

JERSEY / JUDGMENT

Interface Management Limited, Interface Trustees, Interface Secretaries Limited and Rosenthal -v- JFSC [2003] JRC 172 (06 October 2003)

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judgment

the deputy bailiff: 1. This is an appeal by Interface Management Limited ("IML") and related companies and individuals against a decision of the Jersey Financial Services Commission ("the Commission") dated 21st March 2003 refusing to register the appellants to carry on trust company business pursuant to Article 7 of the Financial Services (Jersey) Law 1998 ("the 1998 Law"). For convenience we will refer simply to IML but such expression is to be taken as covering all the appellants. THE STATUTORY FRAMEWORK 2. Under the provisions of the 1998 Law (as amended by the Financial Services (Extension)(Jersey) Law 2000) it is now unlawful for a Jersey incorporated company to carry on trust business anywhere in the world or for any person to carry on trust company business in or from within the island unless registered under the 1998 Law. 3. IML is a trust company which has been carrying on business in the island. In accordance with the requirements of the 1998 Law it submitted an application for registration on 26th January 2001. Under the transitional provisions of the Law, it was allowed to carry on such business pending a decision on its application. 4. Under Article 5(1) of the Financial Services Commission (Jersey) Law 1998 ("the FSC Law") the Commission is responsible, inter alia, for the supervision and development of financial services provided in or from within the island and for such functions in relation to financial services as are required by or under any enactment. The 1998 Law confers the power of registration of trust companies on the Commission. 5. Article 7 of the FSC Law provides as follows:- 1. "Article 7 Guiding principles "In exercising any of its functions the Commission may take into account any matter which it considers appropriate, but shall in particular have regard to - (a) the reduction of the risk to the public of financial loss due to dishonesty, incompetence, or malpractice by or the financial unsoundness of persons carrying on the business of financial services in or from within the island; (b) the protection and enhancement of the reputation and integrity of the island in commercial and financial matters; and (c) the best economic interests of the Island." It follows that, in considering applications for registration as a trust company, the Commission must have regard, inter alia, to the risk of financial loss due to incompetence or the financial unsoundness of persons carrying on such

business and the protection and enhancement of the reputation and integrity of the island. 6.

Article 8(3) of the 1998 Law sets out the grounds upon which the Committee may refuse registration of a trust company:- "(3) The Commission may refuse to register a person on one or more of the following grounds, namely that - (a) having regard to the information before the Commission as to the - (i) integrity, competence, financial standing, structure and organisation of the applicant; (ii) persons employed by or associated with the applicant for the purposes of his 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 Committee information which was untrue or misleading in any material particular; (c) (d) (e) 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 17." 7. The 1998 Law also provides a right of appeal against the decision of the Commission at Article 10(3):- "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 him under paragraph

(5) of Article 8 on the ground that the decision of the Commission was unreasonable having regard to all the circumstances of the case." DUTY TO ACT FAIRLY 8. The Commission will often face a very difficult decision in deciding whether to register a trust company, particularly where that company has been carrying on business prior to the introduction of the requirement for registration. On the one hand the Commission must act to protect the interests of actual or potential clients and the reputation and integrity of the Island; on the other hand, a decision to refuse registration is likely to have very serious consequences for an applicant who may have been carrying on and building up a business over many years. 9. In order to carry out its function under the 1998 Law, the Commission has in effect 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. 10. Is the Commission under a duty to act fairly? In *R v Home Secretary Ex P. Doody*

(1994) 1 AC 531 at 560 Lord Mustill said this - "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive

judgment.

They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.

- (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.
- (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.
- (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.
- (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer". 11. We are in no doubt that the Commission is under a duty to act fairly towards an applicant for registration under the 1998 Law. Any decision reached in circumstances where the Commission has acted unfairly is liable to be quashed. In particular, the applicant is entitled to know the general nature of the case against him (i.e. the matters relied upon by the Executive to suggest that he should be refused registration) and to have an adequate opportunity of responding to those matters. It is the fairness of the procedures as a whole which will fall to be considered but clearly what is required by way of fairness from the Executive (in its investigating and recommending role) is not exactly the same as that required by the Board (in its quasi-judicial role). Nevertheless, both must act fairly in their respective roles and the Commission as a whole must act fairly throughout the overall process. 12. To meet the requirements of fairness the Commission has developed a process for considering applications for registration of trust companies. As taken from the present case, this envisages the Executive, after carrying out its inquiries, writing a form of warning letter indicating that it is minded to recommend refusal of registration. That letter to the applicant sets out the Executive's concerns and invites the applicant to respond to and comment on those concerns prior to the Executive deciding whether it will in fact recommend refusal. Thus, the applicant has an opportunity at this stage of persuading the Executive not to proceed as it was originally minded to. Assuming that, having considered the representations of the applicant, the Executive remains of the view that it should recommend refusal, the Executive then prepares a draft of the material which it will place before the Board. That draft is supplied to the applicant, who is invited to comment on it. The Executive's recommendation and the response of the

applicant are then placed before the Board. At the hearing itself, both the Executive and the applicant are given the opportunity of making oral submissions to the Board. Following these submissions the Executive (including the Director General) and the applicant withdraw and the Board then reaches its decision. In the present case, there was an additional stage because the Board deferred its decision in order to seek further information. The Board wrote to the applicant setting out the Board's concerns and inviting a response. After the applicant's response, the Executive prepared a further memorandum containing its recommendation which was again sent to the applicant and to which the applicant was entitled to respond. The Executive and the applicant were able to address the Board orally at the adjourned hearing. They then withdrew and the Board reached its decision. 13. Taken in the abstract, the procedure established is one which complies with the legal requirements for fairness. It informs the applicant at all material stages of the case he has to meet and gives him an opportunity of convincing the relevant part of the Commission, (i.e. the Executive, in connection with its recommendation and the Board in connection with its decision) that it should reach a decision favourable to the applicant. However, whether the requirements of fairness are actually met in a particular case will of course depend upon how the system is put into operation. IML submits that the procedure did not operate fairly on this occasion. THE FACTUAL

BACKGROUND

14. Because IML has raised points in relation to the procedure adopted by the Commission, it is necessary to set out the history of the application in a little detail. The Court has been provided with a very full history and has had the opportunity of reading the voluminous bundles of documents submitted by the parties. However it is only necessary for present purposes to give a summary. 15. Until March 2000 IML was closely associated with the Beresford Group ("Beresford") being owned as to 50% by that group and 50% by Julie De Beurges Rosenthal ("Ms Rosenthal"). In March 2000 IML and Beresford decided to go their own respective ways. Ms Rosenthal purchased the balance of shares in IML and the present position is that she owns 24,995 out of 25,000 issued shares; the remaining five are held by Mr John King who is no longer involved in the day to day management of the company. The clients were divided between Beresford and IML. 16. On 17th July 2002, following detailed consideration of the application and a number of meetings between IML and officers of the Commission, Mr. Richard Pratt, the Director General of the Commission, sent a letter to IML (the 'Minded to Refuse Letter') informing it that he was minded to recommend to the Board that it should refuse to register IML as a trust company business. 17. The Director General said in this letter that his concerns related to the issues of integrity, competence and structure and were particularly illustrated, firstly in the non compliance with the customer money rules contained in the Financial Services (Trust Company Business) (Assets - Customer Money)) (Jersey) Order 2000 ("the Customer Assets Order"), secondly in the carrying on of unauthorised financial service business, and thirdly in the lack of 'span of control' as defined in the Codes of Practice. His detailed reasons were set out in a ten-page

