

TRINIDAD & TOBAGO
SECURITIES AND EXCHANGE COMMISSION



S.I. 12/2009 to
S.I. 16/2009

Between:

The Trinidad and Tobago Securities And Exchange Commission
and
Airports Authority of Trinidad and Tobago

HELD AT

THE OFFICE OF THE
TRINIDAD AND SECURITIES AND EXCHANGE COMMISSION
DUNDONALD STREET
PORT OF SPAIN

ON

Monday, 29th March, 2010

The Judgment delivered by:

Mr. Francis Lewis
Ms. Marsha king

CHAIRMAN
COMMISSIONER

COUNSEL:

Mrs. Lindi Joy Ballah-Tull and Ms. Deborah Boynes for the Trinidad and Tobago Securities and Exchange Commission

Mr. Samuel Harrison and Ms. Cintra Sooknanan for the Airports Authority of Trinidad And Tobago

The Judgment was read out by Commission King.

A. FACTS

The Commissioners have adduced the following as the facts borne out by the evidence before us. The Airports Authority of Trinidad and Tobago (“the AATT”) is a reporting issuer and became a reporting issuer on the 13th of July, 2000. The AATT is a creature of statute and has been created by the Airports Authority of Trinidad and Tobago Act, Chap. 49:02.

The AATT has not filed with the Trinidad and Tobago Securities and Exchange Commission (“the TT-SEC”) its Annual Reports for the years 2004 to 2008 inclusive; has not filed its Comparative Financial Statements for the years 2007 and 2008; has not filed its Interim Financial Statements for the years 2004 to 2007 inclusive; has filed, but after the due date of July 13th, its Amended Registration Statements for the years 2004 (filed on 15th July, 2005), 2005 (filed on September 27th, 2006) and 2006 (filed on August 15th, 2007); and has filed, but after the due date of March 31st, its Comparative Financial Statements for the years 2004 (filed on the 12th of May, 2006), 2005 (filed on 20th June, 2006), 2006 (filed on 9th January, 2008). All together, this represents 17 contraventions.

The AATT has registered with the TT-SEC bonds from 13th July, 2000 to 2009 totalling approximately TT\$1,280,000.00. The Airports Authority of Trinidad and Tobago Act, Chap. 49:02 by section 20(1) provides that the accounts of the AATT shall be audited annually by the Auditor General or by a qualified auditor appointed by the Auditor General. The AATT has been found to be in contravention of the Securities Industry Act, 1995, Chap. 83:02 by an Order of the Commission dated 3rd November, 2004 for failure to file Annual Reports, Interim Financial Statements and Comparative Financial Statements for the years 2000 to

2003 inclusive, and was ordered to pay a penalty of \$30,000. The AATT paid the penalty.

The AATT has, therefore, filed its Comparative Financial Statements for the years 2004 to 2006, which were accepted by the TT-SEC, and which said documents were prepared by private auditors, namely Ernst & Young and Panel Kerr Foster.

B. ISSUES OF JURISDICTION

Having adduced these facts, we propose to deal with the issue raised by the AATT as to whether the TT-SEC has the jurisdiction to bring these contraventions against the AATT and/or whether the Commissioners have the jurisdiction to hear and determine these contraventions as against the AATT. The Commissioners were of the view that until the issue of jurisdiction was dealt with, it could not address the alleged contraventions as filed by the TT-SEC.

Submissions of Counsel for the AATT

The AATT raised the issue in its written submissions and through its oral submissions that the TT-SEC has no jurisdiction over the AATT for the following reasons:-

- (1) The TT-SEC cannot require the AATT to provide documents which do not conform to the requirements under its enabling Act, the Airports Authority of Trinidad and Tobago Act, Chap. 49:02.

This submission was summed up by Counsel for the AATT who stated:

“As a general principle, the Securities Industry Act would have to make express reference were it to modify or alter the Parliament’s instructions in the Airports Authority Act.”

- (2) Since the TT-SEC has failed to prescribe the forms of the annual report through a by-law under section 66(1) of the Securities Industry Act, 1995, the TT-SEC cannot enforce this provision.

Section 66(1) of the Securities Industry Act, 1995 reads:

“A reporting issuer shall, within four months after the end of its financial year—

- (a) file with the Commission, a copy of its annual report containing the information prescribed by the Commission and any other information that is not of a type prohibited by bye-law”.*

Submissions of Counsel for the TT-SEC

The TT-SEC in response has submitted as follows:

- (1) the forms have not been prescribed through a by-law but the TT-SEC has issued clear guidelines as to the form of the annual reports; and
- (2) the jurisdiction of the TT-SEC is outlined under sections 5 and 6 of the Securities Industry Act, 1995.

