[2016 Gib LR 131]

WEAL v. FINANCIAL SERVICES COMMISSIONER

COURT OF APPEAL (Rimer and Smith, JJ.A., and Dudley, C.J.):
April 27th, 2016

Investment and Securities—investment management—fiduciary services business—by Financial Services (Conduct of Fiduciary Services Business) Regulations 2006, reg. 5, director to "act with due care, skill and diligence in the conduct of its fiduciary services business" assessed objectively—Financial Services Commission may sanction for breach

The appellant appealed against the decision of the Financial Services Commission to impose sanctions on him in respect of his activities as a director of Advalorem Value Asset Fund Ltd.

Advalorem Value Asset Fund Ltd. ("Advalorem") was an experienced investor fund that operated in accordance with a private placement memorandum ("the PPM"). The PPM stipulated, *inter alia*, that Advalorem's directors, of whom the appellant was one, could only invest in distressed assets, *i.e.* property put up for sale at a value that was severely depressed for a reason particular to the seller and not due to general market conditions, and had to consider valuation reports assessing the market value of a proposed investment before approving its purchase.

The investigations by the Financial Services Commission ("FSC") into Advalorem related to, *inter alia*, the board of directors' agreement to purchase two pieces of land valued at £15m. and £6m. respectively. These valuations were based on three special assumptions, the most important of which was that the land was, at the date of valuation, in receipt of planning permission that would allow development potential, and consequently value, to be maximized. Five years earlier, the pieces of land had been sold for £180,000 and £140,000 respectively.

The FSC issued directions under s.35(1A) of the Financial Services (Investment and Fiduciary Services) Act 1989 prohibiting the appellant from being the director of an experienced investor fund without the permission of the FSC and subject to compliance with a number of conditions. It found, *inter alia*, that he had failed to "act with due skill, care and diligence" in the conduct of the affairs of Advalorem, contrary to reg. 5 of the Financial Services (Conduct of Fiduciary Services Business) Regulations 2006, because he had approved the purchase of the two pieces of land despite knowing that, in breach of the PPM, there had been no consideration of whether they were distressed assets and the valuations

relied on were manifestly inappropriate, were based on unrealistic special assumptions, and did not accurately assess the market value of the land.

The appellant's appeal against the decision of the FSC was dismissed by the Supreme Court on the grounds that the FSC's conclusions could not be faulted.

On further appeal under s.45(7) of the 1989 Act, which permitted an appeal to the Court of Appeal on a question of law but not on a factual issue, the appellant submitted that (a) the court had failed to identify or apply the correct test to determine whether he had breached the requirement to "act with due skill, care and diligence in the conduct of its fiduciary services business" in reg. 5 of the 2006 Regulations; (b) the correct test was whether he had acted with the care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that could reasonably be expected of a person carrying out the appellant's functions (the objective element) and the general knowledge, skill and experience that the appellant actually had (the subjective element), and the application of that test required an overall assessment of the appellant's competence, character, diligence, honesty, integrity, judgment and current ability to perform his duties; and (c) the Supreme Court had been wrong to conclude that the board of directors had given final approval to purchase the two pieces of land, the true position being that the approval process was ongoing, the appellant had intended to inspect the pieces of land in person to ascertain whether they were distressed assets and whether the special assumptions were realistic, and in doing so he would have carried out his duties as a director with "due skill, care and diligence" before giving final approval to purchase the land.

Held, dismissing the appeal:

(1) The Supreme Court had been correct to hold that the appellant had failed to act with due skill, care and diligence in the conduct of the affairs of Advalorem and the appeal would therefore be dismissed. The relevant test under reg. 5 of the 2006 Regulations was whether the appellant had acted with "due care, skill and diligence," to be considered in light of his position as a licensed director of experienced investor funds subject to regulation by the FSC; this was an objective test and there was no need for any wider assessment of his competence, character *etc*. He had breached reg. 5 by failing to ensure that the requirements of the PPM were satisfied before approving the purchase of the two pieces of land. The subjective test proposed by the appellant would be rejected, but it would have been satisfied in any event since the FSC had found that he had been aware of the breaches of the PPM when he approved the purchase of the land (para. 19; para. 21; paras. 26–27).

(2) Contrary to the appellant's submissions, Advalorem's board of directors gave final approval to purchase the two pieces of land. The appellant's intention to inspect the land in person was not advanced before the Supreme Court; such an inspection was not necessary to ascertain

whether the requirements of the PPM were satisfied; and the appellant's submissions on this point sought to challenge the Supreme Court's factual conclusions and were therefore impermissible (para. 20; paras. 28–30).

Cases cited:

(1) *Bishopsgate Inv. Mgmt. Ltd. (in liquidation)* v. *Maxwell (No. 2)*, [1994] 1 All E.R. 261; [1993] BCC 120; [1993] BCLC 1282, referred to.

(2) *D'Jan of London Ltd., In re*, [1993] BCC 646; [1994] 1 BCLC 561, referred to.

Legislation construed:

Financial Services (Conduct of Fiduciary Services Business) Regulations 2006, reg. 5: The relevant terms of this regulation are set out at para. 18.

Financial Services (Investment and Fiduciary Services) Act 1989, s.45(7):

> "A decision of the Court under this section shall be final as to any question of fact, but an appeal from such a decision of fact shall lie to the Court of Appeal on any question of law."

C. Gomez for the appellant;
Sir Peter Caruana, Q.C. and *C. Allan* for the respondent.

1 **DUDLEY, C.J.:** This is an appeal from a judgment of Jack, J. given on April 29th, 2015 (reported at 2015 Gib LR 435), in which he dismissed the appeals of the appellant ("Mr. Weal") and Minette Compson ("Mrs. Compson") in respect of certain sanctions imposed upon them by the respondent. Mrs. Compson also appealed against the decision of Jack, J. and, although she subsequently withdrew it, joint grounds of appeal were filed.

2 To the extent that it is necessary to distinguish between the Chief Executive Officer and the Commission itself, I shall refer to them respectively as "the CEO" and "the FSC."

3 Mr. Weal held a Class VIII Company Manager licence restricted to the provision of directorships to experienced investor funds ("the licence"), issued by the respondent under the Financial Services (Investment and Fiduciary Services) Act 1989 ("the Act"). Following the hearing, it came to the court's attention that Mr. Weal surrendered the licence on October 7th, 2015. For the purposes of this appeal, nothing turns on this.

4 Pursuant to the Financial Services (Experienced Investor Funds) Regulations 2012 made under the Financial Services (Collective Investment Schemes) Act 2011, an experienced investor fund must have at least two directors who must be ordinarily resident in Gibraltar and licensed by the FSC. Mr. Weal was one such licensed director of two unrelated

experienced investor funds, Advalorem Value Asset Fund Ltd. ("Advalorem") and Temple Rock Fund PCC Ltd.

5 Following an investigation carried out on behalf of the FSC into the affairs of Advalorem, on December 12th, 2014 it issued notices to Mr. Weal and Mrs. Compson under s.35(1A) of the Act. The direction in Mrs. Compson's case was that she—

> ". . . be under an obligation not to perform the following functions in relation any of [three named] companies or any other person licensed under the Act to carry out investment business or a controlled activity (in both cases as defined in the Act):
>
> Shareholder controller
>
> Director
>
> Any other function, responsibility or requirement of the Financial Services (Conduct of Fiduciary Services Business) Regulations 2006."

In respect of Mr. Weal, the direction was:

> "4.1 You shall not be a director of any experienced investor fund, other than Temple Rock Fund PCC Limited, without the [FSC's] prior consent to each such directorship.
>
> 4.2 The [FSC's] consent to such further directorships and your continuation as a director of Temple Rock PCC Limited shall both depend on and be subject to the following conditions:
>
> (i) that you undertake a programme of continued professional development in relation to the functions, duties and responsibilities of a company director and in particular of companies carrying on business in the field of financial services to be identified and specified by the [FSC];
>
> (ii) that you document to the satisfaction of the [FSC] how you will ensure compliance with the Gibraltar Funds and Investments Association's Corporate Governance Code;
>
> (iii) that you satisfy the [FSC] following completion of the programme, including by conduct of an interview, that your corporate governance skills meet the required standards in accordance with the legal requirements and current industry best practices; and
>
> (iv) if all the above conditions are not met to the satisfaction of the [FSC] within the period of six months from the date of this notice letter the licence shall be cancelled under s.11 of the Act."

Mrs. Compson and Mr. Weal appealed against that decision to the Supreme Court. Section 45(1) of the Act creates a statutory right of appeal whilst s.45(4) empowers the Supreme Court to "quash or confirm the decision of the [CEO] against which the appeal is brought or may substitute any other decision which the [CEO] could have made." Both appeals were dismissed.

Background

6 Advalorem was an FSC-authorized "experienced investor fund" with investments accepted by it on the basis of a private placement memorandum ("the PPM"), to which I shall turn in due course. The idea for Advalorem came from a Mr. Michael Kane, who approached Mrs. Compson and her husband Mark Compson ("Mr. Compson"), who set up the structure. Mr. Kane had no formal agreement with Advalorem and did not hold any office. From its date of registration, it had two natural directors, William Redford and Robert Stark, and one corporate director, Advalorem Asset Management Ltd. ("AAML"). In turn, AAML had two directors, Mr. and Mrs. Compson. Mr. Stark resigned from the board on February 19th, 2013 and on the same day he was replaced by Mr. Weal.

7 In its final report on Advalorem dated October 10th, 2013, the FSC concluded that it was highly probable that Advalorem had been used as part of a fraud perpetrated on pension investors. The FSC's final report and the judgment of Jack, J. deal extensively with a transaction involving land in Kirkintilloch, Scotland. When the board of Advalorem resolved to acquire that land, Mr. Weal was not a director. There can be no attribution whatsoever to Mr. Weal in respect of that transaction, but the background to it serves to put the subsequent proposed transactions in which he was involved in context.

8 The Kirkintilloch land, which is about nine miles north east of Glasgow, is, save for a very small part, in the green belt. It was acquired in 2008 by Hucey International Ltd. ("Hucey"), a British Virgin Islands company beneficially owned and controlled by Gregory Hugh King ("Mr. King"). Hucey then transferred the land to two special purpose vehicles, Polyburn Ltd. ("Polyburn") and Tripod Ltd. ("Tripod"), two Gibraltar companies the shares of which were held by Thistle Holdings Ltd. ("Thistle"), which was also beneficially owned by Mr. King. In respect of the link between Mr. Kane and Mr. King, Jack, J. put it on these terms: "Mr. King and Mr. Kane knew each other, but the precise relationship between the two is unknown" (2015 Gib LR 435, at para. 19).

9 Through a wholly-owned subsidiary, DB Holdings Ltd. ("DBH"), Advalorem purchased from Thistle the shares in Polyburn and Tripod for a total consideration of £6m. This is to be contrasted with a valuation obtained by the FSC from Savilles which gave a market value of

£190,000. The terms of the sale and purchase agreement for the Kirkintilloch land are described in the FSC report as "manifestly inappropriate and highly unusual and unlikely for a transaction of its nature between parties at arm's length," a view echoed in the judgment of Jack, J. who describes them as "unusual and potentially very detrimental to investors in Advalorem" (*ibid.*, at para. 25). That agreement was executed on December 17th, 2012, the same day that the board of Advalorem resolved to buy the land, with completion taking place on February 27th, 2013. For the purpose of acquiring the Kirkintilloch land, the board of Advalorem purportedly relied upon valuations in which the valuers had been specifically instructed to value on the basis of special assumptions, described by Jack, J. as "effectively fantasy assumptions" (*ibid.*, at para. 82).

10 The moneys paid by DBH to Thistle were advanced by Advalorem, which in turn had received a total of £7,760,500 from four pension schemes in the United Kingdom administered by Marley Administration Services Ltd. ("Marley"). On February 12th, 2013, the UK Pensions Regulator warned the FSC about Marley's activities. The UK Regulator was investigating Marley in respect of a "pension liberation scheme." The FSC's suspicion as to how it operated is to be found in the judgment of Jack, J. (*ibid.*, at para. 29):

> "Sir Peter Caruana, Q.C. [who appeared for the FSC] confirmed that the suspicion in the current case was that moneys coming from Marley pension funds were to be 'invested' in grossly overpriced assets, such as potentially the Kirkintilloch land. The overpayment (less moneys payable to those running the scam) was then funnelled back to the pension holders by way of pension liberation, but without the punitive tax being paid. This was, however, no part of the FSC's case against the current appellants. There is no suggestion that either of them had any knowledge or indeed suspicion that such a fraud on the UK Revenue was taking place and no proof of such a fraud has been put before the court."

The FSC did not take any immediate steps against Advalorem or warn it about Marley. Mr. Weal joined the board on February 19th, 2013 and, at the time that he sought and obtained FSC approval to be on the Advalorem board, he also was not informed of any possible suspicions. Mr. Gomez (who has at all times appeared for Mr. Weal) accepts that there was no impropriety on the part of the FSC in not telling Mr. Weal as it could have amounted to "tipping off" Advalorem.

11 In the event, Mr. Weal attended only one board meeting, held on March 13th, 2013, and it is in respect of one of the matters dealt with on that occasion that he has been sanctioned. Present at that meeting were three directors, AAML (represented by Mr. and Mrs. Compson), Mr.

Redford and Mr. Weal, with Mrs. Compson taking the chair. The part of the minutes which is relevant for the purposes of this appeal is very short:

> "*Proposed Purchase of Land*
>
> The chairman reminded the board that the valuation reports attached and forming part of these minutes had been circulated for review. The directors discussed the valuation reports and it was agreed that valuation reports be accepted and the purchase of the land be approved."

The purchase discussed related to land in Sluidubh and Easterhill in Scotland. The valuations, which were provided by the Black Partnership, were based on the same special assumptions as had been used for the valuation of the Kirkintilloch land, namely:

(i) that the sites were in receipt, at the date of valuation, of a suitable planning permission that would allow development potential, and consequently value, to be maximized;

(ii) that there were no adverse ground conditions that would have an adverse effect on value;

(iii) that there were no issues regarding access for development.

Jack, J. contrasts the valuations provided to the board with 2008 purchase prices: "Sluidubh was valued at £6,072,000 and Easterhill at £15,078,000. This stands to be contrasted with the purchase prices in 2008 of £180,000 and £140,000 respectively" (*ibid.*, at para. 31).

12 Following the acquisition of the Kirkintilloch land, the PPM was amended on February 20th, 2013, reducing the number of valuations required from two to one. Nothing turns on this. The investment objective of the fund is to be found at para. 5.1 of the PPM, which provides: "to achieve capital growth through direct and indirect investment in distressed assets, whether by way of acquisition thereof or otherwise by way of investment through loans secured on the distressed assets or other financial instruments." Distressed asset is defined as meaning: "any property which is put up for sale at a value which in the opinion of the investment director is considered to be severely depressed for a reason particular to the seller not a reason attributable to general market conditions." In his judgment, Jack, J. quite properly focused on para. 5.2.2, which deals with investment in distressed assets via a special purpose vehicle, which was the manner in which the Kirkintilloch land was acquired by Advalorem. For the purposes of the issues that arise in this appeal, there is no material difference between the provisions but, given that the minutes refer to the purchase of the land, the submissions are best considered against the relevant passages of para. 5.2.1 which deals with direct acquisition of distressed assets:

"The investment director will identify and assess potential distressed assets for direct acquisition by the fund. The distressed asset will be inspected and reported upon by an independent qualified surveyor, being a member of RICS, who will be engaged by the fund as and when required. The fund will engage such other professional advisors as may be required for the assessment, including risk assessments, of the potential distressed assets and to comment on the potential of success and the ultimate profitability of the distressed asset. The directors will consider the above when deciding whether to directly acquire the distressed assets as below.

The investment director will have sole and absolute discretion to recommend to the fund any specific distressed asset that in its judgment should be directly acquired by the fund. Such a recommendation will be made at a meeting of the directors at which the investment director will also provide the report of the independent qualified surveyor (as per above) and the reports of such other professional advisors.

The directors may by resolution approve the purchase of the selected distressed asset (having considered the surveyor report and the advice of such other professional advisors), thereby permitting the fund to attempt to purchase the recommended distressed asset at an advantageous price (which shall not be above market price) to allow the end distressed asset value and investor returns to be maximized.

The fund intends to purchase distressed assets being property which has already obtained planning permission and having been constructed upon or being in the early stages of construction in accordance with the planning permission and/or distressed assets solely having obtained planning permission and/or distressed assets in the early stages of the planning application."

It was against these requirements and criteria that the potential acquisition of the Sluidubh and Easterhill land and Mr. Weal's involvement in that decision-making had to be considered.

13 The grounds and reasons of the CEO for the imposition of the conditions on Mr. Weal's licence are to be found at paras. 5 and 6 of the December 12th, 2014 notice:

"5 The grounds for my decision to impose the conditions are that it appears to me necessary and desirable to do so for the protection of investors.

6 The reasons for my decision to impose the conditions are the following:

6.1 You were a director of [Advalorem] in which capacity both individually and collectively as a member of the board of directors you failed to ensure that Advalorem was being operated in a manner that was not detrimental to the interests of its participants or potential participants and in compliance with [the PPM] in that:

(1) Advalorem agreed to purchase land at a significant and contrived overvaluation following consideration by the board of manifestly inappropriate property valuations (including but not limited to their basis on special assumptions that were inapplicable to the land in question and thus unrealistic) that do not reflect a *bona fide* purchase and sale transaction between two parties at arm's length and at a fair and realistic value, as to the timing, basis of valuations and valuations;

(2) You and the board of directors of Advalorem failed to give sufficient or any proper consideration to the propriety and prudence of the purchase of the land by Advalorem, or to practice sufficient or any diligence in relation thereto and thus failed to have sufficient or any proper regard to the interests of Advalorem or of its participants or potential participants;

(3) In agreeing the said land purchase you and the board of directors of Advalorem failed to comply with and adhere to the provisions of its [PPM] relating to investment objectives and the nature of property that it could or would purchase, the process for the approval by the directors of such purchase and the number of property valuations required; and the provisions related to risk management.

6.2 Accordingly, you have not acted in the conduct of the affairs of Advalorem with due skill care and diligence, in consequence of which I consider that it [is] desirable for the protection of investors, of the public and the reputation of Gibraltar as a financial centre to impose the conditions."

14 Mr. Weal appealed that decision on two grounds: "The decision to issue the direction was wrong; was without any evidential or other proper basis of fact; and was one that no reasonable Chief Executive Officer of the FSC could have issued such that it should be quashed pursuant to s.45(4) of the Act." The second was an averment that the sanction imposed was "excessive, unnecessary, unreasonable and/or unjustified in all the circumstances of the case . . ." In a comprehensive judgment, Jack, J. dealt with Sluidubh and Easterhill (*ibid.*, at paras. 88–92):

"88 The Black Partnership valuations in respect of Sluidubh and Easterhill are made on exactly the same special assumptions as those

in respect of Kirkintilloch. There is, however, much less evidence about the extent to which the special assumptions are unrealistic.

89 There is an issue raised by the appellants as to whether Advalorem ever made a final decision to purchase, or whether the resolution of March 13th, 2013 was solely a decision in principle. It will be recalled that the minutes record that 'it was agreed that valuation reports be accepted and the purchase of the land be approved.' This is in contrast to the minutes of December 17th, 2012, which recorded the resolution that 'the purchase of the land be approved and that Advalorem . . . execute the purchase agreement to complete the purchase.'

90 The reference in the decision letters to 'Advalorem . . . agreed to purchase [Sluidubh and Easterhill]' is ambiguous. It could mean either an agreement in principle or approval of a concrete proposal. In my judgment, it is appropriate to give the appellants the benefit of the doubt on this issue. Unlike in the case of Kirkintilloch, there is no evidence of concrete draft purchase contracts being available to the board. It is unclear whether the price for each site had been finally agreed. There is also the point that Advalorem did not have the money available to pay the purchase price which was being negotiated. This point is of less weight, since Advalorem had signed the contract for the purchase of the Kirkintilloch land without having the moneys available to complete and was therefore not averse to taking that risk, but it is a point against a final agreement to purchase being authorized.

91 Accordingly, in my judgment, the breaches which the FSC can identify in respect of these two sites are:

(a) The Black Partnership valuations do not assess the market value, as defined either in the PPM or in the Red Book.

(b) The valuations were based on three special assumptions.

(c) The valuations do not say in terms whether the special assumptions are realistic or reasonable, although they admittedly give some comfort that some development might be realistic.

(d) The valuations themselves say nothing about whether any application or enquiries had been made into obtaining planning permission for the site.

(e) There was no documentary or other evidence that the land was a distressed asset. Again, there was no discussion at the board meeting about whether the land was a distressed asset.

92 Again, the FSC was, in my judgment, entitled to find that Mrs. Compson and Mr. Weal both knew the above. Further, for the reasons

> set out in relation to the Kirkintilloch land, there was no possible basis for either appellant to believe either the Sluidubh or the Easterhill land was a distressed asset. As with the Kirkintilloch land, reliance on Mr. Compson and Mr. Redford is irrelevant. It follows that Mr. Weal's appeal in respect of the findings of fact at para. 6.1 of his decision letter, and Mrs. Compson's appeal in respect of the findings of fact in para. 5.1 of her decision letter, insofar as they relate to Sluidubh and Easterhill, both fail."

Thereafter, Jack, J. went on to find that the CEO's conclusion at para. 6.2 that Mr. Weal had not acted with "due skill, care and diligence" was, on the basis of the facts found, unassailable.

15 In respect of the sanction imposed, Jack, J. acknowledged that Mr. Weal had only attended one board meeting; that the approval for the purchase of land at Sluidubh and Easerhill was no more than an "in principle" approval; and that no investor had lost money from his actions. Nonetheless, he concluded that his failure to ensure that proper valuations were obtained which complied with the PPM was a serious breach of his duties and, after acknowledging that the CEO was better placed to determine what sanctions were appropriate to further the FSC's regulatory objectives, he said that had she imposed stiffer sanctions he would have upheld them.

16 Section 45(7) of the Act provides that the decision of the Supreme Court on any question of fact is final but an appeal from such a decision of fact lies to this court on any question of law. For Mr. Weal, it is accepted that he is bound by the findings of fact made by Jack, J.

17 One ground of appeal is advanced:

> "The learned judge erred in law in that he failed to identify or to apply the correct test to be adopted by the [CEO] in reaching a decision as to whether a person licensed under the [Act] can lawfully be made the subject of a direction pursuant to s.35(1A) of the Act, or a notice pursuant to s.10 of the Act.
>
> The learned judge thus wrongly concluded that it was open to him to dismiss the appeal on the mere basis that the appellant knew the facts referred to in para. . . . 91 of the judgment without performing any general overall assessment of the appellant's competence, character, diligence, honesty, integrity or judgment, or [his] current ability to perform the duties of a licensed person."

Mr. Gomez submits in his skeleton argument that it was incumbent upon Jack, J. to set out the correct test to be applied as to when a person acts without "due skill, care and diligence in the conduct of its fiduciary services business." He said that the test in Gibraltar to be applied to

directors is to be found in the common law but that reliance may be had upon s.174 of the UK Companies Act 2006 which provides that:

> "(1) A director of a company must exercise reasonable care, skill and diligence.
>
> (2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with—
>
> (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and
>
> (b) the general knowledge, skill and experience that the director has."

In *In re D'Jan of London Ltd.* (2), Hoffmann, L.J., considering very similar language in s.214(4) of the UK Insolvency Act 1986, expressed the view that the statutory provision accurately stated the duty of care owed by a director at common law ([1993] BCC at 648). In relation to the test that is to be applied to directors, Mr. Gomez submits that it has both an objective and a subjective element and that in its application there has to be a judicial assessment of the director's conduct; and that the assessment depends on the part which a director "could reasonably have been expected to play" in the conduct under consideration (*Bishopsgate Inv. Mgmt. Ltd. (in liquidation)* v. *Maxwell (No. 2)* (1) ([1994] 1 All E.R. at 264)). He further submits that in regulatory proceedings there has to be a general overall assessment of the person's competence, character, diligence, integrity and judgment, and his current ability to perform properly the duties of director, and that Jack, J. failed to properly apply the common law test or undertake the general overall assessment.

18 The relevant statutory provisions are these. By virtue of s.10(1) of the Act, the CEO may impose such conditions on licences "as appear to the [CEO] to be necessary or desirable for the protection of investors . . ." For its part, s.11 allows the CEO to alter a licence, *inter alia*, if a licensee contravenes a provision of the Act or fails to satisfy an obligation to which he is subject by virtue of the Act (s.11(2)(b)), or the CEO "considers it desirable for the protection of investors, of the public or the reputation of Gibraltar as a financial centre" (s.11(2)(h)). In turn, reg. 5 of the Financial Services (Conduct of Fiduciary Services Business) Regulations 2006 provides: "A licensee shall act with due skill, care and diligence in the conduct of its fiduciary services business." It is self-evident that a breach of reg. 5 could properly engage the exercise of the CEO's power under ss. 10 and 11.

19 It follows that the test to be applied is whether Mr. Weal acted with due skill, care and diligence. But application of that test needs to be considered in the statutory context in that Mr. Weal was no ordinary

director, but rather a licensed experienced investor funds director subject to regulation by the FSC. In my judgment, given the nature of the enactment and its regulatory provisions aimed at the protection of investors, the plain reading of reg. 5 establishes an objective test. Although reliance upon authorities dealing with the common law test of a director's duty can assist, the dual objective/subjective test does not have to be imported.

20 However, at the hearing, Mr. Gomez's submissions took a rather different form from those advanced in his skeleton. His submissions, as I understand them, are to the effect that, although Jack, J.'s primary findings of fact cannot be challenged, it is open to this court to hold that he reached the wrong conclusion; and that acceptance of the valuation reports and the approval of the purchase of land should not have been construed as being in the nature of a final decision of the board but rather as part of a continuum. He further submitted that Mr. Weal had intended to travel to Scotland to undertake further inquiries in respect of the land, and that, whilst Mr. Weal may not have undertaken a detailed forensic examination of what was before him at the board meeting, had there not been supervening events he would have undertaken his director's duties with skill, care and diligence, albeit adopting a different approach. In support of that submission, Mr. Gomez relied upon a somewhat garbled transcript of a meeting held on November 3rd, 2014 with members of the FSC in which, while seeking to explain his conduct, Mr. Weal told the meeting that—

> ". . . at the time that we had the board meeting she does kind of things that possibly could be an interest then you ask her for the due diligence after that they will also discuss that I had to go out to Scotland as well, the certain respective land could be taken up. There was no such contract or anything that had moved further there is no way we would have ever been buying that land without before due diligence and everything else done in it. I mean, that was simple a meeting had to look in at stuff as work in progress."

He also relies upon a document dated September 7th, 2013 from Messrs. Gomez & Co. (which at the time was also acting for Mr. and Mrs. Compson) in response to the FSC's tentative findings in which it is said: "As part of the process of identifying such suitable properties, Mr. Brian Weal had agreed to accompany Mr. Compson at a further visit to Scotland to view these and other sites when the fund was suspended." Mr. Gomez further seeks to bolster his submission that the approval was but merely part of an ongoing process by relying upon the finding of Jack, J. that Advalorem did not have the moneys to complete the purchase of land at Sluidubh and Easterhill (2015 Gib LR 435, at para. 90). This is a somewhat surprising submission given that, in the September 7th, 2013 document, the position adopted to justify the possible transaction is that

£30m. of investments in Advalorem "were in the pipeline." It is also instructive to note that, before Jack, J., the intention of visiting Scotland to undertake further inquiries was not advanced; rather, as appears from the skeleton relied upon in the Supreme Court, the case then for Mr. Weal (and Mrs. Compson) related to issues of knowledge and attribution. Moreover, the FSC transcript and the passage in the Gomez & Co. response to the FSC merely support the assertion that Mr. Weal would have been visiting Scotland. They do not show any intention on his part to undertake further inquiries in respect of land at Sluidubh and Easterhill, nor is any cogent explanation given as to why it was necessary to travel to Scotland to undertake any such inquiries. In any event, by virtue of s.45(7) of the Act, appeals to this court lie only on questions of law. Mr. Gomez fails to address how or why this court on a second appeal should consider what are fresh assertions of fact and for that reason alone the submission advanced must fail.

21 In this case, whether Mr. Weal exercised reasonable care, skill and diligence as a director of Advalorem falls to be considered exclusively in the context of the March 13th, 2013 board meeting. The language used in the minutes is important: "it was agreed that valuation reports be accepted and the purchase of the land be approved." That language resonates of the "approve the purchase" found in para. 5.2.1 of the PPM. In my view, it is evident that that was the process that was being undertaken. That being the case, it is self-evident that Mr. Weal failed to make any inquiry as to whether this was in fact a proposed purchase of a distressed asset or what the position was in respect of planning permission, and that he was willing to accept valuations which contained "fantasy assumptions" which made them worthless. That of itself would be sufficient to breach the objective standard of "skill, care and diligence" required by reg. 5. But the position is compounded by Jack, J.'s finding that Mr. Weal knew of those breaches (*ibid.*, at para. 92). Indeed, if in applying the test there were a need for a subjective element, that finding would suffice.

22 For these reasons, I would uphold the decision of Jack, J. and dismiss the appeal.

23 **SMITH, J.A.** concurred with both judgments.

24 **RIMER, J.A.:** I have read the judgment of Dudley, C.J. in draft and I agree that Mr. Weal's appeal should be dismissed.

25 Dudley, C.J. has set out the only ground of appeal against the order of Jack, J. that was advanced by Mr. Gomez on behalf of Mr. Weal. Its essence is that the judge proceeded on the basis that, once he was satisfied that the FSC had been entitled to find that Mr. Weal knew each of the matters listed his judgment (2015 Gib LR 435, at para. 91), he was, without more, justified in concluding that the Chief Executive was entitled

to make the direction as regards Mr. Weal that she did. It is said that the judge was in error in failing first to identify the test by which Mr. Weal's claimed shortcomings fell to be assessed and that he could not have concluded as he did without making a general assessment as to Mr. Weal's "competence, character, diligence, honesty, integrity or judgment, or [his] current ability to perform the duties of a licensed person."

26 There is nothing in this ground. The Chief Executive's decision was based on her finding that Mr. Weal had not acted in the conduct of affairs of Advalorem with "due skill, care and diligence" and thus had breached the fifth statement of principle applying to a licensee under the Financial Services (Conduct of Fiduciary Services Business) Regulations 2006, which provides that: "A licensee shall act with due skill, care and diligence in the conduct of its fiduciary services business" (reg. 5).

27 Once the Chief Executive had found that Mr. Weal had breached that principle, that was sufficient to entitle her to issue the direction that she did. Jack, J.'s conclusion was that her finding in this respect was unassailable (*ibid.*, at para. 103). There was no need for Jack, J. to consider the wider matters about Mr. Weal's competence *etc.* to which the ground of appeal refers.

28 That is sufficient to dispose of the appeal, although I should refer to the main thrust of the argument that Mr. Gomez advanced to us, which was by way of an attempt to re-argue the facts. It was to the effect that, insofar as the Chief Executive's judgment as to Mr. Weal's failure to act with due skill, care and diligence was based on his contribution to the resolution of the Advalorem board meeting held on March 13th, 2013, it was unjust. That is because, as Mr. Gomez repeatedly asserted, that resolution merely marked the beginning of a process towards any purchase of the Easterhill and/or Sluidubh sites. He pointed out that there was evidence before the FSC that Mr. Weal intended to travel to Scotland to view these and other potential sites. As far as I am aware, that was the extent of the evidence of what Mr. Weal was proposing to do in relation to the sites, but Mr. Gomez asserted that it entitled the court to find that Mr. Weal would be investigating all aspects of the possible purchase of the sites, including whether the sites were distressed assets and what, if any, planning applications had been made in respect of them.

29 There is no evidence that Mr. Weal's future intentions went to such lengths but any inquiry into such considerations is anyway beside the point. His shortcoming was in assenting to a resolution by Advalorem's board to pursue the attempted purchase of the two sites without, apparently, giving any consideration to whether either site was a distressed asset or, if either was, whether it also satisfied the planning requirements applying to distressed assets by para. 5.2.1 of the PPM. Mr. Weal did not need to travel to Scotland to find out about either of these matters. In the

first instance, all he needed to do was to ask Mr. Compson at the meeting whether either site was a distressed asset and what the planning position was in relation to it. What answer he would have got if he had done so, I do not know. But there is no suggestion that he asked any such question. There is no evidence that either site was a distressed asset, and Jack, J. found that the FSC was entitled to find that Mr. Weal knew that. Nor was there any evidence that either site satisfied the PPM's planning requirements.

30 Mr. Gomez agreed that the sense of the board resolution was that it would be followed by an attempt by Advalorem to purchase the sites. Mr. Weal was, therefore, lending his support to the proposed purchase of land which, as far as he knew, did not qualify as land that Advalorem ought to be considering as a possible purchase. His concurrence in the pursuit by Advalorem of such a purchase was, therefore, a serious shortcoming in the performance of his duties as a director of Advalorem and as a licensee. Either he was unaware of the PPM's criteria governing assets that Advalorem could invest in or he negligently overlooked them. If there is added to these shortcomings his acceptance of the extraordinary valuation reports from the Black Partnership, based as they were on three special assumptions as to the reasonableness of which they said nothing, there can be no doubt that the Chief Executive was justified in finding that his contribution to that board meeting fell below the standard of skill, care and diligence that his licence required of him.

31 This appeal will be dismissed.

Appeal dismissed.