that the Board should have required its Executive to operate from separate premises with separate staff, and to prove the case against Anchor to the criminal standard of proof, and on the footing that it was as if it was dealing with the revocation of an existing registration. 38. The Royal Court dealt with this issue under the heading of 'structural unfairness' in paragraphs 68-77 of the Judgment, and under the heading of 'unfairness of the Board' at paragraphs 109 and 113. And it is true to say, as Mr Shelton submitted, that the Royal Court stated expressly in paragraphs 109 and 113 of the Judgment that the Board was performing an administrative role. 39. The Royal Court gave two reasons at paragraph 76 for rejecting similar arguments that were addressed to it:- (i) The 1998 Law actually provides in Article 8 and elsewhere that the Commission is itself to do the investigating, so the alleged unfairness or partiality of the Executive, and its connection with the Board, is inherent in the legislation. (ii) The statutory right of appeal to the Royal Court in Article 11(3) cures any perceived structural lack of independence (see Lord Hope in *Porter v. Magill*

[2002] 2 AC 357 at page 494). 40. As to the second point, Anchor sought to distinguish *Porter v. Magill* on the ground that the imperfections and alleged perceived bias of the Commission are not cured by the right of appeal, because there is no re-hearing on this appeal under the 1998 Law, whereas there was in *Porter*. This is a distinction without a difference. The legislation provides for an appeal on the grounds that "the decision of the Commission was unreasonable". The procedure on such an appeal will be a judicial one, just as it would be if there were a full re-hearing. There would be few occasions where an appeal would be allowed on a full re-hearing but refused on the basis of 'unreasonableness'. But even if that were not the case, what cures the lack of structural independence between the Board and the Executive, is the judicial process of the statutory appeal, not the nature of the appeal itself. 41. In my judgment, the two reasons that the Royal Court gave for rejecting the same argument when it was addressed to them, were correct, and the distinction now made between a full appeal by way of re-hearing and an 'unreasonableness' appeal does not affect the Royal Court's reasoning. 42. Anchor relies heavily on the Royal Court's decision in *Interface Management Limited v. Jersey Financial Services Commission*

- [2003] JLR 254 in support of the need for the Commission to apply a quasi-judicial process. But, in my judgment, Anchor has misunderstood that decision. 43. In *Interface*, the Royal Court (correctly in my view) held at paragraphs 8-13 of its judgment that the Commission had a duty to act fairly in determining applications for registration under the 1998 Law, and that the procedure adopted by the Commission (which was similar to that adopted in the case of *Anchor*) complied with the legal requirement of fairness. 44. In making this decision, the Royal Court in *Interface* relied expressly (at paragraph 10) on a passage from the speech of Lord Mustill in *R v. Home Secretary ex parte Doody*
- [1994] AC 531 at page 560 where he had made clear that he was talking about administrative powers conferred by statute. 45. It is true that in describing the procedure adopted by the Commission, the Royal Court said the following at paragraph 9:- "In order to carry out its function under the 1988 Law, the Commission has divided itself into two parts. The executive team under the Director General ('the Executive') investigates the applications and in due course makes a recommendation to the Board of the Commission ('the Board'). Although the Director General is a member of the Board of Commissioners, he does not participate in any decision of the Board in this respect. The analogy is far from exact but in cases of this nature, the Executive acts as a form of prosecutor. The Board itself (without the Director General) sits in a quasi-judicial role in order to consider the recommendation of the Executive, balance it against the points put forward by the Applicant and reach a decision" (emphasis added). 46. This passage reflects the procedure adopted by the Commission in this case too. But the reference to a quasi-judicial function cannot be taken too far. It simply means that, as part of the Board's administrative decision-making function, one stage is treated rather like a judicial process. It does not mean, and should not be read as meaning, that Court rules, processes and procedures should be taken as applying to the process as a whole. The 1998 Law makes it abundantly clear that such procedures are neither required nor appropriate until there is an appeal to the Royal Court. 47. Mr Shelton placed particular reliance on the Royal Court's decision in *Shane M Milford v Seaward Marine Limited* 1st December 2000, which decided that adjudicators dealing with claims for unfair dismissal must conduct hearings in accordance with the principles of natural justice. It was there said that neither Judges nor adjudicators should engage in private conversations with one party or another during a hearing, and that it was impossible to tell how even trivial remarks could subconsciously affect the adjudicator's reasoning. The reasoning in the previous paragraph applies equally to the supposed application of these dicta. The Board was taking an administrative decision pursuant to an investigation by its own Executive. Its quasi-judicial function cannot import all the rules applicable to judicial hearings or prevent the Board talking to its own Executive. 48. Accordingly, Anchor's first ground of appeal is unsoundly based and wrong, and must be rejected. Ground 2: Mrs Helen Hatton's alleged request to the Inspector to improve his report 49. Anchor submits that Mrs Hatton, the Deputy Director General, requested the Inspector, Mr Stephen Platt, a barrister appointed by the Board to investigate Anchor under Article 33(1) of the 1998 Law, to 'sex up' his report. This was dealt

