[2026] JMCA Civ 30

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P
THE HON MRS JUSTICE V HARRIS JA
THE HON MR JUSTICE LAING JA

SUPREME COURT CIVIL APPEAL NO COA2024CV00083

BETWEEN	**FINANCIAL SERVICES COMMISSION**	**APPELLANT**
AND	**STOCKS AND SECURITIES LIMITED (In Court-Supervised Winding-up)**	**1st RESPONDENT**
AND	**CAYDION CAMPBELL**	**2nd RESPONDENT**

Michael Hylton KC, Sundiata Gibbs and Miss Timera Mason instructed by Hylton Powell for the appellant

Mrs Caroline Hay KC and Ms Kimberly McDowell instructed by Hay McDowell for the respondents

3 December 2025 and 31 July 2026

Regulatory law – Financial Services Commission – Prescribed financial institution – Assumption of temporary management – Statutory preconditions – Whether Commission established reasonable belief that institution had given a false or misleading statement concerning its affairs – Members' voluntary winding up – Effect of declaration of solvency and appointment of trustee – Whether priority between trustee and temporary manager required determination by appellate court – Financial Services Commission Act, sections 8(5)(b), and Third Schedule – Companies Act, sections 227, 275 and 277

Injunction – Undertaking as to damages – Whether judge erred in granting liberty to pursue recovery of damages pursuant to undertaking

Costs – Financial Services Commission – Liability for costs – Statutory protection from liability absent proof of wilful or reckless misconduct – Financial Services Commission Act, section 22

MCDONALD-BISHOP P

[1] I have read, in draft, the judgment of my learned brother, Laing JA. I agree with his reasoning and conclusion and that the orders proposed by him should be made. There is nothing further I could usefully add.

V HARRIS JA

[2] I, too, have read, in draft, the judgment of my learned brother Laing JA. I agree with his reasoning and conclusion and have nothing further to add.

LAING JA

[3] By notice of appeal filed on 8 July 2024, the Financial Services Commission ('FSC'), the claimant in the court below, appeals against the judgment of Batts J ('the learned judge') dated 31 May 2024. The decision was made in favour of Stocks and Securities Limited ('SSL') and Caydion Campbell ('Mr Campbell'), the first and second defendants, respectively, in the proceedings. The details of the orders appealed are:

> "(a) It is declared that the appointment of Mr Caydion Campbell of Phoenix Restructuring Advisory and Insolvency Services Enterprise (PRAISE), Suite #3, 47E Old Hope Road, Kingston 5 in the parish of St Andrew as Trustee of [SSL] for the purposes of winding up and reorganization is and was at all material times valid.
>
> (b) The interlocutory injunction granted on the 25th January 2023 be and is hereby discharged and the temporary management put in place by the [FSC] on or about the 17th January 2023 shall cease with immediate effect and is hereby also discharged.
>
> (c) [SSL] and Mr Campbell] are at liberty to pursue recovery of damages pursuant to the [FSC's] undertaking as to damages.
>
> (d) Costs of this Claim will go to [SSL] and [Mr Campbell] against the [FSC] to be taxed if not agreed."

The background

[4] The FSC is a body corporate of the Government of Jamaica, established under the Financial Services Commission Act ('the FSC Act'). The FSC's functions include supervising and regulating prescribed financial institutions.

[5] The 1st respondent, SSL, is a company registered with the Companies Office of Jamaica that carries on the business of dealing in securities. It provides a range of services including financial planning, private wealth management and investment.

[6] The 2nd respondent, Mr Campbell, is the trustee of SSL and will also be referred to interchangeably as 'the trustee'.

[7] SSL and Mr Campbell together will be referred to as the respondents.

[8] The chronology of events that have ultimately led to this appeal is undisputed. However, there is disagreement as to the interpretation to be placed on and the effect of the actions of the FSC and SSL, respectively. The chronology filed by the FSC captures the relevant events, and I will adopt it, with appropriate amplification, where deemed necessary.

[9] The evidence before the learned judge confirms the numerous exchanges between the FSC and SSL that resulted from the FSC's discharge of its statutory monitoring function. However, for the purposes of this appeal, a convenient starting point is a letter dated 10 January 2023, sent by SSL to the FSC, in which it gave notice of an alleged incident of fraudulent conduct committed by an employee of the company. By letter dated 12 January 2023, signed by Ms Karene Blair, Senior Director, Securities, the FSC advised SSL of its intention to conduct a targeted examination of the entity and the records and documents which were required. This was stated to be done in accordance with the provisions of section 67F(3)(a) of the Securities (Amendment) Act 2013. The FSC also issued several directions pursuant to section 8(1) of the FSC Act.

[10] SSL responded by letter dated 13 January 2023, in which it purported to provide the FSC with a high-level action plan to be implemented by SSL to address the "impact resulting from current allegations of fraud committed by a former employee…". It also outlined, among other things, a "Next Steps/ Action Plan", which included the immediate appointment of a receiver, effective 16 January 2023. SSL proposed the appointment of "licensed trustee and receiver" Mr Campbell to oversee the investigation and carry out an independent business review.

[11] On 16 January 2023, SSL's shareholders passed a special resolution to reorganise the company's affairs, place it into members' voluntary winding up, and appoint Mr Campbell as trustee for the purposes of the winding up. The resolution was accompanied by a declaration of solvency, executed by three directors and filed with the Companies Office of Jamaica, stating that SSL would be able to satisfy its debts in full.

[12] On the following day, 17 January 2023, the FSC issued a notice of intention to appoint Mr Kenneth Tomlinson as temporary manager of SSL pursuant to section 8(5) and the Third Schedule of the FSC Act, and to assume the temporary management of the institution from 17 January 2023 at 8:30 am.

[13] Thereafter, on 25 January 2023, the FSC commenced proceedings by way of a fixed date claim form against SSL, Mr Campbell, and the three directors who had signed the declaration of solvency, namely Hugh Croskery, Laurence Adamson and Peter Knibb. The FSC sought, among other relief, declarations and orders to revoke the trustee's appointment.

[14] On the same date, the FSC obtained an interim injunction, granted without notice, to restrain the continuation of the winding up pending trial. The claim was later amended on 27 February 2023. On 3 July 2023, the court ordered that the proceedings continue as if commenced by claim form.

[15] The respondents each filed defences to the claim. In addition, Mr Campbell counterclaimed seeking declarations affirming the validity of his appointment, together with an order that SSL be wound up under the supervision of the court.

[16] The matter came before the learned judge, who heard the proceedings on several dates between February and May 2024. In a judgment delivered on 31 May 2024, the learned judge dismissed the FSC's claim and discharged the interlocutory injunction granted on 25 January 2023, as well as the temporary management put in place by the FSC on or about 17 January 2023. He also declared the appointment of Mr Campbell valid and ordered that the winding up of SSL proceed under the supervision of the court. The learned judge further held that Mr Campbell's appointment took priority over the FSC's appointment of the temporary manager and granted the respondents liberty to pursue damages pursuant to the FSC's undertaking given in support of the interim injunction.

