IN THE COURT OF APPEAL, OF THE COOK ISLANDS
HELD AT RAROTONGA

CA 07/05
(OA 10/04)

BETWEEN:

THE WALL STREET BANKING CORPORATION LTD

Appellant

THE FINANCIAL SUPERVISORY COMMISSION

Respondent

Publication of this Judgment prohibited to persons other than the parties

Coram: **Williams, CJ**
Barker, JA
Smellie, JA

Counsel: **Mr P.H. Thorp and Dr A Frame for Appellant**
Mr J.R.F. Fardell, QC & Ms R.A. Edwards for Respondent

Hearing: **10 November 2005**

Date of Judgment: **14 December 2005**

JUDGMENT OF THE COURT

Introduction

1. The Appellant, The Wall Street Banking Corporation Ltd (WSBC) appeals against the judgment of Greig, CJ given at Wellington on 25 May 2005 which rescinded orders against the Respondent, the Financial Supervisory Commission (FSC) made by him, *ex parte*, on 31 May 2004.

2. WSBC had instituted proceedings in the High Court on 31 May 2004 seeking, as against FSC:

   (a) certiorari quashing FSC's decision dated 28 May 2004 not to grant WSBC a banking licence under the Banking Act 2003 ("the 2003 Act"); and

   (b) Mandamus directing FSC to grant WSBC a banking licence on terms and conditions no less onerous than those in licences granted to other licences;

   (c) Damages

3. The application was dealt with under conditions of extreme urgency by the Chief Justice by telephone from Wellington. WSBC had been notified of FSC's refusal to grant it a banking licence on 28 May 2004 and its current banking licence, as will be seen later in this narrative, was due to expire, in terms of the 2003 Act, on 1 June 2004.

4. The orders granted *ex parte* by the Chief Justice were in the following terms:

> "1. Until further Order of the Court, a writ of Certiorari to quash the decision of the Respondent advised to the Applicant by letter dated 28th May 2004 refusing the application by the Applicant for a banking licence.
>
> 2. Until further Order of the Court, a writ of Mandamus directing the Respondent to grant a banking licence to the Applicant under The Banking Act 2003 effective from 1st June 2004.
>
> 3. Until further Order of the Court, a writ of Injunction preventing the Respondent or any of its directors, employees or agents from publicly notifying both the refusal of the licence application of the Applicant and the fate of any other application for a banking licence pursuant to The Banking Act 2003".

5. On 21June 2004, FSC moved to set aside these interim orders on the principal grounds:

   (a) they went beyond preserving the *status quo*,

   (b) they were contrary to sections 8 and 53 of the 2003 Act; and

(c) it was not seriously arguable that WSBC was entitled to relief.

6. The hearing of the application to set aside did not take place until 21 April 2005 in Auckland. It resulted in a judgment delivered from Wellington on 24 May 2005. The Chief Justice held as follows:

> "For reasons I have stated I find that WSBC does not have an "arguable case for an interim injunction to extend or continue a banking licence and that this Court has no power to grant such a licence in extension of the expired licence which WSBC held under s. 5 Banking Act 2003. In the result this Court will make an order rescinding the orders numbered 1 and 2 made on 31 May 2004 such order to lie in Court and not to take effect until 14 days after the date of this judgment. As to order 3 which relates to confidentiality that will continue in force for 14 days after the date of this judgment. The FSC is entitled to costs. If agreement can not be reached by the parties on quantum I will receive submissions thereon.

7. On 3 June 2005, the Chief Justice granted WSBC leave to appeal to this Court and ordered, by way of stay of execution, that his judgment lie in Court not to be sealed, completed or executed by FSC until further order from this Court. This direction applied to the substance of the judgment. He renewed the confidentiality orders.