with by the Royal Court under the heading of 'Inspector's Unfairness' at paragraphs 84-85 of the Judgment. 50. Mr Shelton made it clear in oral submission that his real complaint was that Anchor should have had the opportunity to comment on the Inspector's draft report before it was finalised. 51. Once it is accepted, however, that the Commission is obliged to investigate Anchor's conduct in order to deal with the application, and that it must gather facts concerning Anchor's business for this purpose, the complaint ceases to have any real force. Why, one might ask rhetorically, should the Executive not assist its Inspector by commenting on, and suggesting improvements to, his draft report? There is no reason why it should not do so, provided, of course, that the final report is shown to Anchor before being acted upon, so that it can comment and make submissions upon its contents. 52. In my judgment, it is impossible to say that Mrs Hatton's conduct, even if it was as Anchor has alleged (which the Commission does not accept) was inappropriate or unfair to Anchor. Anchor had a later, but proper, opportunity to explain to the Commission where it disagreed with the Inspector's report. Ground 3: Failure to disclose Inspector's report and to assist Anchor 53. Anchor contends that the Executive delayed in disclosing the Inspector's Report to Anchor, and that it failed properly to assist Anchor in the conduct of its application generally. This was dealt with by the Royal Court under the heading of 'Unfairness by the Executive' at paragraphs 89-92, and at paragraph 192 of the

Judgment.

In that latter paragraph, the Deputy Bailiff commented adversely on the Commission's delay until August 2004 in obtaining the Inspector's report. In paragraphs 92-33, he criticised the Commission for failing to make the draft Report available to Anchor until June 2004, rather than October 2003 available to Anchor. I agree with these remarks. 54. The questions, however, are whether the delay in providing the draft Inspector's Report to Anchor has caused it any real prejudice, or is an unfairness of such importance that the process cannot stand. In my judgment, both of these questions must be answered in the negative. Mr Shelton has been unable to point to any consequence of the delay, except the possibility that it gave Anchor longer to fall foul of other regulatory requirements. This latter point is unmeritorious, since the purpose of regulation is to ensure continuous compliance, not compliance simply for the period up to the time when the application is decided upon. 55. In relation to the suggestion that the Commission failed to assist Anchor to comply with its requirements, it appears that the poor relationship between Mr Shelton and the Commission inhibited such assistance. But, as the Deputy Bailiff pointed out, Anchor had considerable contact with the Executive over the 3 years of the application process. Anchor was provided with several documents setting out what it had done and was doing wrong. Even if, in an ideal world, the relationship between Anchor and the Commission would have been better, and more direct assistance might have been given, I do not accept that the Commission is at fault. Mr Shelton adopted a confrontational approach (as one can see from his interview with the Inspector) and told us that he "had a business to run" and only had limited time to be concerned with regulatory matters. 56. Despite the regrettable delay in making the Report available, this ground is not sufficient by itself (or taken together with other matters) to vitiate the

