IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD NO 124 OF 2022 (IKJ)

IN THE MATTER OF THE MONETARY ACT (2020) AND THE MONETARY AUTHORITY (ADMINISTRATIVE FINES) REGULATIONS (2022)

BETWEEN:

STERLING ASSET MANAGEMENT INTERNATIONAL LIMITED

APPLICANT

AND

THE CAYMAN ISLANDS MONETARY AUTHORITY

RESPONDENT

Appearances:

Mr Ian Huskisson and Mr Bryan Little of Travers Thorp Alberga on behalf of the Applicant

Before: The Hon. Justice Kawaley (in Chambers)

Heard: On the papers

Draft Ruling circulated: 04 November 2022

Ruling Delivered: 11 November 2022

HEADNOTE

Application for leave to appeal administrative fines imposed by Cayman Islands Monetary Authority-test for leave and procedural requirements as application was for leave to seek judicial review-merits of various grounds of appeal-importance of reasons for decision-Monetary Authority (Administrative Fines) Regulations (2022 Revision), Regulations 15, 19,22 and 31-Anti-Money Laundering Regulations (2020 Revision), Regulations 5(a) (v), 5 (b), 12 (1)-(3)-Cayman islands Constitution, section 19

Introductory

1. On 5 November 2021 the Cayman Islands Monetary Authority ("CIMA") sent the Applicant a '*BREACH NOTICE FOR THE PROPOSED DISCRETIONARY FINE*' pursuant to the Monetary Authority (Administrative Fines) Regulations (2022 Revision) ("AFRs"). It listed nine particularised breaches of the Anti-Money Laundering Regulations (2020 Revision, as amended) ("AMLRs") and related fines totalling CI$ 299,050.00. The Applicant's attorneys prepared a robust "*REPLY*" dated 5 December 2021. CIMA issued a '*FINE NOTICE FOR THE DISCRETIONARY FINE*' on 6 May 2022 (the "Decision") which triggered the present application.

2. By an Application dated 2 June 2022, the Applicant sought the following substantive relief:

    (1) "*Leave pursuant to Order 53 Rule 3(1) of the Grand Court Rules and/or Regulation 19 of the Monetary Authority (Administrative Fines) Regulations (2022) to bring these proceedings by way of judicial review.*"

    (2) "*A direction pursuant to Order 53 Rule 3 (10(a) and/or Regulation 22 of the Monetary Authority (Administrative Fines) Regulations (2022) that the*

grant of leave to bring these proceedings by way of judicial review shall operate as a stay of the Decision until further order of this Court."[1]

(3) "*A declaration that the Decision was ultra vires the powers granted to the Respondents by the Monetary Authority Act (2020) and the Monetary Authority (Administrative Fines) Regulations (2022).*"

(4) "*An Order for Certiorari that the Decision be quashed.*"

(5) "*Declarations pursuant to the Constitution that the Decision is incompatible with Article 19 of the Bill of Rights.*"

The proper characterisation of the present application

3. It is clear both as a matter of authority and on a straightforward reading of the relevant provisions of the AFRs that the present application should properly be characterised as an application for leave to appeal under Regulation 19 of the AFRs. That Regulation provides, so far as is material:

> "***Application to the Grand Court for leave to appeal***
> *19. (1) A party that receives a fine notice for a discretionary fine may apply to the Grand Court for leave to appeal against the original decision within thirty days after receiving the notice.*
>
> *(2)The Grand Court may only grant leave to appeal under this regulation if —*
> *(a) the party has grounds for seeking judicial review of the decision; or*
> *(b) the decision was made with a lack of proportionality or was not rational.*"

4. The test for granting leave and the applicable procedural regime merely requires the Court to proceed "*as if*" the application was an application for leave to seek judicial review under GCR Order 53. In *Intertrust Corporate Services (Cayman) Limited-v-Cayman Islands*

[1] The Applicant clarified when commenting on a draft of this Ruling that an application for a stay was in fact being made. The First Affidavit of Charles Ross (paragraph 18) supported this application. Regulation 22 pertinently provides:

"*(1) An appeal does not stay the operation of the original decision.*
(2) However, the Grand Court may, on the appellant's application, order that the fine imposed by the original decision be stayed to secure the effectiveness of the appeal."