The standard of review

[17] The appeal challenges the learned judge's exercise of discretion not to grant an injunction and other discretionary orders such as an order of costs. In such cases, it is a settled principle that this court ought to be slow to interfere with the exercise of a judge's discretion and will do so only where it is of the view that the judge's discretion was wrongly exercised (see The **Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 and **Hadmor Productions Ltd and others v Hamilton and others** ('**Hadmor**') [1982] 1 All ER 1042 at page 1046).

[18] In **Hadmor**, Lord Diplock stated the principle in the following terms at page 1046:

> "On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his

> discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

These principles have been consistently relied on by this court, including in the oft-cited case of **The Attorney General of Jamaica v John MacKay**. The analysis in this appeal will be conducted against these accepted legal principles.

The grounds of appeal

[19] The grounds of appeal are that:

> "(a) In finding that the Declaration of Solvency supporting the voluntary winding up was inaccurate, the learned judge erred in not making a direction under section 227 of the Companies Act that [Mr Campbell's] appointment as trustee was ineffective as a result of the mistake.
>
> (b) The learned judge erred by granting the Respondents liberty to recover damages pursuant to the [FSC's] undertaking in respect of the interlocutory injunction granted on January 25, 2023 without there being a formal application for an inquiry as to damages to which the [FSC] could respond.

(c) The learned judge erred in failing to recognise that the [FSC] has a statutory power, pursuant to section 8(5) of the Financial Services Commission Act, to assume temporary management of a regulated institution.

(d) The learned judge erred in failing to recognise that the [FSC's] statutory power to assume temporary management of a regulated institution is wide and is not limited to circumstances where a receiver is appointed.

(e) The learned judge erred by prematurely terminating the temporary management in these proceedings, despite that issue being the subject of Claim No. SU 2020 CD 000097, which had not yet been heard, and without considering relevant evidence filed in those proceedings.

(f) The learned judge erred in treating [SSL] as a company that was no longer an existing entity capable of being temporarily managed.

(g) The learned judge erred in relying on the judgment of the Supreme Court in **Financial Services Commission v Dyoll Insurance Limited** to support his finding that the Temporary Manager is secondary to the Trustee.

(h) The learned judge erred in failing to find that pursuant to section 8(5)(b) of the Financial Services Commission Act, the [FSC] had the power to assume temporary management of [SSL] where it had reason to believe that a regulated institution gave false statements concerning its affairs.

(i) The learned judge erred in failing to find that the appointment of the Temporary Manager took precedence over the appointment of the Trustee.

(j) The learned judge erred in finding that the directors of [SSL] acted honestly and with good intentions in circumstances where such a finding was unnecessary and could prejudice any future proceedings where that issue would need to be decided.

(k) The learned judge erred in failing to make a declaration that [SSL] was insolvent on January 15 & 16, 2023, considering that he made the following statement:

> **'For the reasons stated below I am satisfied that at the date the declaration was filed the company was already in an insolvent position.'** (paragraph 18)

(l) The learned judge erred in awarding costs against the [FSC] in circumstances where section 22 of the Financial Services Commission Act protects the [FSC] from liability where it acts *bona fide* in the exercise of its powers, functions and/or duties." (Emphasis as in the original)

[20] The orders sought by the appellant are the following:

"(a) A declaration that [SSL's] decision to commence winding up proceedings was contrary to the Financial Services Commission Act and/or contrary to the directions of the FSC dated January 10, 2023 and is therefore null, void and of no effect.

(b) A declaration that on or about January 15 and 16, 2023, when the Directors of [SSL] made the Declaration of Solvency, [SSL] was insolvent.

(c) A declaration that, due to the mistake regarding [SSL's] solvency, its appointment of [Mr Campbell] as trustee is of no effect and the [FSC's] Temporary Management takes precedence.

(d) An order that [Mr Campbell] be removed as trustee of [SSL] and the Temporary Manager is allowed to resume and maintain control of [SSL] until further orders of the court.

(e) An order that the Temporary Management is allowed to be completed in accordance with the Financial Services Commission Act.

(f) An order compelling the Respondents to grant full and unrestrained access to [SSL's] books, documentation, information and records used and/or obtained during the period of the [Mr Campbell's] trusteeship of the company.

(g) The Respondents be restrained whether by themselves, their servants and/or agents, from disposing of and/or dealing with [SSL's] assets and liabilities, or with assets and liabilities in its name, or its creditors' and/or clients' names, or from withdrawing or transferring or otherwise dissipating any funds from its accounts or its creditors and/or clients' account or from accounts in its name wheresoever held for the entire portfolio of the company.

(h) The Respondents be restrained whether by themselves, their servants and/or agents, from interfering with or contravening the acts of the servants and/or agents of the Financial Services Commission and/or Temporary Manager of [SSL] in accordance with the Financial Services Commission Act.

(i) Costs in the appeal and in the court below to the [FSC]."

[21] It is appropriate to note, for context, that at the hearing of this appeal, counsel for both sides advised the court that significant developments had occurred since the learned judge's judgment. Mr Hylton KC, for the FSC, conceded that, in such circumstances, much of the relief sought had been rendered unnecessary, having been overtaken and rendered otiose by those developments. However, King's Counsel indicated that serious issues of law remained unsettled and deserved the consideration of this court.

The issues for determination

[22] Mr Hylton, in his written submissions on behalf of the FSC, stated that the issues to be determined in this appeal can be summarised as follows:

"(a) whether the learned judge erred in finding that the Trustee's appointment took precedence over the FSC's appointment of the Temporary Manager (Grounds C, D, E, F, G, H and I);

(b) whether the learned judge erred by failing to find that the Trustee's appointment was ineffective in circumstances where the Declaration of Solvency supporting the voluntary winding up was inaccurate (Grounds A, J and K);

(c) whether the learned judge erred by granting the Respondents liberty to recover damages pursuant to the FSC's undertaking on the interim injunction granted on January 25, 2023 (Ground B); and

(d) whether the learned judge erred in awarding costs against the FSC (Ground L)."

As a result, Mr Hylton's oral submissions aligned with and adhered to these issues.

[23] He acknowledged that, when the matter was before the learned judge, there was no dispute between the parties as to the steps taken in relation to the winding up of SSL, but the dispute concerned which party was the proper party to take the necessary actions. Arising from that question, King's Counsel submitted that two main issues arose for determination. Firstly, whether the FSC had the power to appoint a temporary manager on 17 January 2023, this being subsequent to the appointment of the trustee. Secondly, if it had that power, whether it had a proper basis to intervene by making such an appointment.

[24] Mrs Hay KC, for the respondents, submitted that the central issue on appeal concerns the legal effect of SSL's members' voluntary winding up and Mr Campbell's appointment as trustee before the FSC appointed a temporary manager. Consequently, she appropriately addressed the appeal by reference to the issues identified in the FSC's written submissions rather than dealing with the grounds individually.