memorandum which accompanied the letter together with supplementary documents. 18. We would summarise broadly the areas of concern set out in the *Minded to Refuse Letter* as follows:- (i) In June/July 2000 an aggregate sum of £152,550 had been withdrawn from the account of a company called Fruit Impex Limited which was owned by the Hare Trust and administered by IML at the time. This sum was paid to a company called Intin Limited, a company owned by Ms Rosenthal, and was apparently used to purchase a fixed interest security. The Director General expressed concern that the officers of IML had given varying explanations over the previous months as to exactly what had occurred. The Commission's interest in this transaction had been provoked by a letter from Beresford on 29th November 2001 alleging forgery in connection with this payment (to which further reference is made later). The Director General was concerned that there had been breaches of Articles 2(1) and 6(2) of the Customer Assets Order in that IML did not appear to have adequate financial records so as to establish what had happened and the monies appear to have been paid out for a purpose other than one permitted under Article 6(2). (ii) The information that Intin was owned by Ms Rosenthal appeared to suggest that she had given incorrect information on the application form when she did not mention it in connection with the question of whether she owned more than 50% of the shares in any company. Furthermore there was concern that another company Interface Management International (UK) Limited, which did not form part of the application for registration, had in fact been carrying out unauthorised trust business. (iii) The 'span of control' in respect of IML was said to be inadequate. The Codes of Practice required there to be three suitably qualified persons within the business. The application listed Ms Rosenthal, Mr Stephen Ross, Ms Karine Lenoir and Mr Ian Kenny as directors. Mr Kenny was the husband of Ms Rosenthal, was not employed full time in the business and was not suitably qualified. The span of control was therefore indicated in the application form as comprising the remaining three directors. However Ms Lenoir was not sufficiently qualified to count. The span of control was therefore two, namely Ms Rosenthal and Mr Ross. Furthermore, at the date of the letter, Mr Ross had given notice of his intention to resign with effect from 30th September; this would bring the span of control down to one person. (iv) The integrity of Ms Rosenthal had been called into question because of the allegation by Beresford that instructions for the payment of the sum of £152,550 from Fruit Impex Limited to Intin Limited (apparently made on the signature of Beresford employees) had been forged. (v) The Codes of Practice for trust company businesses require a trust company to maintain adequate internal controls and keep adequate and orderly accounting records; to have a surplus of Adjusted Net Liquid Assets ("ANLA") over its Expenditure Requirement; and to notify the Commission if the firm's ANLA falls below 110% of its Expenditure Requirement. Ms Rosenthal had admitted that the ANLA calculation had not been undertaken since the requirement had come into effect and the Commission was concerned that the directors would be unable to produce an accurate calculation based on the inadequate financial information available to them. 19. The Director General went on to ask IML to respond within one month as to why he should not recommend to the Board that it refuse a licence to IML. He also explained how the process for considering the application would be taken forward. 20. On the same date the

Commission, acting through its Executive, gave directions under Article 20 of the 1998 Law to the effect that no payments or transactions in connection with client assets should be undertaken without counter-signature by Mr Peter Beamish or Mr Ronald Taylor, partners of Deloitte & Touche appointed for this purpose by the Commission. 21. On 16th August 2002 IML in a letter signed by Mr Ian Kenny, responded to the concerns in the *Minded to Refuse Letter*. There was also a meeting on 5th September. The Executive were of the view that the response did not deal sufficiently with all the matters of concern and Mrs. Helen Hatton, Deputy Director General, wrote to Mr Kenny on 10th September setting out the Commission's continuing concerns. She asked for a response by 20th September which would set out IML's plans for achieving compliance with the span of control and solvency requirements as well as IML's answers to the specific queries raised in the *Minded to Refuse Letter* which she felt had not been adequately responded to. A further meeting was held on 25th September at which time IML hand delivered the requested response by means of a letter from Ms Rosenthal. The Director General responded on 3rd October to the effect that, in his view, IML had not adequately addressed his original concerns. He informed IML that he proposed to prepare draft papers for the meeting of the Board scheduled for 4th December 2002 and that he would send these shortly to IML. IML would then have one month to make further representations which could be placed before the Board. The draft memorandum was sent to IML, which commented by letters dated 23rd and 25th November. 22. The letter of 23rd November contained a detailed rebuttal of the allegation of forgery. It is not necessary to summarize the letter other than to say that it appeared on the face of it to offer a credible defence against the forgery allegation and to cast doubt upon the grounds relied upon by the Beresford employees for their belief that their signatures had been forged. 23. The letter of 25th November stated that IML proposed to deal with the span of control deficiency by employing two suitably qualified persons as directors. The first was a Mr. A and the second was a person who was not named at that stage but was described as currently being a director of a licensed trust company. The letter also stated that IML proposed to address the financial status issue by securing an injection of £200,000 (in exchange for 16% of the shares of the company) from a Swiss trust company which was not named at that stage. 24. On 28th November the Director General sent the memorandum to the Board. It was accompanied by all of the correspondence and the documents which had been annexed to the correspondence from both sides. The Executive recommended that registration of IML be refused and added that the responses from IML just received did not alter their recommendation. The Director General summarised his reasons as follows:- (i) Integrity

- he referred to the alleged forgery in connection with the Hare Trust matter. (ii) Financial status - he referred to his concerns over solvency, and the fact that the ANLA calculations had not been produced as required. He pointed out that it was for this reason that the Executive had appointed Mr Beamish and Mr Taylor. (iii) Competence - only one of the directors (Mr Ross) held a full qualification and he had subsequently resigned. (iv) Structure - the span of control was inadequate previously and this had been compounded by the

departure of Mr Ross although IML was seeking to strengthen the span by recruiting additional shareholders/directors. 25. At the hearing of the application on 4th December 2002, the Board received the written submissions and also heard oral submissions from both the Executive and IML. The Board decided not to accede to the recommendation of the Executive but to adjourn the matter for further information. On 9th January 2003 the Chairman of the Board wrote to IML setting out the Board's concerns. We think it convenient to set out this letter in full:- "..... 1. I write further to the hearing held before the Board of Commissioners (the "Board") of the Jersey Financial Services Commission (the "JFSC") on 3 December, 2002 (sic) in relation to Interface. As you are aware, the hearing arose from a reference by the Executive of the JFSC to the Board recommending that Interface should be refused registration as a trust company under the Financial Services (Jersey) Law 1998 (the "Law"). The Board received written and oral submissions from both the Executive and you in relation to this matter. 2. The Board has decided to adjourn its final decision in this matter in order to allow for the provision of further information in relation to a number of aspects of Interface's application for registration as aforesaid. 3. The Board is particularly concerned about three aspects of Interface's current operation. 4. Firstly, Interface is in breach of the so-called 'span of control' provisions as set out in Sections 3.2 and 3.3 of the Trust Company Business Codes of Practice (the "Trust Code") made under the Law. 5. Interface has mentioned in correspondence and via your oral submissions to the Board, that there are two individuals interested in joining Interface who possess the appropriate qualifications and/or experience to satisfy the span of control requirements (see your letter dated 25 November, 2002 to Pratt). One of these individuals - a Mr A (full name referred to in letter) - has been identified by name. The other has not and your explanation for this is that the person in question did not wish to jeopardise his current employment by revealing his name to the JFSC until such time as the position in relation to Interface's licence was clear. Save as aforesaid, the Board knows nothing about these individuals, their qualifications or the likelihood of their joining Interface. You should also be aware that under the Law potential principal persons are required to notify the JFSC in writing and obtain consent prior to becoming a principal person; and a registered person is required to give written notice to the JFSC before the end of one month beginning with day on which he or she becomes aware that any person has become, or is about to become a principal person or has increased his or her shareholding as the case may be, or is about to do so. 6. In the view of the Board, the current breach by Interface of the span of control requirements is a very serious matter indeed and must be addressed before Interface can be granted a licence. In this context I would point out that Messrs Beamish and Taylor, who were appointed by directions under Article 20 of the Law for the sole purpose of acting as co-signatory on company and client matters, do not form a part of the span of control for the business. 7. Secondly, there are aspects of Interface's financial affairs which are of concern to the Board. These are as follows:- a. In relation to its dealing with the Hare Trust, Fruit Impex Limited and Intin Limited the failure of Interface to keep adequate records of customer money contrary to Art 2 (1) of the Financial Services (Trust Company Business (Assets-Customer Money)) (Jersey) Order 2002 (sic) and to act in accordance with Art 6(2) in regard to customer