Monetary Authority, FSD No. 158 of 2021 (NSJ), Judgment dated 23 June 2021(unreported) which counsel placed before the Court, Justice Nicholas Segal effectively adopted the submission of counsel that Regulation 20 (1) of the AFRs should be construed according to its plain terms:

> "*(1) The Grand Court Rules (2022 Consolidation) and the Court's practice directions about judicial reviews apply to an appeal, with necessary changes, as if the appeal were an application for judicial review.*" [Emphasis added]

5. Accordingly, although the applicant in that case had applied for 'leave to appeal', Segal J (at paragraph 3) "*accepted… that in the circumstances I should deal with the ex parte application on the papers without a hearing*". Of my own motion under GCR Order 20 rule 8(1), I amend the first prayer in the present Application to read as follows:

> "1. Leave pursuant to [^^^] Regulation 19 of the Monetary Authority (Administrative Fines) Regulations (2022) to appeal the Decision."

6. Since the application is in substance an application for leave to appeal, procedurally determined by analogy with an application for leave to seek judicial review, I consider it self-evident that no need to consider the prayer for relief under the Bill of Rights falls for determination at the present leave stage, if it can be resolved within the present proceedings at all.

The Decision and the grounds of appeal

The Decision

7. The Application was supported by the Affidavit of Charles Ross dated 2 June 2022 and, by way of response to a query from the Court, the Second Affidavit of Charles Ross. The deponent is a director of the Applicant, which is referred to in the Decision by the acronym "SAMIL". Exhibit "CR-1" to the Affidavit of Charles Ross exhibits a large amount of background material beginning with a 14 December 2018 CIMA letter requesting an AML audit for SAMIL and including, *inter alia*, the KPMG Review dated 26 March 2019 which identified the need for corrective actions, documents relating to a CIMA onsite inspection in 2020 and culminating in the CIMA Final Inspection Report dated 18 January 2021. The only underlying documents I consider to have any significant relevance to the present application are the 5 November 2021 CIMA Breach Notice, SAMIL's Reply dated 5

December 2021, the Final Inspection Report and the Fine Notice which forms the subject of the present application for leave to appeal.

8. The breaches recorded in the Fine Notice may be summarised as follows:

(1) Breach of Regulation 5 (b) through failing to comply with Regulations 12 (1) (c) and 12 (3) (a);

(2) Breach of Regulation 5 (b) through failing to comply with Regulation 12 (2) (a);

(3) Breach of Regulation 5 (b) through failing to comply with Regulation 12 (1) (e) (ii);

(4) Breach of Regulation 5 (b) through failing to comply with Regulations 12 (1) (c) and 12 (3) (a);

(5) Breach of Regulation 5 (b) through failing to comply with Regulation 12 (2) (a);

(6) Breach of Regulation 5 (b) through failing to comply with Regulation 18 (a) (i);

(7) Breach of Regulation 5 (b) through failing to comply with Regulation 18 (a) (ii);

(8) Breach of Regulation 5 (a) (v);

(9) Breach of Regulation 5 (b) through failing to comply with Regulation 12 (1) (e) (i).

9. The breaches fall into the following main categories:

(a) failing to identify the beneficial owner or demonstrate an adequate understanding of ownership structures of customers and/or to demonstrate adequate monitoring and/or to keep due diligence documents current (six Regulation 12-related breaches);

(b) failing to comply with the identification requirements prior to forming and during a business relationship (two Regulation 18(a) breaches; and

(c) failing to maintain adequate systems in relation to sanctions lists (one Regulation 5 (a) (v) breach).

10. It is only fair to the Applicant to provide some further context to these findings. The overall impression the documents create is of an extremely rigorous inspection process, with CIMA insisting on documentary proof for all customer due diligence ("CDD") actions taken, and a *bona fide* regulated entity doing its best to fully comply with the regulatory requirements, albeit apparently falling short in some respects.

