Easter Term

[2021] UKPC 11

Privy Council Appeal No 0024 of 2017

JUDGMENT

FundHaven Ltd and another (Appellants) v The Executive Director of the Securities Commission of the Bahamas (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Reed

Lord Briggs

Lord Sales

Lord Hamblen

Lord Burrows

JUDGMENT GIVEN ON

26 April 2021

Heard on 8 March 2021

Appellants	Respondent
Gail Lockhart Charles	Gawaine Ward
Robert Strang	
(Instructed by Sinclair Gibson LLP)	(Instructed by Charles Russell Speechlys LLP (London))

LORD HAMBLEN:

Introduction

1.
Under section 21(1) of the Court of Appeal Act of the Commonwealth of The Bahamas ("the CA Act") a second appeal to the Court of Appeal is only permitted on "a point of law alone" and provided that "a Justice of the Supreme Court or of the court shall have certified that the point of law is one of general public importance".

2.

This appeal concerns the requirement of certification and in particular (i) whether the Court of Appeal was correct to conclude that the Supreme Court Justice did not certify a point of law of general public importance for the purposes of section 21(1) of the CA Act and (ii) whether the Court of Appeal was justified in refusing itself to certify such a point of law.

The factual and legal background

3.
The second appellant, South American Investment Fund Ltd ("SAIF"), a Bahamian company, is a private investment holding vehicle for an Argentinian family.

4.
In 2004, SAIF elected to be licensed as an investment fund under the Bahamian Investment Funds Act 2003 ("the Act").

5.
The respondent, The Securities Commission of The Bahamas ("the Commission"), is a statutory body responsible for the supervision and regulation of the activities of the investment funds, securities and capital markets under the Act and under the Securities Industry Act 2011 (and, before its repeal, the Securities Industry Act 1999).

6.
Under section 2 of the Act an "investment fund" is a company, unit fund or partnership "that issues or has equity interests the purpose or effect of which is the pooling of investor funds with the aim of spreading investment risks and achieving profits or gains arising from the acquisition, holding, management or disposal of investments". It does not, however, include any such pooled investment funds "where the holder of an equity interest does not have the option to redeem his equity interest or require the issuer to repurchase his equity interest" - ie "closed-end" funds.

7.
Under section 7 of the Act a company may elect to be licensed as an investment fund and is thereby deemed to be an investment fund for the purposes of the Act. Section 7(1) provides:

"7(1) A company, unit trust or partnership, where the holder of an equity interest does not have the option to redeem his equity interest or require the issuer to repurchase his equity interest may elect to be licensed by the Commission as an investment fund and if it so elects shall from the date of licensing be deemed an investment fund for the purposes of this Act."

8.
The Act makes provision for two categories of investment fund administrators, restricted and unrestricted. By section 13 of the Act, unrestricted fund administrators may themselves license funds under their administration as SMART funds. A SMART fund is "an investment fund established by the Commission as a Specific Mandate Alternative Regulatory Test Fund that satisfies certain prescribed parameters and requirements of a category, class or type of investment fund previously approved by the Commission".

9.
Section 26 of the Act requires the administrator of an investment fund to "use reasonable efforts to ensure that the investment fund does not carry on or attempt to carry on business as an investment fund contrary to provisions of this Act."

10.
The Investment Fund Regulations ("the Regulations") were made in exercise of powers conferred by section 62 of the Act. Regulation 17(1)(g) requires fund administrators to "take all reasonable steps to ensure that operators are meeting their obligations and are complying with the Act and these Regulations".

11.
SAIF appointed Winterbotham Trust Company Ltd ("Winterbotham") as its administrator. Winterbotham was an unrestricted investment fund administrator under the Act. On 14 December 2004, Winterbotham licensed SAIF as a SMART Fund Model 003 (SFM003). On 21 March 2006 Winterbotham resigned as SAIF's administrator and cancelled SAIF's SFM003 licence.