money. In this regard the Board has taken into account your oral submissions as to the difficulties you have encountered with Beresford Trustees Ltd, particularly after the Royal Court ruled that the latter remained Trustee of the Hare Trust, in obtaining information and/or documents, but any difficulties experienced with Beresford do not in the view of the Board justify the failures in record keeping...

b. The Executive's view that when questioned by JFSC officials on 15 July 2002 neither you nor Ms Lenoir were able to answer questions in respect of financial matters and that Interface's financial information appeared inadequate and unreliable.

c. The Executive's view that Interface is close to insolvency which, together with the failure to produce quarterly financial resource calculations, led the Executive to issue directions on 17 July 2002 amongst other things appointing Peter Beamish and Robert Taylor, partners in Deloitte & Touche, as signatories to all bank accounts of Interface and its clients.

d. Interface's admission in a letter dated 16 August 2002 to Mr Pratt that its financial position had not been strong in the last three quarters.

e. The past failure of Interface to comply with the Financial Resources Requirements as set out in Section 5 of the Codes of Practice issued in respect of the Law.

f. The payment of Interface's expenses personally by you and your husband (File note dated 6 September 2002 of meeting at Commission on 5 September).

g. The past failure of Interface to satisfy the Second Schedule of the Trust Code as to calculation of the Adjusted Net Liquid Assets and Expenditure Requirements.

h. Interface's admission in relation to its financial position contained in Section F of the undated note entitled "Written Submissions of Interface management Limited" which you handed to the Board on 3 December, 2002, particularly the fact that its Adjusted Net Liquid Assets ("ANLA") are below 110% of expenditure requirements (see section 5.3.2. of the Trust Code).

8. Thirdly, Interface has mentioned in correspondence and via your oral submissions to the Board, that a Swiss trust company has indicated an intention to purchase a 16% shareholding in Interface which would result in a capital injection into Interface of £200,000 and a "substantial amount" of new business for Interface (see your letter dated 25 November, 2002). During your oral submission, you identified this Swiss company as Tresag and provided the Board with a copy of a marketing brochure issued by the company. The Board will need to satisfy itself that the sum mentioned will be sufficient to enable Interface to meet the Financial Resource Requirements laid down in the Codes, and Interface will need to prepare an ANLA calculation to show the financial position of the Company as it would be if the £200,000 is received.

9. In the view of the Board, the concerns about the financial standing of Interface are serious and must be addressed satisfactorily before Interface can be granted a licence.

10. the Board has decided to suspend a final decision on this matter pending the following:

a. Receipt from Interface of detailed information of the two individuals who have expressed an interest in joining Interface - in accordance with the obligations under Articles 12 of the Law and following the published application processes - including (1) their identity; (2) a full curriculum vitae, sufficient to indicate that these individuals would satisfy the span of control requirement; (3) the earliest date when they may be able to join Interface as full time employees; (4) confirmation that they will join Interface at such date if offered employment; (5) the permission of the persons concerned for police checks to be carried out; (6) confirmation from the persons concerned that they

have seen this letter from the Board. b. Receipt from Interface of a request for permission for Tresag to become a principal person of Interface in accordance with the Law plus detailed information about Tresag including (1) its full name and its place of incorporation; (2) the nature of its business; (3) a clear indication from Tresag as to its financial standing (including its latest financial report and accounts); (4) the name and address of its regulatory authority; (5) the name and address of its auditors; (6) properly completed long form personal questionnaires in respect of all principal persons of Tresag ; (7) details of its ownership structure; (8) a clear indication as to the terms of the proposed agreement between Interface and Tresag and of Tresag's intention to commit to this agreement; c. Receipt of written confirmation from the prospective principal persons that they have seen this letter from the Board. d. Receipt of further information from the Executive on the financial standing of Interface. The Board shall write to the Executive seeking this further information and suggesting that Deloitte & Touche , or other qualified parties, provide such information. 11. The Board takes the view that the burden is on Interface to show that it can satisfy the requirements for registration as a trust company under the Law. The Board therefore invites Interface to provide the information requested with a view to satisfying those requirements. Interface should provide the information sought within a month of the date of t his letter. 12. For the avoidance of doubt, the Board expresses no final view and gives no assurances as to the decision it may reach in relation to this matter which will be based on all the information received by way of the written and oral submissions from both the Executive and yourself that are already before the Board together with any further information received including the response to this letter. When the Board considers the further information obtained an opportunity will be presented for you to make further written or oral submissions to the Board should you wish to do so." 26. On 6th February 2003 Ms Rosenthal produced a detailed response on behalf of IML to the points raised by the Chairman. In essence, so far as span of control was concerned, IML said that it would be recruiting two additional directors. Letters of confirmation from these two individuals were enclosed. The first was Mr A to whom reference had been made earlier. The second was Mrs B who was currently employed by another trust company but was expected to join IML and bring her client base with her. As to the financial position, Mrs B would receive up to a 30% shareholding in exchange for the substantial business which she would be bringing with her. The financial position of IML would of course be improved by the fees earned from such additional business. In addition Tresag Treuhand AG (" Tresag ") would subscribe for new shares totalling some 16%-20% of the share capital thereby providing £200,000 for IML. She also responded to the other matters raised by the Chairman. The detailed long form questionnaires requested by the Chairman were supplied. She also enclosed ANLA calculations. 27. On 27th February 2003 the Deputy Director General sent a memorandum ("the second memorandum") to the Board with a copy to IML. The second memorandum summarized the matters referred to in the Chairman's letter and the response on each matter from IML and offered the Executive's observations thereon. The memorandum went on to point out that the ANLA calculations enclosed with the letter from IML contained a number of basic errors and questionable items. In addition two new