Section 5 of the Securities Industry Act, 1995 states:

“The functions of the Commission are to-

- (a) advise the Minister on all matters relating to the securities industry;*

- (b) maintain surveillance over the securities market and ensuring orderly, fair and equitable dealings in securities;*
- (c) register, authorise or regulate in accordance with this Act self-regulatory organizations, securities companies, brokers, dealers, traders, underwriters, issuers and investment advisors and control and supervise their activities with a view to maintaining proper standards of conduct and professionalism in the securities business;*
- (d) protect the integrity of the securities market against abuses arising from the practice of insider trading;*
- (e) create and promote such conditions in the securities market as may seem to be necessary, advisable or appropriate to ensure the orderly growth and development of the capital market.”*

Section 6 of the Securities Industry Act, 1995 states that:

“For the purposes of the discharge of its function, the Commission has power subject to this Act to-

- (a) deal with such matters as may be referred to it by any person registered with the Commission under this Act from time to time;*
- (b) formulate principles for the guidance of the securities industry;*
- (c) monitor the solvency of the registrants and take measures to protect the interest of customers where the solvency of any such registrant is in doubt;*
- (d) adopt measures to supervise and minimize any conflict of interest that may arise in the case of brokers or dealers;*
- (e) review, approve and regulate takeovers, amalgamations and all forms of business combinations in accordance with this Act or any other written*

law in all cases in which it considers it expedient or appropriate to do so;

- (f) approve the contents of prospectuses, offering circulars or any form of solicitation, advertisement or announcement by which securities are offered for sale to the public;*
- (g) take action against persons registered under this Act for failing to comply therewith;*
- (h) undertake such other activities as are necessary or expedient for giving full effect to this Act;*
- (i) do all things which may be necessary or expedient or are incidental or conducive to the discharge of any of its functions and powers under this Act”.*

The TT-SEC further submitted that the Commissioners have no jurisdiction to declare that the Securities Industry Act, 1995 should be modified or altered to give effect to Parliament’s instructions under the Airports Authority of Trinidad and Tobago Act, Ch. 49:02.

The TT-SEC cited *Global Securities Corporation v British Columbia Securities Commission, British Columbia Supreme Court, 1997, B.C.T.C. LEXIS 5358; 1997 BCTC Uned B43*.

The TT-SEC further submitted that under section 137(1) of Securities Industry Act, 1995 the AATT should have gone to the Court of Appeal if it felt that it was hard done by, by a by-law. Section 137(1) reads:

“A person affected by a by-law of the Commission may appeal to the Court of Appeal against the application of that by-law to him.”

Above are summaries of the arguments advanced by both sides, which were dealt with extensively in the written and oral submissions.

Analysis & Conclusion

The Commissioners were of the view that the TT-SEC has jurisdiction over the AATT for the following reasons:

The TT-SEC was created by the Securities Industry Act, 1995 for the purposes laid out in sections 5 and 6, which, broadly stated, would be to regulate, define, control, maintain surveillance over and protect the integrity of the securities market. Just like the AATT, the TT-SEC is a creature of statute. The AATT's primary business is not that of a securities trader or broker/dealer, but as soon as it proposed to issue bonds it intended to perform a function which is regulated by the TT-SEC. As a result, therefore, on the 13th day of July, 2000 the AATT, rightfully and was legally required by section 64(2) of the Securities Industry Act, 1995 to become a reporting issuer. Section 64(2) of Securities Industry Act, 1995 states:

"A person who proposes to issue securities to the public shall register with the Commission as a reporting issuer and file a registration statement in the prescribed form and within the prescribed time."

Counsel for the AATT agreed that the AATT was correctly registered as a reporting issuer. Once the AATT became a reporting issuer, then the TT-SEC had jurisdiction over it pursuant to section 6 and specifically section 6(g) of the Securities Industry Act, 1995 which is stated above in the matter at hand.

The Securities Industry Act, 1995 Ch. 83:02 is not circumscribed by the Airports Authority of Trinidad and Tobago Act, Ch. 49:02. The fact that the AATT has within its statute a particular way in which its accounts must be audited in its

function as an airport authority does not prevent it from falling within the jurisdiction of the TT-SEC.