12.
In June 2006, SAIF appointed the first appellant Accuvest Fund Services Ltd ("Accuvest") as its administrator and informed the Commission by letter that it had done so, in succession to Winterbotham. Accuvest was licensed as a restricted investment fund administrator and therefore could not license investment funds. Its directors were Mr Jensen and Mr Nottage, who were also the directors of SAIF.

13.
On 27 April 2007, Accuvest applied to the Commission for SAIF to be licensed as a SMART Fund Model 005 (SFM005). After a period of correspondence during which the Commission required Accuvest to provide certain information, it eventually licensed SAIF as a SFM005 on 25 June 2008.

14.
Under section 3 of the Act, an investment fund "shall not carry on business or attempt to carry on business" unless it is licensed. The Commission formed the view: (i) that SAIF had been operating as an investment fund without a license in breach of section 3 of the Act, because it had remained active but had not been licensed between March 2006 and June 2008; and (ii) that Accuvest had acted in breach of section 26 of the Act and regulation 17(1)(g). These alleged breaches were made the subject of a formal complaint by the Commission as set out in a notice dated 8 November 2010.

15.
There was a hearing of the complaint before the hearing panel of the Commission on 28 January 2011. At the hearing SAIF and Accuvest were represented by Mr Jensen and Mr Nottage.

16.
The panel delivered its decision on 27 January 2011. It found that once Winterbotham resigned as administrator, SAIF's licence could not subsist, and that Accuvest was therefore obliged to ensure that the required documents were submitted to the Commission to license SAIF. The panel found that SAIF had not ceased operations, and so had been operating without a licence, and therefore found the breach of section 3 of the Act to be proven. In relation to Accuvest, the panel found that it had failed to use reasonable efforts to ensure SAIF did not carry on business contrary to the Act, or to ensure that it met its obligations, and therefore found the breach of section 26 of the Act and regulation 17(1)(g) to be proven. In its final decision in March 2011, the panel imposed fines on SAIF and Accuvest totalling $81,000.

Procedural history

17.

Accuvest and SAIF (“the appellants”) appealed against the panel’s decision to the Supreme Court. The appeal was heard by Hepburn J on 18 and 19 July 2011. She gave judgment on 6 January 2012, dismissing the appeal save in relation to the fines imposed, which were reduced by one third.

18.
On 3 July 2013, the appellants filed a notice of motion in the Court of Appeal seeking the leave of the Court of Appeal to appeal out of time against the judge’s decision.

19.
On 3 September 2013, the Court of Appeal ruled that, in accordance with section 21(1) of the CA Act, the appellants required a certificate from the judge, certifying that the point of law upon which they appealed was one of general public importance. Section 21(1) of the CA Act provides as follows:

“Any person aggrieved by any judgment, order or sentence given or made by the Supreme Court in its appellate or revisional jurisdiction, whether such judgment, order or sentence has been given or made upon appeal or revision from a magistrate or any other court, board, committee or authority exercising judicial powers, and whether or not the proceedings are civil or criminal in nature may, subject to the provisions of the Constitution and of this Act, appeal to the court on any ground of appeal which involves a point of law alone but not upon any question of fact, nor of mixed fact and law nor against severity of sentence: Provided that no such appeal shall be heard by the court unless a Justice of the Supreme Court or of the court shall certify that the point of law is one of general public importance.”

20.
Since there was no certificate, the Court of Appeal dismissed the application and suggested that the appellants re-file it with a certificate.

21.
On 2 October 2013, the appellants made an application to the judge to certify their appeal as involving a point of law of general public importance. The 16 grounds of appeal were as follows:

“(1) That the judge erred in failing to find that there was no evidence before the disciplinary committee or the Court to prove that SAIF was not an investment fund within the meaning of the Act;

(2) That the judge erred in finding that the disciplinary committee was entitled to find that SAIF and Accuvest were guilty of the breaches alleged in circumstances where there was no evidence before the disciplinary committee or the Court to prove that SAIF was an investment fund within the meaning of the Act;

(3) That the judge erred in finding that the correspondence passing between the Commission and SAIF was evidence capable of proving that SAIF was operating as a fund within the meaning of the Act;

