

**Judgment 23/2008**

**Canivet Webber Financial Services Ltd v Guernsey  
Financial Services Commission – Court of Appeal (Civil  
Appeal 395) – 15 July 2008**

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**Royal Court Civil Rules, 1989 (Rule 48) – Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002 – appeal pending before the Royal Court from decision of the Commission ("the substantive appeal") – application for leave to appeal from order of Royal Court as to security for costs – held that the substantive appeal appeared to be without merit and that the appellant was unlikely to be able to satisfy an order for costs – application for leave refused – oral application for leave to appeal to the Judicial Committee of the Privy Council refused (See Judgments 47/2007 and 13/2008)**

**IN THE COURT OF APPEAL IN THE ISLAND OF GUERNSEY**

Civil 395

**The** 15 July, 2008 before Jonathan Philip Chadwick Sumption OBE QC, presiding,  
Sir de Vic Carey and Nigel Peter Fleming QC

**CANIVET WEBBER FINANCIAL SERVICES LIMITED**

**(Appellant)**

**V**

**GUERNSEY FINANCIAL SERVICES COMMISSION**

**(Respondent)**

In the matter of the appeal by the Appellant to the Royal Court from the decision of the Respondent dated 2 March 2007, and the application by the Appellant for leave to appeal from the Order of the Royal Court as to security for costs dated 5 December 2007;

THE COURT, having heard Mr A D C Webber, director, for the Appellant, and Advocate J W Wessels for the Respondent, thereon on 14 July 2008, this day GAVE JUDGMENT in the attached terms, REFUSED the application for leave to appeal and AWARDED costs in favour of the Respondent on the recoverable basis;

AND THE COURT REFUSED an oral application on behalf of the Appellant for leave to appeal to the Judicial Committee of the Privy Council

**K H TOUGH**

Registrar of the Court of Appeal



requirement that the business should be managed by at least two people and that there should be at least one non-executive director on the Board; its internal compliance procedures and record-keeping were inadequate; there were no proper arrangements for client appointments outside Mr. Webber's home; Mr. Webber was frequently absent from Guernsey; and the company had a history of failing to meet deadlines when responding to the Commission. The Commission observed that the Appellant had obtained his licence under the previous statutory regime and would not meet the minimum criteria for licensing under the Law of 2002.

4. The decision to revoke the licence was provisional because in accordance with the practice of the Commission the Appellant was entitled to have the matter referred to a non-statutory tribunal, the Guernsey Financial Services Tribunal, before it became effective. The Appellant duly availed itself of this right. On 20 February 2007, in a careful advisory ruling, the Tribunal concluded that the licence ought to be revoked. In summary, they upheld the Commission's criticisms; they found that 'any regulator worth its salt' would have concluded by 2003-4 at the latest that action was required to ensure that the Appellant complied fully with the regulatory regime; they suggested the main problem was that Mr. Webber was too preoccupied with his other affairs to manage the company properly. The Tribunal considered whether to support Mr. Webber's proposal that the company should have another six months to get its house in order. But they concluded that after four years in which it had failed to deal with the problems which the Commission had identified, 'the risks to the public and to the Commission's duties that would be involved in that course are too great, and the chances of its being successful are too slight.' They suggested that if Mr. Webber wished to be licensed as an insurance intermediary, he should apply for a new licence under the Law of 2002. On 2 March 2007, the Commission notified the Appellant of the revocation of its licence.

5. Section 43 of the Law provides that a person aggrieved by a decision to revoke a licence may within twenty-eight days appeal to the Court on the ground that the decision was 'ultra vires or was an unreasonable exercise of the Commission's powers.' The same form of words was considered by this Court in *Walters v. States Housing Authority* (1997) 24 GLR 76, in the context of Section 56 of the Housing (Control of Occupation) (Guernsey) Law 1994. The Court held that on such an appeal it was open to the Royal Court to set aside the decision if it was either irrational or unreasonable. For the purpose of deciding whether it was unreasonable, it was not enough for the Court to say that it would itself have made a different decision, if the Commission's decision was nevertheless within the bounds of reasonableness. The effect is to leave the Commission with a margin of discretion which will vary with the circumstances but is likely to be relatively broad given the element of judgment involved.