overall fairness of the procedure adopted by the Commission. In my judgment, Anchor was told exactly the case it had to meet, was given ample opportunity to make its submissions before a decision was made, and was given every chance to comply with the Commission's requirements. The real problem was that Anchor did not respond adequately to the criticisms that were being made, because Mr Shelton, as he made very clear in the course of the appeal hearing, did not regard them as valid. Ground 4: D. I. Troy's letter dated 1 st September 2004 57. Anchor places great reliance on the supposed unfairness of the Executive's reliance on the letter dated 1 st September 2004 from Acting Detective Inspector Troy to the Jersey Financial Crimes Unit. This was dealt with by the Royal Court under the heading of ' Unfairness by the Executive ' at paragraphs 95-96 of the Judgment. 58. Mr Shelton complained particularly that the letter contained D. I. Troy's prejudicial opinions on Anchor and Mr Shelton, in addition to facts. Anchor was, however, given the opportunity to respond to the letter. For my part, I see no reason whatever why the Commission should not take into account the opinions of the police. Indeed, it might forcefully be argued that they would be failing in their duty as a regulator if they failed to do so. 59. Mr Shelton pointed out that, in some cases, courts reject the entire evidence of a witness, because it is discovered that one element in his evidence is false. D. I. Troy was not giving evidence. He was providing information and opinions to the Commission in relation to an application they were considering under the 1998 Law. 60. In my judgment, the Commission adopted an entirely appropriate course. They received D. I. Troy's letter, asked Anchor to comment upon it, and then decided what they should accept and reject on the basis of the available evidence. This is a procedure which cannot be faulted, and one of which there can be no legitimate complaint. Ground 5: The Inspector was incompetent, aggressive and biased 61. Anchor's next complaint is that the Royal Court failed to accept the suggestion that the Inspector was incompetent, aggressive and biased. This was dealt with under the heading of ' Unfairness by the Executive ' at paragraph 100 of the Judgment, and also in paragraph 177. 62. Mr Shelton submitted that the Inspector was biased because of the manner in which he presented evidence against Anchor, based on opinion rather than fact. It was suggested that he got facts wrong, and that " as soon as he found something that could hurt Anchor, he stopped " investigating. Mr Shelton's view was that the Inspector came at it " from a negative approach ", and that he was " looking for a stick to beat you with ". 63. In my judgment, these are not indications of bias, and taken together with my reading of the interview transcripts, they do not do more than demonstrate that Mr Shelton disagreed with the Inspector as he did with the Commission. The Inspector had discovered matters which he thought were serious indications of Anchor's inappropriate attention to regulatory matters. Mr Shelton thought (as he told us several times) that there was nothing more Anchor could do. The two were never going to agree. But that does not mean that the Inspector was biased. I have seen no evidence that he was. 64. I can deal with the Inspector's alleged aggression very shortly. The fact is, as the Deputy Bailiff pointed out at paragraph 177, that Mr Shelton started aggressively by accusing the Inspector of being on a 'witch hunt'. It is neither surprising, nor a matter of criticism, that he reacted in kind. 65. As for the allegation that the Inspector was incompetent, again this can be dealt with shortly. The Inspector was a qualified barrister, whose experience had been considered and approved by the Executive. It had plenty of material to consider the reliability of the Reports and duly did so. The precise

degree of the Inspector's experience in trust matters cannot be used to allege incompetence against him. Ground 6: The Board should have asked Anchor for further submissions after receipt of legal advice 66. Anchor's complaint in relation to the legal advice is a small and technical one. 67. The timing was as follows. The hearing before the Board took place on 2 nd February 2005. It was after that hearing that Mr Powell told the Royal Court a clear decision had been made to reject Anchor's application. The Board also decided to take legal advice on whether that putative decision was likely to be upheld by the court as lawful and reasonable. Advocate Kelleher's legal advice was delivered to the Board on the th February 2005, the Board's decision was communicated to Anchor on 4 th March 2005. 68. Anchor contends that the Board should have gone back to Anchor after receipt of the legal advice, because the Board's draft reasoning was suggested by Advocate Kelleher to be ambiguous. This contention was not dealt with in the Judgment, although the complaint that the legal advice was not disclosed is dealt with at paragraphs 102-109 of the Judgment. 69. The Board had provided Anchor with all the material that the Executive had deployed in relation to the application, and the Board had taken a decision after allowing Anchor the opportunity to be heard. The Board commissioned legal advice just to make sure that its reasoning was likely to be regarded as lawful and reasonable. Only 4 days later, the decision was confirmed and Anchor was informed of it. 70. It is impossible to see how the failure to re-open the matter by producing the advice to Anchor at that stage can have been unfair. Mr Shelton suggested in argument that Anchor should have been asked to say if it had any primary evidence to rebut the secondary evidence which the advice pointed out was being relied upon. This seems to me to be a hopeless argument. Anchor had been given a fair hearing by 2 nd February 2005. Thereafter, the legal advice formed part of the Board's final decision-making process. Anchor had no right to be involved in that process, or to see the advice that the Board sought. 71. I should mention in this respect that I wholly endorse the Deputy Bailiff's treatment of the case law on the disclosure of legal advice sought by an administrative decision-maker in paragraphs 107-109 of the Judgment. As the Royal Court held, this was a case analogous to *Stoop v. Royal Borough of Kensington & Chelsea*

