[2009] UKPC 49
Privy Council Appeal No 26 of 2009

JUDGMENT

Lowell Lawrence *v* Financial Services Commission

From the Court of Appeal of Jamaica

before

Lord Saville
Lord Collins
Lord Kerr
Lord Clarke
Sir Henry Brooke

JUDGMENT DELIVERED BY
LORD CLARKE
ON

14 December 2009

Heard on 6 October 2009

Appellant	*Respondent*
Minett Lawrence	Patrick W Foster QC
(Instructed by Myers, Fletcher & Gordon)	(Instructed by Charles Russell LLP)
Appellant	
Christopher Dunkley	
(Instructed by Myers, Fletcher & Gordon)	

LORD CLARKE:

Introduction

1. This appeal arises out of a penalty notice dated 1 July 2004 served on the appellant by the respondent as the Financial Services Commission of Jamaica ('the FSC'). The notice was stated to be issued pursuant to section 21(2) of the Financial Services Commission Act 2001 in respect of an offence specified in the Fourth Schedule of that Act ('the FSCA 2001'). The appellant sought judicial review of the FSC's decision to issue the notice on the principal ground that it was unlawful to do so without giving him an opportunity to be heard by an impartial tribunal in response to allegations on which the notice was based. The application came before the Full Court of the Supreme Court of Jamaica, comprising Reid, Marsh and DO McIntosh JJ and was dismissed with costs in judgments handed down on 28 October 2005.

2. The appellant appealed to the Court of Appeal in Jamaica. The appeal raised essentially the same points as had been argued before the Full Court but a new and preliminary point arose before the appeal was heard. Whereas at first instance it had been assumed on all sides that the relevant provisions of the FSCA 2001 were in force when the notice was issued, it was discovered that they were not, with the result that Jamaica enacted the Financial Services Commission (Insurance Services) (Validation and Indemnity) Act 2006 ('the Validation Act'). In the Court of Appeal the FSA correctly conceded that it had had no power to issue the penalty notice but contended that the notice was validated by the Validation Act. The Court of Appeal considered that question as a preliminary issue and held that the notice was indeed validated by the Validation Act. It then considered the substantive appeal and dismissed the appeal. It also dismissed an appeal against the order for costs. However, the Court of Appeal subsequently gave leave to appeal to Her Majesty in Council.

The issues in the appeal before the Judicial Committee

3. The issues raised before the Board were essentially the same as those raised before the Court of Appeal. They were (1) whether the penalty notice was validated by the Validation Act and, if so, in what respects; (2) whether the appellant is entitled to have the notice quashed; and (3) whether the Court of Appeal erred in upholding the order for costs against the appellant. In considering those issues, it is convenient first to refer to the relevant statutory position, then to set out such of the facts as are necessary to determine the issues and finally to take each of the issues in turn.

The statutory position

4. The FSC 2001, which it appears was enacted in May 2001, provided for the establishment of the FSC. By section 6 it was given wide powers to regulate financial services, which were defined by section 2 as meaning services provided or offered in connection with (a) insurance, (b) the acquisition or disposal of securities and units under a registered unit trust scheme and (c) such other services as the relevant Minister might by order declare to be financial services.

5. Section 21 of the FSC 2001 provides, so far as relevant:

“21(1) This section shall apply to an offence under any relevant Act, being an offence specified in the Fourth Schedule.

(2) The Commission may give to any person who it has reason to believe has committed an offence to which this section applies, a notice in writing in the prescribed form offering that person the opportunity to discharge any liability to conviction of that offence by payment of a fixed penalty under this section.

(3) No person shall be liable to be convicted of the offence if the fixed penalty is paid in accordance with this section and the requirement in respect of which the offence was committed is complied with before the expiration of the fifteen days following the date of the notice referred to in subsection (2) or such longer period (if any) as may be specified in that notice or before the date on which proceedings are begun, whichever event last occurs.

(4) Where a person is given notice under this section in respect of an offence, proceedings shall not be taken against any person for that offence until the end of the fifteen days following the date of the notice or such longer period (if any) as may have been specified therein.

(5) In subsections (3) and (4) ‘proceedings’ means any criminal proceedings in respect of the act or omission constituting the offence specified in the notice under subsection (2) and "convicted" shall be construed in like manner.

(6) ….

(7) A notice under subsection (2) shall -

(a) specify the offence alleged;
(b) give such particulars of the offence as are necessary for giving reasonable information of the allegation;

(c) state -

(i) the period (whether fifteen days or a longer period) during which, by virtue of subsection (4), proceedings will not be taken for the offence; and

(ii) the amount of the fixed penalty and the Collector of Taxes to whom and the address at which it may be paid.

