

HEPBURN, J

This is an appeal by the First Defendant/Appellant, Accuvest Funds Services Limited ("Accuvest") and the Second Defendant/Appellant, South American Investment Fund Limited ("SAIF") (together "the Appellants") by notice of motion filed 28 April 2011 ("the Motion") from the Decision ("the Decision") given by the Hearing Panel ("the Panel") on 29 March 2011 and communicated to the Appellants on 31 March 2011. The Panel found the Appellants guilty of certain breaches of the Securities Industries Act (the "SIA"), the Investment Funds Act, 2003 (the "IFA") and the Investment Funds Regulations (the "Regulations") and fined the Appellants a total of \$81,000.00. This appeal is against the entirety of the Ruling of the Panel, that is to say, the finding of guilt and the impositions of fines.

The Statutory Regime

2. The Securities Commission of The Bahamas ("the Commission") is a statutory body established by section 3 of the SIA. The Commission's functions are set out in section 4(1) of the SIA, viz.:

4. (1) **The functions of the Commission shall be —**
- (a) **to formulate principles to regulate and govern mutual funds, securities and capital markets;**
 - (b) **to maintain surveillance over mutual funds, securities and capital markets ensuring orderly, fair and equitable dealings;**
 - (c) **to create and promote conditions to ensure the orderly growth and development of the capital markets;**
 - (b) **to advise the Minister generally regarding mutual funds, securities and capital markets; and to do such other things as may be prescribed by this Act or by any other written law.**

3. By section 4(2) of the SIA, the Commission is empowered "to do anything which is calculated to facilitate or is incidental or conducive to the proper discharge of its functions under subsection (1).

4. The Commission also has certain regulatory functions under Part V of the IFA.

46. (1) It shall be the duty of the Commission –
- (a) to maintain a general review of the operations of investment funds and parties related to investment funds in The Bahamas.
 - (b) to monitor, by way of receipt of regular reports or in such other manner as it thinks necessary the affairs or business of any investment fund or party related to an investment fund in The Bahamas
- (2) The Commission may make ruled providing for such matters as may be necessary or expedient for giving effect to its duties.

47. (1) The Commission shall have the authority to regulate the investment fund industry and the operations and duties of investment funds and parties related to the investment fund.

(2) Without prejudice to the generality of the foregoing the Commission shall have the authority to establish by rules the standards or educational criteria, if any, which govern the suitability of a party related to an investment fund or contracted to provide any of the services of a party related to an investment fund.

48. In the exercise of its functions under this Act the Commission shall satisfy itself that the provisions of the Financial Transactions Reporting Act are being complied with.

5. The Disciplinary Committee of the Securities Commission of The Bahamas (“the Disciplinary Committee”) is a statutory body established under section 34(3) of the SIA Act:

34. (3) To assist the Commission and the Executive Director in carrying out the functions hereby required, the Commission shall establish a Disciplinary Committee comprising five persons including not more than two persons who are members of the Commission.

6. The composition of the Disciplinary Committee are set out in SIA Regulation 120:

120. (1) Pursuant to section 34(3) of the Act, the Disciplinary Committee shall be a standing body comprised of five individuals which may include not more than two persons who are members of the Commission, appointed by the commission to serve for terms of two or three years.

(2) The non-Commission members of the Disciplinary Committee shall be citizens of The Bahamas, who are of the highest reputation and character and who have a background in law, banking, government, accountancy or economics

and they shall not be connected directly with the securities industry in The Bahamas.

(3) Two or three members of the Disciplinary Committee may be appointed by the chairman of the Commission for any investigation being conducted by the Executive Director; the chairman or the deputy chairman of the Commission shall serve as the chairman of the Disciplinary Committee.

7. The manner in which the hearing of a disciplinary matter is to be conducted is set out in SIA Regulation 121. SIA Regulations 121(1) and 121(6) are set out below:

121. (1) Any hearing in a disciplinary matter shall be presided over by a hearing panel of the Commission which shall be comprised of any number of members of the Commission who are not already on the Disciplinary Committee, but not less than three, who have been appointed by the chairman; the chairman shall also appoint a member to serve as the chairman of the hearing panel.

(2) ...

(3) ...

(4) ...

(5) ...

(6) Generally, the hearing may be conducted as follows –

(a) after each party has made its opening statement, the Executive Director shall present his case, followed by the defendant presenting his;

(b) both sides may submit exhibits and call witnesses, including experts, to testify;

(c) they shall not be bound by the formal rules of evidence;

(d) each party may cross-examine the others' witnesses;

(e) the commission hearing panel may question either party at any time during the proceedings;

(f) the Executive Director shall have the burden of proof.

The Appeal

8. By their Motion, the Appellants seek an order that:

“WITH REGARD TO THE FIRST APPELLANT

1. Although the First Defendant was licensed in 2004 as a restricted fund administrator there were special circumstances that explain its failure to comply with the regulatory regime of the Investment Fund Act during the years 2005, 2006 and 2007. In any event, the First Appellant's purpose was to administer funds licensed and regulated by the Securities Commission. Further, [Accuvest] was not active in the funds administration business, during the period 2004 thru 2007.