(4) That the judge erred in finding that the correspondence passing between the Commission and SAIF was evidence capable of confirming the operation of an unlicensed fund;

(5) That the judge erred in finding that the disciplinary committee was entitled to find that the correspondence passing between the Commission and SAIF was evidence capable of proving that SAIF was operating as a fund within the meaning of the Act;

(6) That the judge erred in finding that the disciplinary committee was entitled to find that the correspondence passing between the Commission and SAIF was evidence capable of confirming the operation of an unlicensed fund;

(7) That the judge erred in finding that the disciplinary committee was entitled to find that Accuvest was in breach of section 26 of the Act;

(8) That the judge erred in finding that the disciplinary committee was entitled to find that the correspondence passing between the Commission and SAIF was evidence capable of confirming that Accuvest was in breach of section 26 of the Act;

(9) That the judge erred in finding that the disciplinary committee was entitled to find that the correspondence passing between the Commission and SAIF was evidence capable of confirming that Accuvest was in breach of regulation 17(1)(g);

(10) That the judge erred in finding that the disciplinary committee was entitled to find that Accuvest was in breach of the Regulation 17(1)(g);

(11) That the judge erred in finding that the disciplinary committee was entitled to find that the correspondence passing between the Commission and SAIF was evidence capable of confirming that Accuvest was in breach of the Regulation 17(1)(g);

(12) That the judge failed to appreciate that the burden of proof was on the Commission at all times to prove the breaches alleged against SAIF and Accuvest;

(13) That the judge failed to appreciate that the Commission had not discharged the burden upon it to prove the breaches alleged against SAIF and Accuvest;

(14) That the judge failed to appreciate that before findings can be made that an entity is operating as an unlicensed fund within the meaning of the Act evidence must be adduced to prove that that the entity issues or has equity interests the purpose or effect of which is the pooling of investor funds with the aim of spreading investment risks and achieving profits and gains arising from the acquisition, holding, management or disposal of investments;

(15) That the judge failed to appreciate that no evidence was before the disciplinary committee or the court to prove that SAIF issued or had equity interests the purpose or effect of which was the pooling of investor funds with the aim of spreading investment risks and achieving profits and gains arising from the acquisition, holding, management or disposal of investments; and

(16) That the fines imposed by the panel were unjustified based upon the evidence before the court."

22.
In paragraph 12 of the appellants' skeleton argument for the hearing, having set out the grounds of appeal, it was stated that the "central questions of law" raised by the appeal and which were "of general public importance" were as follows ("the suggested points of law"):

"a. Whether by virtue of section 7.1(1) of the [Act], or any other theory of law, a company that does not issue or have equity interests the purpose or effect of which is the pooling of investor funds with the aim of spreading investment risks and achieving profits and gains arising from the acquisition, holding, management or disposal of investment can be considered to be carrying on business within the meaning of section 3 of the [Act].

b. Whether a company that was once but is no longer licensed by the Commission as an investment fund continues to be deemed an investment fund by virtue of section 7(1) of the [Act].”

23.
During the course of the hearing the judge made various references to the suggested points of law. Examples relied upon by the appellants include the following:

“The question of law is whether once … an entity is deemed to be a fund [by virtue of being licensed] and it no longer chooses to be licensed, it continues to be deemed a fund.”

…

“It had applied once. It decided not to apply again and that it was under no obligation to apply … Because it did not meet the definition of a fund.”

…

“The critical questions is whether, having chosen once to be licensed one is forever deemed to be a fund”

…

“And you contend that what is central is in essence and your ground of appeal are really summarised in para 12 of your skeleton.”

…

“her grounds can really be summarized by her statement in para 12 of her skeleton, which is that … the point of general importance is summarized by para 12. And it’s the question of whether by virtue of section 7(1) of the Act a company which does not fall within the definition of fund as set out in … section 2 of the Act can be considered to be carrying on business within the meaning of section 3.”

…

“I think his point is that SAIF was treating itself as a company that wanted, had elected to be licensed. And you say, yes, fine I could elect to be licensed, but until you issue me that license I am not a fund. [Counsel: I’m not deemed to be a fund]. You say that is the point of general public interest.”