The Airports Authority of Trinidad and Tobago Act, Ch. 49:02 created the AATT and gave it its powers as an Airport Authority. The regime under the Securities Industry Act, 1995 gave the TT-SEC its powers as a regulator of the securities industry. Such regulatory power to act is paramount in all matters concerning securities in Trinidad and Tobago. All persons, whether they be the Central Government of Trinidad and Tobago, Central Bank or any other legal person, is governed by the TT-SEC when it comes to matters of securities. Once the AATT dealt in securities, it was governed by the Securities Industry Act, 1995.

The AATT recognized this as far back as the year 2000 when it became a reporting issuer. It returned on four subsequent occasions to register bonds to the value of approximately TT\$1,280,000.00. Its letters to the Auditor General, the Ministry of Finance and the TT-SEC from as far back as 2004 reiterated that the AATT accepted that it fell under the jurisdiction of the TT-SEC.

By order of the TT-SEC dated the 3rd day of November, 2004 the AATT was found to be in contravention of the Securities Industry Act, 1995 and a penalty of \$30,000 was ordered. The penalty was paid by the AATT. It does not, therefore, lie in the mouth of the AATT in the year 2010 to say that the TT-SEC has no jurisdiction over it.

C. THE CONTRAVENTIONS

Having stated the above, we propose to deal with each contravention in progression.

1. Contravention SI 12 of 2009: the AATT's Failure To File Its Annual Reports For The Years 2004 To 2008 Inclusive

This contravention is stated in section 66(1)(a) of the Securities Industry Act, 1995 as follows:

“A reporting issuer shall, within four months after the end of its financial year—

(a) file with the Commission, a copy of its annual report containing the information prescribed by the Commission and any other information that is not of a type prohibited by bye-law”.

Submissions of Counsel for the AATT

Counsel for the AATT submitted that the AATT could not file; in fact, it was impossible for annual reports to be filed because section 61(1) of the Securities Industry Act, 1995 refers to information prescribed by the Commission. In section 3 of the Securities Industry Act, 1995 “prescribed” is defined as meaning prescribed by by-laws of the Commission. The TT-SEC has not incorporated a by-law prescribing the form of an annual report. As a result of the non-prescription, the by-law was void for uncertainty and was ambiguous.

Counsel, cited Lord Simonds in the case of *London and North Eastern Railway Company v Berriman [1946] 1 AC 278*, stated: “*A man is not to be put in peril upon an ambiguity*” and quoted with approval Lord Esher, Master of the Rolls in *Tuck and Sons v Priester (1887) 19 QBD, 629* that:

“if there is a reasonable interpretation which would avoid the penalty ... we must adopt that construction. If there are two reasonable constructions, we must give the more lenient one. That is the settled rule for the construction of penal sections”.

Counsel also cited the case of *Fawcett Properties Limited v Buckingham County Council [1961] AC 636*, quoting Lord Denning (obiter):

"I can well understand that a by-law will be void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning"

and stated that this rule was applied with approval by the Court of Appeal in *Percy v Hall [1997] Q.B. 924*.

Further Counsel argued, in construing the words of the statute its natural and ordinary meaning was to be applied (*R v Nova Scotia Pharmaceutical Society, et al. (No. 2) [1992] 2 S.C.R. 606* and *Pinner v Everett [1969] 1 WLR, 1266 at page 1273, per Lord Reid*).

Counsel for the AATT further submitted, that even if the guidelines provided by the TT-SEC indicated that the annual report should be in a certain form, it did not specifically address the AATT and its peculiar circumstances of not having shareholders, either with significant or controlling interest or at all. The AATT's liquidity and capital resources were largely determined by the Government. The format of the AATT's statutory report was prescribed by the Airports Authority of Trinidad and Tobago Act, Ch. 49:02 section 21. In these circumstances, the AATT contended that it could not be held accountable for the non-filing of annual reports for the period in question.

Counsel for the AATT raised the jurisdiction point which was dealt with earlier and a further defence that the TT-SEC was estopped from bringing an action against the AATT for those matters which arose in excess of the four year limitation period. This issue of limitation will be addressed near the end of the judgment, since it overarches other contraventions.

Submissions of Counsel For the TT-SEC

Counsel for the TT-SEC responded by conceding that the forms were not prescribed as stated within the meaning of the Securities Industry Act, 1995 but states that the AATT has misdirected itself as to the interpretation in that the words, “*and any other information that is not of a type prohibited by by-law*” in section 66(1)(a) means that not only the prescribed form of a by-law but also any or all other information. Therefore, the filing of the annual report is not predicated on the issuance of the by-law by the TT-SEC.