The grounds of appeal

11. The grounds of appeal set out in the Application may be summarised as follows:

(a) four of the breaches (breaches (1), (2), (3) and (8) (14 out of 16 customers) related to conduct prior to the formation of business relationships at a time when the AMLRs were not in force so by virtue of the transitional provisions of Regulation 31 of the AFRS, no breach could legally have occurred;

(b) the sanctions list requirements are risk-based and not absolute and the alleged breaches gave rise to no genuine risk;

(c) the Fine Notice failed to explain with any particularity why various matters raised in SAMIL's Response were rejected;

(d) CIMA failed to comply with its duty under Regulation 15(4) of the AFRs to furnish reasons for the way in which the fine discretions were exercised;

(e) as regards breach (9), the largest fine was imposed for maintaining inadequate records of "transaction monitoring". During the inspection process, no such records were requested although they could have been supplied.

The legal test applicable to granting or refusing leave

12. The Applicant's counsel relied upon the test for granting leave to seek judicial review articulated in an oft-quoted passage from the judgment of Lord Donaldson (MR) in *R-v-The Legal Aid Board ex p. Hughes* [1992] 24 H.L.R. at 702-703. The key reasoning which has been approved in subsequent cases is the following:

> "*….It is only when there is clearly an arguable case that leave should be granted ex parte. Equally, it is only when prima facie there is clearly no arguable case that leave should be refused ex parte….*"

13. In *In the Matter of an Application for Leave to Seek Judicial Review and an Application for a Confidentiality Order*, GC 20 of 2021 (IKJ), Judgment dated 24 March 2021 (unreported), I observed:

> "*6…As Richard Williams J recently held in Anglin-v-Governor of the Cayman Islands, Cause No. G 169 of 2020, Judgment dated November 20, 2020 (unreported):*
>
> *'2... The purpose of the requirement for leave...is to eliminate at an early stage any applications which are frivolous or hopeless and to ensure that the matter only proceeds to a substantive hearing if there is a case fit for consideration. I bear in mind that leave should be granted if the Court thinks, on the material available and without going into the matter in depth, that there is an arguable case for granting relief.'*"

14. The governing legal test for granting or refusing leave to appeal under the AFRs, applying leave to seek judicial review principles requires both a careful and somewhat robust approach. The leave filter is designed to ensure that arguable cases are not deprived of a full inquiry, but also that public authorities are not vexed with clearly hopeless legal challenges.

Findings on the merits of the grounds of appeal

<u>The Regulation 31 point</u>

15. SAMIL's 5 November 2021 Response forcefully advanced the point that it was legally impossible for it to breach requirements applicable to taking on clients before the relevant obligations took legal effect by virtue of Regulation 31 AFRs. That Regulation provides:

> "*31. The Authority shall not impose a fixed fine, fixed fine (continuing) or a discretionary fine or take any steps to do so under Part 3 in respect of the breach of a prescribed provision that took place before the 15th December, 2017 or within ninety days after that date.*"

16. No response to the point is proffered by CIMA in its Fine Notice served six months later. The point arises from the language used by CIMA itself in its Breach Notice which refers on more than one occasion to failures "*before forming a business relationship*". However, whether the breach for which the fine is being imposed is legally tied to a point in time when the client relationship was formed depends most importantly on the terms and effect of the administrative rules in question. If one looks at the relevant breaches which contain the seemingly standard wording (which applies quite smoothly to client relationships formed after the AFRs came into effect), the breaches engage Regulation 5 (b) of the AMLRs as read with specific sub-paragraphs within Regulations 12 (1)-(3) and 18 (a) and Regulation 5 (a) (v).