24.
The judge appears nevertheless to have been troubled as to what exactly the points of law were and towards the end of the reply submissions of counsel for the appellants she sought further clarification as follows:

“THE COURT: I just want to be clear again in my head that you say that when one looks at the entirety of your grounds of appeal, and when I say ‘your’, I mean the applicant, that when one looks at all of these 16 grounds of appeal that really they may all be summarized by para 12(a) and (b) of your skeleton. And 12(a) and (b) of the skeleton have precisely the points that were just referred to here by virtue of section 7 of the IFA Act.

MRS LOCKHART-CHARLES: My Lady, not that they may be summarized, but the legal point that is expressed in paragraph (a) and (b) of the skeleton will determine whether the grounds of appeal will succeed or not. …

THE COURT: Sorry, if you had then to summarize to me what is the point of general importance in this appeal or where the ... points ... of law that are of general public importance ... what would you say they are?

MRS LOCKHART-CHARLES: That a company that does not fit the definition of 'investment fund' as defined in section 2 of the Act cannot, by virtue of section 7(1) of the Act, be in breach of section 3 of the Act. So a company that does not fit the definition of 'investment fund' may elect to be licensed and in which case it will be deemed a fund, but it cannot be in breach of section 3 of the Act which says that an investment fund shall not carry on or attempt to carry on business unless it is licensed. Can't be in breach because it is either licensed because it is deemed ... Once you are licensed, are you forever after deemed to be a fund or are you once you are no longer licensed, do you go back to being an ordinary IBC, that is not subject to sanction under the Investment Funds Act?"

25.
The judge then decided to certify that the appeal raised a point of law of general public importance, stating her conclusion and the reasons for it as follows:

"I have heard from both of you and most of the time my attitude towards an application from an appeal is that if someone wants to appeal a ruling or a judgment, I will just allow them to appeal it. I guess simply because I think the more decisions we can have on appeal the better for our jurisprudence. And I appreciate that in this case, though, I have to consider whether the point raised is a point of law of general public importance, and I think Mr Ward made some very strong arguments as to why it ought not to be regarded as the appeal has not raised any point of general public importance. I think I am persuaded that the point ought to be certified simply because it raises a question or questions with respect to our securities, our laws governing the securities industry and I still see it as fairly fledgling, although it has been around for many years, but these points ought to be considered by the Court of Appeal because the questions impact the financial sector.

... I do think that I'm going to certify that the appeal raises a point of general public importance."

26.
By a certificate dated 2 October 2013 and signed on 6 November 2013 ("the first certificate"), the judge purported to certify the point of law in the following terms:

"... that the grounds of appeal identified in the draft Notice of Appeal annexed to the defendants/ appellants' Summons filed herein on the 4 September 2013 involve a point of law which is of public importance."

27.
The appellants filed a fresh notice of motion for leave to appeal on 7 October 2013. At a hearing on 11 November 2013, the Court of Appeal (Allen P, John JA and Conteh JA) rejected the first certificate as unsatisfactory as it had not identified the points of law in question. The court stated that the point of law had to be identified in the certificate and that it was not appropriate for the court to go behind it and look at the transcripts of the hearing in order to "find" the point of law.

28.
The appellants then drafted a new certificate ("the second certificate") and submitted it to the judge for certification. It was in the following terms:

“It is certified Her Ladyship Madam Justice Claire Hepburn, Justice of the Supreme Court that the following points of law identified at paragraph I2A and B of the appellant’s Skeleton Argument dated 19 September, 2013 and raised by the intended appeal namely:

a. Whether by virtue of section 7(1) of the [Act], a company that does not issue or have equity interests the purpose or effect of which is the pooling of investor funds with the aim of spreading investment risks and achieving profits and gains arising from the acquisition, holding, management or disposal of investment can be considered to be carrying on business within the meaning of section 3 of the [Act].

b. Whether a company that was once but is no longer licensed by the Commission as an investment fund continues to be deemed an investment fund by virtue of section 7(1) of the [Act]

Are points of law of general public importance.”