[1992] 1 PLR 58 (which concerned an administrative planning decision, where such advice was not disclosable), rather than to *Costain Limited v. Strathclyde Builders Limited*

[2004] SCLR 707 (which concerned a judicial adjudicator's decision, where such advice was disclosable). Ground 7: The Board's delay in providing reasons 72. Anchor's next complaint is a valid one, but is also technical and unmeritorious. Anchor requested reasons for the Board's decision on 3 rd March 2005, the day before the decision was communicated. Article 11(3) provides that the applicant may require the Commission to furnish reasons ' within 14 days '. Accordingly, on the construction accepted by the Deputy Bailiff at paragraphs 114-6 of the Judgment, the Commission's reasons should have been provided by 18 th March 2005, but were in fact not produced until 5 days later on 23 rd March 2005. 73. Anchor did not allege either here or below that any prejudice arose as a result of this delay, but characterises it as a " flagrant breach of a statutory obligation ". I take the view that the breach of this obligation cannot jeopardise the underlying decision, in the absence of any prejudice. In the result, therefore, Anchor's complaint leads

nowhere. 74. Mr Shelton raised a new point at the hearing that, if Mr Powell's evidence that the Board actually took the decision on 2 nd February 2005 was accepted, the reasons should have been given even earlier. It is clear, in my view, that the decision was not taken until 4 th March 2005, even though a provisional decision was taken on the 2 nd February 2005, subject to review in the light of the legal advice which had been sought. Ground 8: The Board and the Chairman were inexperienced, biased and behaved unfairly 75. This complaint is a general catch-all for Anchor's criticisms of the Board itself. It is suggested that the Board were inexperienced in trust company business, biased and treated Anchor unfairly. These points were raised in different ways below, and are dealt with by the Deputy Bailiff at paragraphs 117-118 and 190 of the Judgment. 76. The complaint of inexperience is said to be supported by a late affidavit from Mr Steven John Gidley, Anchor's erstwhile compliance officer, who dealt with certain matters in Mr Powell's 4 th affidavit of 1 st March 2006, concerning Advocate Clapham's experience. In essence, Mr Gidley says that he does not recollect that Advocate Clapham was engaged in any substantial matter for HSBC in the years 1992-2001 or that HSBC had a principal legal adviser in that period. Mr Powell, on the other hand, had said that Advocate Clapham was the principal legal adviser for HSBC in Jersey for 30 years. Although Mr Powell may have over-stated the period, there is no glaring inconsistency between the two pieces of evidence, since Advocate Clapham had been in practice since 1966. Even if there were an inconsistency, I cannot resolve it at this stage. 77. Mr Shelton says that none of the Board members was competent to judge the conduct of trust company business in 1999. In my view, Mr Shelton misunderstands the required functions and experience of the Board. The Board needs to be properly representative. In other words, it needs to comprise people who are capable of understanding the financial services industry from different professional and educational perspectives. It does not have to represent specifically trust company or any other types of business. 78. In short, there is clear evidence that the Board was properly appointed and comprised experienced and respected members of society. There is, therefore, no ground for Mr Shelton's allegation that the Board was inexperienced. 79. Anchor complains of general bias and unfairness. It points to allegations made by Mrs Hatton, which are said to be inaccurate or unfounded. In respect of each of these points, as Mr Shelton accepts, Anchor was given the opportunity to correct the points made by the Executive in general or Mrs Hatton in particular. 80. The real point, however, is that Mr Shelton's allegation of bias and unfairness stem from a misunderstanding of the Board's role and raison d'être. Mr Shelton did not understand that it was the Board's role to make sure that compliance procedures were in place to track down money laundering and dealings in drug money. He objected to the suggestion that his trust company should be involved in such activities. As far as he was concerned, he had a business to run and could not spend all his time investigating his own clients. 81. Mr Shelton explained his approach in a revealing oral submission in relation to the Board's alleged unreasonableness. Mr Shelton was talking about his dealings with Mr Adderson's accounts and accounts associated with Mr Adderson. There were, of course, extant charges of drug trafficking against Mr Adderson. Mr Shelton submitted that:- (i) These