6. Because the company was not represented by an advocate, it was necessary for it to initiate its statutory appeal by applying for permission to issue a Royal Court summons. The Appellant took that step on 29 March 2007. There followed several months of delay while the Appellant pursued an objection to the Commission's choice of Advocate Wessels to represent it, and the Commission sought to strike out the proceedings on the ground that the Royal Court Summons was not in the event issued until after the statutory time limit. These matters were resolved by the Lieutenant Bailiff in two judgments given on 13 September and 5 December 2007. She dismissed the application to exclude the Commission's advocate and extended time for initiating the proceedings. On the footing that the proceedings would

continue, she made the order for security for costs that is now before this Court.

7. The relevant legal principles are well-established. The power to order security to be given for the costs of proceedings is conferred by Rule 48 of the Royal Court Rules. The practice substantially corresponds to that applying in England. An Appellant may be ordered to give security unless its resources (including any prospect of external funding) are shown to be sufficient to enable it to satisfy an order for costs that may be made against it. If they are not sufficient, it is necessary to balance the injustice to the Plaintiff of stifling a potentially meritorious claim against the injustice to the Defendant of being unable to recover the costs of a successful defence. In most cases two questions are likely to be uppermost in the Court's mind. The first is whether the proceedings have some merit. This does not mean that the Court must be satisfied that they are likely to succeed. Nor does it mean that the Court will conduct an interlocutory trial of the merits. But the Plaintiff must have a genuine claim, in the sense that there is some substantial basis for it. The Court is entitled to go into the matter in sufficient detail to assure itself of that. The second question, which arises if there is a genuine claim, is whether the effect of ordering security will in fact be to stifle it. The Court will not ordinarily make an order that will have that effect, especially if the impecunious condition of the Plaintiff can plausibly be attributed to the Defendant's conduct; and, we would add, especially where the Defendant is a public authority defending a statutory appeal against its decision. In *Tolstoy Miloslavsky v. UK* [1996] EMLR 152, the European Court of Human Rights considered the corresponding English practice and held that it did not 'impair the essence' of a litigant's right of access to a Court and was not therefore inconsistent with Article 6 of the Human Rights Convention. Critical to this conclusion was the fact that the practice allowed regard to be had to the merits of a claim in a case where there were no assets to secure the other side's costs.

8. The Lieutenant Bailiff found that the Appellant had no substantial assets and was unlikely to be in a position to satisfy an order for costs. That seems to be an inescapable inference from the fact that the company has not traded since 2005 as well as from its management accounts for the last full year of trading, which show that it had a negative turnover. Its expenses since 2005 appear to have been met by Mr. Webber, who is the real protagonist and beneficiary of these proceedings. It appears from the Lieutenant Bailiff's judgment that Mr. Webber did not contend before her that it would be wrong in principle to order security against his company. At any rate, she was not prepared to assume that he would be unable to provide it either from his own resources or from those of his backers. The only substantial dispute was about the amount. In those circumstances, it appears to us that on the material before her the Lieutenant Bailiff's decision was entirely justified.

9. Since then, says Mr. Webber, matters have moved on. We have before us e-mails from him dated 26 May 2008 and 13 July, setting out some further facts and making his submissions on this appeal. He has supported these by his oral submissions at the hearing and by a further e-mail sent shortly after the argument had concluded. In summary, Mr. Webber says that the financial difficulties of his company after 2003 were due to the unreasonable pressure which the Commission placed upon him at a time when he had personal difficulties and was heavily engaged in litigation in the family courts of Guernsey and England. As a result, the company is not in a position to provide security for the Commission's costs. Mr.

Webber adds that he is not personally in a position to do so either. At the time of the hearing before the Lieutenant Bailiff, he says, there was a 'prospect' that a particular backer would be prepared to provide security for the Commission's costs. However, we are told that the backer withdrew once the Court declined to exclude Advocate Wessels, that being, apparently, a matter on which the backer had strong views. The backer having withdrawn and there being no prospect of finding another, Mr. Webber now says that the effect of ordering security would be to stifle his claim.