[25] For reasons that will become apparent, it is convenient to first address the second issue of whether there was a proper basis for the FSC to intervene by appointing a temporary manager. It was asserted that the appointment was predicated on an inaccurate declaration of solvency, and I will examine this issue as framed by Mr Hylton in the appellant's written submission as a starting point.

Issue 2: Whether the learned judge erred by failing to find that the Trustee's appointment was ineffective in circumstances where the Declaration of Solvency supporting the voluntary winding up was inaccurate (Grounds A, J and K);

The appellant's submissions

[26] Mr Hylton noted that the power to appoint a temporary manager, as provided for in section 8(5) of the FSC Act, is triggered when the FSC believes that any of the conditions specified in paras. 4-9 or 10 of Part A of the Third Schedule exists in relation to a prescribed financial institution. The condition listed at para. 5 of this schedule is where "[t]he institution has given false or misleading information in its application for a licence or registration or false statements concerning its affairs".

[27] Mr Hylton highlighted the sequence of events starting with the 12 January 2023 letter in which the FSC expressed its concerns "regarding the true financial condition of [SSL]" and additional concerns regarding the company's exposure to possible fraudulent activities and "the implications therefrom for the solvency of the entity". He highlighted that, following the 12 January 2023 letter, SSL informed the FSC by letter dated 13 January 2023 that it would conduct the necessary investigations and was in the process of appointing a receiver. SSL then issued a declaration of solvency and passed a resolution to place it in voluntary liquidation.

[28] Mr Hylton asserted that SSL made false statements, namely that it was solvent when it was not, and that it was going to appoint a receiver. King's Counsel argued that these representations must be considered having regard to the fact that in its 13 January 2023 response to the FSC's 12 January 2023 letter, there was no suggestion by SSL that the company was solvent or that it would be wound up. The representation was that Mr Campbell was being approached to ascertain the state of affairs of the company, while on 16 January 2023, SSL took another course of action by appointing Mr Campbell as the trustee. King's Counsel argued that it is noteworthy that the notice of the meeting on 16 January 2023 contained nothing about the appointment of a receiver or the conduct of

an investigation, which was the intended course as communicated by SSL on 13 January 2023.

[29] Mr Hylton stated that, on 16 January 2023, the directors were very active in that they issued the declaration of solvency, entered into an agreement with Mr Campbell, and passed a resolution appointing him as trustee. They also notified the Companies Registry and the creditors. SSL also notified the FSC by email, time-stamped 5:52 pm 16 January 2023, with attachments.

[30] Mr Hylton argued that there is a need for focus on the declaration of solvency. He noted that the declaration of solvency being an assertion that the company is solvent and able to pay its debts is pivotal because section 277(4) of the Companies Act provides that a winding up in which a declaration of solvency has been made and delivered in accordance with that section is referred to in the Companies Act as a members' voluntary winding up and a winding up in the absence of such a delivered declaration is referred to as a creditors' voluntary winding up.

[31] In addressing the evidence of the FSC's witness Ms Blair, that she did not see the email of 16 January 2023, which was sent to the FSC, and which attached the declaration of solvency, Mr Hylton noted that the email on 16 January 2023 was copied to eight persons at the FSC. However, he conceded that none of those persons was called on behalf of the FSC to give evidence of their knowledge that the declaration of solvency was issued and that, in their opinion, it constituted a false declaration. King's Counsel advanced the position that, other than the declaration of solvency, the FSC had received information from SSL that was false, including the letter dated 13 January 2023, in which SSL stated that it was undertaking investigations into the fraud allegedly committed by its employee.

[32] As regards the appellant's power to intervene in a regulated entity's affairs, it was submitted that the learned judge erred in finding that the appointment of a temporary manager was "ineffective to stop winding up proceedings which have already

commenced". It was accepted that the FSC Act does not specifically identify the passing of a winding up resolution as a basis for the FSC to intervene. However, it was argued that this does not bar the FSC from exercising its regulatory powers to intervene.

[33] Mr Hylton criticised the learned judge's discussion of the FSC's power, conferred by the Third Schedule of the FSC Act, to intervene after a receiver has been appointed, because the sole reason the FSC gave in para. 5 of the notice of intention to appoint the temporary manager was a false statement by SSL. This, King's Counsel submitted, was one of the six conditions specified in paras. 4 to 9 of Part A of the Third Schedule.

[34] It was highlighted that section 227 of the Companies Act gives the court the power to declare that proceedings taken in the winding up were not validly taken if the court thinks fit. Given the conduct of SSL since the letter of 12 January 2023, it was submitted that the learned judge ought to have made that order in this case.

[35] It was highlighted that at para. [18], the learned judge found that SSL was insolvent at the time the statutory declaration was filed, and, at para. [21], he referred to this finding and concluded that the directors had nevertheless honestly and reasonably arrived at the contrary opinion that SSL was solvent. However, Mr Hylton submitted that even if it was the case that the directors were mistaken, this should have caused the learned judge to consider that it triggered section 227 and to hold that Mr Campbell's appointment was ineffective. Alternatively, the learned judge ought to have granted order 3 sought in the FSC's particulars of claim, namely a declaration that when the directors made the declaration of solvency, SSL was insolvent.

[36] It was also argued that the learned judge was mistaken in his interpretation of section 277(1), on the ground that, because it provides that the directors "may" make a declaration of solvency, it was optional, and its falsity was irrelevant. It was posited that the declaration is mandatory for a members' voluntary winding up, as opposed to a creditors' winding up.

[37] Mr Hylton also criticised the learned judge's finding that the directors acted honestly and reasonably as unnecessary and unfortunate, given the implications it may have for future investigations into SSL's operations.

The respondents' submissions

[38] Mrs Hay submitted that the FSC has cited no authority to support the proposition that an inaccurate declaration of solvency renders a trustee's appointment invalid. She argues that the Companies Act contains no such provision.

[39] According to Mrs Hay, the declaration of solvency is not a mandatory step in a members' voluntary winding up. Rather, it is an optional step that precedes the winding up resolution. The winding up itself commences only when the resolution is passed. Consequently, any defect in the declaration does not invalidate the subsequent winding up proceedings.

[40] She submitted that section 277 of the Companies Act expressly provides a consequence for making a declaration without reasonable grounds, namely criminal liability for the directors concerned. The statute does not provide that the winding up or the trustee's appointment thereby becomes void.

[41] Mrs Hay further argued that section 227 of the Companies Act preserves the validity of proceedings in a voluntary winding up unless a court, upon proof of fraud or mistake, declares otherwise. Because the declaration of solvency predates the commencement of the winding up, it does not fall within that provision.