matters were "all in the hands of the police". (ii) "If we are running a business, we are not in the business of being a public or private detective". (iii) "So long as we are not involved in any money laundering ourselves, I don't understand the Board's point". 82. As a result of this approach, Mr Shelton was never going to see eye to eye with the Executive. For their part, the Executive pointed out to Mr Shelton where Anchor had fallen short of regulatory requirements in a number of areas. For his part, Mr Shelton simply did not see the need to make his own investigations into his clients' affairs, once the police had been informed of any wrongdoing. The two attitudes were sadly irreconcilable. 83. The consequence of this divide was that Mr Shelton viewed everything that the Inspector and the Executive suggested or requested as an unreasonable imposition. And he told them so. This, in my judgment, is the origin of the issues thrown up by this litigation. 84. Against this background, it is our responsibility to decide whether the Board was biased or behaving unfairly. I have reviewed the papers and all the allegations made by Mr Shelton with care. And I can say that, in my judgment, what Mr Shelton interpreted as bias and unfairness by the Commission, was simply its attempts to get Anchor to see what proper regulation required it to do. Unfortunately, it was never to succeed, because even up to the hearing on 15 th March 2006, it was clear to me that Mr Shelton had not understood the role of a registered financial services provider under the 1998 Law. 85. In the result, it is clear to me that Anchor's general contention that the Board was unfair and biased cannot succeed. The Commission was simply doing its job, and the more strenuously it tried to persuade Mr Shelton that Anchor had to investigate its clients' activities to make sure that no illegal dealings were taking place, the more he reacted against what he was being told, in the mistaken belief that this was the job of the police or of others, and not of the trust company he controlled. 86. Mr Shelton relied also in this connection on the general delay of the proceedings. As I have already said, I do not believe that the delay in reaching a final decision on Anchor's application, though regrettable, can vitiate the decision itself. Ground 9: The Deputy Bailiff was affected by apparent bias 87. Mr Shelton opened his oral submissions to the Court with the new contention that the Deputy Bailiff was affected by apparent (but not actual) bias. This was based on the fact that the Deputy Bailiff had been awarded a 15% pay rise by a Pay Review Board sitting in 2002, of which the Chairman and Deputy Chairman were 2 of the 3 members. 88. Paragraphs 99-103 of Lord Hope's speech in *Porter v Magill*

[2002] 2 AC 357 makes clear that the test of apparent bias in England is now: "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased ". This test must be applied once the Court has ascertained all the circumstances which have a bearing on the suggestion that the Judge was biased. 89. Mr Shelton accepted this test in oral argument, and submitted that it was obvious to the man in the street that the Deputy Bailiff would be perceived as biased, and that it was not relevant to consider the judge's own understanding of his own conduct. He said that the public would find it " distasteful " to think that the Deputy Bailiff could decide a matter involving the Commission comprising two members of the Pay

Review Board. 90. In my judgment, the relevant facts and circumstances that must be taken into account as the basis for the application of Lord Hope's test are as follows:- (i) The Chairman and Deputy Chairman of the Commission were 2 of 3 members of the Pay Review Board that recommended that the Deputy Bailiff should have a 15% salary increase in June 2002. (ii) The pay review affected all Crown Officers and States Legal Appointees, in addition to the Deputy Bailiff. (iii) The pay review was based on objective comparators, including the salaries of High Court Judges in England and Wales. (iv) Both the Chairman and Deputy Chairman had made it clear in 2002 that they would not sit on another pay review board. 91. These circumstances make it clear that, looking at the matter objectively, no fair-minded and informed observer, having considered these facts, could conclude that there was a real possibility that the Deputy Bailiff was biased in favour of the Commission in these proceedings. Matters evidencing the Board's alleged unreasonableness Ground 10: The allegedly perverse finding that Shelton was aware of Marshall's cash dealings 92. Anchor's first contention was that the Royal Court made a perverse finding that Mr Shelton was aware of Mr Marshall's inappropriate dealings with cash in relation to Mullen Investments Limited ("Mullen"). This is dealt with in the Judgment at paragraphs 135-137, and 187(i). 93. In brief, the facts were that Mr Marshall (when he was at Anchor) received cash from Mr Adderson. Mr Marshall then distributed that cash to other clients, and arranged for them to make bank transfers to Mullen. The Board found that Mr Shelton, as a director of Mullen, must have been aware of Mr Marshall's cash dealings. It relied on the evidence given by Mr Callender and Ms Breese to the Inspector, and rejected the contrary evidence of Messrs Marshall and Shelton. 94. Mr Shelton denies that he knew about these transactions, but not that he was a director of Mullen. He points to the fact that the Commission accepts that the transactions were disguised, and then asks, rhetorically, why they should be disguised from others but not from him? This simply begs the question. The Board had to decide between conflicting evidence, and came to a rational and reasonable conclusion that Mr Shelton must have known what was going on in a company of which he was a director. There are no grounds upon which that decision can seriously be challenged. Ground 11: The Board's adverse findings in relation to Browham Trading 95. Anchor contests the Board's two adverse findings, recorded at the end of paragraphs 143 and in paragraph 187(vii) of the Judgment, that:- (i) Anchor did not have any reasonable knowledge of the activities of Browham Trading Limited ("Browham"); and (ii) Mr Shelton authorised the transfer of funds to Moscow despite strong objections from his colleagues, Ms Murray and Mr Gidley. 96. In oral submission, Mr Shelton said that he overrode the objections of Mr Callender (not Ms Murray and Mr Gidley) because he was his boss, and that Mr Callender had ultimately authorised the payment in any event. 97. Again, I do not see how the Board's ruling on these matters can seriously be challenged, since the essential facts are not seriously disputed. Ground 12: The Board's adverse finding in relation to Air Sofia Europe Limited 98. Anchor says that the Board failed to take Mr Shelton's evidence into account in finding that Anchor had not taken sufficient steps to know its client, Air Sofia Europe Limited ("Air Sofia"). The Royal Court dealt with this at paragraphs 146-7 of the Judgment. 99. Mr