The TT-SEC has given guidelines as to the form of the annual report, which would inform the AATT and the general public with reasonable certainty as to the form of the annual reports required by the TT-SEC. Further, the TT-SEC submitted that the guidelines could be applied to the AATT with necessary adaptations, and are clear and unambiguous. Therefore, the AATT’s claim of impossibility fails.

The TT-SEC contends that the golden rule must be applied to the interpretation of section 66(1) of the Securities Industry Act, 1995, which rule was stated in the cases of *Cheng v Governor of Pentonville Prison [1973] AC 931, HL*, where Lord Simon of Glaisdale cited Lord Justice Danckwerth in *Artemiou v Procopiou [1966] 1 Q.B. 878, 888* as follows:

“An intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available ... it is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, ... unless that is at variance with the intention of the legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further.”

Analysis & Conclusion

The Commissioners were of the view that the form of annual reports required to be filed by the AATT is not prescribed within the meaning of the Securities Industry Act, 1995. However, we do not agree that this makes the by-law uncertain, ambiguous and, therefore, void.

Firstly, we have already stated that the powers and functions of the TT-SEC under the Securities Industry Act, 1995 are contained in sections 5 and 6 thereof. We do not propose to repeat them. Suffice it to say that section 66(1) of the Securities Industry Act, 1995 must be interpreted within the confines of the ordinary and natural meaning according to the intention of the legislature. In our perusal of the authority cited by counsel for the AATT, it was clear that the judges in *London and Northern Eastern Railway Company v Berriman*, already cited, were of the view that the statute must be interpreted within the "primary intendment of the Act". This was said by Lord Wright. He also stated:

"The rule of law, I take it, upon the construction of all statutes... is, whether they be penal or remedial, to construe them according to the plain, literal and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act, or to some palpable and evident absurdity."

Lord Porter quoted Lord Esher, Master of the Rolls, and *Unwin v. Hanson [1891] 2 Q. B. 115, 119* as follows:

"If the Act is one passed with reference to a particular trade, business or transaction and words are used which everybody conversant with that trade, business or transaction knows and understands to have a particular meaning in it, then the words are to be construed as having that particular

meaning, though it may differ from the common, ordinary meaning of the words.”

In the case of *Fawcett Properties Limited v Buckingham County Council*, already cited, the Law Lords’ position can be summed up by Lord Cohen’s statement of the principle, a man is not to be put in peril upon an ambiguity as follows”

“This principle involves that if a statutory provision was ambiguous, the court should adopt any reasonable interpretation which would avoid the penalty, but the court should not, I think, strike a provision out of an Act on the ground of uncertainty unless it is impossible to resolve the ambiguity which it is said to contain”.

What then was the intention of the legislature within the confines of the Securities Industry Act, 1995? We are of the view that the intention was to ensure that a reporting issuer files its annual returns and any other information not prohibited by by-law. The form of the annual report, although not prescribed, does not create a situation of uncertainty and ambiguity, so as to make section 66(1) void. Any professional person in the industry knows what an annual report is supposed to contain. Even if they did not, the TT-SEC’s guidelines are clear.

As regards the AATT’s position that its peculiar requirements were not taken into account by the guidelines and that the guidelines should be adopted to the peculiar circumstances of the AATT. The AATT has filed its annual report with the TT-SEC for the years 2000 to 2003, which were accepted by the TT-SEC. The AATT, therefore, is well aware of the form which is acceptable to the TT-SEC. As to the proposition that the filing of its annual reports was impossible, the AATT has made nonsense of its own argument by the very fact that it has complied with section 66(3) of the Securities Industry Act, 1995 in the past and by the letters to the TT-SEC that were sent in response to the notice of

contravention in 2004. The reasons advanced by the AATT for failing to file were not accepted by the Commissioners.