(8) The fixed penalty for the offences specified in the Fourth Schedule shall be the penalty specified therein in relation to such offences.

> (9) In any proceedings for an offence to which this section applies, no reference shall be made after the conviction of the accused to the giving of any notice under this section or to the payment or non-payment of a fixed penalty thereunder unless in the course of the proceedings or in some document which is before the court in connection with the proceedings, reference has been made by or on behalf of the accused to the giving of such a notice, or, as the case may be, to such payment or non-payment."

In addition, subsection (10) provides for the Minister to prescribe the form of the notice and, subject to an affirmative resolution required by subsection (11), gives the Minister power to amend the Fourth Schedule.

6. The Fourth Schedule sets out what are described as "offences in respect of which liability to conviction may be discharged by payment of fixed penalty". The schedule includes over 50 offences under both the Securities Act and the Insurance Act 2001. The offences include both offences of omission and offences of commission. One of the offences is that created by section 70 of the Insurance Act 2001 referred to below.

7. The Insurance Act 2001 came into force on 21 December 2001. It contains very detailed provisions relating to the conduct and regulation of insurance business. Although the Board was not shown any provision to this effect, there is unchallenged evidence that the LSC took over the role of the Superintendent of Insurance upon the enactment of the Insurance Act 2001. However that may be, no-one suggested that it would have been possible for the appellant thereafter to be registered by the Superintendent of Insurance, who had previously been responsible for the registration of insurance companies and their intermediaries.

8. The appellant is or was an insurance intermediary within the meaning of Part IV of the Insurance Act 2001. For present purposes the critical section in Part IV is section 70, which provides as follows:

> "70(1) No person shall, in relation to insurance business of any class specified in section 3(1) carry on or purport to carry on, business as, or act in the capacity of, an insurance intermediary, unless he is registered under this Part to do so.
>
> (2) Any person who contravenes this section shall be guilty of an offence and liable on summary conviction before a Resident Magistrate to a fine not exceeding three million dollars or to imprisonment for a term not exceeding three years or to both such fine and imprisonment."

By section 71(1) an application for registration under Part IV must be made to the LSC in the prescribed form and accompanied by evidence of payment of the fee and such documents as may be prescribed. By section 72(1) no-one can be registered under Part IV as an agent or sales representative of an insurance company unless the company is registered under Part II or exempted from such registration.

9. As already indicated, when this matter came before the Full Court, everyone thought that all the relevant provisions were in force. In fact, some of them were not. The insurance provisions of the FSCA 2001 were not brought into force until 4 March 2005. By paragraph 2 of the FSCA 2001 (Appointed Day) (Insurance Provisions) Notice 2005 ('the 2005 Notice') the definition of 'financial services' as including 'insurance' and the provisions of the Fourth Schedule of the FSCA relating to the Insurance Act 2001 came into force on 4 March 2005. It is striking that no-one was apparently aware of the true position when the matter was argued before the Full Court because it was argued on 11 and 12 April 2005, whereas the 2005 Notice is dated 4 March 2005 and was published in a Supplement to the Jamaica Gazette on 7 March 2005, which was thus only just over a month before the argument in the Full Court took place. The FSC has given no explanation as to how that came about. Whatever the explanation, two matters are plain. The first, as is conceded, is that when, on 1 July 2004, the FSA purported to serve a notice on the appellant under section 21 of the FSCA alleging an offence set out in the Fourth Schedule, the notice was void and of no effect because neither section 21 nor the Fourth Schedule was in force in so far as they related to insurance business. The second is that, if the FSC had disclosed the fact that the insurance provisions of the FSC 2001 only came into force on 4 March 2005, the Full Court would have quashed the notice and the appellant's application for judicial review would have succeeded, albeit not on the ground on which he had advanced it.

10. In the recitals to the Validation Act 2006, which was enacted on 10 August 2006, it is stated that the FSCA 2001 was enacted in May 2001 to empower the FSC to supervise and regulate non-deposit-taking institutions operating in the financial services sector, including insurance business, but that on 2 August 2001 its provisions were brought into operation, other than those relating to insurance business, by virtue of an appointed day notice. The Board has not seen that notice but it is not suggested that those recitals do not state the true position.

