Judgment 23/2009 **Canivet Webber Financial Services Limited v Guernsey Financial Services Commission – Court of Appeal (Civil Appeals 395/396) – 25 February 2009 and 19 May 2009**

(i) Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002 – application to the Court of Appeal for leave to appeal from strike-out by the Royal Court of an appeal to that court ("the substantive appeal") from a decision by the Commission, and for leave to appeal from related orders ("the procedural appeals") – substantive appeal had been struck out as a result of the breach of an "unless order" by the Royal Court – review of the prospects of success in the substantive appeal – regulatory role of the Commission - held that the substantive appeal to the Royal Court had no realistic prospect of success – leave to appeal refused – costs to follow the event but not to be enforced without the leave of the Court of Appeal

(ii) Application for leave to appeal to the Judicial Committee of the Privy Council – no appeal as of right under s.16 of the Court of Appeal (Guernsey) Law, 1961 – leave to appeal refused, there being no issue of law of public importance raised by the case – publication of notice of revocation of licence postponed for three months to enable application to be made to the Judicial Committee – (See Judgments 47/2007, 13/2008 and 23/2008

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

Civil 395/396

The 25th February, 2009 before Sir de Vic Carey, sitting as a Single Judge

CANIVET WEBBER FINANCIAL SERVICES LIMITED
(Appellant)

v

GUERNSEY FINANCIAL SERVICES COMMISSION
(Respondent)

In the matter of the applications by the Appellant for leave to appeal from the Order made by the Royal Court on 21 July 2008, striking out the Appellant's appeal to that Court from the decision of the Respondent to revoke its insurance intermediaries licence, ("the substantive appeal"), and for leave to appeal from related Orders made on 16 June 2008, 11 July 2008 and 4 December 2008 respectively ("the procedural appeals");

Whereas the plenary Court of Appeal, consisting of Sir de Vic Carey, presiding, Geoffrey Charles Vos, QC, and Miss Clare Patricia Montgomery, QC, sitting on 9 January 2009, heard Mr A D C Webber director of the Appellant, and Advocate J M Wessels for the Respondent, thereon, and RESERVED its decision;

And whereas the Judgment of the Court was formally HANDED DOWN this day, in the terms attached hereto, whereby THE COURT: -

1. DISMISSED the procedural appeals having held that the substantive appeal to the Royal Court had no realistic prospect of success;

2. EXPRESSED the provisional view that the costs of these appeals should follow the event; and
3. Given that the solvency of the Appellant was in issue, and that it was questionable whether any order for costs could be paid, DIRECTED that any order for costs should not be enforced without the leave of this Court;

SIR DE VIC CAREY, sitting as a Single Judge, and having heard submissions by Mr Webber and by Advocate Wessels, in relation to a possible appeal to the Judicial Committee of the Privy Council;

(i) DIRECTED that, pending further order, no further action be taken by the Registrar in connection with the pending applications by the Appellant for taxation of orders for costs made against it;

(ii) OPINED that nothing contained in the order of this Court, relating to the stay of any order for the enforcement of costs, relieved the Appellant of any duty to discharge the Court costs in connection with this appeal, such costs being payable direct to the Registrar; and

(iii) DIRECTED that, within fourteen days from this day, the Appellant must deliver application in writing to the Registrar, copied to Advocate Wessels, for consideration on the papers by the Court of Appeal as constituted for the hearing of the procedural appeals, for

(a) Leave to appeal to the Judicial Committee of the Privy Council (which application must be accompanied by the proposed grounds of appeal); and

(b) An order that, not withstanding that the procedural appeals have been dismissed, the Respondent shall be restrained from exercising its statutory duty under the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002 to publish notice of the revocation, pending further order by the Court of Appeal or by the Judicial Committee of the Privy Council.

M A TOSTEVIN
Deputy Registrar to the Court of Appeal

Approved Judgment
16 February 2009
Formally handed down 25 February 2009

IN THE COURT OF APPEAL
OF THE ISLAND OF GUERNSEY

CIVIL DIVISION

Before: **Sir de Vic Carey, Presiding**
Geoffrey Charles Vos, Esq., QC
Clare Patricia Montgomery QC

Between: **CANIVET WEBBER FINANCIAL SERVICES LIMITED**

and

GUERNSEY FINANCIAL SERVICES COMMISSION

Appellant

Respondent

The Appellant was represented by its Director Mr. A.D.C.Webber
Advocate J M Wessels represented the Respondent

JUDGMENT

MONTGOMERY JA: (Delivering the first judgment at the invitation of Carey JA presiding)

The Appellant Company, Canivet Webber Financial Services Ltd (CWFSL), applies for leave to appeal from the order of Lieutenant Bailiff Catherine Newman QC, made on 21 July 2008, striking out CWFSL's appeal against the Respondent's decision to revoke its insurance intermediaries licence under section 9(3) of the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law 2002, dated 2 March 2007 (the substantive appeal) and ordering CWFSL to pay the Respondent's costs**.** On 10 October 2008 Newman LB refused an application by CWFSL pursuant to rule 57 of the Royal Court Rules 2007 for relief from this sanction.

2. CWFSL also applies for leave to appeal against the orders of Newman LB dated 16 June 2008, 11 July 2008 and 4 December 2008. The orders of 16 June 2008 and 11 July 2008 were orders requiring CWFSL to file certain statements and material in support of its substantive appeal. The order of 11 July 2008 was an 'unless order' specifying 21 July 2008 as the date for compliance. It was the breach of this order that led to the substantive appeal being struck out. The order of 4 December 2008 was an order requiring CWFSL to pay £9,043.84 as an interim payment in respect of 25% of the

costs orders made against it.

3. I shall refer to these applications for leave to appeal to this Court as the procedural appeals.

4. CWFSL was incorporated in 1999 to carry on business as an insurance intermediary. Its sole director and proprietor is Mr. A.D.C. Webber, who has represented it in these proceedings and in the proceedings before the Royal Court. The Respondent (the Commission) is a statutory body charged under the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law 2002 (the 2002 Law) with the licensing and regulation of insurance intermediaries.

5. CWFSL was granted an insurance intermediaries licence by the Commission on 28 January 1999 under the legislation then in force to provide advice on general and long term insurance business. Between 2002 and 2007 a number of regulatory issues arose between CWFSL and the Commission. The first formal action taken against CWFSL was on 16 May 2003, when the Commission warned CWFSL that it was considering revoking its licence and imposed a condition preventing it from placing new business. The Commission identified the grounds for this action as including the fact that there was no company secretary, or accountant and that Mr Webber's co-director had resigned and had not been replaced; in addition compliance with the four eyes criteria (that is the regulatory requirement that the business should be managed by at least two people) had not been achieved and all the recommendations made after a site visit in February 2002 had not been implemented.

6. The 'no new business' condition was removed in August 2003 but at the same time the Commission repeated its concern about the level of back office support and record keeping by CWFSL. A condition was imposed requiring improvements to be made and notified to the Commission. In January 2004 the Commission expressed its concern that CWFSL had failed to comply with the conditions imposed and suggested that CWFSL should accept "a voluntary suspension of its licence until such time as CWFSL is once again able to conduct business in manner acceptable to the commission." Albeit reluctantly Mr Webber agreed to this suggestion and on 15 January 2004 he wrote to the Commission requesting the voluntary suspension of the CWFSL licence, undertaking not to transact any insurance business during the period of suspension and agreeing to arrange for the servicing of existing clients to be undertaken by another company. I shall refer to this other company as A Ltd. This request was accepted by the Commission on 20 January 2004. The Commission indicated that, before the suspension could be rescinded, CWFSL would have to satisfy the Commission that it had dealt with all the issues raised by the Commission. No appeal was ever brought against the decision to accept the voluntary suspension of the CWFSL licence or to impose conditions on its revival.