2. There were extreme special circumstances that justified and explained any failure by the Appellant to communicate properly with the Respondent in any way;
3. The penalties imposed upon the Appellant are completely disproportionate to the breaches complained of;
4. That the original order be stayed pending the hearing of this Notice and all mention of the decision be removed from the record and the website of the Securities Commission until the outcome of this appeal.

WITH REGARD TO THE SECOND APPELLANT

5. South American Investment Fund Limited ("SAIF") are not liable to the Respondent as it is not in reality a fund;
6. SAIF was in reality an IBC and should have been regulated under the relevant Act and not the Act applied by the Disciplinary Committee of the Respondent;
7. The Second Appellant was not in reality a fund capable of being regulated by the Respondents; rather it was a purely private vehicle that at no stage involved any risk to public investors. The Appellant never traded any shares and its underlying structure was essentially static with any income being dividends on the underlying operation;
8. That the original order by stayed pending the hearing of this Notice and all mention of the decision be removed from the record and the website of the Securities Commission until the outcome of this appeal."

9. The grounds of the Appeal as set out in the Motion are:

"Introduction

1. The Respondent has made a number of factual errors in its finding and has wrongly imposed penalties upon the First and Second Appellants. In any event, if any penalty is warranted the one imposed is unnecessarily harsh and disproportionate. The Appellants and in particular SAIF, is a private vehicle and not a public fund. Both the Appellant are creatures created to serve the financial needs of a private family and its business. No member of the public or any outside investor was ever able to invest in it and therefore, was never put at risk.

First Appellant

2. Although it became licensed in 2004, during the financial years 2005, 2006 and 2007 the First Appellant was not carrying out administration services and as a consequence no audited financial reports were produced nor were any produced for he year.
3. The Respondent has erred in fact by finding that administration activities had commenced at the time of inspection in 2007. They had not. Any evidence that such activities had commended is merely evidence of holdings by a third party financial consultant, Weston B. Charles & Co.
4. Although the communications between the First Defendant and the Respondent may have been able to have been criticised and although the First Defendant may have failed to file its annual statement as fund

administrator this has been explained by the “special circumstances” that the individual involved was operating under at the time and highlights why the penalties imposed by the Respondent are disproportionate and unfairly harsh.

Second Appellant

5. The Appellants did not elect to be regulated by the Respondent and therefore cannot be subject to any penalties imposed by it. SAIF is a closed end fund and can elect to be registered and regulated under the Respondent. This is supported by Section 7 of the Investment Funds Act. At no stage prior to 2008 did SAIF elect to be registered and the Respondent did/has not produced an evidence to show that SAIF had so elected until it was licensed by the Commission on its election which did not begin until 2008. Thus anything prior to 2008 cannot come under the jurisdiction of the Commission.
6. SAIF was not licensed until 2008 and it is from that period that it became subject to the Investment Funds Act. Again the Respondent has not shown any reason why it believes the Second Appellant was subject to this Act before 2008. It follows that the penalties imposed by the Respondent for alleged breaches prior to 2008 must be overruled.
7. To be clear, the Appellant was under no obligation to be registered and licensed unless and until it elected to do so. The Appellant did not elect to do so until 2008. Any alleged breaches of the Act prior to the date are unsubstantiated and the Appellant was/is under no obligation to answer them as the Respondent had no jurisdiction over the Appellant.
8. Although the Second Appellant may have failed to communicate with the Respondent in a timely fashion, this has been explained by the “special circumstance” that the individual involved was operating under at the time and highlights why the penalties imposed by the Respondent are disproportionate and unfairly harsh.”

10. The Motion is supported by the Affidavit of Sean Nottage (“Mr Nottage”) a Director and General Counsel of Accuvest, and a Director of SAIF, dated 28 April 2011. Philip Stubbs (“Mr Stubbs” or the “Respondent”), is the Acting Executive Director of the Commission. His affidavit in response was sworn on 5 July 2011 and filed on 7 July 2011. The Record (“the Record”) for the hearing of the Appeal was filed on 26 May 2011. The documentary evidence relied upon by the parties in the hearing before the Panel on 28 January 2011 and the transcript (“the transcript”) of that hearing were included in the Record.

11. The Appeal is brought pursuant to section 42(1) of the SIA, which provides as follows:

42. (1) Any person aggrieved by a decision, refusal, ruling or order of the Commission may appeal to the Supreme Court in accordance with rules of court.

12. The Appeal is also brought pursuant to Rules of the Supreme Court ("RSC") Order 55, which provides as follows:

O.55 r.1

1. (1) Subject to paragraphs (2) and (3), this order shall apply to every appeal which by or under any enactment lies to the Supreme Court from any court, tribunal or person.

(2) This Order shall not apply to an appeal by case stated.

(3) The following rules of this Order shall, in relation to an appeal to which this Order applies, have effect subject to any provision made in relation to that appeal by any other provision of these Rules or by or under any enactment.

(4) In this Order references to a tribunal shall be construed as references to any tribunal constituted by or under any enactment other than any of the ordinary courts of law.