Background facts

8. WSBC is a company incorporated under the provisions of the International Companies Act 1981-2 and carries on business in the Cook Islands and elsewhere. It had been licensed as a Bank under the Offshore Banking Act 1981 (the 1981 Act) since it began business in the Cook Islands in 1992. Its licence under that Act was for 5 years and expired on 9 November 2005. WSBC could have applied for a renewal under the 2001 Act.

9. The FSC was established under the Financial Supervisory Commission Act 2003. Its duties include the review and monitoring of financial institutions and supervision of their compliance with internationally-accepted standards. Its functions include the licensing of those who wish to carry on banking business in or from the Cook Islands under the 2003 Act. These Acts, passed in 2003, are

two of the statutes which the Parliament of the Cook Islands enacted to control international financial institutions operating within or from the Islands in order to ensure their compliance with international standards. The 2003 Act repealed the 1981 Act. There had been concerns expressed internationally about the Cook Islands banking regime, including the placing of the country on a short-list of "Non Co-operative Countries and Territories" by an international watch-dog organisation.

10. The scheme of the 2003 Act in respect to licensing was to repeal the 1981 Act and to deem that every existing licensee under the 1981 Act, such as WSBC, was issued with a licence under the 2003 Act which licence ceased to have effect 12 months after the 2003 Act had come into force on 1 June 2003 (section 5 (1) (3)). Any person, wishing to conduct banking business in the Cook Islands, including existing licensees, had to apply for a banking licence to the FSC which was required to deal with any application within 3 months from the date of receiving the application (sections.6 and 7). WSBC, as an existing licensee, applied to the FSC in 1 March 2004 for a licence under the 2003 Act. By letter dated 28 May 2004, the FSC notified WSBC that is application had been refused. The expressed reasons for the refusal were:

> "That it was unable to be satisfied that all of the principal direct and indirect owners and proposed directors are 'fit and proper' persons in terms of section 8 of the Act. The Commission was of the view that for some their association as owners/directors of a small company in Australia, whose employees were convicted of illegal financial dealings, could not be ignored. While it is understood that neither the company nor the directors were charged or convicted of any offence, they nevertheless must bear some responsibility for the activities of their employees"

FSC referred further to a number of other issues, unspecified, which the FSC said were unresolved.

11. Although existing banks were given a licence for 12 months after the 2003 Act came into force and the FSC was required to process any application for a banking licence within 3 months, counsel agreed that it had not been possible for WSBC (or any other bank) to have made application for a licence under the 2003 Act until some 9 months after that Act had come into force. We were told from

the Bar that the reason for this unsatisfactory state of affairs was that the members and officers of the FSC had not been appointed and that appropriate forms were not available. Consequently, FSC was unable to receive and process applications for some 9 months after the Act had come into force on 1 June 2004. WSBC's application was filed on 1 March 2005.

Basis of High Court Hearing

12. The High Court hearing proceeded on a basis agreed between counsel after a telephone conference with the Chief Justice on 24 February 2005. The Court was asked to consider only questions of jurisdiction which centered on sections 8 & 53 of the 2003 Act. Consequently, WSBC did not file affidavits in reply to the affidavits filed by FSC which dealt with factual matters relating to the declinature of WSBC's application for a licence. Such affidavits from WSBC would have been necessary in order for the Court properly to assess the claim of WSBC that the decision of the FSC refusing the licence should be set aside on the grounds of unreasonableness.

13. FSC's first submission before Greig CJ was an assertion that section 53 of the 2003 Act was a "privative" clause which made FSC's licensing decisions immune from judicial review, except in the absence of good faith. The Chief Justice rejected this submission and his decision in that respect is not challenged.

14. The Chief Justice then proceeded to consider "whether there is a seriously arguable case for WSBC". He held that there was not, despite the agreement that only jurisdictional arguments were to be considered and despite the absence of affidavits from WSBC in answer to the FSC affidavits. In our view, he should not have considered this aspect of the case given counsel's prior arrangement.