29.
The second certificate, dated 12 November 2013, was eventually signed on 18 December 2015, not by the judge, who had apparently retired on 31 May 2014, but by the Deputy Registrar of the Supreme Court.

30.
The matter then went into abeyance until mid-March 2016 when various supplemental affidavits were filed. The second notice of motion for leave to appeal out of time was re-listed and came before the court at a hearing on 16 March 2016. The Court of Appeal (Allen P, Isaac and Crane-Scott JJA) rejected the certificates as unsatisfactory and determined, from reading the transcript of the hearing before the judge on 2 October 2013, that the judge “had not properly considered the application before her, and more importantly, had not actually certified the points as required” (para 11).

31.
In view of “the obvious difficulties which arose in relation to the certificate” (para 12) the court agreed to consider for itself whether there were on the documents before the court points of law of general public importance such as would give it jurisdiction to hear the appeal under section 21(1) of the CA Act.

32.
In its judgment dated 22 June 2016, the Court of Appeal ruled that the appellants had not shown that any or all of their 16 grounds of appeal involved “a point of law alone” or a point of law of “general public importance” and so they declined to issue a certificate. In the result the court declined jurisdiction to hear the notice of motion for leave to appeal out of time and dismissed it with costs.

33.
The Court of Appeal dismissed the appellants’ application for conditional leave to appeal to the Privy Council on 1 March 2017. On 11 October 2017 the Privy Council granted permission to appeal. The matter was due to be heard on 19 March 2020 but was adjourned at the parties’ request due to logistical difficulties raised by the Covid-19 pandemic and consequent government- imposed restrictions.

The issues

34.
The issue on the appeal was agreed between the parties in the following terms:

“Whether the Court of Appeal was entitled to discharge the Certificate of the Learned Judge, The Hon Mrs Justice Claire Hepburn.”

35.
This issue raises a prior question of whether the judge issued a proper certificate. If not, the further issue arises as to whether the Court of Appeal was justified in refusing to certify a point law.

36.
In the view of the Board the essential issues on the appeal may therefore be stated as follows:

(i)
Did the judge certify a point of law of general public importance for the purposes of section 21(1) of the CA Act?

(ii)
If not, was the Court of Appeal justified in refusing to certify such a point of law?

37.
For completeness, it should be noted that, at the permission to appeal stage, the Commission contended that there was no jurisdiction to appeal to the Privy Council under section 23 of the CA Act because the decision of the Court of Appeal was not a decision on appeal. This point has not been pursued or argued before us and so the Board will proceed on the assumed basis that it has jurisdiction.

Did the judge certify a point of law of general public importance for the purposes of section 21(1) of the CA Act?

38.
The appellants’ first contention is that the judge’s first certificate was a valid certificate. They accept that it might be said that, in respect of section 21(1), if no point of law is identified, then no point of law has been certified. They also accept that the certificate did not expressly identify the points of law of general public importance. They submit, however, that the certificate did impliedly identify the suggested points of law; or that the points of law the judge had in mind could be identified with reasonable certainty.

39.
They submit that the judge was impliedly stating that the appeal raised the suggested points of law, as identified at para 12 of the appellants’ skeleton argument. Those were the two points put to her by the appellants in their application and the judge acceded to that application. They contend that the extracts from the transcript cited at para 23 above show that the judge repeatedly identified the points of law by reference to para 12 of the appellants’ skeleton argument, and concisely restated their effect.

40.
It is the view of the Board that a certificate purportedly issued under section 21(1) must identify and state what the point or points of law of general public importance are. The process of certification enables the point of law to be identified without the need for further inquiry. All the appeal court should need to consider is the certificate. It should not be necessary and is not appropriate for the Court of Appeal to trawl through the transcripts and the parties’ written and oral submissions seeking to “find” the point of law. The point of law must be stated in the certificate itself.