[42] Relying on English authorities, including **Re New Millennium Experience Co Ltd Greenwich Millennium Exhibition Ltd v New Millennium Experience Co Ltd and others** [2003] EWHC 1823 (Ch) and **De Courcy v Clements and another** [1971] 1 All ER 681, King's Counsel submitted that subsequent discovery of inaccuracies in a declaration of solvency does not invalidate it if, at the time it was made, there existed a reasonable basis for the directors' assessment. The law seeks to avoid judging directors' decisions solely through hindsight.

[43] Mrs Hay also noted that the Companies Act provides mechanisms for converting a members' voluntary winding up into insolvency proceedings where a company is subsequently found to be insolvent. That statutory remedy, she argued, further demonstrates that an inaccurate declaration does not invalidate the winding up itself.

[44] Mrs Hay concluded by submitting that the learned judge correctly concluded that the validity of Mr Campbell's appointment did not depend on the accuracy of the declaration of solvency and that any issue regarding the declaration was ultimately irrelevant to the legality of the winding up.

Analysis of issue 2

[45] Section 8(5)(b) of the FSC Act and para. 5 of Part A of the Third Schedule, together permit the FSC to assume the temporary management of the institution in accordance with Part C of that Schedule. Section 8(5) provides as follows:

> "(5) Where the Commission believes that any of the conditions specified in paragraph 4, 5, 6, 7, 8, 9 or 10 of Part A of the Third Schedule exists in relation to a prescribed financial institution, the Commission may-
>
> > (a) take such action as it considers appropriate under subsection (1) (*a*), (*b*), (*c*) or (*d*);
> >
> > **(b) assume the temporary management of the institution in accordance with Part C of that Schedule;**
> >
> > (c) suspend, cancel or revoke the licence or registration of that institution in accordance with the procedure specified in the relevant Act; or
> >
> > (d) present to the court a petition for the winding up of the institution or an application regarding reconstruction thereof." (Emphasis supplied)

[46] Part A identifies specific circumstances, and those listed at 4 to 10 are as follows:

> "4. A final judgment has been obtained against the institution and has remained unsatisfied for at least one month.

5. The institution has given false or misleading information in its application for a licence or registration or false statements concerning its affairs.

6. The institution is contravening or has contravened any cease and desist order or any directions issued by the Commission pursuant to this Act.

7. The value of the institution's assets is substantially less than the amount of its liabilities.

8. The institution has notified the Commission that it proposes to surrender its licence or registration.

9. A receiver has been appointed in respect of the institution.

10. The institution, a director, any employee or agent of the institution has, in the conduct of the institution's business, contravened a provision of the Money Laundering Act or any regulations made thereunder." (Emphasis supplied).

For our purposes, item 5 is of particular relevance.

[47] Provided the proper foundation exists for the assumption of temporary management of an institution, Part C provides the mechanism for its implementation. Paragraphs 1(1) to 1(5) are in the following terms:

"PART C

Temporary Management of a Prescribed Financial Institution

1.-(1) For the purposes of section 8(5)(b) the Commission shall serve on the prescribed financial institution a notice announcing its intention of temporarily managing the institution from such date and time as may be specified in the notice.

(2) The Commission may appoint any person to manage the institution on its behalf.

(3) A copy of the notice referred to in sub-paragraph (1) shall be sent to the Registrar of the Supreme Court and shall be posted in a conspicuous position at each place of business of

the institution and shall be published in a newspaper circulated in Jamaica.

(4) Upon the date and time specified in the notice referred to in subparagraph (1), there shall vest in the Commission full and exclusive powers of management and control of the institution, including, without prejudice to the generality of the foregoing, power to-

(a) continue or discontinue its operations;

(b) stop or limit the payment of its obligations;

(c) employ any necessary officers or other employees;

(d) execute any instrument in the name of the institution;

(e) initiate, defend and conduct in the name of the institution, any action or proceedings to which it may be a party.

(5) Not later than sixty days after the Commission has assumed temporary management of a prescribed financial institution, it shall apply to the Court (furnishing full particulars of the institution's assets and liabilities) for an order confirming the vesting in the Commission of full and exclusive powers of management of the institution as described in subparagraph (4)." (Italics as in the original)

[48] Para. 3 of Part C of the Third Schedule also provides that where the Commission has served a notice on an institution under para. 1, it shall, within 60 days from the date specified in such notice or such longer period as a judge of the Supreme Court may allow, present a petition to the court under the Companies Act for the winding up of the institution.

[49] The statutory process, which originated with the service of the notice on SSL announcing the FSC's intention of temporarily managing the institution from the date and time specified in the notice, was, therefore, a critical step in the proceedings. The notice

was dated 17 January 2023, and the portion thereof which is of prime concern to this court is reproduced hereunder:

"NOTICE OF INTENTION TO APPOINT A TEMPORARY MANAGER

Pursuant to section 8(5) and the Third Schedule of the Financial Services Commission Act

To: Stocks & Securities Limited
33 ½ Old Hope Road
Kingston 10

The Financial Services Commission has reason to believe that the condition set out in paragraph 5 of Part A of the Third Schedule of the Financial Services Act ('FSC Act') exists in relation to Stocks & Securities Limited ('SSL'). Specifically, the Financial Services Commission ('FSC' or 'Commission') has reason to believe that Stocks & Securities Limited ('SSL') '*has given a false or misleading statement concerning its affairs*'.

TAKE NOTICE that Pursuant to section 8(5)(b) of the Financial Services Commission Act ('FSC Act'), Paragraph 5 of Part A of the Third Schedule and Part C of the said Third Schedule, from the 17th day of January 2023, at 8:30 a.m., the Commission intends to assume the temporary management of SSL.

…" (Emphasis and italics as in the original)

[50] The reason expressly identified in the notice is that the FSC has reason to believe that SSL "has given a false or misleading statement concerning its affairs". In para. 17 of the FSC's written submissions, it was asserted that "The FSC thought that the declaration of solvency, which claimed that the company would be able to satisfy its debts, was a misleading statement concerning the company's affairs". This point was amplified in oral submissions; however, the essence of Mr Hylton's submissions before this court was that the reason advanced in the notice was valid. He asserted that it was a reasonably held belief, given the declaration of solvency and the actions taken by the directors between 13 and 16 January 2023, which were contrary to their prior representations. In particular, this included the inconsistency between SSL's communication with the FSC regarding the

appointment of a receiver and SSL's change of course and decision to wind up and/or reorganise the company by appointing a trustee. In written submissions, the FSC advanced the position that this divergence and SSL's eventual action were also seen as "evidence" of false statements being made concerning the company's affairs, and that this contributed to the FSC invoking section 8(5)(b) of the FSC Act.

[51] Once the FSC has issued a notice under section 8(5)(b) of the FSC Act, it must apply to the court no later than 60 days thereafter for an order confirming the vesting in the FSC of full and exclusive powers of management and control of the relevant institution (see para. 1(5), Part C, Third Schedule). Although the FSC Act does not make an express provision, it is implied that, on that application, the FSC would be required to demonstrate to the court that "any of the conditions specified in paragraph 4, 5, 6, 7, 8, 9 or 10 of Part A of the Third Schedule exists" in relation to the relevant prescribed institution.