15. The Chief Justice then held that it was beyond the power of the Court to grant any injunction or remedy which could have the effect of extending WSBC's banking licence which had expired by operation of statute on 1 June 2005 or to grant a new licence. Hence, he made orders referred to in para 6 above.

16. Section 54 (1) of the 2003 Act requires that Court proceedings under the Act to which a licensee is a party or which relate to a licensee are to be heard *in camera*, unless the Court otherwise orders. The reasons for such a provision are obvious. If it became public knowledge that the licence of any bank to carry on business was being questioned, there could be unfortunate and possibly irreparable consequences, affecting many parties. The hearings before Greig CJ and this Court were therefore held *in camera.*

17. After the orders of the Court of 31 May 2005, FSC issued a licence to WSBC without any indication that the reason for issuing it was in obedience to a Court order. Likewise, WSBC has been included in a published list of holders of banking licences under the 2003 Act. WSBC has thus continued to carry on business for some 18 months after its previous licence under the 1981 Act had lapsed by operation of statute and after it had been refused a licence under the 2003 Act.

18. If this appeal succeeds, then WSBC will proceed with its substantive application for permanent relief, filing affidavits in reply to FSC's affidavits and possibly amending its pleadings. This Court finds it unfortunate that the application in the High Court to discharge the interim orders was confined to the grounds mentioned above. The procedure employed was a classic case of a "treacherous shortcut" at "the price of delay, anxiety and expense"; *Tilling v Whiteman* [1980] AC1, 25.

19. The result of the procedure employed is that all this Court can now consider is whether Greig CJ was right to hold that he had no jurisdiction to grant interim relief which had the effect of extending WSBC's licence beyond the date of its statutory termination. His grounds for so holding were that it is impermissible to allow to continue a licence which has expired before the final determination of the application for judicial review. The legislation does not allow the Court to extend the term of a licence when there is no provision for extension in the statute. Only a new licence could give an effective extension. In any event, special considerations applied to mandatory injunctions which would make the Court reluctant to issue one. Moreover, the Court was unable to fix the terms and

conditions of a banking licence which the FSC alone was entitled to do. WSBC could apply for a new licence (It has not done so).

Arguments

20. Counsel for WSBC submitted the Chief Justice was wrong to decide that the orders went beyond preserving the *status quo.* He was wrong to rely on two decisions under section 8 of the New Zealand Judicature Amendment Act 1972. These cases were: *Commissioner of Inland Revenue v Lemmington Holdings Ltd* (1982), 5 NZTC 61.268 and *Woodhouse v Auckland City Council* (1984), 1 PRNZ 26.

21. The Chief Justice was also in error, counsel submitted, in purported reliance on the *Woodhouse* case, to refer to the difficulty in deciding what terms and conditions would apply to any licence. In this respect, FSC had advised the Court that there were no special considerations, apart from the jurisdictional problems, which prevented the Court from making the interim orders sought. In counsel's submission, there was no evidence that FSC was minded to impose terms.

22. In Counsel for WSBC's submissions, a mandatory injunction was necessary to maintain the *status quo* in the circumstances that WSBC had been conducting a successful banking business for 12 years and was entitled to the opportunity to challenge the purported termination of that business. Suddenly to close down a banking business would have disastrous results for customers and correspondents of the bank and could trigger a run on the bank. Conversely, there was no detriment to FSC in the continuation of the interim orders.

23. Dr Frame presented an argument, not presented in the High Court, attacking the relevant sections of the 2003 Act as being void and *ultra virés* the Constitution. In particular, the curtailment and cancellation of WSBC's offshore banking licence, issued under the 1981 Act for 5 years from 9 November 2000, by the combined effect of section 5(3) of the 2003 Act and FSC's refusal to issue a licence under that Act, constituted a "compulsory acquisition" without

compensation, contrary to Article 40 of the Constitution. It was also a "deprivation" of the use of WSBC's property contrary to Article 64(1) (c) of the Constitution. There were supplementary arguments;

(a) The ineffectiveness of section 5(3) of the 2003 Act leaves standing the "deemed" licence created by section 5(1) of that Act unless and until there is a constitutionally permissive measure to bring that licence to an end; and

(b) Appeal rights against the refusal by FSC to licence existing holders of banking licences should be read into section 12 of the 2003 Act.