areas of concern had arisen:- (i) The Executive had been advised by a letter from Deloitte & Touche dated 11th February 2003 that IML had been operating without professional indemnity insurance since October 2002. This was a breach of Section 5.4 of the Codes of Practice which required the maintenance of such insurance. Furthermore the loss of such insurance was a material event which should have been notified to the Commission by IML pursuant to Section 6.3.2.13 of the Codes of Practice. (ii) IML had had no auditor since 2001 when KPMG had resigned. This was a breach of the Financial Services (Trust Company Business) (Accounts, Audits and Reports) (Jersey) Order 2000 ("the Accounts Order"). (iii) The memorandum summarised the grounds for refusal as including:- (a) a lack of integrity by Ms Rosenthal demonstrated through the repeated provision of false and misleading information to the Commission; (b) trading without professional indemnity insurance since October 2002 without notifying the Commission, which was a breach of Sections 5.4 and 6.3.2.12 of the Codes of Practice; (c) failure to appoint an auditor, which was a material breach of the Accounts Order; (d) failure to keep adequate records of client money which was a breach of the Customer Assets Order; (e) a continued failure to meet the financial resource requirements specified in the Codes of Practice in relation to ANLA. 28. A fax was sent the same day to IML's office notifying it that the Board would consider the matter on 5th March and stating that the second memorandum with enclosures would be hand delivered to IML's office later that day, which it was. Mrs Hatton was informed by an employee, Miss Nicholls, that the papers had been received but that Ms Rosenthal was on holiday. Mrs Hatton impressed upon Miss Nicholls the importance of the documents. 29. On 5th March the Board met to consider the matter further. Ms Rosenthal attended together with Mr Beamish. Oral submissions were made by the Executive and Ms Rosenthal who also produced written submissions and documents for the Board. 30. The Board considered the matter after the withdrawal of Ms Rosenthal and the Executive. The Board decided to refuse registration. This decision was notified to IML by letter dated 21st March 2003. The grounds for refusal given by the Board were that, with regard to the requirements of the 1998 Law:- "1. The company's financial resources, span of control, structure and organisation are inadequate; 2. The company has failed to comply with the Codes of Practice." 31. By letter dated 8th April Bedell Cristin, acting for IML, asked for a statement of the Board's reason pursuant to Article 10(3) of the 1998 Law. The Chairman replied by letter on 11th April stating that the reasons were set out in the original notification (as set out in the preceding paragraph) and that these together with the papers before the Board on 3rd December (sic) and 5th March were sufficient to ascertain the reasons of the Board. 32. During the course of this appeal, the Deputy Director General has sworn an affidavit which exhibits all the relevant documents. It includes the minutes of the meeting of the Board on 5th March 2003. The minutes set out the various submissions made by the Executive and Ms Rosenthal in some detail and then say the following about the Board's conclusions:- "The Chairman requested the Board to focus on the Executive's grounds for refusal, and to consider whether there was sufficient evidence to support these. He suggested that Commissioners should focus separately on the issues of competence and integrity. In a discussion on the grounds for refusing Interface's application the following points were made:- (a) There were clear

grounds for refusing Interface's application on the evidence of lack of competence. The firm failed to meet the requirements for span of control, financial resources, PII and appointment of auditors. Its future depended on business that might not materialise, or be retained. (b) On the basis of the evidence supplied and the points left unresolved the Board was not in a position to take a view on Ms Rosenthal's integrity. Any future application to act as a principal person would need to be judged on its own merits. (c) A conditional licence should not be offered. The granting of such a licence would set a precedent which would present the Commission with considerable difficulties with other cases in the future. In addition the extent of the action which the applicant would need to undertake before authorisation could be considered would be tantamount to the creation of a new business. (d) Ms Rosenthal had a number of options open to her, as had other businesses in a similar position to the applicant who had taken necessary action to comply with the Codes of Practice, had dealt with an inadequate span of control by merging with an existing licence holder, had affected orderly wind-downs, or had moved away from the island. The Commissioners agreed that: (a) having regard to the requirements of the Financial Services (Jersey) Law 1998, the applicant's inadequate financial resources, span of control, structure, organisation, and failure to comply with the Codes of Practice were adequate grounds for refusing Interface's application. Ms Rosenthal had acknowledged these grounds herself. (b) A conditional licence should not be granted, nor was it felt appropriate to offer additional "transitional" time in which to address the applicant's failings. (c) No view would be expressed on Ms Rosenthal's integrity." THE LEGAL TEST ON APPEAL 33. Historically the test applied by the Royal Court in administrative appeals was three-fold. The Court had to satisfy itself: (i) that the proceedings of the Committee were in general sufficient and satisfactory; (ii) that the decision was one which the law empowered the Committee to make; and (iii) that the decision reached by the Committee was one to which it could reasonably have come having regard to all the circumstances of the case. (see Taylor -v- IDC (1969) JJ 1280) 34. In Island Development Committee -v- Fairview Farm Limited

(1996) JLR 306 the Court of Appeal ruled that paragraph (iii) of the above test was incorrect. The Court of Appeal said at 317:- "The Royal Court, as an appellate body, must consider not merely whether the inferior body has followed the correct procedure, but also whether its own view is that the decision was unreasonable. It may allow whatever weight it thinks proper to the experience and knowledge of the inferior body, but it cannot escape the responsibility of forming its own view. the duty of the Court on an appeal under Art.21 is not merely to consider whether any reasonable body could have reached the decision which the Committee did reach, but to decide whether the Court considers that that decision was, in its view, unreasonable." Since then further helpful elaboration was given by Bailhache, Bailiff in Token Limited -v- Planning and Environment Committee

(2001) JLR 698 at 703:- "the Solicitor General submitted that the decision in Fairview Farm did not entitle the court to find that the Committee's decision was reasonable but quash it because the court had reached an equally reasonable but different decision. We agree. The court might think that a committee's decision is mistaken, but that does not of itself entitle the

court to substitute its own decision. The court must form its own view of the merits, but it must reach the conclusion that the Committee's decision is not only mistaken but also unreasonable before it can intervene. There is an element of semantics here but there is, nonetheless, a qualitative difference between finding that a decision is unreasonable, rather than simply mistaken. To put it another way, there is margin of appreciation before a decision which the court thinks to be mistaken becomes so wrong that it is, in the view of the court, unreasonable." 35. The wording of the appeal provision of the 1998 Law is in similar terms to that of the Island Planning (Jersey) Law 1964 and the test set out in Fairview Farm is applicable. It follows that, adapting the test in Taylor, the Court will look at three aspects on an appeal. First it will consider whether the decision was one which the decision maker was empowered to make i.e. was the decision ultra vires ? Secondly it will 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. Thirdly it will look at the merits of the decision and decide whether it considers that the decision was unreasonable. Where an appeal is allowed because of procedural errors or unfairness of sufficient gravity, the likely remedy will be that the decision is quashed and the matter remitted to the decision maker for reconsideration. Where, on the other hand, the appeal is allowed because the Court considers the decision to be unreasonable, it will make such order as it thinks fit which may of course be a substantive order to the opposite effect of the original decision e.g. ordering that a trust company be registered rather than refused registration. GROUND OF APPEAL 36. There is no question of vires in this case but IML raises issues going both to the procedural aspects and the merits of the decision of the Commission. (i) The procedural issues: 37. Mr. Taylor submits that the Executive acted unfairly in a number of respects during the course of its investigation and recommendations and that this taints the decision of the Board. 38. Firstly he refers to the evidence of Mr. Dickinson, an employee of Advocate Taylor's firm, who swore an affidavit to the effect that, on 2nd June 2003, (i.e. after the decision of the Board), during the course of a telephone conversation with Mr. Ian Brandon, an employee of the Commission, Mr. Brandon referred to the fact that he had raised the question of a cessation of business plan with Ms Rosenthal in 2002. Mr. Taylor submitted that this showed that the Executive had made up its mind at the time of the Minded to Refuse Letter that IML's application was going to be refused and that it was not open to persuasion to the contrary. The matter was raised by Mr. Dickinson in correspondence with Mrs. Hatton who indicated in a letter dated 5th June that the conversation between Mr. Brandon and Ms Rosenthal had taken place in the context of a discussion as to what would happen in the event that registration was refused. 39. A reference to the preparation of a cessation of business plan prior to a decision by the Board may carry different meanings. At one extreme, if a member of the Executive were to assert that the application was doomed to failure and that the applicant had better get on with preparing a cessation of business plan, this would be strong evidence that the Executive had closed its mind and was simply going through the motions in relation to the consultation process. On the other hand, if an applicant were to ask an officer of the Executive what would happen if the application were to be refused and if that