Shelton elaborated the point orally by saying that Anchor had not commenced a business relationship with Air Sofia at the time of the complaint, and that it did later obtain sufficient "know your client" information. He pointed to this allegation as a demonstration of the Commission's excessive willingness to find something wrong with Anchor's conduct. 100. In my judgment, this may be a small point, but it cannot be said that the Board was behaving unreasonably in rejecting Mr Shelton's evidence on this issue. I am sure, however, that this allegation would not have led, on its own, to the conclusion the Board reached. Ground 13: The Board's allegedly perverse rejection of Mr Gidley's evidence on the 15 STRs 101. Anchor submits that the Court made a perverse finding in rejecting Mr Gidley's evidence that he had checked the 15 Suspicious Transaction Reports ("STRs") made in October 2003 to the then compliance officer and Money Laundering Reporting Officer, Ms Bevis. The Deputy Bailiff found in paragraphs 151-2 and 187(iv) of the Judgment that the Board had been perfectly entitled to find that these STRs were dealt with in a very dismissive manner by Anchor, and that at least 4 of them called for a proper review. 102. Mr Shelton's submission is that these 15 STRs were produced when Ms Bevis left, and that she had (one assumes vindictively) persuaded other people to file them as her parting shot. He submitted that the Westlake Trust STC was one of 17 STRs, and that Mr Gidley, the new compliance officer had thought that this was the only one worthy of attention. 103. In addition, Mr Shelton complained that the Inspector was also guilty of some default in himself failing to report these STRs to the police. He said that the Board's decision ignored the competence and expertise of Mr Gidley. 104. This issue raises squarely the difference of view between the Commission and Mr Shelton, to which I have already made reference. Mr Shelton could not really see why it was Anchor's job to investigate its own clients, and he, therefore, resented the Inspector's view that all STRs required careful review. The fact of the matter is that the Board was fully entitled to prefer the Inspector's view to that of Mr Shelton and Mr Gidley, and no ground has seriously been raised as to why it should not have done so. Ground 14: Board's perverse finding in relation to Mr Dimsey 105. The allegations concerning Mr Dimsey once again bring to the fore the conflict of approach between Mr Shelton and the Board. Anchor complains that perverse findings were made in relation to Mr Dimsey, because Anchor did disclose its relationship with Mr Dimsey, and he had anyway already paid his debt to Society, and posed no threat by his association with Anchor. These matters were dealt with by the Royal Court at paragraphs 153-159 and 187(vi) of the Judgment. 106. Mr Shelton accepts in oral submissions that it was unfortunate that Mr Dimsey had been allowed to sign letters on Anchor's notepaper and to work from Anchor's offices, when he was not an employee of Anchor. But Mr Shelton persisted in failing to understand why an association with a man like Mr Dimsey was a problem. 107. In short, Mr Dimsey was convicted of conspiracy to defraud in 1980, and of conspiracy to cheat the Inland Revenue in 1997. He served a term of imprisonment. Between the sale of his business, DFM Consultants Limited, to Anchor in 1998 and 2003, Mr Dimsey had some association with Anchor as a consultant, and access to Anchor's files. Even by 2003, the transfer of DFM's clients to Anchor had not been completed. 108. Mr Shelton accepted that there was *prima facie* a problem with