24. Dr Frame referred to several Privy Council decisions from various Commonwealth countries with similar constitutional provisions to those in the Cook Islands' Constitution in support of the following basic proportions.

(a) The banking licence was "property";

(b) WSBC was deprived of the licence by a "coercive act"; and

(c) The deprivation of the licence was not a permissible derogation under Article 64 of the Constitution

25. Counsel for FSC's essential submission was that WSBC's banking licence expired on 1 June 2004 by operation of law. The Legislature had directed FSC not to issue licences unless FSC were satisfied that an applicant satisfied certain requirements. The Court could not do what the Legislature had clearly indicated could be done only by FSC. WSBC's only right was to apply again for a licence. The "*status quo*" was that WSBC could have no licence after 1 June 2005.

26. Counsel submitted that the present case was analogous to the *Woodhouse* case, where the only right of the applicant, whose licence had expired, was to apply for a new one. Counsel also offered argument on the constitutional question.

Based on other precedents, counsel submitted that the 2003 Act did not infringe WSBC's rights under the Constitution.

Discussion

27. *Lemmington* and *Woodhouse* were both decisions under New Zealand legislation which empowers the Court to make specific kinds of interim orders to protect the position of an applicant for judicial review. Section 8(1)(c) of the Act in question permits the making of orders:

> "Declaring any licence that has been revoked or suspended in the exercise of the statutory power, or that will expire by effluxion of time before the final determination of the application for review, to continue and where necessary, to have a continued in force".

28. In *Woodhouse*, the applicant's mobile food-stall licence from the Council expired on a given date and there was no right of renewal. Henry J held that section 8(1)(c) could only be invoked to continue a licence where the licence itself was one which, in or as a result of the substantive proceedings may be, held to continue in force and effect. The Judge relied, *inter alia*, on the New Zealand Court of Appeal decision in *Movick v Attorney General* [1978] 2 NZLR 545. There it was sought to review a ministerial decision not to extend a temporary permit which granted to the appellant the right to remain in New Zealand. The Court held that only the Minister could grant the right to remain in the country. The Court could not do so. Henry J, in *Woodhouse*, found further difficulty in granting relief because the Court was in no position to impose terms for the licence such as the site for the food stall, the appropriate rent and other conditions.

29. In *Lemmington*, the New Zealand Court of Appeal by a majority (Woodhouse P and Richardson J) overruled Chilwell J in the High Court, who had issued interim orders continuing tax code certificates issued by the Commissioner beyond their expiry dates. The view of the majority is encapsulated in the words of Richardson J at p 10 of the Judgment:

"it would be remarkable if the legislation authorizes the Court to extend the terms of a licence which contained no provision for extension. To do so would improve rather than preserve the position of the applicant".

30. The minority judgment of Cooke J (as he then was) noted that the Commissioner had taken (as does FSC here) the high ground, trying to eliminate the case *in limine* by invoking a question of principle. He held that the applicants were entitled to respond by saying that, in principle, they could succeed in their judicial review application and that they had put before the Court enough to justify holding the interim order. In his opinion, it was:

> "... at least reasonably arguable that the court may in its discretion grant relief against a proposed exercise of the assessment function if the taxpayer can show that the Commissioner proposes to act either on a fundamentally wrong legal basis or **contrary to some binding requirement of natural justice and fairness; especially if, as alleged here and not contested by the Commissioner, financially disastrous consequences would result were matters left to the delays of the objection procedure.**" (p 14 of Judgment) (Emphasis added.)