7. At the end of September 2004 the arrangement with A Ltd was terminated and on 26 November 2004 the Commission gave notice of its intention to revoke the CWFSL licence in the absence of any arrangement to service the existing clients. On 1 December 2004 CWFSL entered into an arrangement with a second company. I shall refer to this company as B Ltd. On the strength of this fresh agreement the Commission agreed to not to seek the revocation of the CWFSL licence.

8. In November 2005 CWFSL met with Commission representatives. Mr Webber requested the Commission to reinstate the CWFSL licence. This led the Commission to identify a number of issues that would have to be addressed in order for the Commission to restore the licence.[1] The action required of CWFSL included a requirement to appoint a suitable second director; to arrange for the four eyes criteria to be met; and to bring the CWFSL record keeping up to date. The Commission gave eight weeks for these tasks to be accomplished although Mr Webber had expressed the belief in the November meetings that he would be able to address all the points in four weeks. The Commission said that, in its view, after nearly two years of suspension, there were only two regulatory responses open to it: either reinstatement or revocation.

9. On the expiry of the eight week period the Commission wrote to CWFSL pointing out that issues in relation to the appointment of a director, four eyes arrangements, and deficiencies in internal procedures had not been addressed.[2] The Assessment Committee of the Commission was then convened to consider the position and on 6 February 2006 concluded that it was unable to agree to the reinstatement of the licence or to allow further time to address outstanding issues. A recommendation was made that the revocation of the CWFSL licence should be considered on the grounds, amongst others that no suitable second director had been identified or appointed, no written agreement for four eyes cover had been made; and there remained concerns as to record keeping.

10. On 31 March 2006 the Commission gave notice under section 41(2) of the 2002 Law that it was proposing to take a decision to revoke under section 9 of the 2002 Law. On 7 April 2006 there was a meeting between CWFSL and the Commission. On 15 May 2006, the Commission notified CWFSL that it had taken a provisional decision to revoke the licence. The Commission identified a number of outstanding issues on which it said that CWFSL had failed to make sufficient progress. Amongst the issues identified were: CWFSL's failure to arrange for a suitable non executive director to be appointed to its board; its failure to satisfy the 'four eyes' criteria; the adequacy of its internal and compliance procedures as well as the adequacy of its records and record-keeping. The Commission stated that CWFSL did not meet the minimum criteria for licensing under the Law of

[1] Commission letter 18 November 2005
[2] Commission letter 18 January 2006

2002.

11. The decision to revoke the licence was as I have observed provisional. CWFSL had throughout made it clear that it would wish to have any adverse decision referred to a non-statutory tribunal then in existence, the Guernsey Financial Services Tribunal (the Tribunal). The Commission agreed to suspend its procedures pending a hearing by the Tribunal. On 20 February 2007 after a two day hearing during which Mr Webber gave evidence and was cross examined, the Tribunal concluded that the Commission had been correct to reach its provisional conclusion that the licence ought to be revoked and that the conclusion did not require modification having regard to then current state of affairs.

12. The Tribunal approached its decision on the basis that the burden of proof lay on the Commission to justify its decision. The Tribunal did not explicitly identify the standard of proof required but it is plain from reading its decision that the appropriate civil standard was applied.

13. The Tribunal recognised that section 9(1)(a) of the 2002 Law gave the Commission power to revoke a licence if it appeared to the Commission that any of the criteria in the Conduct of Business for Licensed Insurance Intermediaries Rules (the COB Rules) or in the Code of Practice for Insurance Intermediary Applicants and Licensees conducting business within the Bailiwick of Guernsey (the Code of Practice) or the Principles of Conduct of Finance business (the Principles) were not met.

14. It was common ground that some at least of these criteria were not met. CWFSL did not have a suitably qualified non executive director contrary to paragraph 5 of Schedule 4 to the 2002 Law; its business was not managed by at least two people so as to provide for the oversight of the business by four eyes contrary to Paragraph 4(1) of Schedule 4 to the 2002 Law and Clause 3 of the Code of Practice; and its procedures, records and record keeping suffered from deficiencies contrary to Paragraph 6 of Schedule 4 to the 2002 Law, Principle 9 of the Principles and Rule 7 of the COB Rules and it did not have professional indemnity insurance, contrary to the requirement in section 4(2)(h) (i) of the 2002 Law and Rule 14 of the COB Rules.

15. The issue with which the Tribunal grappled was whether the failure of CWFSL to meet these criteria was the responsibility of the Commission because of its unfair, disproportionate and unreasonable behaviour in dealing with CWFSL or whether the non compliance was the responsibility of CWFSL. The Tribunal considered this issue in posing the question: "What was the root cause of the Company's misfortunes and present predicament?"

16. The Tribunal determined this issue of fact against CWFSL. It found that "any Regulator

worth its salt" would have concluded by 2003-4 at the latest that action was required to ensure that CWFSL complied fully with the regulatory regime. It suggested the main problem was that Mr Webber was too preoccupied with his other affairs to manage CWFSL properly.

17. The Tribunal also considered whether, notwithstanding its decision on this central factual issue, it should nevertheless recommend that the Commission should give CWFSL six months to get its house in order as Mr Webber had requested. It concluded that it should not do so: "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." The Tribunal suggested that if Mr. Webber or CWFSL wished to be licensed as an insurance intermediary, they should apply for a new licence under the Law of 2002.

18. On 2 March 2007, having considered the opinion of the Tribunal, the Commission notified CWFSL of its confirmation of the provisional decision to revoke CWFSL's licence.

19. Section 43 of the 2002 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." On such an appeal it is open to the Royal Court to set aside the decision if it was either irrational or unreasonable, see ***Walters v The States Housing Authority***, Guernsey Court of Appeal No 231 of 1997. [24 GLJ 76]

20. CWFSL initiated its substantive appeal under section 43 of the 2002 Law by applying for permission to issue a Royal Court summons on 29 March 2007. There were then several months of delay while CWFSL 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 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 an order for security for costs in the sum of £12,000. CWFSL was later granted[3] an extension of time to 29 February 2008 to lodge security for costs. CWFSL appealed against the order for security for costs but on 15 July 2008 the Court of Appeal dismissed the appeal. No security for costs has since been provided and no stay of the order requiring the payment has been obtained.

21. Given this convoluted and protracted procedural history, it is regrettable that it has not proved

[3] Order dated 25 February 2008

possible for the merits of the substantive appeal to be heard and determined by the Royal Court at some point in the last two years. Where, as here, a statutory appeal is brought by an unrepresented appellant against a public body, it is desirable for that public body to keep to a minimum the procedural demands made of the appellant in order to ensure that the statutory right of recourse to the Royal Court is not thwarted. For this reason it will rarely be appropriate for the court to order security for costs in such a case.

22. Notwithstanding the absence of a hearing on the merits and the absence of any assistance in the form of a judgment at first instance on those merits, this Court cannot avoid reaching a view on the prospects of success for CWFSL in the substantive appeal since if there were any realistic prospect of CWFSL succeeding in that appeal, it would be necessary to consider whether the Lieutenant Bailiff was right to insist upon the production of the documentary material specified in her orders and to strike out the substantive appeal and maintain that striking out in circumstances where Mr Webber's father had died on 18 July 2008, a mere three days before his substantive appeal was struck out. If however the substantive appeal has no real chance of success, it seems to me that the present procedural appeals should not be allowed. The court should not encourage or permit a litigant who has a case that has no realistic prospect of success, to continue to pursue that case, particularly where the litigant has failed to comply with court orders and requires the Court to exercise discretion in its favour.