associating with Mr Dimsey, but said that he was not an associate in any relevant sense known to the law, but did not seem to understand why that should be a ground for refusal of registration. Mr Shelton went on to acknowledge that it might well be that they should have disclosed the association with the benefit of hindsight. 109. As set out above, Article 9(3)(d)(ii) expressly allows the Commission to refuse registration on the grounds that any person associated with the applicant for the purposes of the applicant's business has been convicted of an offence involving dishonesty. The reason for this provision is obviously that dishonest people may have a less satisfactory attitude to money laundering. 110. In my judgment, notwithstanding that Mr Dimsey had left by the time of the Board's decision, it was entitled to take account of Anchor's association with Mr Dimsey, and of the failure to mention his position on the application form, in determining the application. It indicated clearly that Mr Shelton did not understand some fairly basic regulatory requirements. It was not an answer to say that Mr Dimsey had paid his debt to society. The legislation is aimed at preventing persons with convictions for dishonesty from being involved in trust company business, obviously in the absence of very exceptional circumstances. 111. Mr Shelton's willingness to excuse these events was one of the most worrying aspects of the case. He went so far in oral submission as to say that there was no problem because Mr Dimsey's convictions did not involve stealing clients' funds. Suffice it to say that the Board was amply justified in reaching the conclusions it did. Ground 15: Mr Shelton's explanation for his failure to mention his *désastre* 112. Anchor submits that the Royal Court should have been satisfied with Mr Shelton's explanation for his failure to disclose his *désastre* on Anchor's application form. The explanation was that the recall of the *désastre* on the same day made it as if it had never happened, but this was rejected by the Royal Court in paragraphs 163-4 of the Judgment. 113. Mr Shelton submitted orally that the Board had behaved unreasonably, and he rejected my suggestion that it had been, at worst, somewhat harsh. In my judgment, the Board was justified in reaching the conclusion it did, since the question answered clearly demanded a positive response. The question was "have you at any time during the last 10 years had your property declared en *désastre*?" The only honest answer that Mr Shelton could have given was that he had indeed had his property declared en *désastre* in 1995, but that the order had been recalled the same day. 114. Mr Shelton tried to say that the point had been dropped in 2002, and should not, therefore, have reappeared in 2005 in the Board's reasons. I am afraid that I cannot see any reason why the Board was not entitled to rely on all matters that properly appeared to them to fall within Article 9(iii), as this undoubtedly did. Ground 16: Shelton did not behave in a sarcastic or unco-operative manner 115. Anchor submits that the Royal Court should not have accepted that Mr Shelton had behaved in an uncooperative, sarcastic and offensive manner with the Inspector. The Deputy Bailiff found that the Board had been justified in finding that Mr Shelton was uncooperative, and that the Inspector's conduct did not justify that attitude, in paragraphs 172-6 of the Judgment. 116. This ground can only really be determined by reading the transcript of the interview in question which took place on 19 th May 2004. I have no hesitation in saying that the transcript shows that Mr Shelton displayed an