17. Regulation 5(b) of the AMLRs provides:

> "*5. A person carrying out relevant financial business shall not, in the course of the relevant financial business carried out by the person in or from the Islands, form a business relationship, or carry out a one-off transaction, with or for another person unless that person-*
>
> *(a)…*
>
> *(b) complies with the identification and record-keeping requirements of Parts IV and VIII…*"

18. The breaches in respect of which fines were imposed based on Regulation 5(b) do indeed impose obligations linked to the time at which the business relationship was formed and so it is very plainly and clearly arguable that it is legally impossible for any breach of Regulation 5(b) to have occurred in relation to client relationships formed before the AFRs came into effect according to the transitional provisions of Regulation 31on which the Applicant's counsel strongly relied. The same conclusion must also be reached in relation to Regulation 5(a) (v) which provides:

> "*5. A person carrying out relevant financial business shall not, in the course of the relevant financial business carried out by the person in or from the Islands,*

form a business relationship, or carry out a one-off transaction, with or for another person unless that person-

(a) maintains as appropriate, having regard to the money laundering and terrorist financing risks and the size of that business, the following procedures in relation to that business —

…

(v) adequate systems to identify risk in relation to persons, countries and activities which shall include checks against all applicable sanctions lists…"

19. It is true that Regulation 12 imposes continuing obligations independently of Regulation 5 after business relationships have been formed and Regulation 18 provides:

"***Obligation where unable to comply with customer due diligence***
18. Where a person carrying out relevant financial business is unable to obtain information required by these Regulations to satisfy relevant customer due diligence measures —
(a) the person shall —
(i) not open the account, commence business relations or perform the transaction; or
(ii) terminate the business relationship…"

20. But the present application turns on the breach for which the Applicant was fined, not other breaches which might have been relied upon by CIMA and were not. It is clearly *prima facie* arguable that the specific breaches in respect of fines that were imposed in reliance on Regulation 5 (a) and (b) of the AMLRs were legally misconceived and not proved. Leave to appeal is accordingly granted in relation to these grounds of appeal.

The inadequate reasons grounds

21. The Applicant complains firstly that Regulation 12 of the AFRs was not complied with because, inter alia, "*the Fine Notice was virtually identical to the Breach Notice…The pro forma statement on the Fine Notice to the effect that CIMA had reconsidered its position in the light of SAMIL's response…was perfunctory in any event*". Regulation 12 provides:

> "***Duty to consider reply***
> *12. (1) This regulation applies only if —*
> *(a) a breach notice has been given for a fixed fine, fixed fine (continuing) or discretionary fine;*
> *(b) the reply period has ended; and*
> *(c) a reply has been given.*
> *(2) The Authority has a duty to —*
> *(a) reconsider whether it still holds the belief stated in the breach notice, in the light of all matters raised in the reply concerning that belief; and*
> *(b) if the notice was for a discretionary fine, consider the matters raised in the reply to the extent they are relevant to exercising fine discretions.*"

22. It is true that the Regulations do not expressly impose a mandatory obligation to explain why points raised have been rejected in relation to discretionary fine cases as they do in relation to fixed fines (Regulation 15 (2) (c). It also true that CIMA is entitled to rely on the presumption of regularity in relation to official acts. However, having regard to the fact that section 19 of the Constitution creates a constitutional right to receive reasons for administrative decisions, I find that it is *prima facie* arguable that the duty to reconsider includes, by necessary implication, a requirement to explain why it has rejected matters raised in a reply, assuming of course that the matters call for an answer. The Constitution provides:

> "***<u>Lawful administrative action</u>***
> *19.—(1) All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.*
> *(2) Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act.*"

23. Such a construction would support the interests of good administration in that it would limit the circumstances in which CIMA's decisions could be attacked for failing to reconsider if it was obvious that reconsideration had taken place on the face of a fine notice. It would also make it easier for applications for leave to appeal to be considered in a more expeditious manner than has been possible with the present application. In the present case it is not obvious that reconsideration did in fact occur because the serious legal points raised about the way pre-business relationship formation breaches were formulated which called for an answer were rejected without any explanation.