2. Contravention SI 13 of 2009: Failure to file Comparative Financial Statements for the years 2007 and 2008 as is required by By-law 56 of the Securities Industry by-law, 1997

By-law 56 of the Securities Industry By-Laws, 1997 reads as follows:

“A reporting issuer shall file annually a comparative financial statement relating separately to-

- (a) the period that commenced on the date of incorporation or organization and ended as at the close of the first financial year or, if the reporting issuer has completed a financial year, the last financial year as the case may be; and*
- (b) the period covered by a financial year preceding the last financial year, if any.*

2. A statement required to be filed under paragraph (1) shall:

- (a) be filed within ninety days from the end of the last financial year; and*
- (b) include, where it is to be filed by a reporting issuer:*
 - i. an income statement.*
 - ii. a statement of surplus; and*
 - iii. subject to paragraph four, a statement of changes in financial position if the issuer is not primarily engaging the business of investing.”*

This is not the full statement of the by-law. The by-law continues.

Submissions of Counsel For the AATT

The AATT contends that it cannot, of its own accord, appoint an auditor outside of section 20(1) of the Airports Authority of Trinidad and Tobago Act, Ch. 49:02. The Auditor General has been guilty of delay or has been unable to audit the AATT's accounts in a timely manner to allow the AATT to comply with its responsibilities under this By-law.

The AATT's repeated requests for the Auditor General to audit its accounts have fallen on deaf ears. When the AATT attempted to do so by hiring private auditors to prepare same, the Auditor General responded by reiterating to the AATT section 20 of the Airports Authority of Trinidad and Tobago Act, Ch. 49:02 and further stated that she would appoint a firm of chartered accountants to audit the financial statements for the years 1998 to 2003. It was, therefore, impossible to comply with By-law 56.

Submissions of Counsel For the TT-SEC

Counsel for the TT-SEC contends that as soon as the AATT supplied their financial statements, which were accepted by the TT-SEC, the argument of impossibility in law did not apply. The TT-SEC further contends that the cause of the failure to file goes towards mitigation and not impossibility.

Analysis & Conclusion

The Commissioners were of the view that the AATT contravened by-law 56 of the Securities Industry By-laws, 1997 since the AATT knew, as early as the year 2004, that an audited financial statement from private auditors would be

acceptable to the TT-SEC. The AATT filed its comparative financial statements for the years 2003, 2004, 2005 and 2006.

3. Contravention S 14, 2009: Failure to file interim financial statements for the years 2004 to 2007 inclusive pursuant to section 66(2) of the Securities Industry Act, 1995 and By-law 55 of the Securities Industry By-laws, 1997

Section 66(2) of the Securities Industry Act, 1995 states:

“A reporting issuer shall file such other reports in such form as may be prescribed.”

By-law 55 of the Securities Industry By-Laws, 1997 states that a reporting issuer shall file with the Commission, within sixty days of the date on which it is prepared, an interim financial statement and goes on.

Submissions of Counsel For the AATT

The AATT contends that By-law 55 is ambiguous and reiterated the maxim that the AATT cannot be put in peril upon an ambiguity and cited *London and North Eastern Railway Company Limited v Berriman*, already cited. Further, the AATT stated that since no interim financial statement has been prepared by the AATT, that there was no obligation by the AATT to file. The interpretation of By-law 55 does not mandate preparation of these statements.

The AATT also reiterated the jurisdiction point with which we have already dealt, and the limitation period was also raised and, as previously stated, will be dealt with at the end.

Submissions of Counsel For the TT-SEC

The TT-SEC contends that an interpretation of By-law 55 in the manner suggested by the AATT is misguided, patently unreasonable, untenable and creates an absurdity in the construction of the By-law and reiterated its position concerning interpretation as stated before.

Analysis and Conclusion

The Commissioners are of the view that an interpretation of By-law 55, which arrives at the conclusion that as long as an interim financial statement has not been prepared, there is no obligation to file, is absurd. Section 66(2) of the Securities Industry Act, 1995 makes it mandatory for the reporting issuer to file such other reports in such form as may be prescribed. By-law 55 prescribes the report to be the interim financial report and gives a time frame for filing, with detailed information as to its form and content.

Read together, section 66(2) of the Securities Industry Act, 1995 and By-Law 55 of the Securities Industry By-Laws, 1997, direct the filing of an interim financial report. The words, "within sixty days of the date on which it is prepared," must, therefore, be interpreted as to the time for filing with the TT-SEC and therefore, the reporting issuer has no discretion as to whether to file or not.

4. Contravention SI 15 of 2009: Late filing of amended registration statements for the years 2005 to 2006 inclusive, pursuant to section 64(3) of the Securities Industry Act, 1995

Section 64(3) of the Securities Industry Act, 1995 states:

“A reporting issuer shall amend its registration statement annually, so that the information contained therein is correct as of the end of its most recent financial year.”

Submissions of Counsel For the AATT

The AATT contends that it was unable to file in a timely fashion because, at critical times, the AATT operated without a Board. Appointments to the Board were to be issued by the President of Trinidad and Tobago over which it had no control. The issue of limitation was again raised.

Submissions of Counsel For the TT-SEC

The Counsel for TT-SEC contends that this contravention is one of strict liability and that any reasons advanced by the AATT goes towards mitigation and not to the question of whether it has contravened.

Analysis and Conclusion

The Commissioners are of the view that the AATT has contravened section 64(3) of the Securities Industry Act, 1995. The fact that the AATT had no Board of Directors did not prevent them from being in contravention. In fact, when a reporting issuer comes to the public to offer bonds or to issue any securities, it is the duty of that reporting issuer to have in place, and continue to have in place, all governmental and compliance requirements; especially as basic a requirement as a Board of Directors.

5. Contravention SI 16 of 2009: Late filing of comparative financial statements for the years 2004 to 2006 inclusive, pursuant to By-law 56 of the Securities Industry By-law, 1997 which has already been stated.

Submissions of Counsel For the AATT

The AATT contends that it could not, of its own accord, appoint an auditor to audit its accounts, since the Airports Authority of Trinidad and Tobago Act, Ch. 49:02 at section 20 requires that the accounts of the AATT be audited by the Auditor General or a qualified auditor appointed by the Auditor General. The AATT has implored the Auditor General to audit its accounts, but this has failed. As a result, the AATT has hired private auditors, Ernst & Young and Panel Kerr Foster who did the audited accounts, which were submitted to the TT-SEC although out of time.

The AATT also contended that this was not a strict liability matter; that pursuant to section 143 of the Securities Industry Act, 1995 the Commissioners must act rationally to determine whether there has been a contravention and then whether the public interest requires a penalty.

Submissions of Counsel For the TT-SEC

The Counsel for TT-SEC contends that this is another matter based on strict liability since By-law 56 of the Securities Industry By-Laws, 1997 states that these comparative financial statements shall be filed within sixty days from the end of the last financial year.

The TT-SEC contends that section 143 of the Securities Industry Act, 1995 states that the Commissioners must determine whether a person has contravened this Act and whether it is in the interest of the public to make the order.

Analysis and Conclusion

The Commissioners are of the view that the AATT has contravened By-law 56 of the Securities Industry By-law, 1997. The By-law is stated in mandatory terms, so that the reporting issuer shall file within ninety days from the end of the last financial year. The due date for the filing of the comparative financial statements is March 31st. The AATT has filed its comparative financial statement late for the years 2004 to 2006 inclusive, by its own admission.

D. THE LIMITATION PERIOD FOR CONTRAVENTION PROCEEDINGS

This brings us to the arguments advanced by the AATT regarding a period of limitation as regards contraventions for the year 2004. This argument will go towards contraventions numbers SI 12, SI 14, SI 15 and SI 16 of 2009.

Submissions of Counsel For the AATT

The AATT contends that under section 143(3) of the Securities Industry Act, 1995, which reads:

“Every penalty imposed by the Commission in the exercise of its power under this Act shall be payable into the general revenue and may be covered by the State as a civil debt, and for the purposes of the proof of such civil debt a certificate under the hand of the Chairman or the Chief Executive Officer of the Commission shall be receivable in evidence as sufficient proof of such debt.”

This should be interpreted to mean that the TT-SEC is subject to the same limitations of any civil debt including the statutory limitation period.

The AATT further contends that every contravention is, therefore, subject to section 3(1) of the Limitation of Certain Actions Act, Chap. 7:09, which reads:

“The following action shall not be brought after the expiration of four years from the date on which the cause of action accrued, that is to say:

...

(c) actions to recover any sum recoverable by virtue of any enactment.”

Accordingly, all contraventions issued since 2004 are statute barred.

Submissions of Counsel For the TT-SEC

The TT-SEC countered with the submission that the AATT is misguided in its interpretation of section 143(3) of the Securities Industry Act, 1995, since section 2 of the Limitation of Certain Actions Act, Chap. 7:09 defines “action” as meaning any civil proceeding in a court of law other than those relating to real property. This is interpreted by the TT-SEC to mean that the four-year limitation period only applies to civil proceedings or matters in the nature of civil proceedings, and that the proceedings before the Commissioners are not civil matters.

The Counsel for TT-SEC relied for this interpretation on *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government [1943] Appeal Cases 147*, which was approved in *R v Hull Prison Board of Visitors, ex parte St. Germain and others [1979] 1 ALL ER. 701*. In this case of *Amand v Home Secretary* Lord Wright’s statement is quoted:

“The principle which I deduce from the authorities I have cited and other relevant authorities which I have considered, is that if the cause or matter

is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a "criminal cause or matter". The person charged is thus put in jeopardy. Every order made in such cause or matter by an English court, is an order in a criminal cause or matter, even though the order, taken by itself, is neutral in character and might equally have been made in a cause or matter which is not criminal."

The TT-SEC quoted *Halsbury's Laws of England/Statute, Volume 44:1, Para 1240* to define the word "penal". The word, "penal" as defined therein refers to a fine, penalty or forfeiture which inflicts a detriment or greater detriment on persons affected. The TT-SEC contended, therefore, that the Commission imposes a penalty and maintains surveillance over the securities market.

The methodology under section 143(3) of the Securities Industry Act, 1995 does not determine that these proceedings are civil, but that the proceedings fall within the criteria laid down in the above cited cases. The Limitation of Certain Actions Act, Chap. 7:09, therefore, does not apply to these proceedings, which are, in essence, quasi criminal.

Analysis & Conclusion

The Commissioners see the issue to be important, in that the AATT has admitted that there is no section in the Securities Industry Act, 1995 which directly states that there is a limitation period on contraventions.

Our decision would, therefore, turn on whether the treating of the recovery of a penalty as a civil debt is sufficient to transform the proceedings into a civil proceeding. Under section 143(1) of the Securities Industry Act, 1995 the Commission is given the power to make an order for a penalty of not more than

\$50,000 after a hearing determines that a person has contravened. It seems to us that it is only when this penalty is imposed that recovery of it may be treated as a civil debt. The proceedings, therefore, begins from the notice of contravention to its conclusion in a penalty which seems to fit comfortably within the definition as defined in *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government*, already cited. Thus, the Commissioners find that there is no limitation period by which the decision is circumscribed.

E. PENALTIES

So now we come to the penalties. In determining the penalties to be applied in these several matters, the Commissioners have had regard to all of the matters raised by the AATT, namely:

- (1) that the AATT has apparently not been able to impress upon the Auditor General the need to do his fundamental duty to audit the AATT's accounts in accordance with the statutory deadlines or failing this to appoint a qualified auditor to undertake these audits under the direction of the Auditor General and these audits continue to be outstanding for several years;
- (2) the AATT at one point did not have a Board of Directors and that it was not within its power to appoint one and had apparently not been able to impress upon its line Minister the need to rectify this matter in a timely manner;
- (3) the AATT hired private auditors in the person of Ernst & Young and Panel Kerr Foster in order to comply with its obligations under the Securities Industry Act, 1995 and the Security Industry By-laws, 1997 for the audits of its 2000 to 2003 financial statements; however, the AATT did not do the required reporting for the period 2004 to 2008;
- (4) the AATT did not appear to be maliciously contravening the Securities Industry Act, 1995 or the Securities Industry By-Laws, 1997;

- (5) the fact that the AATT was required to appear before the Public Accounts Committee of Parliament for non-submission of its audited financial statements;
- (6) whether the AATT accepted responsibility for its actions and tangibly demonstrated this, and in particular, recognized and demonstrated by its actions, its duty to its security holders;
- (7) any extenuating circumstances that resulted in the AATT being in contravention of the Securities Industry Act, 1995 and the Security Industry By-Laws, 1997; and
- (8) the steps taken by the AATT to ensure that the contraventions of the Act and By-Laws would not be repeated and compliance would be sustained; and has reliably demonstrated that it has put the appropriate governance and compliance systems in place to meet its obligations and to cease contravening the Securities Industry Act, 1995 and the Security Industry By-Laws, 1997.

The Commissioners wish to advise the staff of the TT-SEC that these types of contraventions must be addressed in a timely manner by the Commission, and that contraventions which accrued in the year 2004 were not brought before the Commissioners in the shortest possible time by the staff of the Commission.

Having stated that, the Commissioners want to indicate that the AATT has not acted in a manner that would inspire investor confidence; especially concerning a basic requirement to report to its security holders and the TT-SEC.

The AATT's statement that the bonds it had issued are guaranteed by the Government of the Republic of Trinidad and Tobago and therefore, investors are at little or limited risk, cannot be taken to mean or be interpreted that there is no risk to investors. In fact, in recent times there have been failures of Governments and subsequently of government-backed securities to the detriment of investors.

We are invested with a grave responsibility, that is, to maintain surveillance over the securities market and ensure orderly, fair and equitable dealings in securities by monitoring the solvency of the registrants and taking measures to protect the interest of investors, when the solvency of any such registrant is in doubt.

In order to do this, it is absolutely necessary that the registrants comply with the requirements to disclose its financial status by:

- (1) Filing annual reports within four months after the end of its financial year;
- (2) Filing comparative financial statements within 90 days from the end of the last financial year;
- (3) Filing interim financial statements within 60 days of the period commencing with the beginning of the financial year and ending six months before the financial year end; and
- (4) Filing its amended registration statements annually from its date of registration as a reporting issuer with information as at the end of its last financial year.

The AATT has contravened each of these statutory requirements for one reason or another, but has issued bonds to the value of approximately TT\$1,280,000.00 for the period 2000 to 2009 inclusive. The exposure of security holders is sizable and substantial. There is no guarantee that these investors would be completely protected against risks.

It is not, in our view, even necessary for the TT-SEC to protect the investor from losses. Our mandate is to ensure that the investor has the information to make decisions as to his or her investment and that such information is available should investors require it. All of these documents are required to be filed in the public interest. The Commissioners, in arriving at the penalties to be imposed, will have regard to the following:

- (1) the reasons for the contraventions;
- (2) what steps were taken by the reporting issuer to cease being in contravention;
- (3) whether there was any meaningful attempt by the reporting issuer to prevent future contraventions. Given its track record of contraventions, the AATT is likely to be in contravention in the future, unless the AATT undertakes and adheres to meaningful and sustained changes in governance and compliance, in an urgent, proactive and sustained manner;
- (4) how long was the reporting issuer in contravention and actions taken to submit outstanding documents;
- (5) were there any extenuating circumstances resulting in the reporting issuer being in contravention;
- (6) does the reporting issuer accept responsibility for its action;
- (7) was any attempt made to get the information to its investors; and
- (8) has the reporting issuer acted with reckless disregard to the requirements of the Securities Industry Act, 1995 or the Securities Industry By-Laws, 1997.

This list is by no means exhaustive; but it indicates the way in which the Commissioners look at any mitigation that was brought before it.

The Commissioners also note that the AATT needs to recognize and understand that the TT-SEC does not require audited accounts from the Auditor General, but merely requires audited accounts from an approved auditor. Reporting issuers are

required to submit formally audited accounts to the TT-SEC and it is not essential under the Act that these must be audited by the Auditor General.

There appears, therefore, to be no attempt by the AATT to prevent future contraventions. The Commissioners have also taken into consideration the fact that this is not the first time that the AATT has come before the TT-SEC with contraventions.

The Commissioners, therefore, are duty bound to impose penalties upon the AATT within its power under section 143 of the Securities Industry Act, 1995 as follows:

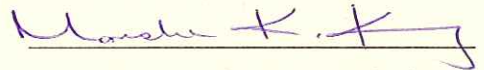
- (1) Failure to file annual reports for the years 2004 to 2008 will result in a penalty of \$50,000 for each of the years from 2005 to 2008 inclusive. As for the year 2004, the Commissioners have decided to reprimand the AATT and not apply a penalty;
- (2) Failure to file comparative financial statements for 2007 to 2008 will result in a penalty of \$50,000 for each contravention;
- (3) Failure to file interim financial statements for the years 2004 to 2007 inclusive will result in a penalty of \$50,000 for each of the contraventions for the years 2005 to 2007. Here, again, the Commissioners have decided to reprimand the AATT for the non-filing in the year 2004;
- (4) Late filing of the amended registration statements for the years 2004 to 2006 inclusive, again, the AATT is reprimanded for the year of 2004 but an imposition of the penalty of \$50,000 for each of the contraventions for the years 2005 to 2006 is imposed on the AATT; and

- (5) Late filing of the comparative financial statement for the years 2004 to 2006, again, an imposition of a penalty of \$50,000 for each of the years from 2005 to 2006 inclusive and the AATT is reprimanded for the year 2004.

The Commissioners hereby order further that the AATT file all outstanding annual reports, comparative financial statements and interim financial statements within a six-week period of the date hereof, on or before the 10th day of May, 2010. Failure to do so will result in severe sanctions.



Francis Lewis (Commissioner)



Marsha K. King (Commissioner)