impatient and hostile approach to his interviewer. As Mr Shelton made clear in oral submission, he resented what he saw as the youth and inexperience of the Inspector. In my view, however, that did not justify Mr Shelton's attitude which entirely justified the Court's finding that he was uncooperative, offensive and sarcastic. Ground 17: Mr Shelton did not fail to co-operate with the police 117. Anchor submits that the finding that Mr Shelton had failed to cooperate with the police in relation to Mr Adderson, was perverse, because he had tried on several occasions to make an appointment with Inspector Minty without success. The Royal Court found that the e-mails relied on below had shown a lack of co-operation in paragraph 176 of the Judgment. 118. I have read the series of e-mails passing between Mr Shelton and Inspector Minty in 2002, and am satisfied that the Board had reasonable grounds for concluding that Mr Shelton's approach was uncooperative. Indeed, he appears to have treated the police with the same disregard as he treated the Inspector, Mr Platt. I am drawn to the conclusion that Mr Shelton's approach to the police was motivated by the same misunderstanding of the importance of the regulatory requirements of the 1998 Law as the other matters that I have referred to above. 119. Mr Shelton told the Court that he had badgered the police to come and see him, but they had declined. Reading the e-mails concerned, I can understand why it was not considered a good use of police time for them to expose themselves to Mr Shelton's threatened vituperation. Ground 18 : The Board's decision was generally unreasonable 120. Finally, Anchor relies on the supposed general unreasonableness of the Board's decision. The Royal Court summarised the gravamen of the Board's findings in paragraph 187 of the Judgment, and found in paragraph 190 that the findings of fact recorded in the Board's letter of reasons (with minor exceptions) were reasonable, and that the decision to refuse Anchor's application for registration was also reasonable. It was also recorded in paragraph 190 that the Jurats had concluded that, so far from saying that the decision was unreasonable, the Board's decision was one they themselves would have reached. 121. It is worth re-stating the 10 main matters upon which the Board and the Royal Court relied:- (i) Anchor's unacceptable conduct in relation to the administration of the entities with which Mr Adderson was associated, and Mr Shelton's knowledge of Mr Marshall's irregular cash dealings. (ii) Mr Shelton's inappropriate approach to Mr Adderson having been charged with drug trafficking, namely that he was unable to see that the monies Anchor was holding could have been the proceeds of drug trafficking. (iii) Anchor showed no concern over continuing to act for associated clients once Adderson was arrested. (iv) Mr Shelton had merely looked briefly at Mr Marshall's clients after his activities were exposed and he left Anchor. Mr Shelton told us that he had done so because " he had a business to run ". (v) Anchor's failure to deal properly with the 15 STRs filed on Ms Bevis's departure. (vi) Anchor's association with Mr Dimsey, and the failure to disclose it on the application form. (vii) Mr Shelton's dominant control of Anchor, including his insistence on the transfer of Browham's funds to Moscow, and his refusal to listen to protestations from Ms Murray and Mr Callendar about Mr Dimsey's presence in Anchor's office. (viii) The Board was entitled to think that Anchor's attitude remained the same despite the rectification of some of the problems that had previously arisen. (ix) Anchor's attitude to due diligence

and the prevention of money laundering had not changed sufficiently to allow the grant of registration. (x) Mr Shelton's uncooperative attitude to the Commission and the police 122. Mr Shelton reiterated the submissions recorded in earlier parts of this judgment by way of answer to these points, and summarised his submission by saying that " regardless of attitude, my conduct was in accordance with the rules ". He submitted that he agreed with the Royal Court's view that it was appropriate to stand back and ask whether Anchor had been treated fairly and whether the Board's decision had been unreasonable. He invited us to do just that. 123. Mr Shelton's submission was that Anchor had maintained its liquidity, had not been guilty of mis-selling, had not been in serious breach of the Codes of Practice, so that there was no apparent or real risk to the reputation of Jersey. He said that Anchor's financial integrity has never been questioned, so that refusal of registration could not be a proportionate punishment for the occasional breach of a Code of Practice. 124. In my judgment, for the reasons by the Board as approved by the Royal Court, and as summarised in this judgment, the Board's decision was entirely reasonable. I am able also to say, in common with the Jurats in the Royal Court, that I would have reached the same decision as the Board if I had been in its position. Conclusion on the main grounds of appeal 125. For the reasons I have elaborated above, the answers to Anchor's four main grounds of appeal are as follows:- (i) The Royal Court, in fact, correctly followed the procedural approach set out in its previous judgment in *Interface Management Limited v. Jersey Financial Services Commission*

[2003] JLR 254. (ii) There were no material relevant matters that the Royal Court failed to take into account, and no material irrelevant matters that it took into account in reaching its decision. (iii) Having regard to the all the circumstances of the case, the Royal Court's decision was one, which a reasonable tribunal properly directing itself, could reach. (iv) The Deputy Bailiff was not affected by apparent or any bias. 126. In these circumstances, I would dismiss Anchor's appeal. *Authorities Financial Services (Jersey) Law 1998. Interface Management Limited v Jersey Financial Services Commission*

[2003] JLR 524 . *Porter v Magill*

[2002] 2 AC 357 p 494. *R v Home Secretary ex parte Doody*

[1994] AC 531 p 560. *Shane M Milford v. Seaward Marine Limited* 1 st December 2000. *Stoop v Royal Borough of Kensington & Chelsea* [1992] 1 PLR 58. *Costain Limited v. Strathclyde Builders Limited*

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