23. Mr Webber's argument on behalf of CWFSL that he should have been granted relief under rule 57 without regard to the merits of the substantive appeal is unsustainable. Rule 57 of the Royal Court rules provides as follows;

> *Relief from sanctions.*
> *(1) On an application for relief from any sanction imposed for a failure to comply with any rule, order or direction, the Court will consider all the circumstances, including -*
>
> *(a) the interests of the administration of justice,*
> *(b) whether the application for relief has been made promptly,*
> *(c) whether the failure to comply was intentional,*
> *(d) whether there is a good explanation for the failure,*
> *(e) the extent to which the party in default has complied with other rules, orders or directions,*
> *(f) whether the failure to comply was caused by the party or his Advocate,*
> *(g) whether the trial date or likely trial date can still be met if relief is granted,*
> *(h) the effect which the failure to comply had on each party, and*
> *(i) the effect which the granting of relief would have on each party.*

24. True it is that rule 57 makes no explicit reference to the need to consider the merits of any case, but it is unthinkable that the court would exercise discretion under the rule in favour of a hopeless case. Such an exercise of discretion would not be in the interests of the administration of

justice, on any view.

25. On 16 December 2008 the procedural appeal came before this Court as presently constituted. Mr Webber and CWFSL had then had only nine days notice of the listing of the appeal. Given the importance of the appeal to Mr Webber and CWFSL and the fact the decision was potentially determinative of the substantive appeal the Court considered that it was appropriate to adjourn the hearing of the appeal to 9 January 2009 in order to give CWFSL and Mr Webber the opportunity to present submissions dealing with the merits of the substantive appeal.

26. On 9 January 2009 the Court had the benefit of an extensive written argument from Mr Webber on behalf of CWFSL supplemented by his oral submissions. Following that hearing the Court has been provided with further documents by the Commission. Those documents have been supplemented by a further bundle from Mr Webber which provided useful additional material that has enabled the Court to assess the regulatory history of the dealings between the Commission and CWFSL. The Court is therefore in a position to take an informed view of as to whether the substantive appeal has any real prospect of success.

27. As Mr Webber argues and I accept, the substantive appeal is concerned with the decision of the Commission. The opinion of the Tribunal is only of relevance insofar as it contains reasoning adopted by the Tribunal or contains factual material relevant to the decision. I observe however (since Mr Webber makes stringent criticisms of the conclusions of the Tribunal) that it was his decision on behalf of CWFSL to seek the views of the Tribunal.

28. In my judgment the substantive appeal raises in a stark form a question that Mr Webber described in the course of argument and in the course of correspondence with the Commission as a "Catch 22". CWFSL did not meet the criteria for licensing. It could not meet the criteria for licensing, according to Mr Webber, unless it was permitted to trade without meeting the criteria for up to six months or more. In those circumstances, should CWFSL have been permitted to trade in order to enable it to meet the criteria, given the interests of CWFSL in continuing in business and the interests of its existing clients, or should its licence have been revoked?

29. It will be observed that the answer of the Commission and the Tribunal was that the licence should be revoked. The substantive appeal by CWFSL can only succeed if this answer was unreasonable. In my judgment there is no real prospect of CWFSL being able to establish that the answer was unreasonable. It was in reality the only answer that the Commission could have given, having regard to the nature of the regulatory failures and their cumulative effect, the unlikelihood of those failures being remedied within a reasonable time, the limited responsibility of the Commission

for those failures and the Commission's duty to the public to the public in the event that the failures were not remedied.

30. **The nature of the failures**. There were some minor regulatory failings on the part of CWFSL, such as difficulties with its office accommodation that in my view would not have on their own justified a decision to revoke the licence since they were capable of regularisation within a reasonably short period. There was also room for legitimate argument as to whether there was a regulatory obligation on CWFSL to up-date historic records in respect of transactions completed before the licensing regime came into effect or to complete records where it was not possible to provide any additional details because the clients had cancelled the business.

31. However the gravamen of other regulatory failings identified by the Commission (and admitted by CWFSL) such as: the failure to obtain professional indemnity insurance; the absence of a second pair of eyes to oversee the business; the need to appoint a independent non executive director; and the lack of a robust administrative capacity capable of meeting the required standards of administration and compliance; were in my judgment serious failings that, taken together, were not capable of being waived or overlooked in the process of granting or reinstating a licence. I consider that the failings were cumulatively such that no regulator could reasonably be expected to reinstate a licence affected by such failings, however exceptional the circumstances of the licence holder.

32. Professional indemnity insurance. Every insurance intermediary is required to maintain professional indemnity insurance with minimum limits under section 4(2)(h) (i) of the 2002 Law and Rule 14 of the COB Rules. The withdrawal of indemnity insurance is a trigger event under the 2002 Law for regulatory action. In my judgment the Commission was not entitled to treat the requirement for professional indemnity insurance as capable of being postponed. To have done so would have exposed the public to an unacceptable risk of loss in circumstances where the statute has expressly stipulated they should be protected.

33. Four eyes. The requirement for the business of an insurance intermediary to be directed by at least two individuals is set out in paragraph 4 of Schedule 4 to the 2002 Law. Clause 3 of the Code of Practice provides that: "Both [persons] must demonstrate the ability to influence strategy and day to day policies and their implementation, and both must actually do so in practice. Both persons' judgments must be engaged in order that major errors leading to difficulties for the business are less likely to occur. Both persons must have sufficient experience and knowledge of the business and the necessary personal qualities to detect and resist any imprudence, dishonesty or other irregularities by the other person. Two closely related persons would not normally meet the "four eyes" criterion."

34. In relation to companies such as CWFSL where all of its shares are owned by one individual, Clause 3 of the Code of Practice provides that: " … any applications for approval from a company where the majority of the shares are owned by a single individual is (sic) unlikely to be approved… These provisions are designed to ensure that at least two minds are applied to the formulation and implementation of the policy of the licensee. ... New sole traders will not be licensed but where a licensed person is a sole trader (including single director companies), he may comply with the above, if there are documented robust arrangements with another licensed entity, which is not a sole trader, to ensure that: 1. the business is supervised adequately, taking into account the nature and volume of activities; and 2 the other licensee provides locum cover in the event of absence or inability to provide advice to clients".

35. In my judgment the involvement of more than one person in decision-making is central to the proper governance, transparency and control of any insurance business. The four eyes requirement provides a safeguard bearing on the quality of management oversight of the business' activities. The additional check and balance provided by compliance with this requirement ensures appropriate focus on important business decisions and enhances the prospects of compliance with legal and regulatory requirements. It also reduces the likelihood of failings by any individual resulting in losses to clients

36. Independent directors. Paragraph 5 of Schedule 4 to the 2002 Law permits and requires the Commission to impose requirements on companies as to the composition of its board of directors. The directors must include at least one director: "(i) who is not an associate (other than a director) of, or associated party (other than a director) in relation to, the Company; and (ii) who is not responsible for the management of the Company's business." Clause 1 of the Code of Practice, under the heading "fit and proper" provides as follows: "The Commission believes that the concept of "fit and proper" embraces honesty, competency and solvency. It looks for evidence that an applicant, its intended directors and employees and, where appropriate, its controlling shareholders, meet a high, rather than a minimum, standard."

37. This is an additional and important protection for the public. The appointment of an independent director provides an external check upon the probity and prudence of the executive management of a company and is an important part of ensuring good corporate governance.