officer were to reply that, in that event, a cessation of business plan would have to be drawn up, there would appear to be nothing wrong with that. On the contrary, it would be a helpful and proper response. In other words, the significance of a reference to a cessation of business plan will depend entirely on the context. In this case there is no evidence of the context. The only evidence before the Court is that an officer of the Commission has stated that the topic was mentioned at about the time of the *Minded to Refuse Letter*. But no evidence has been produced by IML as to the context of the remark concerning the need for a plan. In the circumstances there is no evidence which points towards the Executive having a closed mind because of this remark. 40. Secondly, Mr. Taylor submits that the officers of the Executive showed a hostile attitude towards IML and that this suggests actual or apparent bias on their part and taints their recommendation. In support, he referred to the affidavits of Ms Rosenthal, Ms Karine Lenoir and Mr. Stephen Ross. Ms Lenoir was a trust administrator who was first employed in 1997 when IML was part of Beresford and stayed after the separation. She says that, following the Beresford complaint concerning the Hare Trust in November 2001, she met members of the Executive on a number of occasions in connection with their investigation. She felt that they were acting in an oppressive way and that IML was being accused of wrongdoing. As a director, this impacted upon her personally. She said that they approached IML in 'an icy manner' and that their inquiries were not conducted with 'warmth or politeness'. On several occasions, members of the Executive walked in to IML's offices without a prior appointment and started demanding to see documents. She left IML at the end of October, 2002, mainly because of the uncertainty caused by the problems with the Commission and the company's future generally. 41. Mr. Stephen Ross was employed by IML in January 2001 as a director with responsibility for compliance and marketing. He stated that, just before Christmas 2001, the Commission started investigating the complaint made by Beresford in relation to the Hare Trust. These events had of course occurred prior to his joining IML. It is clear that Mr. Ross was concerned by the investigation. He said that he felt that some of the questions of Commission representatives 'were trying to entrap me' and sometimes they dealt with matters 'in an unpleasant manner'. He felt as if he was on trial. In July 2002 he gave notice of his intention to resign from the company with effect from 30th September because of the stress of the whole affair. In particular, it was stressful that people were calling him in order to get IML's bills paid. Due to the added pressure caused by the investigation of the Commission, his job was becoming untenable. 42. Ms Rosenthal swore a detailed affidavit. It is clear that she feels that the investigations by the Commission were a contributory factor to IML's financial difficulties because they took up enormous amounts of time which could have been devoted to promoting the company and gaining new clients. Furthermore, although she exonerates Mrs Hatton (who, she says, always dealt with her in a professional manner) she felt that other representatives approached her in a confrontational manner which was difficult to deal with. It remains her belief that the Executive had determined at an early stage that IML would not be granted a licence under any circumstances. 43. The allegations made by the appellants are strongly denied by Mrs

Hatton in her affidavit. She says that, on the contrary, her files show a track record of the Commission endeavouring to work with IML towards helping it achieve compliance with the requirements for a trust company. She gives some examples, including sending representatives to teach Ms Rosenthal and Ms Lenoir how to do the ANLA calculations and the fact that the Commission regularly accepted late submissions and, rather than rejecting incomplete or incorrect information, sought further details. She had not heard any form of prejudicial attitude from any colleague or any member of the Board. 44. We accept that the investigation by the Commission into the Beresford complaint concerning the Hare Trust and the continuing inquiries into whether IML should be registered as a trust company imposed stress on the employees and principals of IML, particularly bearing in mind the small number of personnel. The opportunity for promoting the company's business was limited as a result. However, that was an inevitable consequence of the situation. As Mr. Taylor very properly conceded, the Executive, having received the serious allegation contained in the Beresford complaint about the Hare Trust, was under a duty to investigate it. Given the differing and confusing responses given by IML over the period, it is not surprising that this investigation was thorough and on-going. Furthermore, the Executive was carrying out the necessary inquiries into the structure and financial position of IML in order to see whether it was suitable for registration. These inquiries had to be undertaken and we see no grounds for criticism of the Commission in this respect. 45. As to whether some members of the Commission disclosed a hostile attitude, it is undoubtedly the duty of all members of the Commission to show due courtesy to those whose affairs they are investigating. The Commission is given very wide powers and there is no room for an oppressive or overbearing attitude in the application of those powers. It is the duty of senior management to ensure that this message is understood by all of its investigating staff. 46. However, the evidence produced by IML is very general and unspecific and comes nowhere near satisfying the Court that officers of the Commission acted in such a hostile or oppressive manner as to call their actions into question. We have carefully considered Ms Rosenthal's affidavit and those sworn by Mr Ross and Ms Lenoir (who, as Mr. Taylor pointed out, do not have an axe to grind, having left the employment of the company) but we are quite satisfied that these do not establish any actual or apparent bias on the part of the Executive even if the Court were to accept their evidence as to the manner in which the representatives of the Commission conducted their inquiries. The Executive was under a duty to investigate the Beresford complaint and carry out inquiries in order to establish whether IML fulfilled the necessary criteria for registration as a trust company. Inevitably, in such a situation, there is scope for a perception on the part of the person being investigated that the investigator is being over-zealous or has made up his mind; but we do not find that in truth to have been the case. We accept that the members of the Executive approached the matter - as they must in law - with an open mind. The evidence tendered by IML, even if accepted (but upon which we make no finding) is insufficient to establish that the Executive or its staff acted oppressively. 47. Thirdly Mr. Taylor submits that the Executive did not adopt a measured or proportionate approach to the Hare Trust issue. He accepts that Ms Rosenthal gave