31. Later, at p 16 of the report, when explaining his reasons for differing from the majority, Cooke J said:

> "The effect of the interim order in the High Court is that in making any assessments on the investors the Commissioner must proceed on the footing that the special certificates are in force and have been granted on a correct view of the law in that the investors are entitled to the incentive deductions. It is only in that sense that the order prevents the Commissioner from implementing the assessment procedure. This kind of judicial control is no different from that involved in any other case where an advance determination is given interpreting the law to be applied by a statutory authority in performing its duties. If the order were discharged the Commissioner would have his ordinary power of altering or adding to any assessment made in the meantime.
>
> As to whether a determination of the law should be made by the court before an assessment is made by the Commissioner, the provisions of sec. 27, protecting assessments except against the objection procedure, are plainly a most important consideration to be borne in mind. But they do not **exclude an exercise of the court's jurisdiction in the pre-assessment stage and there may be cases, no doubt quite rare, where common justice to a taxpayer demands nothing less.**" (Emphasis added.)

32. The Cook Islands does not have a statute governing judicial review. It has the prerogative writs without the refinements thereto achieved by the New Zealand

statute. One must therefore look at the common law position as being applicable. Mr Thorp referred to a useful summary by Fisher J in *Telecom New Zealand Ltd v Clear Communications Ltd* (1997), 6 NZBCC 102, 326 at 102, 335. This dictum deals with the additional caution which should attend the grant of an interim mandatory injunction – a matter which was of concern to Greig, C J.

> "...I do not think that those tests are effected by the question whether the proposed injunction is prohibitory or mandatory. It is just that when the tests are applied, the potential for injustice to a defendant will often be increased by requiring him or her positively to act rather than passively to desist: for a particularly helpful discussion in that regard see that of Hoffman J in *Films Rover International Ltd & Others v Canon Film Sales* [1987] 1 WLR 670 at pp 679, 680, 682 and 685 applied in *Businessworld Computers Pty Ltd v Australian Telecommunications commission* (1989) 82 ALR 499 at p 503. As Hammond J put it in *Faumui v AFS (New Zealand) Ltd* (unrep, Auckland, CP 500/93, 20 August 1993 at p 7), an interlocutory injunction is normally brought to preserve the status quo pending a final decision; a mandatory interlocutory injunction is likely to be more intrusive and to disturb the status quo. **But each case turns on its own circumstances. For example a defendant's withdrawal of a long-standing service could be more intrusive than an order requiring its continuation. A single action from the defendant which has the effect of saving the plaintiff's property from destruction might be easy for the defendant and critical to the plaintiff. The tests for prohibitory and mandatory injunctions are the same; it is merely that when they are applied to the factual circumstances of particular cases, different outcomes may result."** (Emphasis added)

33. Fisher J was, dealing with an application for a mandatory injunction requiring the payment of money, which is extremely rare. What is of relevance in this decision is his emphasis on the circumstances of the particular case as being determinative of whether to exercise the discretion to grant an injunction. For example, a defendant's withdrawal of a long-standing service could be more intrusive than an order requiring its continuation.

34. Cooke J in *Lemmington*, in the passages cited, emphasised the relevance in exercising the discretion of financially disastrous consequences to an applicant and to common justice.

35. In our view, possible disastrous consequences and common justice (not just to WSBC) require the continuance of the interim orders until the determination of the substantive application for injunction for the following reasons:

(a) The FSC took no account of the obvious disastrous consequences of closing down a bank without any running-down period. Without considering evidence relating to WSBC's particular situation, the Court must be able to infer that the summary termination of a banking licence would cause great detriment and upset to a bank's creditors, debtors, customers, correspondents and staff, both within and outside the Cook Islands. Circumstances can easily be envisaged where third parties could suffer loss.

(b) It was no fault of WSBC that it was unable to apply for a licence early in the year's deemed licence period. One might have thought that the Legislature had made it possible, given the 3 months' mandatory time for processing applications, for a candidate to wind down its operation in an orderly way before the deemed licence year expired, should that candidate fail to obtain a licence. The inability of FSC to process applications until 9 months of that year had expired made any timely application impossible.