38. Administrative capacity. The 2002 Law provides for a number of protective and prudential measures that are only capable of being monitored and reviewed if proper records are kept by the insurance intermediary. As Paragraph 6 of Schedule 4 to the 2002 Law explicitly recognises, a business cannot be regarded as being prudently run if it can not and does not maintain adequate systems of control and record keeping. There will of course be some failures in control and record

keeping that are minor and of no real significance. However persistent and repeated failures in record keeping pose a danger to the public because they would effectively mean that the business is unsupervised.

39. **The likelihood of remedial action.** This question loomed large before this Court, as it did before the Commission and the Tribunal. Mr Webber submitted on behalf of CWFSL that the cause of his difficulties in meeting the regulatory demands on CWFSL was the fact that the licence had been restricted or suspended. But for those restrictions he argued that each of the failings identified by the Commission would have been remedied and could be remedied within six months of unrestricted trading. I set out below the detailed history of CWFSL's attempt to address the concerns of the Commission. In my judgment the most serious intractable problems for CWFSL were not, even arguably, caused or significantly contributed to by the restrictions imposed by the Commission on the licence. Between 1999 and 16 May 2003 as well as between August 2003 and January 2004, CWFSL operated without any restrictions on seeking new business. However CWFSL was not able to take advantage of these windows of opportunity to recruit and retain a second pair of eyes or to build an adequate administrative system, or in the case of the latter period, appoint a new non executive director.

40. These serious problems and failings appear to me on the material provided by Mr Webber to have been caused by the inability of Mr Webber and CWFSL to appreciate the seriousness of the situation and to apply sufficient resources of time and money to them. In reaching this conclusion I do not doubt that Mr Webber and CWFSL did spend a considerable amount of time and money on the problems of CWFSL but it was not sufficient. For example the major reason that no progress was made on these central issues between August 2003 and January 2004 was because, as Mr Webber told the Commission, until other court actions in which he was involved were concluded he; "effectively would have to have a sabbatical period"[4]

41. However even if, contrary to analysis set out above, the suspension of the licence caused Mr Webber's difficulties in meeting the regulatory demands on CWFSL, the suspension was a course invited by CWFSL and agreed by Mr Webber. It is quite apparent that the invitation by Mr Webber to the Commission to suspend the licence of CWFSL was issued reluctantly, but it was nevertheless the course voluntarily chosen by CWFSL. No appeal was brought in relation to the regulatory decisions leading up to the request for voluntary suspension of the licence. Nor, in my judgment, would any appeal have succeeded. The voluntary suspension of the licence was a reasonable step to take in the circumstances even if, with the benefit of hindsight, it is a step that Mr Webber regrets having taken

[4] CWFSL letter 6 January 2004

as it had, so far as he was concerned, the unforeseen consequence of making his task of securing compliance on behalf of CWFSL much harder.

42. The plea made by Mr Webber to the Commission[5] (repeated in terms to this Court) was to the effect that if CWFSL had six months[6] in which to operate unrestricted by any licence conditions: "I can sort things out." In addition before the Court it was argued that CWFSL should have been subject to a further period of suspension in 2006/7 or that it should be subject to direct but informal supervision by the Commission during a six month period. All of these pleas depended upon the Commission being able to conclude that there was a reasonable prospect of the business of CWFSL becoming fully compliant with the regulatory regime within the period of six months or so. Mr Webber was and remains unable to provide the Commission with any material that was capable of justifying a belief that a period of six months unrestricted trading would have enabled Mr Webber or CWFSL to remedy the deficiencies. Furthermore as the detailed history set out below demonstrates; CWFSL had not been able to remedy all deficiencies in the past despite Mr Webber's confident assertions that remedial action would be taken and the fact that, historically, the problems had been less severe and more amenable to resolution.

43. Professional indemnity insurance. This did not crystallise as a problem until January 2006. CWFSL wrote to the Commission[7] in April 2006 admitting that: "our insurers have told us that we are unable to be given this cover until the Commission reinstates the licence of CWFSL. This is because the Commission have suspended CWFSL's licence for so long. This is another example of the 'catch 22' situation we have constantly referred to yourselves where your actions and decisions have themselves made it difficult to comply with your requirements. It is therefore essential that the licence is reinstated even if it is on a temporary basis."

44. It rapidly became apparent that this problem was not limited to CWFSL's existing insurers but affected its ability to obtain professional indemnity insurance anywhere in the market. Mr Webber explained in his meeting with the Commission on 7 April 2006: "Nobody will give me cover until that licence suspension is lifted."

45. Mr Webber told the Court that this remained the position in 2009. No professional indemnity insurer was willing to cover CWFSL, even on a contingent basis, unless its licence was restored. There is no direct evidence to explain the unwillingness of the insurance market to cover CWFSL. The explanation provided by Mr Webber that the unwillingness is related to the period of suspension

[5] See transcript 7 April 2006
[6] Or "at least six months," CWFSL letter 26 April 2006.
[7] CWFSL letter 19 January 2006

does not appear to be correct since CWFSL was able to negotiate cover throughout the period of suspension. The problem only emerged when Mr Webber proposed that CWFSL should have its licence reinstated.. The fact that CWFSL and Mr Webber have not been able, at any time over the last three years, to obtain any indication from a professional indemnity insurer that it would be willing to cover CWFSL in the event that its licence was restored demonstrates that there was and is no realistic prospect of CWFSL being able to argue that the Commission's decision to revoke was unreasonable.

46. Four eyes. The problem in relation to the need for a second pair of eyes had been apparent to CWFSL from at least 2001. In 2000 the Commission had adopted a policy of not accepting new applications from sole traders and of seeking to ensure that any sole traders had access to a second pair of eyes. CWFSL was sent copies of the relevant requirements in a Commission letter dated 21 December 2001 that made it clear that sole traders would require: "a formal agreement in writing for locum and four eyes arrangements. This may be split between the financial review of books and records and the provision of insurance advice by an appropriately experienced person." The Commission identified this criterion as being an important requirement and had made it clear that sole traders would not be permitted to continue to trade beyond the end of 2001. Although this policy was formulated primarily for the benefit of individual sole traders and not companies, CWFSL was informed by the Commission that it would accept a formal agreement in writing to cover the locum and four eyes requirement in the case of CWFSL.

47. On 11 February 2002 CWFSL was informed that: "a formal written agreement must be in place with a locally resident person with sufficient insurance experience to act as locum cover for periods of absence due to sickness and holidays." CWFSL appointed a Mr Y to act as a locum in 2002, however it was disclosed in June 2003 that no meetings had taken place with him and shortly after July 2003, the arrangement broke down. Early in 2003 Mr Webber believed he has successfully recruited another man, Mr C, however Mr C left CWFSL and in July 2003 Mr Webber wrote to the Commission saying that he: "was still intending to bring in an FPC qualified adviser but you will be well aware of the difficulties of trying to recruit such people."

48. The issue of four eyes capacity was thereafter raised from time to time and on 29 September 2005 the Commission asked for concrete proposals describing how any four eyes arrangements in CWFSL would work, if the licence was to be restored. No details were provided, although Mr Webber wrote requesting the Commission to draw a line on the past and permit CWFSL to undertake new business if every set of new business was checked by the Commission. This proposal (repeated before us as a possible solution to the four eyes problem) did not find favour with the Commission for entirely valid reasons. It is impracticable as well as undesirable for the Commission to be involved in transactional activity or day to day compliance checks in the manner suggested, however exceptional

the situation of CWFSL was or is.