24. More straightforward is the complaint that the Fine Notice failed to comply with Regulation 15 (4) (c) of the AFRs which required the Notice to set out "*the reasons for the way in which fine discretions were exercised*". Far from being merely *prima facie* arguable, that point is almost irresistibly made out. The Regulations seem to require a quasi-judicial explanation of the basis upon which the nine separate fines were quantified. It is difficult to see how the bare assertion that "*the imposition of a discretionary fine is appropriate in the circumstances*" can be said to comply with this procedural requirement. On the face of the Fine Notice, it is impossible for the Court to quickly determine (as it ought very arguably to be able to do) that the relevant requirement was met. Regulation 5 and 6 of the AFRs pertinently describes the discretionary fine criteria in the following broad yet highly specific manner:

> "***General criteria in relation to both fine and amount***
> *5. (1) The criteria referred to in regulation 4 are —*
> *(a) the nature and seriousness of the breach;*
> *(b) the degree of the party's inadvertence, intent or negligence in committing the breach;*
> *(c) if the breach is a continuing one, its duration;*
> *(d) the measures or precautions the party took to prevent the breach;*
> *(e) the measures or precautions that a reasonable person in the party's position, acting prudently and exercising due diligence, would have taken to prevent the breach;*
> *(f) whether or not the breach was due to —*
> *(i) reasonable reliance on information given to the party; or*
> *(ii) a cause beyond the party's control, including, for example, someone else's act or default or an accident;*
> *(g) the degree of difficulty in detecting the breach;*
> *(h) evidence of intent by the party to conceal the breach or mislead the Authority;*
> *(i) the party's conduct after becoming aware of the breach, including, for example —*
> *(i) whether and how quickly the party brought the breach to the Authority's attention; and*
> *(ii) the party's efforts to remedy the breach or prevent its reoccurrence;*
> *(j) any financial or other damage or loss or other harm done or caused by the breach, including, for example, to —*
> *(i) the party's creditors, customers, investors, policyholders or shareholders;*
> *(ii) financial markets; or*
> *(iii) the performance of the Authority's functions;*

(k) whether, before or after the breach, there was a change to the party's business or affairs that affects or may affect the consequences of the breach for the party, including, for example, the party's ability to pay a fine;
(l) if the Authority has imposed a fine on the party in similar circumstances to the breach, the amount of that fine; and
(m) the party's history of compliance, in the five years before the breach, with the Anti-Money Laundering Regulations (2020Revision) and similar laws in other jurisdictions.

(2) In considering the party's history of compliance, regard need only be had to the party's compliance with, and breaches of, those laws of which the Authority is aware or is made aware by the party.

(3) Paragraph (2) applies even if no punishment was imposed or no other action relating to the breach was taken under those laws.

Additional criteria in relation to fine amount

6. In deciding the amount of a fine, the criteria also include —
(a) the following in relation to the party —
(i) any circumstances of mitigation that may exist;
(ii) resources and ability to pay; and
(iii) financial hardship;
(b) potential adverse financial consequences on third parties of imposing a fine in the amount proposed; and
(c) a circumstance that aggravates, or may tend to aggravate, the breach or its effects."

25. Leave is granted to pursue the "inadequate reasons" grounds. Of course, it will be open to CIMA to ultimately answer these points (assuming they are found to be valid) in its responsive evidence.

<u>The sanctions list requirements are not absolute and any breaches gave rise to no genuine risks ground</u>

26. Having granted leave on the inadequate reasons grounds, I consider it inappropriate for me to consider a ground the merits of which may potentially be influenced by the Respondent's

explanation as to why its initial position was unaltered by the Reply. That said, this ground at first blush seems unmeritorious and more supportive of grounds of mitigation than a legally viable answer to the breach.

The no 'transaction monitoring' documents were requested in the inspection process ground

27. I refuse leave to appeal on this ground because it is *prima facie* clear that this complaint is not arguable. The ground of appeal alleges that CIMA failed to ask for transaction monitoring documents during the inspection process. The Inspection Report recorded a breach of the transaction monitoring requirements based on a review of 12 client files (paragraph 5.2.80). Management is recorded as accepting some degree of non-compliance which it promised to remedy by 31 March 2021 (paragraph 5.2.85).

Summary

28. Leave to appeal is granted in respect of the Regulation 31 of the AFRs and inadequate reasons grounds. Leave is refused in relation to the transaction monitoring documents ground. I defer consideration of whether the sanctions lists requirements ground is arguable until the *inter partes* hearing, and merely note my doubts about its merit at this stage. The fines are stayed pending the determination of the appeal pursuant to Regulation 22(2) of the AFRs.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT