[2005–06 Gib LR 131]

IN THE MATTER OF ROCK FINANCIAL SERVICES LIMITED (GIBRALTAR INVESTOR COMPENSATION BOARD and FINANCIAL SERVICES COMMISSIONER, Claimants)

SUPREME COURT (Dudley, A.J.): December 8th, 2005

Financial Services—investor protection—investor compensation scheme—participation in investor compensation scheme automatic under Financial Services (Investor Compensation Scheme) Ordinance 2002, s.3(1) for Gibraltar investment firm authorized under Financial Services Ordinance 1998

Financial Services—investor protection—investor compensation scheme—authorized investment firm not participant in Financial Services (Investor Compensation Scheme) if no longer "in business" of providing investment services for purposes of Financial Services Ordinance 1998, s.3(1) because ceased trading and wound up—Scheme Ordinance 2002 not retrospective

The claimants applied for a ruling that the Financial Services (Investor Compensation Scheme) Ordinance 2002 ("the Scheme Ordinance") applied so as to enable investors to be compensated for investments in a company that had failed prior to its coming into effect.

The Scheme Ordinance came into operation on July 24th, 2003 and implemented Directive 97/9/EC on investor-compensation schemes, which prohibited firms that were not members of an investor compensation scheme from transacting business. The Minister for Trade and Industry had stated that the implementation of the scheme was to be coordinated with the introduction of investment passporting services to the European Union. Section 3(1) of the Scheme Ordinance provided that: "An investment firm . . . shall participate in the scheme" and by s.2(2), "investment firm" was to be construed, according to the Financial Services Ordinance 1998, s.3(1), as "a person . . . whose regular occupation or business is the provision of . . . investment services."

Rock Financial Services Ltd. was authorized under the Financial Services Ordinance to provide financial services. On May 8th, 2003, by which time the company had effectively ceased trading, two of its directors informed the Financial Services Commissioner that the company was insolvent and had misused customers' assets. On May 15th, 2003, the Commissioner required the company to cease carrying on an

investment services business. On July 22nd, 2003, the court ordered that it be wound up and on July 25th, the Financial Services Commissioner cancelled its authorization to provide investment services. In the present proceedings, the interested parties included participants in the scheme who would be liable to contribute towards the losses suffered by investors in Rock Financial if these were found to be entitled to compensation.

The first claimant submitted that (a) Rock Financial had become an immediate participant in the scheme at its inception because the Scheme Ordinance, s.3(1) made participation mandatory and automatic for investment firms in Gibraltar; (b) it was "an investment firm" within the meaning of s.2(2) of the Scheme Ordinance when it came into effect because it was still authorized to provide investment services, albeit subject to conditions; (c) in any event, the statute should be applied retrospectively as the unfairness that would otherwise result to investors who had suffered losses allowed the presumption against retrospectivity to be displaced; and the second claimant submitted that (d) it had a duty to declare Rock Financial in default under s.9 of the Scheme Ordinance and thus to require participants in the scheme to compensate the investors.

The second to sixth interested parties submitted that (a) the Scheme Ordinance did not have the effect that Rock Financial became an immediate and automatic participant in the scheme; (b) it was not an "investment firm" at the relevant time because it was not, under s.3(1) of the Financial Services Ordinance, in "regular occupation or business" as a provider of investment services; (c) the presumption that the statute did not have retrospective effect should not be displaced because the legislature had intended it to apply prospectively and it would be unfair to burden the participants in the scheme with the payment of compensation for a company that had been wound up before the scheme's inception; and (d) therefore, the Financial Services Commissioner had no power to declare Rock Financial in default under s.9 of the Scheme Ordinance.

Held, refusing to make the ruling claimed:

(1) The effect of s.3(1) of Financial Services (Investor Compensation Scheme) Ordinance 2002 was that participation in the scheme was immediate and automatic for a Gibraltar investment firm authorized to provide services under the Financial Services Ordinance 1998. The use of the word "shall" in s.3(1) *prima facie* suggested that participation in the scheme was mandatory. Furthermore, when interpreting the Ordinance, it was appropriate to consider the wording of the Directive that it implemented and that this prohibited firms that were not participants from conducting business indicated that participation was intended to be automatic (paras. 12–15).

(2) Rock Financial was not, however, "an investment firm" within the meaning of s.2(2) of the Scheme Ordinance when it came into operation and was not, therefore, a participant in the investor compensation scheme. Although still authorized when the Scheme Ordinance became effective,

it was not in the "regular occupation or business" of providing investment services, as defined in s.3(1) of the Financial Services Ordinance, since it had been instructed by the Financial Services Commissioner to cease business and had been the subject of a winding-up order two days before the scheme had commenced (paras. 20–22).

(3) The Scheme Ordinance did not have retrospective effect. There was a general principle that European Community measures were not to be applied retrospectively and, furthermore, the expressed intention of the legislature to coordinate the scheme's introduction with the right to provide investment passporting services supported the view that the scheme was to operate prospectively. There was nothing in the statute to displace the presumption against retrospectivity and this would have required particularly unambiguous language, since it would have been unfair to burden the participants in the scheme with the payment of compensation to investors in a company that had failed before the scheme existed (paras. 29–32).

(4) The Financial Services Commissioner had no power to declare Rock Financial in default under s.9 of the Scheme Ordinance since it was not a participant in the investor compensation scheme (para. 33).

Cases cited:

(1) *Chebaro* v. *Chebaro*, [1987] 1 All E.R. 999; [1987] Fam. 127; [1987] 2 F.L.R. 456; [1987] Fam. Law 380, referred to.

(2) *Diversinte SA* v. *Administracion Principal de Aduanas de la Junquera* (Case C–260/91), [1993] E.C.R. I-1885, applied.

(3) *Hall* v. *Woolston Hall Leisure Ltd.*, [2001] 1 W.L.R. 225; [2000] 4 All E.R. 787; [2001] I.C.R. 99; [2000] I.R.L.R. 578, *dicta* of Gibson, L.J. applied.

(4) *L'Office Cherifien des Phosphates* v. *Yamashita-Shinninhon SS. Co. Ltd.*, [1994] 1 A.C. 486; [1994] 1 All E.R. 20; [1994] 1 Lloyd's Rep. 251, applied.

(5) *Social Security Secy.* v. *Tunnicliffe*, [1991] 2 All E.R. 712; [1992] 4 Admin. L.R. 57, applied.

(6) *Yew Bon Tew* v. *Kenderaan Bas Mara*, [1983] 1 A.C. 553; [1982] 3 All E.R. 833; (1982), 126 Sol. Jo. 729, applied.

Legislation construed:

Financial Services (Investor Compensation Scheme) Ordinance 2002, s.2(2): The relevant terms of this sub-section are set out at para. 18.

s.3(1): The relevant terms of this sub-section are set out at para. 8.

s.9(1): "A participant shall be in default if the Financial Services Commissioner so declares."

Financial Services Ordinance 1998, s.3(1): The relevant terms of this sub-section are set out at para. 18.

Directive 97/9/EC of March 3rd, 1997 on investor-compensation

schemes, art. 2(1): The relevant terms of this paragraph are set out at para. 12.

J.J. Neish, Q.C. for the claimants;
S. Catania for the Chief Minister of Gibraltar, an interested party;
A. White, Q.C. and *C. Rocca* for Credit Suisse (Gibraltar) Ltd.; Jyske Bank (Gibraltar) Ltd.; Lombard Odier Hentsch Private Bank Ltd.; Jamapal Investments (Gibraltar) Ltd.; and SMC Asset Management Ltd, interested parties.

1 **DUDLEY, A.J.:** The underlying issue arising in this action is whether investors in Rock Financial Services Ltd. are entitled to compensation under the scheme set up by the Financial Services (Investor Compensation Scheme) Ordinance 2002 (the "Scheme Ordinance").

Procedural background and parties

2 The action, a CPR, Part 8 claim, started life with H.M. Attorney-General as a party. By order of Pizzarello, A.J. of October 27th, 2003, the Attorney-General ceased to be a party, the Minister for Trade, Industry and Telecommunications was given liberty to make representations and a structure was put in place to allow for investors in Rock Financial to make representations. By order of Schofield, C.J. of February 3rd, 2005, consequent upon a re-assignation of ministerial portfolios, the Minister for Trade, Industry and Telecommunications was substituted by the Chief Minister as an interested party. On February 10th, 2005, I ordered that scheme participants also be granted leave to make representations at the hearing.