11. The same is true of the next recital, namely that the Insurance Act 2001 came into force on 21 December 2001. However there is a curiosity in relation to the remaining recitals, which appear to ignore the provisions of the 2005 Notice bringing the insurance provisions of the FSCA into force on 4 March 2005. The recitals state that on 21 December "and subsequently" the provisions of the FSCA relating to insurance were not brought into operation and that it was desirable to validate and confirm all acts done in good faith by the FSC in the purported exercise of its functions under the FSCA and the Insurance Act 2001 in relation to the insurance industry "during the period 21 December 2001 to the date of the commencement of the Validation Act", namely 11 August 2006.

12. It is curious that there is no reference to the 2005 Notice but no-one has suggested that, for the purposes of this appeal, there is any significance in that omission. Whatever the position with regard to the FSCA 2001, it is common ground that the Insurance Act, including section 70, has been in force since 21 December 2001. It was therefore in force on the dates of the offences alleged to have been committed by the appellant.

13. Section 2 of the Validation Act provides:

> "2 Notwithstanding anything to the contrary in any enactment, all acts done in good faith, between the 21st day of December, 2001 and the commencement of this Act, by –
>
> (a) the Financial Services Commission, its officers and staff, in the purported exercise of the powers conferred upon the Financial Services Commission in relation to the insurance industry by the Financial Services Commission Act and the Insurance Act-2001 and by all other persons acting in connection with or in support of such acts;
>
> (b) any other persons having an official duty or being employed in the administration of the Financial Services Commission Act in relation to the insurance industry,
>
> are hereby declared to have been validly, properly and lawfully done and are hereby confirmed; and the Financial Services Commission, its officers and staff and the other persons specified are hereby freed, acquitted, discharged and indemnified as well against The Queen's Most Gracious Majesty, Her Heirs and Successors as against all persons whatever from all legal proceedings of any kind, whether civil or criminal, in respect of or consequent on those acts."

14. The Board will return below to the application of these statutory provisions to the facts of this case.

The facts

15. The appellant was an insurance intermediary for many years before 2001. Moreover he had previously been registered by the Superintendent of Insurance under a previous statute to settle policies on behalf of Life of Jamaica Limited. When he resigned from that company his registration was automatically cancelled but he was subsequently registered when engaged by Prime Life Insurance Company and Spectrum Insurance Brokers on 1 May 1991 and 12 August 1992 respectively. When he left Spectrum his registration was again automatically cancelled. He then joined MONY Life Insurance Company of the Americas Ltd ('MLICA') and continued settling policies for them. There is evidence that he did so without being registered by the Superintendent of Insurance, although, if he did, that fact is not relevant to the issues in this appeal. There is a suggestion that it was thought that an intermediary for a non-Jamaican insurance company did not require registration and that one of the purposes of the 2001 legislation was to require all insurance companies and their intermediaries to be registered. That was indeed one of the effects of the legislation but, whatever may have been thought by some, there is no support for the conclusion that there was no requirement for non-Jamaican insurers to be registered before the 2001 legislation.

16. It is not in dispute that between about February 2002 and at least October 2003 the appellant continued to carry on insurance business as one of MLICA's intermediaries without being registered by the FSC or anyone else to do so. The appellant's evidence is that MLICA was in business selling insurance and financial products in

Jamaica before the Insurance Act 2001 came into effect and that it continued to do so thereafter without objection from the FSC or anyone else. In about February 2002, after consulting the FSC, MLICA applied for registration under the Insurance Act 2001. It is not clear when an application was first made on behalf of MLICA's intermediaries including the appellant. However, there is evidence that on 22 June 2002 MLICA submitted an application for registration on behalf of 22 of its intermediaries including the appellant, although the only document the Board has seen is a letter dated 20 June 2002 sent to the FSC on behalf of MLICA seeking registration on behalf of nine intermediaries, including the appellant. The only evidence of a reply to that application is a letter of 31 March 2003 saying that the appellant's application form was incomplete. It is common ground that there was no contact between the FSC and the appellant or, no doubt, the other intermediaries. The intermediaries continued to act as such while the applications were pending. At no time did either the FSC or MLICA inform the appellant that his application (or that of MLICA) had been refused.

17. The evidence submitted on behalf of the FSC is that it learned some time in 2003 that MLICA was doing insurance business in Jamaica selling insurance policies. It may be that the appellant would say that it knew that long before 2003. No immediate steps were taken to stop the appellant or others from selling insurance while unregistered. Nor did the FSC grant or refuse the appellant's application. On the other hand the Board does not accept the appellant's evidence that the FSC, by its conduct, led him to believe that he was duly registered under the Insurance Act. There were no possible grounds for such a belief except inaction on the part of the FSC, which could not possibly amount to registration. The FSC's evidence, which is not contradicted by the appellant, is that between 22 February 2002 (when MLICA submitted its first application for registration) and 21 October 2003, the appellant settled 36 policies on behalf of MLICA, although he was not registered either by the Superintendent of Insurance or by the FSC to do so.