(c) The implications for WSBC of refusing interim relief are far greater than those for FSC.

(d) WSBC is entitled, as was the taxpayer in *Lemmington* in Cooke J's view, to have the chance to challenge FSC's decision on unreasonableness grounds. This Court is not bound to follow decisions of the New Zealand Court of Appeal and in the present case, the Court prefers the dissenting judgment of Cooke J (which accorded with that of Chilwell J at first instance) to that of the majority. Admittedly, the facts of *Lemmington* were very different from those in the instant case and the Court was considering a statutory provision. However, in a rare case such as this, the Court at common law can do justice to a situation, even where a mandatory injunction is necessary.

(e) We do not consider that the Court need be concerned, as was the Chief Justice, with an inability to fix conditions for the prolongation of the licence. Even if the substantive application to overturn the FSC decision

fails, then the Court may have to consider keeping the licence in force for whatever time is necessary for a managed withdrawal from business by WSBC to be effective. If the application succeeds, then either the FSC decision is quashed or FSC is directed to reconsider WSBC's application. In either event, there would have to be an extension of the present (i.e. that which was granted after the *ex parte* orders) licence to allow either for a licence to be issued with or without terms or for a reconsideration of the application.

36. Furthermore, the Court considers that WSBC has made out an arguable case that s 5(3) of the 2003 Act may have contravened constitutional provisions. We deliberately put our view no higher since, if a constitutional argument is to be mounted, we accept that the Attorney-General might wish to intervene and to present argument on the issue.

37. Another helpful authority which points in the direction of what we consider to be the justice of the present situation is *Fiorland Venision Ltd v Ministry of Agriculture & Fisheries* [1978] 2 NLR 341. There, the appellant had an existing licence under 1967 legislation New regulations came into force in 1975 which comfirmed existing licenses in force for the time being. Following a demand from the Ministry that it would have to apply for a new licence, the appellant duly did so. The Minister declined the application and required the appellant to close down its game parking-shed immediately. No reasons for the decision were given. Reversing the first instance decision of Wild, C J, the Court of Appeal held that there was no evidence on which the Minister could reasonably or properly have determined that he was not satisfied on the matters prescribed by the Regulations. Accordingly, the Court declared that the appellant was entitled to a licence, provided it upgraded its parking shed.

38. The decision meant that the Court was effectively giving the appellant a licence that would normally be granted only by the Minister. The legislation in that case was different, in that the Minister was held under a duty to grant a licence if satisfied on certain named matters. Whereas here, the legislation provides that FSC shall not grant a licence unless so satisfied. Moreover the Fiordland case was a decision on an appeal from a substantive hearing. The argument for relief

of a holding nature can be stronger at the interlocutory stage than at a substantive hearing.

39. The Court considers that it has jurisdiction to preserve the WSBC position pending the hearing of the substantive application for relief. To hold otherwise would be to make WSBC's application nugatory. The unusual circumstance of this case make a mandatory injunction just. FSC was unable to process the application for a licence in a timely way and, as a consequence, WSBC was faced with 3 days' notice of termination of its licence without any regard to consequences.

40. In the view of this Court, the substantive hearing of the application should have taken place months ago. Accordingly, we direct the High Court to accord priority to an early hearing date. It should also fix strict timetables for the filing of further pleadings and affidavits. WSBC should advise the Attorney-General, if it wishes to raise the constitutional argument at the substantive hearing to enable the Attorney-General to seek leave to intervene, if he thinks fit.

41. The appeal is therefore allowed. We think that WSBC's relief is adequate if the existing orders remain in place pending further order of the High Court, including the confidentiality orders.

42. WSBC is entitled to costs which are fixed at $3,000 plus reasonable fares and accommodation for both its counsel and Court filing fees, all to be determined by the Registrar in case of disagreement.

Williams Č J

Barker J A

Smellie J A