3 Subject to some nuances, the thrust of the submissions by counsel are broadly similar. They have not, I am told, consulted each other in the preparation of their respective skeleton arguments. Moreover, the stated position of both Mr. Neish and Mr. Catania is that whilst they both reach conclusions and put these forward as to the manner in which the relevant provisions of the Ordinance are to be interpreted, in principle, their stance as regards outcome is neutral and they see their role in terms of assisting the court. Those instructing Mr. White, Q.C. are not neutral as to outcome. As participants in the scheme, they could be called upon to contribute financially towards the loss suffered by investors in Rock Financial if these are found to be entitled to compensation under the scheme.

4 It is unfortunate that the investors in Rock Financial did not appear at the hearing of this matter, either in person or through counsel, and the only representations advanced on behalf of some of them were through written submissions prepared by Mr. Johan Pienaar, a member of the committee of inspection in the liquidation of Rock Financial. Some of

Mr. Pienaar's submissions are rather wide-ranging in nature and deal with a range of issues which (whilst possibly relevant in the context of other relief which may or may not be available) are not directly relevant to the narrow questions of statutory interpretation before me.

Relief sought

5 What is sought by the claimants in this action is determination of the following questions. By the first claimant:

(1) Whether on its true construction and effect, s.3(l)(a) of the Scheme Ordinance—

(i) automatically and immediately upon the Ordinance coming into operation made Rock a participant in the investor compensation scheme created by s.2(l) of the Ordinance; or

(ii) merely imposed a duty on Rock to become a participant in the scheme.

(2) Whether the provisions of s.3(l)(a) of the Scheme Ordinance apply to Rock, notwithstanding that it had failed and was subject to a winding-up order by the time the Ordinance came into operation.

By the second claimant:

(3) Whether on its construction and effect, s.9 of the Scheme Ordinance imposes a duty on the second claimant to declare a participant in default if any of the matters set out in s.9(2) occurred prior to the Ordinance coming into operation.

Factual background

6 The factual matrix upon which the determination is to be made has been agreed by the parties before me. Although the agreed statement is somewhat more detailed, the material aspects can be summarized as follows:

(1) Rock Financial was authorized on December 7th, 1998 under s.5 of the Financial Services Ordinance 1998 to provide investment services.

(2) On July 12th, 2002, the Scheme Ordinance was passed by the House of Assembly, receiving the Governor's assent on August 7th, 2002. Section 1(1) of the Ordinance provides for it coming into effect on a date to be appointed by the Minister for Trade and Industry. In moving the second reading of the bill, the Minister for Trade and Industry stated it was government policy that the implementation of the scheme run simultaneously with and be made available with EU investment passporting services to Gibraltar.

(3) On May 8th, 2003, two of Rock Financial's directors informed the Financial Services Commissioner that Rock Financial was insolvent, that customers' assets had been misused and that some customers had not been repaid their investments. Rock Financial had by then effectively ceased trading. On that day, the Financial Services Commissioner gave Rock Financial notice of intention to suspend its licence as it was considered that it was not a fit and proper person to carry on the business of an investment services firm.

(4) On May 15th, 2003, the Financial Services Commissioner wrote to Rock Financial imposing substantial conditions on its licence; that it cease carrying on an investment services business and that it transfer customers' assets to other authorized firms or to Pricewaterhouse-Coopers.

(5) On May 28th, 2003, Rock Financial's board resolved it was insolvent and that it would proceed to a creditors' voluntary winding up. This did not materialize as the directors were advised that an insolvent voluntary winding up was not possible.

(6) On June 3rd, 2003, the Royal Gibraltar Police raided Rock Financial's office.

(7) On June 13th, 2003, a petition was presented for the winding up of Rock by Eidi & Associates on the basis that Rock Financial was unable to pay contractual debts in the sum of US$5,144,888.14 and that it was just and equitable.

(8) On June 17th, 2003, joint provisional liquidators were appointed.

(9) On June 26th, 2003, the Financial Services Commissioner gave notice to the joint provisional liquidators that he was considering cancelling Rock Financial's licence and giving them 28 days in which to make representations. No representations were made.

(10) On July 4th, 2003, the United Kingdom's Minister for Europe wrote to the Chief Minister informing him that subject to the Scheme Ordinance being brought into effect, investment passporting to the European Union would be available to firms licensed in Gibraltar.

(11) On July 22nd, 2003, this court ordered that Rock Financial be wound up.

(12) On July 24th, 2003, the Investor Compensation Scheme Ordinance came into operation.

(13) On July 25th, 2003, the Financial Services Commissioner cancelled Rock Financial's authorization to provide investment services.

7 In dealing with the questions on the claim form, counsel have focused

on three fundamental issues which I think properly encapsulate the matters that the court must determine so as to rule on the questions posed.

(1) Is participation in the scheme created by the Scheme Ordinance automatic?

(2) Was Rock Financial "an investment firm" when the Scheme Ordinance came into effect?

(3) Does the Scheme Ordinance have retrospective effect?

Automatic participation

8 Section 3(l) of the Scheme Ordinance provides: "An investment firm which is authorised in Gibraltar under the Financial Services Ordinance 1998 shall participate in the scheme if . . . (a) it has its head office in Gibraltar . . ." It is not in dispute that Rock Financial had its head office in Gibraltar. The issue requiring determination is whether the section is mandatory in nature, and therefore whether, immediately upon the Ordinance coming into operation, an investment firm duly authorized automatically participated in the scheme.

9 The use of the word "shall" *prima facie* suggests that the section is mandatory in nature and therefore participation automatic. Moreover, it is noteworthy that it is in sharp contrast to the provisions of ss. 3(2) and (3), which provide: " . . . [A]n investment firm which is a European investment firm may apply . . . An investment firm which participates under subsection (2) may withdraw . . ."

10 Conversely, other sections in the Ordinance, when contrasted with s.3(1), could arguably militate towards an interpretation which does not make participation automatic. In particular, s.4, which creates the board that is to administer the scheme, imposes mandatory future as opposed to automatic mandatory obligations through the use of "shall":

> "(1) The scheme shall be administered by the Gibraltar investor Compensation Board.
>
> (2) The Board shall be appointed by the Minister and consist of . . . The Minister shall consult the Chairman before appointing . . ."

11 Whilst of the view that it is the language of s.3 which is primarily of significance, given these arguably conflicting pointers to the interpretation of s.3(1), it is useful to consider the purpose of the Scheme Ordinance.

12 The long title describes the purpose of the Scheme Ordinance as being to transpose into the law of Gibraltar European Parliament and Council Directive 97/9/EC on investor-compensation schemes. As its title

suggests, the scheme is aimed at providing an element of cover for investors when an investment firm is unable to meet its obligations. It is proper, therefore, to look to the Directive when interpreting the Ordinance (*Hall* v. *Woolston Hall Leisure Ltd.* (3)). Article 2(1) of the directive provides: ". . . [N]o investment firm authorized in that Member State may carry on investment business unless it belongs to such a scheme."

13 The directive creates a prohibition to transact business unless a firm belongs to a scheme. The Scheme Ordinance has no transitional or other provisions whereby investment firms caught by the provisions of s.3(1) have to apply, therefore to imply into the Ordinance such a requirement would inexorably result in any such applicant being unable to transact business unless and until accepted into the scheme. That cannot be said to have been the intention of the legislature when automatic participation can be said to be an equally, if not more, apparent interpretation.

14 Moreover, the proposition that participation is automatic is also implicitly supported by s.17, which deals with the sanctions arising from a failure to comply with the scheme but which is silent as to sanctions for failing to join the scheme.

15 In the premises, I am of the view that s.3(1)(a) of the Scheme Ordinance has the effect of making an investment firm which is authorized under the Financial Services Ordinance and which has its head office in Gibraltar a participant in the scheme immediately upon the Ordinance coming into operation.

Was Rock Financial "an investment firm?"

16 The more substantial issue requiring determination is whether Rock Financial was "an investment firm" when the Scheme Ordinance came into operation on July 24th, 2003.

17 As I understand it, Mr. Pienaar's simple, but forceful, argument can be paraphrased as follows. When the Scheme Ordinance came into effect on July 24th, 2003, Rock Financial was still authorized to provide investment services (albeit subject to the conditions imposed by letter of May 15th, 2003), which authorization was not withdrawn until July 25th, 2003. Therefore, on the relevant date, it remained an investment firm and, given their automatic participation in the scheme, Rock Financial's investors are entitled to compensation.

18 Counsel have taken me through a more laborious path. Pursuant to s.2(2) of the Scheme Ordinance, "'Investment firm' . . . shall be construed in accordance with section 3 of the Financial Services Ordinance 1998." Section 3(1) of the Financial Services Ordinance 1998 in turn provides: "For the purposes of this Ordinance, an investment firm is a person . . . whose regular occupation or business is the provision of any one or more

core investment services for third parties on a professional basis."

19 Counsel accept that the purpose of Rock Financial had been the provision of investment services for third parties and that up until July 25th (albeit subject to the conditions imposed by the letter of May 15th, 2003), it was "authorized" under the Financial Services Ordinance 1998. However, they interpret s.3(1) of the Financial Services Ordinance 1998 as requiring an investment firm to be *de facto* in business for it to come within the terms of the definition. Put another way, the thrust of their submissions is that as at July 24th, 2003, when the Scheme Ordinance came into operation, Rock Financial could no longer be said to be in "regular occupation or business" in the provision of investment services.

20 To my mind, s.3(1) of the Financial Services Ordinance defines "investment firm" in a manner whereby a factual assessment needs to be undertaken so as to determine whether or not an entity comes within the concept. Reading that definition over to s.3(1) of the Scheme Ordinance, the legislature has in effect created a dual test in that for an entity to become a participant in the scheme, it needs to be (i) in "regular occupation or business" in the provision of investment business, and (ii) "authorized" to undertake that activity.

21 In undertaking the factual assessment, there are on the agreed facts what I consider to be three landmark events:

(1) By May 8th, 2003, Rock Financial had effectively ceased to trade.

(2) By letter dated May 15th, 2003, the Financial Services Commissioner instructed Rock Financial to "cease to carry on investment business" and to transfer assets to the custody of PricewaterhouseCoopers or to another authorized investment firm.

(3) On June 13th, 2003, the winding-up petition was presented, with the winding-up order being made on July 22nd, 2003, that is to say two days before the Scheme Ordinance came into effect. (It is noteworthy that by virtue of s.227(2) of the Companies Ordinance, on the making of a winding-up order, the commencement of the order is deemed to be the time of the presentation of the petition.)

22 Although Rock Financial was, when the Scheme Ordinance came into operation, still authorized, on the basis of the facts highlighted it cannot positively be said that it was by that time in "regular occupation or business" for the purposes of it coming within the meaning of "investment firm." Subject to the issue of retrospective operation, I find that Rock Financial was not a participant for the purposes of the Scheme Ordinance.

Retrospective operation of the Ordinance

23 In *Yew Bon Tew* v. *Kenderaan Bas Mara* (6), Lord Brightman deals

with the common law presumption that a statute does not have retrospective effect in the following terms ([1983] 1 A.C. at 558):

> ". . . [T]here is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past."

24 I have also been referred to *Social Security Secy.* v. *Tunnicliffe* (5) and to *L'Office Cherifien des Phosphates* v. *Yamashita-Shinninhon SS. Co. Ltd.* (4), which Mr. White suggests require from the court a more flexible approach. From these three decisions I draw the following principles of particular relevance to the present case:

(1) There is a presumption against retrospectivity.

(2) The presumption may be displaced where the language of the statute suggests that to be the intention of the legislature.

(3) In determining the intent of the legislature, account may be taken of the "circumstances in which the legislation was enacted" (*L'Office Cherifien* ([1994] 1 A.C. at 525, *per* Lord Mustill)).

(4) In determining the intent of the legislature, the greater the unfairness created by the retrospective application—in terms of an adverse effect on existing rights—the clearer the language of the statute is required to be.

25 In the premises, the first fundamental step is the examination of the language of the statute. Section 9 of the Scheme Ordinance, which establishes the criteria by which a participant is to be declared in default, uses language which is prospective in nature, for example, "Commissioner taking the view," "a winding up order being made," "a receiver being appointed" and "the Financial Services Commissioner considering."

26 It is useful to contrast this language with that to be found in statutes found to be of retrospective effect. Thus in *Chebaro* v. *Chebaro* (1), a case concerning the interpretation of s.12(1) of the Matrimonial and Family Proceedings Act 1984, the use of the past tense "has been dissolved" and "have been legally separated" was fundamental to the finding that the statute was of retrospective effect.

27 The only section in the Scheme Ordinance which is capable of supporting a retrospective interpretation to the Ordinance would appear to be s.6, which provides: "(1) The first financial year of the scheme is,

unless the Board decides otherwise, the period ending at the end of 2002."

28 Whilst His Excellency the Governor assented to the Scheme Ordinance on August 7th, 2002, s.1(2) provides for the Scheme Ordinance to come into operation on a date to be appointed by the Minister for Trade and Industry. The provisions of s.6 and s.1, therefore, seem to be at odds. Moreover, absent explanation, to make an Ordinance retrospective by a year would be illogical. In the circumstances, I form the view that s.6 is but a drafting error in the nature of an assumption by the draftsman that the Ordinance would be brought into effect much sooner than it in fact was.

29 To my mind, the language of the Scheme Ordinance does not allow for the presumption of non-retrospectivity to be displaced. I am fortified in my view that the Scheme Ordinance is not of retrospective effect in that it is a measure implementing Directive 97/9/EC. As a matter of general principle, Community measures (absent exceptional circumstances) are not retrospective (*Diversinte SA* v. *Administracion Principal de Aduanas de la Junquera* (2)). There is nothing in the recitals or the body of the directive which suggests that the directive is to have retrospective effect.

30 *Hansard* also supports a prospective interpretation of the Scheme Ordinance. During the first and second reading of the bill in 2002, the promoter of the bill, the Minister for Trade and Industry, stated:

> "I should also make it clear that this is a single market and the Government's policy is that the implementation and enactment of this measure on investor compensation should be coordinated and should be run simultaneous with and be made available with the introduction of investment services passporting to Gibraltar . . ."

31 Indeed, this intention then manifested itself in the coming into operation of the Scheme Ordinance. Following the letter dated July 4th, 2003 from Her Majesty's Government Minister for Europe to the Chief Minister, investment services providers in Gibraltar could provide those services in other EU states. This right, however, was made conditional upon the bringing into operation of the investor compensation scheme. The Scheme Ordinance was, consequent upon this exchange, brought into operation on July 24th, 2003. The coordination of passporting and the coming into operation of the Scheme Ordinance supports the view that the legislature intended the Scheme Ordinance to have prospective effect.

32 The issue of "fairness" arises where the language used by the legislature allows for a retrospective application of a statute. That is not the case before me. It is useful, however, to address the issue. To allow for a retrospective application of the Scheme Ordinance, the language

would have had to be particularly unambiguous. Although cognizant of the loss which investors have suffered upon the collapse of Rock Financial and their natural sense of grievance, what the authorities to which I have been referred contemplate in terms of unfairness is the impairment of existing rights or the creation of new obligations in respect of past events. With this concept as the touchstone it would, in my view, be unfair to burden participants in the scheme with the payment of compensation to those who invested through Rock Financial, given that the company was not a participant in the scheme (and therefore was itself never liable to contribute towards it) and that the scheme did not exist when Rock Financial collapsed.

33 In view of the foregoing, the answers to the questions posed to the court are as follows:

(1) Whilst participation in the scheme by an authorized investment firm is automatic, Rock Financial was not, upon the Scheme Ordinance coming into operation, an investment firm, therefore it was not a participant.

(2) Rock Financial not being a participant and the Scheme Ordinance not having retrospective effect, the provisions of s.3(1)(a) do not apply to it.

(3) Rock Financial not being a participant, the Financial Services Commissioner had no power to declare it in default pursuant to s.9 of the Scheme Ordinance.

Ruling accordingly.