18. It was on the basis of that evidence that the FSC formed the belief that the appellant had acted in the capacity of an insurance intermediary without being registered under Part IV of the Insurance Act 2001 and that he had therefore acted in breach of section 70(1) of that Act and was guilty of the offence specified in section 70(2). On the basis upon which the case was argued before the Full Court, namely that all the relevant provisions of the FSCA were in force, the Board has no doubt that the FSC had reason to believe that that was the case.

19. In early February 2004 (and perhaps earlier) there were discussions between the FSC and MLICA and their legal representatives during which the FSC asserted that there had been breaches of section 7 of the Insurance Act 2001, which is in similar terms to section 70 but relates to insurance being carried on by a body corporate. The position is summarised in a letter from FSC to MLICA's lawyers dated 13 February 2004 as follows. MLICA and some 22 representatives sold 329 policies totalling some US$1,962,728 without being registered in breach of sections 7 and 70 of the Insurance Act 2001 respectively. However, the FSC wished to reach a settlement and at a meeting on 11 February 2004 agreement was reached which may be summarised as follows:

i) MLICA would withdraw its application and not make another before 1 May 2004. It would establish a toll free customer centre and offer a full refund of premiums to policy holders.

ii) The 22 sales representatives would be offered the opportunity to pay a fixed penalty under the Fourth Schedule of the FSCA in lieu of prosecution and "revocation and/or suspension of their registration". It was understood that MLICA would pay the penalty for the representatives and that any representative who paid the penalty (or for whom it was paid) would not be prosecuted or face any other regulatory sanction by the FSC. Nor would the circumstances giving rise to it be taken into consideration in assessing whether the representative was a fit and proper person to be registered. On the other hand, any representative who rejected the fixed penalty option would be referred to the DPP for prosecution and would face sanctions of revocation or suspension.

20. MLICA's lawyers replied on 18 February making a number of suggestions, including that the deposit of US$3.2 million (together with interest) would be returned on withdrawal of the application and the refund of premiums should be limited to policies issued after February 2002. The FSC replied on 26 February essentially agreeing with those points and making one or two others which are not relevant for present purposes. Thus agreement was reached between the FSC and MLICA on the basis set out above. There is no evidence what, if any, communication there was between the appellant and MLICA at this time.

21. On 26 April 2004 the FSC wrote to the appellant (and no doubt other intermediaries) in terms which reflected the agreement reached between the FSC and MLICA. The letter asserted a breach or breaches of section 70(1) by the appellant for the reasons set out above and set out the terms of section 70(2), which creates the offence. It also correctly described the effect of section 21 of the FSCA 2001 as being to authorise the FSC to offer the appellant the opportunity to discharge any liability to conviction for the offence by payment of a fixed penalty as set out in the Fourth Schedule. However, the FSC added that, resulting from its agreement with MLICA, it had decided to offer the appellant the option under section 21 of the FSCA 2001 in lieu of recommending prosecution for his breach of the Act and added that, if the offer was accepted by him, the FSC would not commence proceedings to suspend and/or revoke his registration.

22. The letter then spelled out the two alternatives in express terms as follows:

> "**ALTERNATIVE 1**:
>
> In lieu of prosecution for violation of Section 70 of the Act, you are offered the opportunity to pay a fixed penalty under Section 21 of the FSC Act. In accordance with the Fourth Schedule of the FSC Act the fixed penalty for this offence is One Hundred Thousand Dollars ($100,000). While not a requirement of the Commission, it is understood and accepted by the Commission that MLICA will indemnify you if you agree to pay the fixed penalty. Additionally, the Commission will not commence proceedings to suspend and/or revoke your registration. Upon acceptance of this alternative, you will be

discharged from any liability for prosecution in accordance with the provisions of the FSC Act and will face no other regulatory sanctions by the Commission. Payment of the fixed penalty and the circumstances giving rise to it will not be negatively construed in the fit and proper assessment of you by the Commission.

ALTERNATIVE 2:

If you reject the fixed penalty option, your case will be referred to the Office of the Director of Public Prosecutions for prosecution. Additionally, the Commission will commence proceedings for the suspension and/or revocation of your registration. The circumstances giving rise to your prosecution and facing regulatory sanctions will be taken into consideration in any fit and proper assessment of you by the Commission."