49. On 1 November 2005 in a letter from CWFSL to the Commission it was suggested on its behalf that B Ltd would be able to fulfil the four eyes role. Mr Webber acknowledged that: "the reality is that there is not any other viable alternative." The Commission accepted that an arrangement with B Ltd could be relied upon as satisfying the four eyes principle provided there was a formal written agreement including details of how the arrangement would work and how conflicts of interest would be dealt with. However the Commission pointed out: "this arrangement will only be allowed on a temporary basis for 6 months. Prior to the end of this period CWFSL will need to have employed a further authorised insurance representative who will be able to carry out the four eyes function."[8] This latter stipulation may have been related to the fact that, as from 1 June 2006, Mr Webber required to have passed the Guernsey Insurance certificate exam in order to advise on long term insurance business. This fact was drawn to the attention of Mr Webber in November 2005 and he was told that there was only one sitting of the examination remaining before the deadline. Mr Webber stated he intended to sit the exam then.[9]

50. CWFSL's response was to acknowledge this requirement but to ask "for some flexibility."[10] However when contact was made between the Commission and B Ltd in January 2006 it became apparent that no written agreement had been reached on the four eyes role as there remained an issue about the fee level appropriate.[11] CWFSL complained[12] that insistence on a written agreement was unreasonable, an agreement had been "fully discussed" and would be signed if the licence was reinstated.[13] However in March 2006[14] it became apparent that there were problems in the relationship between CWFSL and B Ltd because of non payment by CWFSL and, in a letter of 5 April 2006, it became apparent that B Ltd had not reached any final agreement with CWFSL in relation to four eyes: "We are willing to sit down and negotiate a new contract with CWFSL should your licence be reinstated. No agreement has been or can be made until such time as the Commission has made its final decision."

51. At the meeting with the Commission on 7 April 2006 Mr Webber was asked whether there was a draft of the four eyes agreement that would operate if the licence were restored. Mr Webber

[8] Commission letter 18 November 2005
[9] CWFSL letter 30 November 2005. As it transpired Mr Webber did not take the exam in 2006. He took and passed the examination in 2008. However on that basis he was not qualified to advise on any long term insurance business at the point when his licence was revoked. This would appear to have provided an additional ground for revocation in any event.
[10] CWFSL letter 30 November 2005
[11] CWFSL letter 13 January 2006
[12] CWFSL letter 19 January 2006
[13] CWFSL letter 19 January 2006
[14] Letters from B Ltd to CWFSL and Commission, 29 and 30 March 2006

said there was not. "We didn't actually think that was necessary. We had some good informal discussions. I accept since then we've had a letter saying we want it but of course that was after [the notice of possible revocation] was given ... there not much in it for [B Ltd] ... they perhaps saw that maybe I could have a proper time with them in the future but in the immediate term all that is involved for them was meetings discussions with me and there wasn't really much potential business because really most people would have wanted to deal with me" On 26 April 2006 B Ltd indicated that, in the absence of payment of its outstanding fees, it would terminate its agreement with CWFSL at the end of April 2006. The fees were not paid[15] and B Ltd terminated the agreement at the end of April 2006. Accordingly when the matter came before the Commission there was no second pair of eyes in CWFSL.

52. Mr Webber was not able to make any concrete suggestion to the Commission that gave any hope that the criteria could be met within six months or at all if the CWFSL licence was reinstated. He merely suggested that there would be "no major problem in finding another company to have an agreement with, similar to the one with" B Ltd.[16] However in the circumstances, given the history of his efforts to recruit qualified staff and to form agreements with qualified firms, it does not appear to be realistic for Mr Webber to argue on behalf of CWFSL that it was unreasonable of the Commission to refuse to allow six month period for CWFSL to comply with the four eyes principle.

53. Independent non executive director. When the Commission first began to make regulatory demands of CWFSL in 2002, Advocate Peter Ferbrache was a director of the company. He stepped down in April 2003. Deputy John Gollop was suggested as a possible replacement in 2003 and after some debate approved by the Commission, but it was not until 3 September 2005 that Mr Webber was able to write to the Commission indicating he intended to resolve the appointment of a company director. The Commission asked for written confirmation of the identity of the proposed new director by 14 October 2005. Mr Webber responded to this request on 1 November 2005 saying he had no information to give the Commission. "The restriction imposed on CWFSL has made finding a director very difficult."

54. Following the plea by CWFSL for reinstatement in November 2005 the Commission said that a proposed new director had to be identified with appropriate qualifications and experience. CWFSL indicated that it understood what was required.[17] However on 7 December 2005 Mr Webber questioned whether, given the role of B Ltd; "there was any real importance to be attached to the appointment of a second director." B Ltd was supervising the business but was "currently reluctant ...

[15] They have since been paid in full.
[16] CWFSL letter 26 April 2006
[17] CWFSL letter 30 November 2005

even on an interim basis" to become a director. On 4 January 2006, writing on behalf of CWFSL, Mr Webber explained that B Ltd had confirmed that "taking into account what [the Commission] had said about the requirements and responsibilities of a director of CWFSL, they were reluctant to individually commit to this role. In view of this it would be appreciated in the difficult and exceptional circumstances CWFSL is in if the Commission would consider a temporary period with only one director or a family member as no one is likely to commit themselves to this role whilst CWFSL's licence is suspended. My other suggestion is would you consider [Mrs M] as the other director as she obviously had a great deal of experience of dealing with insurance matters although she does not have insurance qualifications." Mrs M was at that time employed by CWFSL as a personal assistant/administrator.[18]

55. These proposals and suggestion were, understandably, not acceptable to the Commission. The Commission pointed out that a family member would not be appropriate, nor would Mrs M. The Commission referred CWFSL to Schedule 4 of the 2002 Law which required there to be a second director who must be independent (that is not an associate of the company) and of appropriate standing and experience to effectively direct the business.[19] The CWFSL response was to ignore this requirement and propose Mrs M as the second director. When this proposal was described as unsatisfactory, the response of CWFSL[20] was to claim that the "catch 22 type situation ... particularly applies to the issue of the Director. It is abundantly clear to me that on a general basis there are just not the suitably qualified people available in the island who wish to take up the role of being a company director of a financial services company. However I believe the main stumbling block in respect of CWFSL is the fact that it has not got a licence from the Commission to trade. Should the Commission decide to reinstate the licence, I believe it will be far easier to obtain such a director."

56. When the failure to appoint a suitable director was identified as one of the grounds for recommending revocation, CWFSL argued that the Commission: "have forgotten the point that it is your removal of the licence itself which has made it so difficult to find another director ... so this is a problem not of our making but of yours."[21] This was the impasse that faced the Commission in May 2006 when it reached its provisional decision to revoke. The Commission was unwilling to accept Mrs M and CWFSL was not able to identify any person to fulfil the role and stated if would not be able to do so unless its licence was reinstated.

57. Mr Webber explained the difficulties he faced at his meeting with the Commissioners on 7

[18] Mrs M personal questionnaire
[19] Commission letter 6 January 2006
[20] CWFSL letter 19 January 2006
[21] CWFSL further letter dated 19 January 2006 but clearly delivered on 7th February in response to Commission's letter of 6th February

April 2006. "If a company's licence is suspended, well would you as an individual want to consider being a director because you would think well what sort of problems has this company got, anyone would advise somebody not to get involved ... Is that person going to want to spend hours discussing the situation with me, it is easier for them to just say 'No'." When he was pressed by the Commission to describe what he might do if the licence were reinstated for 6 months, he replied that he was not going to have problems but refused to explain how he could hope to be more successful that he had been over the previous three years, particularly given his comments as to the paucity of talent on the Island and the unwillingness of those who he knew best, such as the directors of B Ltd or Deputy John Gollop to serve as directors in advance of a decision in favour of CWFSL's reinstatement. Mr Webber could not see the very real difficulties his approach created: "I had effectively asked for something which was quite fair and reasonable to have restrictions removed for a period of six months in order to resolve matters to the Commission's satisfaction and for the Commission to be flexible on some of their requirements such as the appointment of another company director: I feel that in the short term to say that Mrs M who worked for me for some time and has a financial qualification was not acceptable for this position was very unreasonable. The Commission I feel failed to understand how difficult it is for a company to resolve matters if there is a public suspension of a company's licence. It makes it impossible to find a company director who is suitable ..."