[52] Given that the trustee had been appointed before the notice was issued, and having regard to the condition relied on and the reason stated in the notice, the FSC was required to establish, by evidence, that it reasonably believed that SSL had "…given a false or misleading statement concerning its affairs."

[53] It is undisputed that the FSC's Senior Director, Securities was the only witness to give evidence regarding the reason the FSC appointed the temporary manager. Ms Blair asserts the following in her witness statement:

> "17. At a meeting held on January 16, 2023, which I attended, I learned for the first time and by extension the FSC at that time became aware for the first time that Caydion Campbell was purportedly appointed as trustee of SSL, and not as a Receiver. This information was surprising to the FSC after SSL Directors had taken certain steps, completed and lodged documents with the Companies Office of Jamaica.
>
> 18. The records of the Companies Office of Jamaica showed that on or about January 16, 2023, SSL filed or caused to be filed Special Resolution dated January 16, 2023,

along with Notice of Appointment stating that the affairs of the company be placed in Members Voluntary Winding up and that Caydion Campbell was the purported trustee.

19. At no material time did any representative of SSL consult with me or any member of the FSC team about the change of course or mention the prospect of appointing a trustee for SSL or the reorganization of SSL. As Senior Director, Securities, if any other person became aware of this information, it would have been routed to me. That did not happen. In essence, SSL had no consent or permission from the FSC to make such appointment. SSL contravened the FSC's Directions.

20. Realising that SSL had radically departed from the FSCs Directions and what representatives had said to the FSC representatives at the opening conference and any other meeting subsequent to January 10, 2023, the FSC, pursuant to its powers under section 8(5)(b) and in accordance with Parts A and C of the Third Schedule of the Financial Services Commission Act, exercised its powers to assume Temporary Management of SSL on the [sic] January 17, 2023 and appointed Mr. Kenneth Tomlinson as the Temporary Manager."

[54] Mrs Hay highlighted the fact that Ms Blair did not assert that the reason had anything to do with the declaration of solvency and in cross examination she said she had not seen the declaration of solvency until after the meeting she attended with Mr Campbell as trustee and officers of SSL on 16 January 2023 and likely by 17 January 2023 when an email with documents was sent to the FSC by Mr Campbell.

[55] Mr Hylton submitted that the e-mail was sent to eight people at the FSC. However, in my view, this does not assist the FSC, as none of those people gave evidence that they had seen the e-mail or that it led to the reasonable belief that its contents and/or those of the attachments constituted "a false or misleading statement concerning its affairs".

[56] In para. 20 of its written submissions, the FSC makes the following complaint:

> "20. The learned judge did not address his mind as to whether this was a valid basis for the FSC's assumption of temporary management but instead focused on bases on which it never relied."

This supports my conclusion that the learned judge did not consider whether there was evidence from the FSC that it formed a reasonable belief that the declaration of solvency was false or misleading. However, this does not inure to the benefit of the FSC as it had the obligation to present evidence of what it considered a valid basis for its assumption of temporary management but failed to do so. Accordingly, I find considerable merit in SSL's submission that the evidence before the learned judge does not support the FSC's position that the decision to appoint a temporary manager was influenced by the content of the declaration of solvency. Further, I find that the FSC was bound by the reason it cited for its intervention, and that there was insufficient cogent evidence before the learned judge to support the alleged "false or misleading statement".

[57] In my opinion, this failure by the FSC is dispositive of the grounds concerning the FSC's statutory basis for temporary management and that having priority over the trustee. The FSC did not establish the critical foundation for its asserted statutory authority to appoint a temporary manager. Although the learned judge's conclusions appear to have been premised on the assumption that the FSC had done so, it is this court's duty to examine whether the FSC had established the statutory basis for appointing a temporary manager. Having found that the FSC failed to establish this basis for intervening, by the appointment of a temporary manager, the FSC failed at this first hurdle and is not entitled to this court's review of the learned judge's analysis and conclusions, since these were predicated on a necessary foundation that was, in fact, non-existent.

Issue 1: Whether the learned judge erred in finding that the Trustee's appointment took precedence over the FSC's appointment of the Temporary Manager (Grounds C, D, E, F, G, H and I);

<u>The appellant's submissions</u>

[58] It was argued that the learned judge's conclusion that Mr Campbell's appointment took precedence over the FSC's temporary manager resulted from the following findings:

(a) the FSC had no power pursuant to the FSC Act to intervene in these circumstances;

(b) since the winding up had already commenced, there was no entity for the temporary manager to manage at the time of his appointment; and

(c) the temporary manager was secondary to the Trustee "**who has statutory duties to fulfill**" (emphasis added).

[59] In addressing the scope of the FSC's power to intervene, Mr Hylton submitted that the learned judge erred in concluding that the FSC lacked authority to intervene once SSL's shareholders had resolved to place the company into voluntary winding up. While acknowledging that the FSC Act does not expressly identify the passing of a winding up resolution as a trigger for intervention, King's Counsel argued that nothing in the legislation restricts the FSC's broader statutory powers to intervene where the conditions prescribed by the Act are otherwise satisfied. In King's Counsel's submission, the learned judge adopted an unduly narrow interpretation of the FSC's powers, which finds no support in the statutory scheme.

[60] Mr Hylton further contended that the learned judge improperly focused on whether the FSC Act expressly permitted intervention following the appointment of a receiver, trustee, or liquidator. He highlighted that the FSC's case was not premised on the appointment of any of those office-holders. Rather, the FSC relied upon its statutory

authority under section 8(5)(b) of the FSC Act and para. 5 of Part A of the Third Schedule, which permits the assumption of temporary management where the FSC believes that a regulated institution has provided false or misleading information or made false statements concerning its affairs.

[61] According to Mr Hylton, the FSC's notice of intention to appoint a temporary manager expressly identified this statutory ground. The FSC considered that the declaration of solvency filed in support of SSL's voluntary winding up, which represented that the company would be able to satisfy its debts in full, constituted a misleading statement concerning the company's affairs. King's Counsel submitted that the correctness of that concern was later confirmed by the learned judge's own finding that SSL was insolvent at the relevant time.

[62] Mr Hylton also pointed to what was said to be an inconsistency between SSL's correspondence of 13 January 2023 and its subsequent communication of 16 January 2023. It was argued that, having previously communicated with the FSC regarding the appointment of a receiver, SSL subsequently altered course and proceeded instead with a voluntary winding up and the appointment of a trustee. This divergence, King's Counsel submitted, further contributed to the FSC's belief that false or misleading statements had been made concerning the company's affairs and reinforced the statutory basis for intervention.

[63] It was argued on behalf of the FSC that the learned judge failed to address whether its reliance on section 8(5)(b) provided a valid basis for assuming temporary management. Instead, it was suggested that the learned judge wrongly focused on elements the FSC had not relied upon. In those circumstances, King's Counsel submitted that the learned judge's restrictive interpretation of the FSC Act and his focus on the appointment of a receiver prevented him from properly considering whether the FSC's statutory powers superseded SSL's subsequent actions in appointing a trustee and commencing voluntary winding up proceedings.

[64] In addressing this issue, King's Counsel specifically addressed ground (f), namely that the learned judge erred in treating SSL as a company that was no longer an existing entity capable of being temporarily managed. He argued that although the respondents contend that the learned judge meant there were no "operations" to manage, that position is still incorrect because it focuses on the temporary manager's function of "managing". However, the power to manage is only one of the full statutory powers set out in the Third Schedule, Part C, para. 1(4) of the FSC Act and is the only one applicable where the company is still carrying on operations.

[65] King's Counsel argued that the fact that the winding up had already commenced is not expressly stated in section 8 of the FSC Act or in the schedule thereto, as a bar to the appointment of a temporary manager.

The respondent's submissions

[66] Mrs Hay submitted that the FSC is a statutory body whose powers are confined to those expressly conferred by the FSC Act and any powers necessarily implied for the performance of its statutory functions. She argued that Parliament did not confer on the FSC any general supervisory authority capable of overriding the statutory regime governing voluntary winding up under the Companies Act.

[67] She contended that the FSC Act provides a carefully defined framework for intervention in the affairs of regulated entities. Under section 8 and the Third Schedule, the FSC may issue directions, require corrective action, appoint a temporary manager, suspend licences, or commence winding up proceedings. However, where it seeks to pursue winding up, the FSC itself is required by section 8(6) to act in accordance with the Companies Act.

[68] King's Counsel submitted that the learned judge correctly recognised the FSC's statutory power to appoint a temporary manager, but also correctly distinguished between a company in receivership and one in voluntary winding up. She argued that the temporary management provisions contemplate the management of an operating

business, that is, one in receivership. By contrast, section 275 of the Companies Act provides that once a company enters voluntary winding up, it ceases to carry on business except insofar as necessary for the winding up process.

[69] According to Mrs Hay, the winding up commenced on 16 January 2023, when the members passed a special resolution to wind up the company and appointed Mr Campbell as trustee. By then, the company's operations had ceased, the directors' powers had terminated under the Companies Act, and the trustee had assumed responsibility for administering the winding up. Accordingly, the FSC's appointment of a temporary manager the following day occurred after the winding up commenced.

[70] King's Counsel further submitted that the FSC Act contains no provision empowering the FSC to intervene merely because shareholders have resolved to place a company into voluntary winding up. The FSC's powers are directed at the regulated institution itself and do not extend to preventing shareholders from exercising rights conferred by the Companies Act.

[71] Mrs Hay rejected the FSC's contention that the learned judge held that intervention is permissible only where a receiver has been appointed. She submitted that the learned judge merely observed that the Third Schedule refers to a receiver, not a trustee, which was consistent with the FSC's own position at trial that the two offices are distinct.

[72] King's Counsel also argued that the evidence did not support the FSC's present contention that its decision to intervene was prompted by concerns about the declaration of solvency. She maintained that the FSC's witnesses' evidence established that the declaration was not the basis for the temporary manager's appointment. She, therefore, submits that the learned judge correctly assessed the scope of the FSC's statutory powers and committed no error of law.

[73] Regarding the status of SSL after the appointment of the trustee, Mrs Hay submitted that the FSC misinterpreted the learned judge's statement that there was "no entity capable of being managed" by the temporary manager. She argued that the

learned judge did not suggest that the company ceased to exist. Rather, he expressly recognised that the company remained in existence during the winding up process but had ceased trading and operating as a going concern.

[74] In her submission, Mrs Hay argued that the learned judge's point was simply that there were no ongoing business operations for a temporary manager to manage once the winding up had commenced, and the FSC had failed to demonstrate that this conclusion was wrong either in law or on the facts.

[75] Regarding the status of the temporary manager vis-à-vis the trustee, King's Counsel submitted that the FSC's position throughout the litigation has been that a temporary manager appointed under the FSC Act holds a superior position to a trustee appointed under the Companies Act. She contended that neither statute supports that proposition.

[76] She argued that the Companies Act is not subordinate to the FSC Act and that no legislative provision authorises a subsequently appointed temporary manager to displace a trustee already appointed in a valid winding up. Once the winding up process is engaged, the trustee becomes subject to statutory obligations under the Companies Act and, where applicable, the Insolvency Act. Those statutory duties cannot be overridden by a later appointment under another enactment.

[77] Mrs Hay submitted that a trustee and a temporary manager perform different functions. The temporary manager's role is to manage and investigate a regulated institution and to make recommendations regarding its future. By contrast, the trustee's role is to realise assets, validate and rank claims, distribute funds to creditors, and otherwise administer the winding up process.

[78] King's Counsel emphasised that the chronology is undisputed and demonstrates that the trustee was appointed before the temporary manager. There was no direction issued by the FSC preventing the appointment of the trustee, nor any statutory provision giving priority to a later appointment of a temporary manager.

[79] Mrs Hay relied on the decision in **Financial Services Commission v Dyoll Insurance Company Limited** (unreported), Supreme Court, Jamaica, Claim No 2005 HCV 1267, judgment delivered on 3 June 2005. She submitted that once winding up proceedings have commenced and a trustee or liquidator has been appointed, the temporary manager must defer to that office-holder. She argued that the FSC produced no authority demonstrating that the trustee's statutory functions could be displaced by a temporary manager.

[80] King's Counsel further contended that the evidence revealed that the temporary manager himself recognised the distinction between the two offices and, in practice, undertook activities characteristic of a trustee, including validating claims and making distributions to creditors. In her submission, this demonstrates that the trustee's functions remained necessary and that the temporary manager was effectively acting outside the statutory scope of his appointment.

[81] For those reasons, Mrs Hay submitted that the learned judge was entitled to conclude that the trustee's role prevailed and that the trustee should be restored to office.

<u>Analysis of issue 1</u>

[82] This issue also raises several interesting questions of law, the resolution of which may provide guidance for the FSC, insolvency practitioners, attorneys-at-law and the public at large. However, having regard to my conclusions on the first issue, it would be undesirable for this court to make any findings on the law. As Lord Mustill stated in **Attorney General's Reference No 3** [1997] UKHL 31:

> "The courts have always firmly resisted attempts to obtain the answer to academic questions, however useful this might be. Normally, where an appeal is brought in the context of an issue between parties, the identification of questions which the court should answer can be performed by considering whether a particular answer might affect the outcome of the dispute."

[83] This pronouncement was made in the course of a hearing on issues related to a criminal matter and a specific reference by the Attorney General, but is of wider application.

[84] I should add that although the parties have acknowledged that developments regarding the operation of SSL have overtaken aspects of the appeal, this appeal does not, in my view, fall within the category of cases in which the entire appeal is academic. In **Stewart (Gordon) v Senator Noel Sloley, Sr et al** [2017] JMCA Civ 19, at para. [25], this court made the following observations:

> "Insofar as this case is concerned, the position therefore appears to be this. As a general rule, courts are concerned to decide disputes between the parties before them, so they do not hear appeals or pronounce on abstract questions of law when there is no dispute to be resolved. Nevertheless, even in cases in which there is no longer a *lis* to be decided between the parties, the courts reserve a discretion to hear appeals, or to deliver judgment, where there are good reasons in the public interest to do so. Such reasons may include the fact that the case for the appeal raises a point of law of some general public interest which it may be important to resolve for the benefit of all the litigants. In cases in which the parties have arrived at the settlement in between the hearing of the appeal and the delivery of judgment, further considerations relevant to the exercise of the court's discretion may also include the wishes of the parties themselves and how far the preparation of any judgment has got by the time the court is advised of the settlement."

[85] This statement was made in relation to an appeal in which a settlement had been reached before judgment was delivered, so the dispute had been resolved, which is not the case in the appeal under consideration. However, I am of the view that similar considerations ought to apply where the court has before it issues that do not assist in resolving the dispute between the parties.

[86] There remains an issue in dispute between the parties, but this has been resolved by my conclusion that the FSC did not satisfy the statutory basis for appointing a

temporary manager. Resolving the question of whether the trustee's appointment took precedence over the temporary manager's appointment is unnecessary and, in my view, would amount to the court deciding an academic question of law, which in any event would be *obiter dicta* (observations made by the court that are not necessary to resolve the appeal).

Issue 3: Whether the learned judge erred by granting the Respondents liberty to recover damages pursuant to the FSC's undertaking on the interim injunction granted on January 25, 2023 (Ground B)

The appellant's submissions

[87] The FSC submitted that, having found Mr Campbell to have been validly appointed as trustee, the learned judge proceeded to grant the respondents liberty to pursue recovery of damages pursuant to the undertaking given by the FSC in relation to the interim injunction granted on 25 January 2023.

[88] It was contended that this order was fundamentally flawed because it effectively permitted the respondents to proceed to an assessment of damages without first making any application for an inquiry into damages. It was argued that, in consequence, the FSC was deprived of the opportunity to make submissions opposing such relief.

[89] Mr Hylton further submitted that it is well established that the failure of a substantive claim does not, without more, mean that an interim injunction was wrongly granted. King's Counsel argued that where an undertaking has been given in support of an injunction application, and the claimant subsequently fails in the substantive proceedings, the successful defendant is still required to apply for an inquiry as to damages. Such an inquiry, it was submitted, is not ordered automatically; rather, the defendant must first demonstrate a prima facie basis sufficient to justify it. In support of that proposition, reliance was placed on Halsbury's Laws of England, Civil Procedure (Volume 12 (2020) – 15. Applications and Orders for Interim Remedies > (2) Interim Remedies > (iii) Interim Injunctions > E. Undertaking as to Damages, para. 607.

[90] Against that background, Mr Hylton submitted that no application for an inquiry as to damages was made before the learned judge, whether orally or in writing. It was, therefore, argued that the learned judge erred in granting liberty to pursue damages, as the effect of the order was to allow the respondents to bypass the established procedural requirements for commencing an assessment of damages arising from an undertaking as to damages.

<u>The respondent's submissions</u>

[91] Mrs Hay submitted that the FSC's complaint misconstrues the learned judge's order. The order merely granted the respondents liberty to pursue damages pursuant to the FSC's undertaking given when it obtained interlocutory injunctive relief. It did not direct an assessment of damages.

[92] She argued that the learned judge expressly recognised the potential relevance of section 22 of the FSC Act and left any question concerning the FSC's immunity or liability under the undertaking to be determined in subsequent proceedings. The order, therefore, preserved, rather than prejudged, the FSC's arguments on that issue.

<u>Analysis of issue 3</u>

[93] The order being challenged by the appellant is the following:

> "The [respondents] are at liberty to pursue recovery of damages pursuant to the [FSC's] undertaking as to damages."

[94] The order is not as precise as it could have been, and there is merit in the respondents' submission regarding its interpretation. As this is the more conservative construction and one that does not prejudice the FSC, the respondents are at liberty to adopt their interpretation of the order and apply for an enquiry into damages. This will also address the FSC's concern regarding an opportunity to oppose it.

[95] Accordingly, I am of the view that it is not necessary for this court to prefer one of the proposed constructions of the order being advanced.

Issue 4: Whether the learned judge erred in awarding costs against the FSC (Ground L)

<u>The appellant's submissions</u>

[96] The FSC also challenged the order awarding costs against it. Mr Hylton submitted that the costs order is inconsistent with section 22 of the FSC Act, which provides that, in the absence of proof of wilful or reckless misconduct on the part of the FSC in carrying out its statutory functions and duties, no liability is incurred by the FSC, its Executive Director, members, or employees.

[97] It was argued that, although the learned judge purported to quote section 22 of the FSC Act at para. [5] of the judgment, the version reproduced, which may have been an earlier iteration of the FSC Act, omitted the words relating to "wilful or reckless misconduct", which King's Counsel described as critical to the proper interpretation and application of the provision.

[98] Mr Hylton further submitted that the FSC had exercised statutory powers conferred upon it to assume temporary management of SSL on the basis of its belief that SSL had provided false information concerning its affairs and that urgent intervention was required for the protection of customers. He highlighted that there was neither a finding nor any suggestion in the proceedings below that the FSC had acted wilfully or recklessly.

[99] King's Counsel contended that, in those circumstances, there was no basis for imposing liability on the FSC in respect of the filing and prosecution of the claim. It was, therefore, submitted that the learned judge erred in awarding costs against the FSC and that the costs order ought to be set aside.

<u>The respondent's submissions</u>

[100] Mrs Hay submitted that the FSC is not entitled to immunity from costs under section 22 of the FSC Act because the proceedings it initiated fell outside the proper exercise of its statutory powers.

[101] She argued that once the FSC became aware of the trustee's appointment, it was required to recognise and respect the statutory role conferred by the Companies Act. Instead, it pursued litigation against both the company and the trustee personally, notwithstanding the trustee's efforts to avoid duplicative costs and to cooperate in achieving a court-supervised winding up.

[102] In dissecting the FSC's conduct, it was submitted that it is not the duty or function of the FSC to sue a prescribed institution it regulates and to seek private relief against it and its trustee

[103] Mrs Hay contended that the decision by the FSC to litigate in the manner ultimately resulted in substantially lengthy and costly proceedings. In her submission, the FSC acted not as a regulator performing statutory functions but as an ordinary litigant seeking declarations and injunctive relief against the regulated entity and its trustee.

[104] Mrs Hay further argued that the FSC Act authorises the FSC to initiate or defend proceedings on behalf of a regulated institution under temporary management, but not to sue the institution itself or its trustee in pursuit of private law remedies. Because the FSC acted outside the scope of its statutory authority, it cannot rely on section 22 to avoid the ordinary consequences of unsuccessful litigation.

[105] Mrs Hay concluded this point by submitting that the learned judge properly exercised his discretion in awarding costs against the FSC and that there is no basis for appellate intervention. It was posited that the proper forum to ventilate the applicability or otherwise of section 22 of the FSC Act might well be before a court inquiring into the undertaking as to damages, since the same issues could apply to the question of costs.

[106] The respondents maintained that the discretion to award costs on the claim and counterclaim against the FSC has been correctly exercised and ought not to be disturbed by this court.

Analysis of issue 4

[107] It is necessary to compare the version of section 22 of the FSC Act reproduced by the learned judge in para. [5] of the judgment with the current version. The version quoted by the learned judge is in the following terms:

> "22. No liability is incurred by the Commission or any person specified in section 15 (1) as a result of anything done by him bona fide in the exercise of any power, or the performance of any function or duty, conferred or imposed by or under this Act."

The current version of section 22 of the FSC Act is as follows:

> "22. In the absence of proof of wilful or reckless misconduct, on the part of the Commission, the Executive Director or any member or employee of the Commission, in the course of carrying out the provisions of this Act or any function or duty conferred on the Commission, or any officer of the Commission, no liability is incurred by -
>
> > (a) the Commission, the Executive Director or any member or employee of the Commission; or
> >
> > (b) any person specified in section 15 (1)."

[108] The framing of the exclusion of liability differs in each instance above, affecting its scope, legal implications, and application. The term "bona fide" generally refers to actions taken in good faith, with honesty and sincerity. This appears to protect the Commission and other named individuals from liability when they act with genuine intent to fulfil their duties or obligations, even if the outcome is not as intended. In contrast, the current formulation raises the threshold for liability, in that the FSC and the named persons are protected unless there is proof of misconduct that is wilful or reckless. This raises the threshold beyond good faith and requires proof of misconduct that is either intentional or reckless. It is to be presumed that the legislature intended this distinction to be material.

[109] Although the FSC Act does not contain an express provision stating that the FSC may sue an institution over which it exercises supervisory jurisdiction as regulator to enforce compliance with financial laws or to restrain unlawful conduct, the broad general duties and powers given by section 6 of the FSC Act suggest that this is an incidental power of the FSC to supervise and regulate prescribed financial institutions and/or to promote stability and public confidence in the operations of such institutions.

[110] The learned judge proceeded on the basis that the FSC had standing to bring the claim, although he found the claim not meritorious. However, the learned judge did not find evidence of wilful or reckless misconduct on the part of the FSC. In these circumstances, I accept the FSC's submission that he did not demonstrate that section 22 of the FSC Act did not apply, nor did he identify any appropriate legal gateway or basis for making an order for costs against the FSC. Accordingly, there is an appropriate reason for this court to consider whether that order should be set aside.

[111] The FSC was unsuccessful in its claim and, but for section 22 of the FSC Act, would be required to pay the costs of the claim in the ordinary course. The question is whether section 22 of the FSC Act avails the FSC. The respondents have conceded that, for policy reasons, it might be important to protect the FSC when it is lawfully performing its functions. However, the thrust of their submissions is that the FSC veered outside its statutory authority and, consequently, could not rely on section 22 for protection from the consequences of what they regarded as its intentional and deliberate choices.

[112] The background to the bringing of the claim is important. I think I can safely take judicial notice that the alleged fraud at SSL had generated widespread public concern and anxiety. This could have affected the public's confidence in the regulation of the financial services industry. I have traced the undisputed chronology of events, and it appears that SSL was not as transparent as it could have been in sharing with the FSC its plans for dealing with the reported problem, which could reasonably have caused the FSC some concern.

[113] Although I have concluded that the FSC did not place sufficient evidence before the learned judge to establish that it reasonably believed that SSL had "…given a false or misleading statement concerning its affairs", that is not the same as a finding that the FSC acted outside its regulatory purpose or with wilful or reckless misconduct. The section 22 enquiry is concerned with the latter question. Viewed against the background of the public concern, the developing information available to the FSC, the declaration of solvency, and SSL's change of course in addressing the reported problem, I am not satisfied that the FSC's resort to court proceedings crossed the statutory threshold of wilful or reckless misconduct.

[114] Accordingly, while the FSC's evidential failure is sufficient to dispose of the substantive challenge against the learned judge's decision, it does not provide a sufficient basis for depriving it of the statutory protection afforded by section 22. Having found that bringing the claim was not outside the incidental powers of the FSC, I am also of the opinion that there is no material before this court amounting to "proof of wilful or reckless misconduct, on the part of the Commission, the Executive Director or any member or employee of the Commission…". In such circumstances, the FSC is entitled to the protection of section 22 of the FSC Act, and no order as to costs should be made against it. No order as to costs of the claim is manifestly fair in the circumstances.

Conclusion and disposition of the appeal

[115] For the reasons expressed above, the appellant has failed on all grounds of the appeal except ground (L). Therefore, the appeal should be allowed in part.

[116] Regarding the costs of the appeal, the FSC has only been successful on the order as to costs in the court below, and I am of the view that it should pay 80% of the respondents' costs of the appeal. Although the claim was brought within the scope of the FSC's incidental powers, the appeal was largely unsuccessful, and section 22 does not require a different costs order in respect of the appeal.

[117] In the premises, I propose the following orders be made the final order of the court in disposing of the appeal:

1. The appeal is allowed in part.

2. Orders (a), (b) and (c) of the learned judge are affirmed.

3. Order (d) that, "Costs of this Claim will go to the 1st and 2nd Defendants against the Claimant to be taxed if not agreed", is set aside and substituted therefor is the following:

   "(d) There shall be no order as to costs of the claim. This order does not apply to the costs of any proceedings brought to enforce the undertaking as to damages given in support of the injunction; such costs shall be determined by the tribunal before which those proceedings are pursued."

4. The respondents are awarded 80% of the costs of the appeal to be taxed if not agreed.

MCDONALD-BISHOP P

ORDER

1. The appeal is allowed in part.

2. Orders (a), (b) and (c) made by Batts J on 31 May 2024 are affirmed.

3. Order (d), that "Costs of this Claim will go to the 1st and 2nd Defendants against the Claimant to be taxed if not agreed", is set aside and the following order is substituted:

   "(d) There shall be no order as to the costs of this claim. This order does not apply to the costs of any proceedings brought to enforce the undertaking as to damages given in support of the injunction; such costs shall be determined by the tribunal before which those proceedings are pursued."

4. The respondents are awarded 80% of the costs of the appeal, to be taxed if not agreed.