23. The letter was not entirely appropriate in the appellant's case. Section 21(3) of the FSCA 2001 specifies that a person who pays the penalty shall not be liable to be convicted of the alleged offence or offences but contains no reference to other regulatory action. Moreover, whatever may have been the position in the case of other intermediaries, the appellant was not registered, so that the references to the possibility of commencing proceedings to suspend or revoke his registration had no place in a letter sent to the appellant. Moreover, the FSC clearly indicated to the appellant that, if he did not agree to pay the penalty, the circumstances, as it was put giving rise to his prosecution and to his facing regulatory charges, would be taken into account against him. There is force in the submission made on behalf of the appellant that in this respect the letter contained an unwarranted threat.

24. On 28 May 2004 the appellant's solicitors replied to the letter of 26 April on his behalf. They denied that he was in breach of any of the laws of Jamaica, said that he would welcome an opportunity to clear his name if prosecuted and demanded a withdrawal of the letter, failing which proceedings would be begun in the Supreme Court. However on 1 July 2004 the FSC wrote to the appellant enclosing a penalty notice notifying the appellant, by paragraph 1, that the FSC had "reason to believe" that he had committed an offence under the Insurance Act 2001, being the offence specified in the schedule to the notice. Paragraphs 2 to 4 of the notice were in these terms:

"2. You are liable to have criminal proceedings taken against you in respect of the offence and, if convicted of the offence, you shall be liable to a fine as set out in the relevant provision of the Act in respect of that offence.

3. Notwithstanding your liability to conviction for the offence, the Commission hereby offers you the opportunity to discharge such liability by payment of a fixed penalty in the amount set out in the Schedule, before the expiration of the period ending on the date set out therein, and if the penalty is paid, then no proceedings shall be taken against you in respect of the offence.

4. The fixed penalty shall be paid to the Collector of Taxes specified in the Schedule and the fourth copy of the notice duly endorsed by the Collector of Taxes in confirmation of the payment of the fixed penalty and the Government of Jamaica Official Receipt, from the Collector of Taxes evidencing payment of the fixed penalty, shall be submitted by you to the Commission."

25. The schedule to the notice identified the relevant offence as that of carrying on or purporting to carry on insurance business as an insurance intermediary without being registered by the FSC, in contravention of section 70 of the Insurance Act 2001. The particulars stated that it was "the finding" of the FSC that the appellant was engaged in the sale of insurance policies as a sales representative of MLICA without being registered by the FSC to do so and that, in so doing he was in breach of section 70. The notice further stated that the fixed penalty was Jamaican $100,000 and that the final date for payment was 23 July 2004. That figure was indeed the amount of the fixed penalty for such an offence specified in the Fourth Schedule of FSCA 2001.

26. The appellant did not pay the penalty but commenced proceedings for judicial review of the FSC's decision to issue the notice. He sought an order of certiorari quashing the decision, an order of prohibition to prevent the FSC from laying a complaint against the appellant to the DPP, an order preventing the FSC from suspending, revoking or otherwise interfering with the appellant's registration under the Insurance Act 2001 and damages for interfering with his contract of employment. The Board will consider the grounds of the claim for judicial review and the orders sought in the context of the three principal issues in this appeal identified above, to which it now turns.

Was the penalty notice validated by the Validation Act?

27. As stated above, it was (and remains) common ground that, if the notice was not validated by the Validation Act, the notice would have to be quashed because, given that the insurance provisions of the FSCA 2001, including section 21 and the Fourth Schedule, were not in force, there was no legal basis upon which the FSC could have issued such a notice. The question of validation only arose before the Court of Appeal, comprising Mr Justice Smith JA, Mr Justice Cooke JA and Mrs Justice Harris JA (Ag), who unanimously held that the notice was validated by the Validation Act 2006. The appellant challenges that decision on the ground that the language of the Act is not sufficiently clear to validate the notice. He submits that the Act could not have the effect contended for by the FSC unless it did so in clear and unequivocal language, especially since the matter had already been considered at first instance when the point was first taken.

28. It is common ground that a statute will only be construed as having retrospective effect if it is plain that it was intended to have that effect or, to put it another way, that such a construction is unavoidable: see eg *Yew Bon Tew* alias Yong Boon Tiew *v Kenderaan Bas Mara* [1983] 1 AC 553. There are many cases which have discussed this principle but, since there is no issue between the parties and the Board agrees that that is indeed the relevant principle, there is no need for it to refer to further authority.

29. The Board agrees with the Court of Appeal that there is no room for doubt as to what the intention of the legislature was in passing the Validation Act. The recitals make it clear that it was intended to validate all acts done in good faith by the FSC in the purported exercise of its functions under the FSCA and the Insurance Act 2001 in relation to the insurance industry "during the period 21 December 2001 to the date of the commencement of [the Validation Act]", namely 11 August 2006. That purpose was plainly put into effect by section 2 quoted above. The critical part of that section is the provision that all acts done in good faith between 21 December 2001 and the commencement of the Validation Act by the FSC, its officers and staff in the purported exercise of its powers under the FSCA and the Insurance Act 2001 were thereby declared to have been validly properly and lawfully done and were thereby confirmed. There can be no doubt that one such act was the giving of the penalty notice and, moreover, that that is so even though the validity of the notice had been unsuccessfully challenged in proceedings commenced before the Validation Act was passed.

30. In these circumstances and since there is no suggestion that the giving of the notice was not done in good faith, it follows that, although the notice was invalid at the time it was sent, it was validated by the Validation Act. It further follows that the appeal on this ground must be dismissed. The Board will return at the end of this opinion to consider briefly a point raised in the course of the argument arising out of the possibility of the appellant being prosecuted in the future.

Is the appellant entitled to have the notice quashed?

31. Both the Full Court and the Court of Appeal, which now comprised Mr Justice Smith JA, Mr Justice Cooke JA and Miss Justice G Smith JA, answered this question in the negative. The principal argument advanced before both courts and on this appeal is that the FSC should have permitted the appellant to be heard before forming the view either that he had committed the offence alleged or that there were reasonable grounds for thinking that he had done so and before serving him with the penalty notice complained of.

32. The Board is unable to accept this argument, essentially for the same reasons as were given by the Full Court and the Court of Appeal. Section 21 of the FSCA 2001 simply gives the FSC power to give a notice to any person "who it has reason to believe has committed an offence" to which the section relates. It was not necessary for the FSC to conclude that the appellant had committed the offence or offences. It is true that in the notice the particulars of the alleged offence stated that it was "the finding" of the FSC that the appellant was in breach of section 70. However, that was not the stated basis of the notice and was not the statutory basis of the notice. As set out above the notice stated that the FSC had "reason to believe" that the appellant was in breach of section 70. That was indeed the statutory test.

33. The FSC was not reaching any conclusion binding on the appellant that he had committed a criminal offence. Nor was its decision to offer him the opportunity to pay a fixed penalty itself the imposition of a regulatory sanction sufficient to render him unfit for registration. In the Board's view, that is so notwithstanding the loose language in some of the correspondence. In giving the notice the FSC was simply offering the appellant a choice, either to pay the penalty, or to refuse to pay and leave the FSC to report the matter to the DPP for possible prosecution. In the case of

payment, the fact of payment would not involve his accepting that he had committed the offence. By section 21(3), no person who paid the penalty was liable to be convicted. It was entirely a matter for the appellant to choose. In the case of non-payment, it would of course be for the DPP to decide whether or not to prosecute. The appellant chose not to pay. His guilt or innocence would then be a matter for the criminal court to decide, if the DPP chose to prosecute. The Board can see no prejudice to the appellant in serving the notice on the appellant and giving him the choice provided by section 21. It may be noted in passing that, by section 21(9), in any proceedings for an offence to which the section applies, no reference can be made to a notice unless it is first referred to by or on behalf of the accused.

34. It follows from the above that, whatever the precise form of the notice, there was no question of the determination of the issue whether the appellant was guilty of an offence before the notice was given. There was no issue upon which the appellant was entitled to be heard or to make representations before the notice was given. It follows that there was no breach of natural justice or of the principle that a defendant to criminal or civil proceedings is entitled to a fair hearing. If the defendant wanted to be heard on the question whether he was guilty of the offence alleged, the appropriate course was for him to wait to be prosecuted and to present his defence. He was not deprived of that opportunity by the giving of the notice.

35. There are many descriptions of the principles of natural justice in the authorities. The underlying principle is clearly stated by Lord Bridge of Harwich in *Lloyd v McMahon* [1987] AC 625 at page 702 as follows:

> "My Lords the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

36. For the reasons already given, the Board is of the opinion that the rights of the appellant were entirely safeguarded by the statutory scheme and, in particular, by his right to defend any criminal proceedings which the DPP chose to bring against him. It may be noted in passing that there was nothing to stop the appellant making representations to the DPP as to why he should not be prosecuted. Thus, he could, if he wished, have said that it would not be just to prosecute him in circumstances in which (as he says was the position) the FSC was aware that he was carrying on insurance business without a licence and in which the FSC was taking an inordinate time to process his application to be registered. He could of course also have sought an order of mandamus against the FSC if it was taking so long to deal with his application so as to be acting unlawfully. He chose not to do so.

37. In *Re McCutcheon and City of Toronto* (1983) 147 DLR (3d) 193 the appellant was given a parking ticket. Under the relevant scheme she could pay a penalty, in which event there would be no further proceedings against her, but if she did not, she would be liable to conviction and payment of a fine. The appellant challenged the law on several grounds, including that it was inconsistent with he**r** right to be presumed innocent under paragraph 11(d) of the Canadian Charter of Rights and Freedoms. In the Ontario High Court of Justice Linden J rejected that submission at page 209 in these terms:

> "In my view there is no merit in this submission. The sliding-scale settlements scheme has nothing to do with the presumption of innocence. It is a convenient way for a traffic violator to avoid being charged. Anyone can refuse to pay anything pursuant to the scheme and await the service of the summons. At that time, the full panoply of defence rights come into play, including the presumption of innocence. Accordingly, there is no infringement here of the right of the accused to be presumed innocent."

Essentially the same principle applies to the facts of this case. The Board is unable to accept the submission made on behalf of the appellant that the principle is not applicable on the ground that the offence in that case was an absolute offence whereas in this case it is not.

38. For these reasons the Board sees nothing unlawful in the decision to give the notice or in the giving of the notice. He had no right to be heard before the notice was given. In the courts below the appellant argued, among other things, that there was an error on the face of the record and that he had a relevant legitimate expectation. However these points were not pursued before the Board and are in any event bad.

39. The Board notes that, on the basis of the position as it was thought to be before the Full Court, it was not submitted on behalf of the appellant that he could challenge the notice on the basis that the FSC did not have reasonable grounds for believing that he was guilty of an offence under section 70 of the Insurance Act 2001. On the assumed basis that the insurance provisions of the FSCA 2001 were in force, there were ample grounds for believing that he was guilty of an offence because it is not in dispute that he was conducting insurance business as an intermediary without being registered under Part IV of the Insurance Act.

40. It follows that the question posed under issue 2, namely whether the appellant is entitled to have the notice quashed must be answered in the negative. This is because the notice was validated by the Validation Act and, on that footing, it was valid.

41. It further follows that the appeal on issues (1) and (2) must be dismissed. The Board would only add this. It was submitted on behalf of the FSC that a decision whether to give a notice under section 21 of the FSCA 2001 was not subject to judicial review. The Board rejects that submission. This can be seen from the facts of this case. If it had been appreciated that the relevant provisions of the FSCA were not in force, the appellant's application for judicial review would have succeeded on the ground that the notice was plainly unlawful and one which could not properly have been issued. Moreover, if no reasonable authority in the position of the FSC could have had reason

to believe that the recipient of the notice had committed an alleged offence, the notice would have been unlawful and open to challenge by judicial review.

Postscript

42. The Board wishes to add this by way of postscript to this part of the appeal. At the hearing of the appeal there was some argument as to the possible effect of the Validation Act on any future prosecution against the appellant for the breach of section 70 of the Insurance Act 2001 alleged in the notice. It was, however, correctly accepted that the Validation Act could have no effect on any such future prosecution. Counsel for the FSC was asked what, if any, consideration had been given to the possibility of such a prosecution. The Board was told that no consideration had been given to such a possibility. This was somewhat surprising since counsel for the FSC is also the Solicitor General.

43. It was submitted on behalf of the appellant that such a prosecution could not succeed. It was submitted that it was bound to fail and that the Board should so hold. However, this is not a point that was raised before the hearing of the appeal. As the Board sees it, there are indeed arguments open to the appellant if such a prosecution were brought. Two in particular were canvassed. The first is that it would be an abuse of process to bring such a prosecution now, given the events of the past. It is said (a) that the notice was served at a time when the FSC should have known that the insurance provisions of the FSCA 2001, including those in the Fourth Schedule, were not in force and therefore that no valid notice could have been served and that the notice was invalid and (b) that the FSC knew or should have known when the matter was before the Full Court that those provisions were brought into force for the first time only about a month earlier. Further the FSC should have brought that fact to the attention of the court, which would have resulted in the appellant's application succeeding. It is said to be a reasonable inference that, if the FSC had appreciated the true position, it would neither have given a notice nor have sought the prosecution of the appellant. There is undoubted force in that point but it was not explored in the argument or evidence before the courts below and, in the opinion of the Board, should be left for determination in Jamaica in the future if it arises. The question whether or not to prosecute is in the first instance a matter for the DPP, who is not directly represented before the Board. The question whether any such prosecution would be an abuse of process would be a matter for the relevant court in Jamaica.

44. The second point is that a prosecution would be bound to fail because the draftsman of section 70 of the Insurance Act 2001 could not have intended to criminalise the carrying on of insurance business as an intermediary without being registered under Part IV of the Act at a time when it was not possible to become registered because the insurance provisions of the FSCA, including the Fourth Schedule, were not in force at the time of the alleged offence. There is also force in this submission. However, it might be argued in response that the purpose of section 70 was to protect, not the FSC, but the insured, and that the words of the section are clear. If a prosecution were to proceed, the question whether the appellant was guilty would also be a matter for the relevant court in Jamaica.

Costs

45. The Full Court ordered the appellant to pay the FSC's costs. On appeal the Court of Appeal upheld that order. Rule 56.15(5) of the Civil Procedure Rules in force in Jamaica at the time provided:

> "The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application."

It is plain that the Full Court had that rule in mind because DO McIntosh J said that the application was misconceived and should be dismissed with costs. We agree that, on the assumption upon which the case was argued, namely that the insurance provisions of the FSCA 2001 were in force when the notice was given, the application was misconceived. It was open to the Full Court to hold, in the exercise of its discretion under the rule, that the appellant should pay the FSC's costs.

46. It follows that, viewed on that basis, the appeal on costs falls to be dismissed. However, in his written case, the appellant invites the Board to have regard to all the circumstances that subsequently transpired. The Board accepts that invitation. It is, in the opinion of the Board, right to have regard to these critical facts to which it has already referred: (1) the insurance provisions of the FSCA 2001, including the Fourth Schedule, were not in force when the penalty notice was given; (2) as correctly conceded on behalf of the FSC, the notice was bad in law when it was given; (3) if the Full Court had known that, it would have granted the application to quash the notice; (4) the FSC should have known that the relevant provisions were not in force, not only because it was its duty to ascertain what its legal powers were, but also because, at or before the hearing before the Full Court, the FSC should have recalled that it was only just over a month before that hearing, on 7 March 2005, that the relevant provisions came into force; and (5) in these circumstances the FSC should not have resisted the application for an order quashing the notice and, in any event, should have brought the true position to the attention of the court.

47. If the FSC had discharged that duty the appellant would have succeeded and not failed before the Full Court and there would have been no question of his being ordered to pay the FSC's costs. In these circumstances the just order is to allow the appellant's appeal against the order for costs made against him by the Full Court. Although it might be said that the appellant should have ascertained the true position, which was in the public domain, the Board takes the view that the primary responsibility was that of the FSC as a public authority. The remaining question is whether the Board should substitute an order that there be no order for costs before the Full Court or whether it should order the FSC to pay some or all of the appellant's costs.

48. The Board's provisional view is that the FSC should pay some or all of the appellant's costs. However, it recognises that this point was not addressed explicitly in the course of the oral argument and is willing to give the parties a short time in which to make written submissions limited to that question. It therefore directs that, in the absence of agreement (the more desirable course), written submissions be exchanged and lodged within 14 days of the date this opinion is promulgated with reply submissions within 7 days thereafter.

49. The position in the Court of Appeal is different. The appellant failed on the points argued in the Court of Appeal and, subject perhaps to a small discount to reflect the fact that its order dismissing the appeal on costs cannot now stand, must pay the costs of the FSC in the Court of Appeal. Before the Board the appellant has failed save as to costs before the Full Court. In the absence of agreement, the parties should make submissions on the questions (a) what discount should be made with regard to the order for costs in the Court of Appeal and (b) what order should be made as to the costs of the appeal to the Privy Council. Such submissions should be made within the same time limits as stated above.

CONCLUSIONS

50. The Board's conclusions may be summarised as follows:

i) The penalty notice was validated by the Validation Act.

ii) Because of the terms of the Validation Act, the appellant is not entitled to have the notice quashed, although he would have been if the Full Court had been informed (as it should have been) that the insurance provisions of the FSCA 2001 were not in force when the notice was given.

iii) The Full Court was justified in making an order for costs against the appellant on the material presented to it. However, if it had been told the true position as it should have been, the notice would have been quashed and the appellant would not have been ordered to pay the FSC's costs. The Board will either make no order for costs or an order that the FSC pay all or part of the appellant's costs before the Full Court. The precise order will be made after considering the submissions as described above.

iv) The appeal against the order made by the Court of Appeal must be dismissed, except in so far as it related to the costs order made by the Full Court. The order for costs in the Court of Appeal will be varied after the Board has considered written submissions.

v) The Board will decide what order to make as to the costs in the Privy Council after considering written submissions.

51. The Board will humbly advise Her Majesty that the appeal be disposed of as set out above.