41.
The appellants rightly accept that the first certificate does not “expressly” identify the points of law. The certificate simply stated that the grounds of appeal “involve a point of law which is of public importance”. Assuming that this is sufficient to incorporate by reference into the certificate the grounds of appeal, and that it is appropriate to have regard to such an incorporated document, that does not assist in identifying any point or points of law. The grounds of appeal largely consist of alleged errors of the judge in what she found (“erred in finding”) or failed to find (“erred in failing to find”) - ie errors in fact finding or, at best, in making findings of mixed fact and law. Although grounds 12 to 15 allege a failure “to appreciate”, even these do not assert an error of law. Moreover, the 16 grounds of appeal taken together do not set out or constitute a point or points of law and there is no basis for seeking to rely on some individual grounds of appeal separately, as it is the grounds of appeal as a whole which were purportedly being certified.

42.
Indeed, the appellants acknowledged before the judge that the grounds of appeal did not identify the suggested points of law. That is why they considered it necessary to seek to set out those points separately in their skeleton argument and in oral argument.

43.
It is no answer for the appellants to say that the suggested points of law can be inferred or implied from a consideration of other documents, such as their skeleton argument and the transcripts. The Court of Appeal should be able to tell from the certificate itself whether a point or points of law have been certified and, if so, what they are. That is not possible in this case, as the court rightly held.

44.
The appellants’ second contention is that the judge’s ruling at the hearing was a sufficient certification for the purposes of section 21(1). It is submitted that there is no express requirement for a written certificate and that a judge may certify orally. It is said that the judge did so when she decided, at the hearing on 2 October 2013, that the appellants’ grounds of appeal raised points of law of general public importance and agreed to certify. By so doing she “impliedly” identified the suggested points of law identified by the appellants in para 12 of their skeleton argument.

45.
In the Board’s view, it is clear that section 21(1) is contemplating written documents. The context is an appeal and the setting out of grounds of appeal which involve a point of law alone. That is a documentary process. Certifying the point of law is a necessary part of that process and is equally contemplated as being in writing. It is a formal requirement. It needs to be in writing for the Court of Appeal to be able to tell from the certifying document, rather than from any other documents, what the point of law is. In any event, even if it was possible to certify orally, that would be of no assistance to the appellants in this case since a certificate was purportedly issued. As such, it is that document that has to be considered in relation to certification. Yet further, the judge’s ruling is unclear since it refers to certifying “the appeal” rather than a point of law. In her ruling she says that “the appeal ought to be certified” and that “I’m going to certify the appeal”. This would appear to reflect the judge’s continuing uncertainty as to what the point of law was, as exemplified in the exchange cited at para 24 above.

46.
The appellants’ third contention is that the second certificate was a valid certificate. It is pointed out that in oral argument on 16 March 2016 the President and Isaacs JA both accepted that the Registrar

could sign a certificate arising out of a judge's ruling, notwithstanding that the judge had demitted office, and that that was a correct statement of the law in The Bahamas. It is submitted that the Registrar has properly considered from a review of the court file "what was the effect of the judge's decision" and was entitled to sign the certificate accordingly.

47.
It may well be that the Registrar is entitled to set out in a court document an order which has been made previously by a judge, since that is an essentially ministerial matter. It is not, however, for the Registrar to determine the terms of an order. In the present case the judge had set out the appropriate terms of the certificate to be issued in the first certificate. She never reconsidered or amended those terms. The points of law set out in the second certificate were put forward by the appellants. They were not suggested or endorsed by the judge. They reflected the appellants' view of what the judge intended to be done. They did not reflect any decision by the judge or any other judge on certification. The resulting certificate did not involve certification by a "Justice of the Supreme Court".

48.
For all these reasons the Board considers that the Court of Appeal was correct to conclude that the judge did not certify a point of law of general public importance for the purposes of section 21(1). It follows that the question of whether the Court of Appeal was entitled to discharge such a certificate does not arise. There was no certificate to be discharged.

Was the Court of Appeal justified in refusing to certify such a point of law?

49.
Section 21(1) of the CA Act provides that certification may be made by a Justice of the Supreme Court "or of the court" - ie the Court of Appeal. The Court of Appeal was therefore entitled to consider the issue of certification for itself.