58. In my view Mr Webber's approach placed far too much emphasis on the formal restriction and suspension of the licence. It is apparent from his own assertions in correspondence and in argument that the primary reason he was unable to recruit a suitable independent director was because no one was willing to do so given the company's history and prospects. Even if the licence had been restored there was no material identified to us that gave any support to the contention that Mr Webber would have been able to persuade a suitably qualified independent person to take on the responsibilities of a director of CWFS within six months of the licence being restored without restriction or condition.

59. Administrative capacity It was apparent that this was an area of weakness in February 2002 when an on site visit at CWFSL identified a number of failings. In June 2003 a further visit concluded that the CWFSL record keeping was poor and there was a general lack of internal controls. As the Commission pointed out in 2003, the Code of Practice required that a high rather than a minimum standard should be met. The Commission raised new points following the visit in 2003, as well as expressing concern that not all the matters identified on the visit in February 2002 had been remedied. Mr Webber acknowledged in July 2003 he had experienced significant difficulty in "finding suitable PA support." One of the points that he made was that it might have been better for standard guidelines and formats to have been issued by the Commission and he complained that the Commission was not

willing to vet his client policies and procedures.[22] However in a meeting with representatives of the Commission he added that; "the imposition of the [no new business] condition had caused major problems by preventing him from recruiting administrative staff."

60. In August 2003, with the help of the Commission, an arrangement was made with A Ltd to provide back office support for CWFSL. In November 2003 Mr Webber told the Commission that he could not recruit a new PA/Admin person while conditions were in place although he was quite sure he would get someone permanent. Following the suspension of the CWFSL licence in January 2004 arrangements were put in place for A Ltd to service the administration of existing clients but this arrangement ended in September 2004. When A Ltd gave notice to CWFSL, Mr Webber asked the Commission if they "had any suggestions as to suitable alternative arrangements ... bearing in mind you were very helpful in relation to the A Ltd arrangement."

61. On 30 September 2004 the Commission gave CWFSL notice that unless it took immediate steps to ensure that its existing clients were serviced, action would have to be taken. CWFSL informed the Commission on 1 November 2004 that its decision to; "suspend CWFSL's licence has obviously made it more difficult to make another suitable arrangement." Mr Webber listed a number of local licensed intermediaries with whom he had made contact and explained that he had not had sufficient time to make any arrangement as; "it is far more difficult than you may think ... it appears that most people are so concerned about the costs and complications of compliance and they are just not interested." This was a point he reiterated on 3 November 2004. "I have been working very hard to get a four eyes and compliance arrangement in place." In the course of that month Mr Webber made contact with B Ltd and on 9 December 2004 entered into an agreement with B Ltd for it to service CWFSL clients

62. This agreement with B Ltd operated throughout 2005 and lay at the heart of CWFSL's proposals for the reinstatement of its licence in November 2005.[23] However in March 2006 B Ltd gave notice to CWFSL that the agreement would terminate at the end of April 2006 unless amounts outstanding in respect of its work in February and March were paid. Without B Ltd there was no real prospect of CWFSL having any sufficient administrative capacity to meet its regulatory obligations if the licence were to be reinstated. This was implicitly admitted by Mr Webber when he met the Commission on 7 April 2006. He was pressed to explain why CWFSL had not been able to solve its administrative problems over the period of the suspension of the licence. Mr Webber's response made it clear that he was not able to solve the administrative problems on his own. He needed to recruit someone to perform this function for CWFSL: "I approached a lot of companies and the view was

[22] Letter CWFSL 23 July 2003
[23] CWFSL letter 30 November 2005

we've got enough of our own compliance problems we don't want to have any other potential problems ... nobody you know is going to want to spend ages checking out my situation and once I got the licence suspension it was virtually impossible to get anyone to agree to tie up with me." The Commission pressed him on whether he had yet produced a procedures manual[24] or whether one could be produced in "a day or two". Mr Webber responded: "The restrictions actually themselves stopped me sorting things out ... I can't say that internal procedures would be sorted out in a couple of days because I am reliant on the tolerance of B Ltd because as you are aware everything that has been done for the Commission goes from me to them ... I think we have done 90% of what was requested and we have a great opportunity, a good bunch of people at B Ltd, luckily for me I get on with them reasonably well ..."

63. On 26 April 2006 B Ltd stated that, in the absence of payment of its outstanding fees, it was terminating its agreement with CWFSL at the end of April 2006. Mr Webber's response on 26 April 2006 was not to identify any other reliable source of administrative support to CWFSL, but merely to claim that he did not see any major problem arising from B Ltd's withdrawal. His response failed to acknowledge the fact that it was highly unlikely that CWFSL would be able to find another company willing to administer its affairs. On Mr Webber's own admission, he had made contact with all those local persons and institutions capable of providing this service and none had been willing to do so.

64. Moreover, following the provisional decision to revoke, Mr Webber expressed the view that the use of a corporate administrator was not really capable of operating satisfactorily. "It is very difficult if not impossible to update client files if you are not allowed to service those clients. The reality is that if there is a servicing agreement with another company it is never going to be that effective because clients naturally want to deal with their own financial adviser i.e. myself."[25] No reliable source of administrative assistance to CWFSL was thereafter identified to the Tribunal or the Commission. Mr Webber repeated to this Court his confidence that, on the reinstatement of his licence, something would turn up but, in the absence of any material capable of justifying Mr Webber's confidence, I consider his confidence was unjustified. In the circumstances I do not consider that Mr Webber or CWFSL have any basis for arguing that there is a realistic prospect of succeeding in the substantive appeal.

65. **The role of the Commission.** As I have already indicated the Tribunal treated the role of the Commission and its responsibility for the state of CWFSL as the central issue for it to determine. I would regard this issue as being relevant but not determinative of the approach by the Commission in 2006 and 2007. Even if a regulator has been unfair in its dealings with an authorised institution it is

[24] This was a requirement identified as having to be fulfilled before the licence was reinstated.
[25] CWFSL letter 6 August 2006

not necessarily a lawful or even a reasonable response to treat that factor as justifying a relaxation of rules designed for the protection of the public and of the regulated industry as a whole.

66. **The duty of the commission.** In its decision, the Tribunal made reference to the regulatory framework, starting with the provisions of the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002 ("the Law of 2002"), but it is perhaps appropriate to record something of the history of the regulation of insurance business and insurance intermediaries in particular.

67. Forty years ago, there was virtually no legislation regulating financial services activity and there were no restrictions on persons who wished to use words such as 'Bank' and 'Insurance', either in the name of the company, which they wished to establish under Guernsey Law, or in the style, or description under which they carried on the business. That changed in 1969 when use of these words was controlled under the Protection of Depositors, Companies and Prevention of Fraud (Bailiwick of Guernsey) Law, 1969. That law additionally gave power to the States by Ordinance, to regulate deposit taking and insurance businesses.

68. Whilst deposit taking was regulated by Ordinance in 1971, nothing was done about insurance until the States Advisory and Finance Committee reported to the States in 1983 that it was necessary to propose a new law to regulate insurance business. These proposals were approved and resulted in the enactment of the Insurance Business (Guernsey) Law 1986 ("the Law of 1986"). The regulatory authority was expressed to be the Committee but that responsibility was transferred to the Commission when it was established the following year This law did not purport to regulate insurance intermediaries, carrying on the kind of business carried on by CWFSL. It was not until 1994 that proposals were approved for amendment of the law of 1986 to include controls over insurance intermediaries. The Advisory and Finance Committee however, ran into a headwind when the legislation implementing the 1994 decision was brought to the States and as a result the Projet de Loi was withdrawn for further consultation.

69. This took time and it was not until 1997 that the Committee returned to the States. In its Report (Billet d'Etat 1997 page 495), the States Advisory and Finance Committee, when reporting on the Commission's Recommendations, quoted the commission as observing that whilst the number of complaints regarding the activities of Insurance Intermediaries is small, the standard of professional competence amongst those intermediaries was "very uneven".

70. In the event the States approved the proposals put forward by the States Advisory and Finance Committee on behalf of the Commission and these were reflected in a Projet de Loi which was

approved by the States on the 1 August 1997. The Projet de Loi was registered on the 7 April 1998 under the title "The Insurance Business (Amendment) (Guernsey and Alderney) Law, 1998" and an Ordinance was passed on 24 June 1998, bringing the Law into force, subject to a certain saving provisions deferring the operation of certain sections until various dates in the summer and autumn of 1998.

71. There was an issue over sole traders, or single director companies, which had been in business as Insurance Intermediaries prior to the new law coming into force and it is clear from the further papers that we have seen that in 2000 the Commission were addressing these issues. The clear intention was that entities which had been under the oversight of a single principal, had to make arrangements, satisfactory to the Commission, for a suitably experienced second pair of eyes to join in the oversight of the operation. There is reference to the discussions with those who are likely to be effected by this tightening up, in the additional papers that were placed before the Commission of which Mr Webber furnished to HM Greffier following the submission of the Commission's bundle before the tribunal.

72. In June 2002, the States approved proposals from the Advisory and Finance Committee which had been drawn up by the Commission, for the upgrading of the Law of 1986 as amended, to comply with the core principles set down by the International Association of Insurance Supervisors. This was perceived as particularly important as the International Monetary Fund was visiting Guernsey in November of 2002, to perform an assessment of the legislation against the core principles.

73. The Projet de Loi incorporating these proposals was laid before the States and approved at the following month's meeting in July. So far as the position of CWFSL was concerned, the requirement for 'four eyes' continued and there were certain further protections required, including the requirement for an independent director with experience in the industry. The important point to note is that although Mr Webber seems to have started as a one man operation when he was first licensed in 1999, there was at that time, no question but that under the legislation which had been introduced the previous year, the sole trader or a company with a sole director, was not going to be able to continue, as had been possible prior to the introduction of the amendment law of 1998. At no time did Mr Webber claim that CWFSL should not be obliged to conform in this regard. Indeed, Mr Webber, who happens to have been a member of the States at the time when these legislative changes were under consideration, has declared himself more than once, as having been supportive as a matter of principle, of the reforms proposed.

74. Given this background, it is clear that the interests of CWFSL and of its existing clients could not be permitted to trump the interests of the public and of potential clients of CWFSL. In my

judgment the regulatory failings of CWFSL exposed those who might do business with CWFSL to unacceptable risks that the legislation was designed to minimise. As sections 4, 7 and 9 of the Law of 2002 make clear, the Commission is obliged, when making decisions in relation to licensing to have regard to the "interests of the public, policyholders or potential policyholders or clients (in the case of an insurance intermediary), and the reputation of the Bailiwick as a finance centre." Given the nature of these statutory obligations and the stated policy aims of the Commission, CWFSL has no realistic prospect of success in seeking to argue that the Commission acted unreasonably in revoking its licence.

75. Mr Webber on behalf of CWFSL has accepted; "that there are minimum criteria set down by the Law and its attaching codes rules and regulations that need to be complied with by CWFSL."[26] Indeed he observed candidly in the course of argument before us, that he did not expect the Commission to grant CWFSL six months without any restrictions on its licence in May 2006. His alternative argument that he should have been given further time or facilities to help CWFSL was in my judgment unrealistic. It was not in any event the way in which he put his case to the Commission and it cannot be unreasonable for the Commission to have acted as it did.

76. I recognise that the decisions of the Commission caused hardship to CWFSL, its clients and Mr Webber. In a letter dated 1 November 2005 Mr Webber said: "I feel I am very much in a catch 22 situation ... although I obviously accept that the Commission has requirements that have to be met, I have always felt that imposing restrictions which actually prevent me from earning a living have not been reasonable and have been exceptionally harsh ... it is exceptionally important to be able to undertake business in the limited amount of time I have which is not taken up with court matters. My circumstances are exceptional because I have no other options as there is no company in Guernsey who would want me in an employed or self employed position whilst my court procedures are not concluded."

77. This point was repeated forcibly by Mr Webber in his letter of 26 April 2006: "I am hoping that the Commission will give me the opportunity to operate my business, to earn a living and to meet the outstanding requirements requested of CWFSL. Even if I am only given a limited amount of time, say six months, I will have the chances to re-establish CWFSL's reputation in some way which at the very least will put me in a more marketable position from the point of view of CWFSL going into another company. The current situation gives neither CWFSL or myself the prospect of becoming re-established in any way at all. In fact I believe that if CWFSL's licence is not reinstated then my own personal reputation in financial services will be tarnished irrevocably which quite frankly I do not feel

[26] CWFSL letter 30 November 2005

I deserve."

78. In my judgment the hardship caused to Mr Webber and CWFSL was, on the material that has been placed before us by Mr Webber, a necessary and inevitable by-product of the increasing regulation necessary to protect the public and to ensure the high standing of Guernsey as a financial centre.

79. Despite Mr Webber's fears, I am confident that the decision of the Commission will be seen for what it is, namely an indictment of CWFSL's failure to meet new compliance standards, but not as a reflection on his honesty or standing in the community. No client has ever complained about his professional services. His situation has been brought about by a number of exceptional circumstances. I doubt if he or any company connected with him were to apply for a new licence the Commission would regard the history of this case as any reflection upon his integrity or probity

80. Having regard to my view of the prospects of success for the substantive appeal and the admitted failure of CWFSL to comply with the 'unless order,' the Lieutenant Bailiff was right to strike out the substantive appeal on 21 July 2008. Although Mr Webber argues that the requirements in the unless order should have been amended or postponed (on 21 July 2008 as well as at subsequent hearings) and that CWFSL's obligation to provide security should be delayed until after the substantive appeal, it would not have been in the interests of justice to amend or postpone these obligations if (as I have held it to be) the substantive appeal is hopeless. The documents specified in the 'unless' order had first been identified as being required to be provided by 6 June 2008[27] and then by the 30 June 2008[28] and finally in the unless order[29] by 21 July 2008.

81. Mr Webber has argued before us that the strike out order failed to recognise the injustice that the order caused to CWFSL and violated its and his human rights. Having regard to the prospects of success for the substantive appeal, I do not consider that any arguable injustice has been caused to CWFSL by the striking out of a hopeless case or that Mr Webber's or CWFSL's human rights have been violated.

82. Mr Webber also submitted that the Court of Appeal in July 2008 was not able to assess the merits of the substantive appeal as he was distracted at the time of the hearing by the critical illness of his parents. As I have already stated, his father died three days after the appeal on 18 July 2008. Given this submission I have not given weight to the views expressed by the Court of Appeal in July 2008. I

[27] Order dated 7 May 2008
[28] Order dated 16 June 2008
[29] Order dated 11 July 2008

have instead sought to form my own view on the prospect of success for CWFSL and Mr Webber.

83. Mr Webber was advised by the Court of Appeal on 17 December 2008 to concentrate his submissions on the merits of his substantive appeal and not to re-open issues he had raised in the past as to bias and conflict of interest in connection with the role of Ozannes, which the Court made plain it would not revisit in the light of this Court's judgment of 1 April 2008. Since the hearing on 9 January 2009, Mr Webber has forwarded further material concerning Advocate Harwood's role in the formal application for incorporation of CWFSL. This does not, in my view, call into question the correctness of that judgment and it does not affect my views on the merits of the substantive appeal. I would therefore dismiss the procedural appeals.

84. The Respondent has sought an order requiring CWFSL to provide security for costs in relation to the costs of this appeal in the sum of £5,000. The applications for leave to appeal having failed, no purpose would be served by making the order for security for costs and I do not propose to deal separately with the application by the Respondent save to express the provisional view that costs of these appeals should follow the event and that accordingly that CWFSL should pay the Respondent's costs of these appeals on the ordinary recoverable basis. Given that CWFSL's solvency is in issue and that it is questionable whether any order for costs can be paid, I would go on to direct that any order for costs of the proceedings either in this Court or in the Court below should not be enforced without the leave of this Court. For the avoidance of doubt this would include any order of the Court below awarding to CWFSL the costs of the unsuccessful strike out application mounted on behalf of the Commission.

85. There is one further matter which has arisen as a result of a closer study of the papers before us at the hearing. I have made reference to the order of Newman LB of 4th December 2008 under which CWFSL was ordered to pay by 28th November 2008 £9,043.34 a sum equal to one quarter of the Commission's costs to date. The order appears to have comprised the draft application of Mr Wessels on behalf of the Commission stamped and signed by Deputy Greffier Ross on behalf of Newman LB. No reference is made on its face as to whether representations written or oral were received prior to the making of the order. From the enquiries we have made I am satisfied that notice of the application was given by Mr Wessels to Mr Webber in early November. A few days later Mr Webber informed HM Greffier that he objected and wished to be heard, emphasising the point that he had asked for taxation of all the Commission's claims for legal costs. The Order then appears to have been made a few days after its operative date in circumstances where we cannot be certain that there was the appropriate further reference to CWFSL. This matter was not raised before us by Mr Webber as a discrete point, but in the light of what I understand as to the position I am not satisfied that Newman LB's order of 4th December should stand in its present form and I accordingly would set it aside. In

view of what I have suggested above concerning leave being required for any enforcement of costs it would not appear necessary to say any more at this stage.

VOS JA: I agree

CAREY JA: I also agree

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

Civil 395/396

The 19th May, 2009 before Sir de Vic Carey, President, Geoffrey Charles Vos QC and Miss Clare Patricia Montgomery QC

CANIVET WEBBER FINANCIAL SERVICES LIMITED
(Appellant)

V

GUERNSEY FINANCIAL SERVICES COMMISSION
(Respondent)

In the matter of the application by the Appellant for leave to appeal to the Judicial Committee of the Privy Council, from the judgment of the Court of Appeal handed down on 25 February 2009, and for an order restraining the Respondent from exercising its statutory duty under the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002 to publish notice of revocation of licence;

THE COURT, having considered written contentions from Mr A D C Webber, director of the Appellant, and Advocate J M Wessels for the Respondent, this day ISSUED its decision in the terms attached hereto; and

1. REFUSED the application for leave to appeal to the Judicial Committee of the Privy Council; and

2. ORDERED that, notwithstanding that the application for leave to appeal had been refused, the Respondent shall be restrained from exercising its said statutory duty to publish for a further period of three months to allow the Appellant to pursue any application it may wish to make to the Judicial Committee for special leave to appeal and for further postponement of publication of revocation by the Respondents.

K H TOUGH
Registrar to the Court of Appeal

Approved Judgment
13 May 2009

IN THE COURT OF APPEAL
OF THE ISLAND OF GUERNSEY

CIVIL DIVISION

Before: **Sir de Vic Carey, Presiding**
Geoffrey Vos Esq., QC
Clare Montgomery QC

Between: **CANIVET WEBBER FINANCIAL SERVICES LIMITED** **Appellant**

and

GUERNSEY FINANCIAL SERVICES COMMISSION **Respondent**

JUDGMENT

MONTGOMERY JA:

The Applicant Company, Canivet Webber Financial Services Ltd (CWFSL), applies for leave to appeal to the Judicial Committee of the Privy Council from the decision of the Court of Appeal handed down on 25 February 2009. In that judgment the Court of Appeal held that CWFSL's appeal against the Respondent's decision to revoke its insurance intermediaries licence under section 9(3) of the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law 2002, dated 2 March 2007 (the substantive appeal) had no realistic prospect of success. CWFSL also applies to postpone any publication by the Respondent giving notice of the revocation of CWFSL's licence under the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law 2002.

2. Pursuant to the direction of Carey JA, sitting as a Single Judge, submissions in writing in support of the applications for leave to appeal and for the postponement of the publication have been provided by Mr Anthony Webber on behalf of CWFSL. Those submissions contain a detailed critique of the actions of the Respondent and repeat submissions made before us in January 2009 to the effect that the Respondent's actions were unlawful and unreasonable.

3. The submissions assert that the Court of Appeal has proceeded on a basis that was mistaken both in fact and in law and failed to take into account material to which the submissions draw attention.

4. Mr Webber on behalf of CWFSL has expressed the preference that there should be an oral hearing of CWFSL's applications. However his submissions, which run to 74 closely typed pages (excluding documents incorporated by reference), appear to us to be sufficiently comprehensive as to render an oral hearing unnecessary, particularly since the Respondent has filed no substantive submissions on the application for leave to appeal. The Court has therefore considered the application on the papers and this is the judgment of the Court thereon.

5. Section 16 of the Court of Appeal (Guernsey) Law 1961 provides as follows:
"No appeal shall lie from a decision of the Court of Appeal under this Part of this Law without the special leave of Her Majesty in Council or the leave of the Court of Appeal except where the value of the matter in dispute is equal to or exceeds the sum of five hundred pounds sterling."

6. This is not a case in which there has been any final decision by the Court within the meaning of section 16, see *Havilland Estates Limited et al v. Channel Island Ceramics et al (No 2)*, Court of Appeal 18 January 1993 1993 15 GLJ 81; or where the case determined by the Court involved a dispute that had any monetary value, see Vos JA in *Garnet Investments Ltd v BNP Paribas (Suisse) SA* Court of Appeal Unreported 9 January 2009.

7. Accordingly CWFSL has no right to appeal under section 16 although the Court of Appeal has discretion to grant leave to appeal. That discretion will only be exercised in favour of an appeal where the decision of the Court involves a point of law of great and general public importance. It is the clear view of all three members of the Court that there is no issue of law of public importance raised by this case. The appeal has been resolved by reference to established and conventional legal principles.

8. Mr Webber and CWFSL must therefore seek the special leave of the Judicial Committee if CWFSL wishes to pursue any appeal.

9. It follows that the application for postponement of publication is in our judgment without merit. However in order to avoid any decision of the Judicial Committee being rendered nugatory as a result of the immediate publication of the revocation decision, we are prepared to grant a further period of postponement of 3 months to allow CWFSL to pursue any application it may wish to make to the Judicial Committee for special leave to appeal and for postponement.