10. We are not altogether convinced by Mr. Webber's explanation about the backer, and we note that although he says that he cannot afford to put up security personally, he has given no details of his resources. But we are prepared to assume in the Appellant's favour that the effect of ordering security in the current situation will be to prevent it from prosecuting its challenge to the Commission's decision. In our judgment, however, the Appellant has not shown that he has a genuine claim against the Commission. The grounds on which it has been advanced to date appear to us to have no prospect of success whatever. There is therefore no injustice to the Appellant in requiring it to furnish security for the Commission's costs as a condition of its being allowed to proceed.

11. We make the following points:

- (1) On analysis, Mr. Webber's complaints about the Commission's decision of 2 March 2007 appear to be directed at its reasonableness rather than its powers, and that is how Mr. Webber put it in argument.
- (2) It is right to remind oneself at the outset that the only decision of the Commission which the Appellant is entitled to challenge in these proceedings is the decision notified on 2 March 2007 to revoke its licence. Much of Mr. Webber's complaint about the Commission relates to earlier decisions, notably the imposition of the 'no new business' condition in 2003 and the suspension of the licence in 2004. No statutory appeal was brought against these decisions within the statutory time limit or indeed at all. As far as the present proceedings are concerned the earlier history of the dispute is water under the bridge. The question is whether the Appellant has any real prospect of showing that the revocation of its licence was unreasonable in the circumstances existing in March 2007, irrespective of how those circumstances had come about.
- (3) Mr. Webber does not suggest that his company was complying with its regulatory obligations in March 2007. Indeed he accepts that it had not complied at any time since his dispute with the Commission began in 2003. The main ground on which he challenges the Commission's decision is that to restore the company's fortunes he needed six months of trading, with an unrestricted licence, free of time-consuming and distracting regulatory interventions. He says that it was unreasonable for the Commission not to agree to this. It was, he says, unduly exacting and insufficiently sympathetic to his personal difficulties and the pressures of his other litigation. It failed to take account of the special problems of small financial services companies, instead applying standards appropriate to larger and better-staffed organisations.

These arguments show that Mr. Webber has completely misunderstood the Commission's function. Its function is to protect the public and not to look after the interests of financial services practitioners of whatever size. The reasonableness of its decisions must be judged primarily in that light. Mr. Webber's personal problems have no bearing on the public interest, and there is no reason why the Commission should be concerned with them, unless they are persuaded that these are of so temporary a nature that a substantial improvement in the company's standard of compliance can be expected within a reasonable time. The Tribunal pointed out that Mr. Webber had had four years in which to sort the company's regulatory problems out. Mr. Webber has no answer to this. The fact that for most of that period his licence was either suspended or restricted to servicing existing business may explain why the business was not making money but cannot explain why it was not complying with its regulatory obligations.

- (4) Mr. Webber hints without positively asserting that the Commission was biased against him by the fact that his ex-wife had previously been one of its officers, but offers nothing to give substance to the hint.
- (5) Otherwise his submissions are confined to irrelevant criticisms of the general standard of the Commission's performance of its functions, derived mainly from press reports on other matters, and a suggestion that his company's prospects of success 'will become more clear when CWFSL has completed the full documentation of the case.' The press reports have no bearing on the reasonableness of the commission's decision in the present case. As for the suggestion that further documentation is necessary, Mr. Webber seems to have mainly in mind the minutes of the Commission meeting at which the revocation decision was made. Mr. Webber, however, knows the Commission's reasons, for they were set out in its notification letter. His challenge depends on whether in the circumstances a decision made for those reasons was objectively unreasonable. Nothing in the Appellants' grounds of challenge could make it relevant to examine the Commission's internal decision-making processes.

12. In our judgment, the Appellants' lack of merits makes it impossible to suggest that a serious appeal will be stifled if the Appellant has to find security for the Commission's costs. The Commission should not, in justice, have to spend substantial sums in fighting off a hopeless challenge from an impecunious licensee, without any assurance that an order for costs in its favour will be enforceable. We therefore refuse leave to appeal against the Lieutenant Bailiff's order.