50.
The Court of Appeal first considered the requirement under section 21(1) that the appeal must relate to a "point of law alone". In answering that question, the Court of Appeal correctly focused on the grounds of appeal since they formally set out the proposed basis of the appeal. In the Board's view the Court of Appeal was justified in concluding that the 16 grounds of appeal raised points of fact or mixed fact and law rather than points of law alone.

51.
The same conclusion follows if one has regard to the suggested points of law, even though they are not set out in the grounds of appeal.

52.
The first suggested point of law depends upon the factual assertion that SAIF was not carrying on business as an investment fund within the meaning of the Act. This was not, however, the case which was advanced before the panel. Before the judge the appellants sought to adduce fresh evidence to that effect in the form of an affidavit of Mr Nottage, but the judge refused to admit that evidence. In those circumstances the appellants were not able to make good that assertion, as the judge held at para 60 of her judgment:

"60. As regards the Breaches against SAIF, Mr Scott's core submission was that SAIF was not a fund within the meaning of the IFA and so was not subject to the regulatory jurisdiction of Commission.

That submission was not put to the Hearing Panel. Mr Ward submitted that Mr Scott could not make that submission as that submission had not been made to the Panel. I do not accept Mr Ward's submission as being correct. I am satisfied that Mr Scott could put that submission to this court. The difficulty which faced Mr Scott, however, is that the evidence of fact on which his submission was based is only found in Mr Nottage's affidavit and I have ruled that that evidence is not to be received by the court in this appeal. Without the evidence in Mr Nottage's affidavit, and in particular the exhibits to Mr Nottage's affidavit, Mr Scott's submission that SAIF was not a fund within the meaning of the IFA and so was not subject to the regulatory jurisdiction of Commission and the submissions which flow there from are rejected."

53.
The second suggested point of law assumes that the only basis upon which SAIF could be regarded as an investment fund for the purpose of the Act was the deeming provision in section 7(1) of the Act. The judge found, however, that there was evidence upon which it could properly be inferred that SAIF was carrying on business as an investment fund, including its decision to apply for a licence to operate as such a fund and then to seek to be re-licensed. The natural inference would be that this was done because SAIF wished to operate as an investment fund, and there was no other explanation in evidence. As the judge found at para 63:

"63. I am satisfied that 'PS3' to 'PS12' is evidence on which the Panel could make its findings of guilt SAIF. The evidence is that Accuvest elected to be registered in 2004, when it was being administered by Winterbotham. The application to the Commission in 2007 was with respect to the re-licencing of SAIF following the transfer of administration from Winterbotham. In response to Breach 2 against Accuvest, Mr Nottage told the Panel that at the relevant time SAIF was either a SMART Fund and held a licence or was in the process of registering as a SMART Fund once the administration services was transferred to Accuvest. SAIF was licenced as a SMART Fund when it elected to become registered as a fund under section 7 of the SIA in 2004 and once it elected to become registered it could not simply choose not to be registered, particularly if it did not inform the Commission of its decision."

54.
On the facts as found in the present case, the suggested points of law are therefore not points of law "alone".

55.
The Court of Appeal then considered whether the suggested points of law were of general public importance and concluded that they were not. The Court of Appeal correctly observed that, as explained above, both points depended on matters of fact and that meant that it was difficult to see how they "transcend the circumstances of the parties and are of great public importance to The Bahamas' financial sector and to the public generally" (para 39). The Court of Appeal further pointed out at para 42 that:

"Apart from this, the intended appellants have, in our view, failed to establish that the application for certification of the two questions has been occasioned by a state of uncertainty in the law which has arisen from an incorrect interpretation of the law by the judge below. Nor is there any evidence before us to suggest that persons other than the intended appellants will be affected by the outcome of the intended appeal were the questions to be certified."

56.

These considerations amply justify the conclusion reached by the Court of Appeal. In any event, the general importance of a point of law is very much a matter for the local court to consider and determine rather than the Board and considerable deference will be given to views of the Court of Appeal on such a matter.

Conclusion

57.
For the reasons set out above the Board will humbly advise Her Majesty that the appeal should be dismissed.