varying explanations as to what had happened to the funds in question but submits that these were explicable on the grounds that IML had returned the relevant paper work to Beresford (following a decision in the Royal Court that the deed appointing IML as trustee in place of Beresford was void) and had also been misled by Sinitus Treuhand AG ("Sinitus") (which held the bond) to the effect that Wells Fargo Bank was holding the bond so that she had in turn inadvertently misled the Commission on this point. The Hare Trust was one of about 100 clients of IML and it was the only one in respect of which there were grounds for concern as to the adequacy of the record keeping, the nature of the transaction or the location of the client assets. 48. We do not agree with this submission. The complaint about the Hare Trust having been made, it was clearly proper for the Commission to investigate it. The confusing and contradictory explanations initially given by IML (usefully summarized in paragraph 7 of the second memorandum) quite naturally aroused concern on the part of the Commission as to whether all was well. It therefore had to dig further into the matter. Indeed, as we will see, information was received as late as January 2003 which cast doubt on the most recent explanation about the bond given by IML in January 2002. We do not consider that the Executive treated this matter out of proportion or that it behaved unfairly in investigating it. 49. Fourthly, Mr. Taylor relies upon a specific aspect of the Hare Trust matter. He submits that the Executive did not deal fairly with the allegation of forgery made by Beresford. The allegation was that the signatures of the Beresford signatories on the letter of instruction withdrawing the cash from the bank account of Fruit Impex Limited had been forged. In support of this allegation the statements of the two Beresford signatories in question referred to a number of matters which led them to conclude that the signatures were not theirs. In its letter of 23rd November 2002, IML had produced a detailed and convincing rebuttal of the allegation by showing that, in a number of cases where Beresford retained formal signing powers in respect of clients whose affairs were administered by IML following the separation, IML had drafted the letter of instruction and had simply submitted the letter for signature by the relevant Beresford signatories. The letter developed additional arguments as to why the various factors relied upon by the signatories as supporting their belief that their signatures had been forged in relation to the Hare Trust were incorrect and showed that the letter of instruction in relation to the Hare Trust had followed the same format as had been adopted in relation to a number of other clients. Yet, submitted Mr. Taylor, despite having received this convincing letter, the Director General did not deal with it in any detail, either by modifying his views in relation to the forgery allegation or by explaining why he remained suspicious and did not accept the explanations. He simply referred to it in passing in his memorandum to the Board and said that his recommendation remained unaltered. 50. We think that the Director General should have addressed the response of IML in rather more detail in his recommendation to the Board. An allegation of forgery is a very serious matter, particularly where it has been made against a director of a company which is applying for registration as a trust company. Having read the letter of 23rd November, we accept the broad thrust of Mr. Taylor's characterization of it. It does provide some apparently persuasive arguments to suggest

that the grounds relied upon by the Beresford signatories in support of their belief that the signatures in this case had been forged were not necessarily correct. We are not for a moment saying that the Director General must deal in his submission to the Board with every response made by an applicant to every concern expressed by the Executive. In most cases the concern of the Executive and response of the applicant can be left to speak for themselves. But where a matter as serious as an allegation of forgery is raised and where there is what appears on the face of it to be a reasonably persuasive defence, we think that the Director General should do more than simply refer to the fact that the response has been made but that his view remains unaltered. We think that the Director General should have either modified what he said in relation to the forgery allegation or explained why he remained unconvinced by IML's response. 51. However, we do not consider that this failure undermines the decision of the Board because it expressly made no finding on Ms Rosenthal's integrity. It based its decision to refuse registration wholly on other grounds. It did not therefore endorse the views of the Executive. Mr. Taylor submits that the fact that the forgery allegation was left in its original form might well have prejudiced the Board in the sense that it might have subconsciously been affected by the existence of the allegation. We do not agree. The Board is made up of distinguished members who are specifically chosen for their ability and experience. In our judgment they are perfectly capable of putting out of their minds an allegation which they have found not to be proven. It is not dissimilar to a criminal case where the prosecution allege that the defendant has committed three offences and adduce evidence in support, but the jury only convicts of one offence. The conviction is not quashed merely because the jury also heard evidence on two charges which it found not to be proved. It is clear that in this case the Board gave very careful consideration to the matter and chose not to accept the recommendation of the Executive in relation to questions concerning Ms Rosenthal's honesty and we do not consider that there is any risk of their having been prejudiced by the fact that they had been informed of the allegations. Furthermore, we do not think it practicable to be too restrictive in what the Executive puts before the Board. It is the Executive's duty to put before the Board all matters which it in good faith reasonably considers relevant to the Board's decision; it is for the Board then to decide which of the matters put forward by the Executive it accepts and which it does not. 52. Fifthly - and again in relation to the Hare Trust - Mr. Taylor complains of the manner in which the Executive dealt with the veracity of the letter dated 17th January 2002 from Sinitus . Following the initial complaint from Beresford on 29th November 2001, the Executive was, as we have mentioned already and as was accepted by Mr. Taylor, given a number of different and confusing explanations as to what had happened to the funds. By January 2002, the version put forward was that funds had been invested in a bond which was held by Sinitus . In support, a letter from Sinitus to IML dated 17th January 2002 was produced. That letter stated that Sinitus was holding to IML's order under the rubric 'Fruit Impex Limited' a depot bond of £150,000 plus interest. The letter went on to say that the funds had been invested through Sinitus since April 2000 and were held in a UK Treasury bond. Perhaps because of the various conflicting information which had been given, the

Executive sought assistance from the Swiss Federal Banking Commission. That Commission stated in a letter to the Commission dated 27th January 2003 that, in the course of looking into Sinitus to determine whether it required a licence for its activities under Swiss law, it had been informed that Sinitus had purchased the bond on 22nd January 2002 and had sold it on 5th February 2002. A subsequent letter dated 19th February 2003 from the Swiss Commission confirmed that Sinitus had informed them that it had been instructed to buy a 'UK Treasury bond triple A rating' at the beginning of 2002, the selection of the bond being left to Sinitus and had been instructed to sell the bond on 31st January 2002. In the second memorandum, the Executive referred to the fact that, at an interview on 24th January 2002, Ms Rosenthal had been asked about the bond and in answer to the question "Can you confirm if the bond has remained the same investment since June 2000" replied "I believe so, yeah". In fact, it appeared from the information provided by the Swiss Commission that the instructions to purchase the bond had only been given to Sinitus a few days before that interview. The Executive concluded at paragraph 7.5 of its memorandum that the 'inescapable conclusion' from the above was that it was not until the Commission raised the issue with IML that Ms Rosenthal decided to make good her assertion that a bond had been purchased with funds withdrawn from Fruit Impex Limited. The Executive concluded therefore that false and misleading information had been given. It suggested that either Ms Rosenthal had persuaded Sinitus to provide a false statement or she had forged the letter from Sinitus. Either way it went to Ms Rosenthal's integrity. 53. Mr. Taylor submitted that this was a very prejudicial conclusion which was not justified on the state of the evidence before the Executive. The Executive should have made further inquiries. A possible explanation - as Ms Rosenthal suggested in her oral submissions to the Board on 5th March - was that there had simply been a change in the identity of the investment and that this was what Sinitus was referring to when it stated that the bond was purchased on 22nd January 2002. He further relied upon the fact that, because Ms Rosenthal was away on holiday when the second memorandum and accompanying papers were delivered on 27th February and did not return to the office until 3rd March, she only had two days in which to respond to this very serious new allegation. 54. As to the point concerning the short notice, it is of course unfortunate that Ms Rosenthal - who was the sole span of control director at the time - was out of the office on holiday when the second memorandum was delivered. However, Mrs. Hatton emphasized to the staff that the document was very important and that Ms Rosenthal should be informed of it. It was her choice as to whether to seek a delay in the hearing before the Board on the grounds that she had had insufficient time to deal with the second memorandum. She returned to the office on 3rd March and, although she referred to the very short time which she had had since then when making her oral submission to the Board, she did not seek an adjournment. Furthermore, she had managed to prepare written submissions dealing with the various matters. Apart from the issue of the Sinitus letter, the only other new matters raised in the second memorandum were the lack of professional indemnity insurance and the lack of an auditor. These were clearly matters already within Ms Rosenthal's knowledge and she dealt with them fully in

her submissions to the Board. 55. Clearly it is important that applicants should have sufficient time in which to prepare adequately for hearings. However, the papers were delivered on 27th February and we do not think that the Commission can be criticized for the fact that Ms Rosenthal was away until 3rd March. Had she sought an adjournment, she might have been granted one but we do not think that the shortage of time caused IML any prejudice. It would surely have been possible for Ms Rosenthal, upon her return to the office, to make urgent contact with Sinitus in order to obtain an explanation for the apparent inconsistency between its letter of 17th January 2002 and its statement to the Swiss Banking Commission. If, as was suggested as being a possibility by Mr. Taylor and Ms Rosenthal, the explanation was that there had simply been a change in the particular investment held on 22nd January 2002, this could easily have been explained by Sinitus in a fax. Yet Ms Rosenthal has at no stage stated that she made any approaches to Sinitus between her return to Jersey and the hearing. She was therefore only able to speculate during the course of the hearing before the Board. Indeed, when questioned by the Court, Mr. Taylor conceded that, even now, no explanation had been obtained from Sinitus about the inconsistency, presumably because it has not been approached for an explanation by Ms Rosenthal. We therefore do not consider that the short time between her return to Jersey and the hearing on 5th March prejudiced her in her ability to respond to the Executive's concern about the Sinitus letter. 56. Nor do we think it was incumbent upon the Commission to make further inquiries as Mr. Taylor has submitted. Mr. Taylor initially submitted that the Commission should have approached Sinitus itself. On reflection, he accepted that Sinitus would undoubtedly have refused to make voluntary disclosure of information to a foreign regulator. The Commission could only therefore have gone back through the Swiss Banking Commission whereas IML was in a position to obtain information directly from Sinitus as its client. We do not think that the Commission needed to do more. It had obtained information from the Swiss Banking Commission which raised serious questions as to the correctness of the letter of 17th January 2002 from Sinitus. It had provided all the documents and its concerns to IML which was in the best position to obtain clarification from Sinitus. IML made no effort to do so. Nor do we agree with Mr. Taylor's submission that the Executive was not justified on the evidence before it in making the submissions to the Board which it did. 57. In any event, this whole matter related to the issue of Ms Rosenthal's integrity. As we have already stated, the Board expressly declined to make a finding on this issue and reached its decision on other grounds. It follows that the Board did not make an adverse finding against Ms Rosenthal in respect of the Sinitus letter. Thus, even if there had been any element of unfairness or error in the way in which the Executive had dealt with this aspect, (which we do not find was the case) it would not have tainted the Board's decision. 58. Sixthly, in connection with the procedure adopted by the Executive, Mr. Taylor submits that it did not give adequate consideration to the proposals put forward by IML in February 2003 to remedy the position, namely the employment of two new qualified directors, Mr. A and Mrs. B, and the injection of £200,000 by Tresag as a new shareholder. He makes much the same point in relation to the decision of the Board itself and we think it convenient to deal with it

when reviewing the merits of the Board's decision. 59. In summary, so far as the procedure of the Executive is concerned, we do not find that it failed in its duty to act fairly. The one area in which we have been critical of the Executive (the way in which it dealt with IML's response to the forgery allegation) was not material to the decision of the Board and in any event was not of sufficient gravity to taint the decision of the Board. (ii) Duty to give reasons 60. Mr. Taylor submits that the Board failed in its duty to provide a statement of reasons under Article 10(2) of the 1998 Law. 61. Article 10(2) provides as follows - "(2) Where the Commission:-

- (a) acting under Article 8, refuses to register a person
- (b) the applicant May require the Commission to furnish him within 14 days with a statement in writing of its reasons for that decision". 62. We have set out at paragraphs 30 and 31 the reasons given at the time of the decision and the response of the Chairman on 11th April to a request from Messrs. Bedell Cristin for a statement of reasons in accordance with Article 10(2). 63. The Court is in no doubt that the Board acted in breach of Article 10(2) in its reply of 11th April to the request for a statement of reasons. As Mr. Taylor correctly submitted, an applicant should be able, after provision of a statement of reasons under Article 10(2), to know the answer to the question "Why did I fail?" In our judgment, IML could not ascertain the answer to that question from the information given at that stage by the Board. The only statement of reasons was to be found in the public statement attached to the letter of 21st March. That is a very general statement taken largely (although not entirely) from the wording of Article 8 itself. It gives no indication of the exact respect in which the company was found to be inadequate, or in breach of the Codes of Practice. The Chairman's response to the effect that the reasons could be ascertained from a reading of the public statement together with the papers before the Board at its two meetings was not helpful. The papers were extremely voluminous and contained a large number of matters which had not ultimately been pursued by the Executive or upon which the Board had not relied. It would have required a very detailed and painstaking analysis to try and ascertain which matters relied upon by the Executive had been supported by the Board; indeed, we are not sure that this matter could have been satisfactorily undertaken in the absence of the minutes of the meeting of the Board, which were not produced until later when Mrs. Hatton's affidavit was sworn for this appeal. 64. Furthermore, the reasons given at that stage make no reference to the real issue at stake. As we shall see, IML accepted that it was deficient in a number of respects and could not be granted registration in its present form. It therefore asked for a conditional registration with conditions to ensure that the problems of span of control, financial resources etc. were dealt with. There was no reference to this in the reasons available as at 11th April and no indication of why the Board had decided not to grant a conditional registration as requested. 65. It is a matter for the Board as to how much detail it gives when initially announcing its decision but we see nothing unlawful in its choosing to give only brief reasons at that time along the lines of those provided in this case. However, the purpose of Article 10(2) is to enable the applicant to know exactly why he is refused a licence and to decide whether he has grounds upon which to appeal. The

statement must therefore be in satisfactory form and in sufficient detail to achieve this purpose. (See de Smith, Woolf and Jowell : Judicial Review of Administrative Action, para 9-049) The applicant is entitled to know which matters relied upon by the Executive were accepted by the Board and which were not. To the extent that findings of fact were necessary to the Board's decision, those findings should be stated. So, for example, where a ground of decision is that the applicant has failed to comply with Codes of Practice, the statement under Article 10(2) should set out which provisions of the Codes of Practice were breached and the exact respects in which they were breached. Where financial resources are said to be inadequate, sufficient detail must be given so that it can be understood in what respect this was so. Where the span of control is said to be insufficient, the statement should explain how this is so. Where, as here, the issue is whether the applicant should be granted registration conditional upon proposed changes to cure the various deficiencies, the statement must set out why the Board has decided that that would not be appropriate. 66. However, the matter does not rest there. Mrs. Hatton's affidavit exhibited the minutes of the meeting of the Board on 5th March to which reference has already been made and it is accepted by all parties that these are to be taken as a statement of the Board's reasons for its decision. That is consistent with the practice described at para 9-055 of de Smith, Woolf and Jowell . Mr. Taylor submits that these reasons are also inadequate but, as that is closely linked to the reasonableness of the decision, we think it convenient to deal with that submission when considering the merits, to which we now turn. (iii) Merits of the decision 67. It was not disputed by Mr. Taylor at the hearing of this appeal or by Ms Rosenthal at the hearing before the Board on 5th March that IML was not suitable for registration in its current state. As Ms Rosenthal said at the hearing, she would not have registered the company in its then condition. Its then condition can perhaps be summarized as follows - (i) There was an inadequate span of control. Ms Rosenthal was the sole appropriately qualified permanent director although the Codes of Practice required a span of control of three. (ii) The requirements for financial resources were not met. The ANLA calculations had not historically been undertaken as required and the calculations submitted in February 2003 in response to the Chairman's letter were incorrect. The liquidity requirement, measured by reference to the proportion of ANLA to the Expenditure Requirement, was not met. (iii) The company had not had professional indemnity insurance (PII) as required by the Codes of Practice since October 2002. Furthermore the company had failed to disclose the loss of PII to the Commission as required, although Ms Rosenthal explained that this had arisen through a misunderstanding because she thought Deloitte Touche had informed the Commission. She also explained that the difficulties in obtaining registration meant that IML could not obtain PII. It was a Catch-22 situation. An inability to pay the premium in one annual instalment (as required by the insurance company) rather than in monthly instalments seems also to have been a factor. (iv) The company did not have an auditor as required although Ms Rosenthal explained that, following the retirement of KPMG, she had approached Moore Stevens and had understood that they had accepted appointment, although it transpired that this was not in fact so. All these deficiencies existed even though it was over two years since IML had put in its application. From that time it would have

known that it would have to meet the various published requirements. In the light of these matters, it was undoubtedly reasonable for the Board to conclude that unconditional registration was not appropriate. 68. We accept that the reasons set out in the minutes on this aspect do not go into the degree of detail which we have suggested earlier in this judgment. However, we are quite satisfied that no prejudice has been caused by this. At the hearing of this appeal, all parties have had no difficulty in identifying exactly what was being referred to by the Board in the two paragraphs (a) in the passage set out in paragraph 32 of this judgment and there was no real dispute on this aspect of the Board's findings. 69. The real issue before the Board on 5th March was whether IML should be granted some form of conditional registration. In her oral submission to the Board, Ms Rosenthal said that she wished to create a new IML with a new span of control and new shareholders. In her written submission, handed to the Board on 5th March, Ms Rosenthal (at paras 8.1, 9 and 10 thereof) asked for a conditional licence contingent upon:- '(a) the introduction of fresh capital within a reasonable time frame; (b) the introduction of further clients and revenue streams within a reasonable time frame; (c) introduction of fresh individuals to meet the span of control requirements within a reasonable time frame; and (d) such further conditions as the Commissioners may consider reasonable.' 70. In the papers before the Board and in her oral submissions she elaborated on these as follows.

- (a) was to be addressed by the introduction of Tresag as a shareholder with a consequent capital injection of £200,000;
- (b) was to be addressed by the employment of Mrs. B whose clients, it was anticipated, would follow her to IML; (c) was to be addressed by the employment of Mr. A and Mrs. B. 71. Mr. Taylor submits that neither the Executive nor the Board gave proper or sufficient consideration to these proposals. He points out that the Executive had not carried out its full due diligence on Mr. A, Mrs. B or Tresag so as to proffer a firm conclusion on their suitability. Furthermore, the Executive had dismissed the position of Tresag on the basis that it had not produced audited accounts whereas the Chairman's letter of 9th January had only referred to the need for accounts to be provided. The Board had not given adequate reasons for rejecting the conditional licence route suggested by IML. The only two reasons given in paragraph
- (c) of the minutes were one of policy - that it would set a precedent which would cause difficulties in responding to other cases in future - and secondly, that the degree of change required would be tantamount to the creation of a new business. Neither of these reasons were developed sufficiently to know exactly why the Board had so concluded; nor had the Board apparently considered as an alternative the appointment of an accountant to review the whole matter pursuant to Article 7(5) of the 1998 Law. In essence, he submitted, the decision was unreasonable because the Board should have acceded to the application for a licence conditional upon the various matters suggested by IML and because inadequate reasons had been given to explain the Board's refusal. 72. We think that it would have been helpful for the Board - either in the statement of reasons, which should have been given or

in the minutes themselves - to have given their reasons in rather more detail. We advise the Board to do so in future. Nevertheless, we think that the Board's reasons emerge with sufficient clarity. It is clear from the last sentence of paragraph (a) of the first part of the minutes that the Board was by no means certain that the new business would necessarily follow Mrs. B if she joined IML. In our judgment, that was a view to which the Board was perfectly entitled to come on the evidence before it. Clients do not always follow a person with whom they have been dealing at a particular company. 73. Its finding as to the uncertainty of the new business was an essential part of the background to the Board's decision not to grant a conditional licence because it relates to the future and to the very proposals put forward by IML in support of a conditional licence. The Board considered that, to allow a conditional licence in this case would set a precedent which would cause difficulties in future. We can well understand that concern. No doubt there are a number of small trust companies which are having difficulties in complying with the new requirements. There are clearly risks attached to granting a licence which is conditional upon the occurrence of future events such as the injection of funds by a new shareholder, the transfer of a substantial body of clients from another trust company and the employment of new individuals. What happens if the conditions are not met? There could well be justified criticism of the Commission if clients were to lose money as a result, particularly in a situation where, as of the date of the application, there was no professional indemnity insurance or auditor. It seems to us that the Board was entitled to adopt a general policy of not being favourably disposed towards granting licences conditional upon matters of this nature, but we accept Mr. Taylor's submission that any such policy must not be immutable and the Board must always consider whether the facts of the individual case justify an exception. The position as to a general policy was helpfully set out by Lord Denning MR in *Sagnata Investments Limited v Norwich Corporation* (1971) 2 QB 614 at 626:- "I take it to be perfectly clear now that an administrative body, including a licensing body, which may have to consider numerous applications of a similar kind, is entitled to lay down a general policy which it proposes to follow in coming to its individual decisions, provided always that it is a reasonable policy which is fair and just to apply. Once laid down, the administrative body is entitled to apply the policy in the individual cases which come before it. The only qualification is that the administrative body must not apply the policy so rigidly as to reject an applicant without hearing what he has to say. It must not 'shut its ears to an application': See

- (1971) AC 610, 625 per Lord Reid. The applicant is entitled to put forward reasons urging that the policy should be changed or saying that in any case it should not be applied to him. But, so long as the administrative body is ready to hear him and consider what he has to say, it is entitled to apply its general policy to him as to others." 74. We do not think that the Board did adopt an immutable policy. On the contrary, we think that it did consider the position by reference to the particular facts of this case. This is evidenced by its consideration of the uncertainty of the future income stream and the extent of the required change in the company, i.e. two new qualified directors, a transfer of Mrs. B's clients to IML and the

injection of £200,000 from a new shareholder. The degree of deficiency in the existing state of the company was also relevant. The possibility of asking for a report under Article 7(5) was referred to by the Executive in the second memorandum but there was no point in following this course of action if the Board had concluded that it had sufficient information to lead it to the conclusion that registration should be refused. 75. We find it impossible to categorise the decision of the Board to refuse to grant a conditional licence as unreasonable. On the contrary, we think it is one to which we ourselves would have come had we been in the position of the Board, bearing in mind the requirements of the FSC Law and the 1998 Law as summarized earlier in this judgment and the various factors to which the Board made reference in the minutes of its decision. Accordingly, we dismiss the appeal. Authorities Financial Services (Jersey) Law 1998. Financial Services (Extension) (Jersey) Law 2000. Financial Services Commission (Jersey) Law 1998. R. -v- Home Secretary, exp. Doody

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