O.55 r.2

2. An appeal to which this Order applies may be heard and determined by a single judge.

O.55 r.3

3. (1) An appeal to which this Order applies shall be by way of rehearing and must be brought by originating motion.

(2) Every notice of the motion by which such an appeal is brought must state the grounds of the appeal and, if the appeal is against a judgment, order or other decision of a court, must state whether the appeal is against the whole or a part of that decision and, if against a part only, must specify the part.

(3) The bringing of such an appeal shall not operate as a stay of proceedings on the judgment, determination or other decision against which the appeal is brought unless the court by which the appeal is to be heard or the court, tribunal or person by which or by whom the decision was given so orders.

O. 55 r.4

4. (1) The persons to be served with notice of the motion by which an appeal to which this Order applies is brought are the following –

(a) ...
(b) ...

(2)
(3)

(4) In the case of an appeal against an order, determination, award or other decision of a tribunal, Minister, government department or other person, the period specified in paragraph (2) shall be calculated from the date on which notice of the decision was given to the appellant by the person who made the decision or by a person authorised in that behalf to do so.

O.55 r.5

5. Unless the Court otherwise directs, an appeal to which this Order applies shall not be heard sooner than 21 days after service of notice of the motion by which the appeal is brought.

O.55 r.6

6. (1) The notice of the motion by which an appeal to which this Order applies is brought may be amended by the appellant, without leave, by supplementary notice served not less than 7 days before the day appointed for the hearing of the appeal, on each of the persons on whom the notice to be amended was served.

(2) Within 2 days after service of a supplementary notice under paragraph (1) the appellant must lodge two copies of the notice in the Registry.

(3) Except with the leave of the Court, no grounds other than those stated in the notice of the motion by which the appeal is brought or any supplementary notice under paragraph (1) may be relied upon by the appellant at the hearing; but that Court may amend the grounds so stated or make any other order, on such terms as it thinks just, to ensure the determination on the merits of the real question in controversy between the parties.

(4) The foregoing provisions of this rule are without prejudice to the powers of the Court under Order 20.

O.55 r.7

7. (1) In addition to the power conferred by rule 6(3), the Court hearing an appeal to which this Order applies shall have the powers conferred by the following provisions of this rule.

(2) The Court shall have power to receive further evidence on question of fact, and the evidence may be given in such manner as the Court may direct either by oral examination in court, by affidavit, by deposition taken before an examiner or in some other manner.

(3) The Court shall have power to draw any inferences of fact which might have been drawn in the proceedings out of which the appeal arose.

(4) It shall be the duty of the appellant to apply to the judge or other person presiding at the proceedings in which the decision appealed against was given for a signed copy of any note made by him of the proceedings and to furnish that copy for the use of the Court; and in default of production of such a note, or, if such note is incomplete, in addition to such note, the Court may hear and determine the appeal on any other evidence or statement of what occurred in those proceedings as appears to the Court to be sufficient. Except where the Court otherwise directs, an affidavit or note by a person present at the proceedings shall

not be used in evidence under this paragraph unless it was previously submitted to the person presiding at the proceedings for his comments.

(5) The Court may give any judgment or decision or make any order which ought to have been given or made by the court, tribunal or person and make such further or other order as the case may require or may remit the matter with the opinion of the Court for rehearing and determination by him or it.

(6) The Court may, in special circumstances, order that such security shall be given for the costs of the appeal as may be just.

(7) The Court shall not be bound to allow the appeal on the ground merely of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned.

The nature of an appeal under RSC Order 55

13. The observations of May LJ in the English Court of Appeal, Civil, case of **EI Du Pont De Nemours & Co v ST Dupont** [2003] EWCA Civ 1368 on the nature of an appeal under RSC O. 55 at paragraphs 85, 88, 89 and 90 accurately reflect the role of the court hearing an appeal under O. 55 in The Bahamas, notwithstanding that case concerned an appeal brought pursuant to the English CPR 52.11:

85. In considering the nature of an appeal, certain questions intrinsically arise. Will the appeal court start all over again as if the lower court had never made a decision? Will the appeal court hear the evidence again? What weight is to be given to the decision of the lower court? Will the appeal court admit fresh evidence and, if so, upon what principles? To what extent and upon what principles will the appeal court interfere with the decision of the lower court? These and related questions are not answered simply by labelling the appeal process as a review or a rehearing.

...

88. Order 55, which applied generally to statutory appeals to the High Court, provided in rule 3(1) that an appeal to which that order applied should be by way of rehearing. By rule 7(2), the court hearing the appeal had power to receive further evidence on questions of fact, but without the restriction in Order 59 rule 10(2)¹. The court again had power to draw inferences of fact...

89. These provisions for a rehearing were not however references to a rehearing "in the fullest sense of the word" as noted by Brooke LJ in paragraph 31

¹ The English Order 59 concerns appeals to the Court of Appeal. Rule 10(2) provides that "in the case of an appeal from a judgment after the trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds".

of his judgment in *Tanfern Limited v. Cameron-MacDonald* [2000] 1 WLR 1311 at 1317. Brooke LJ was there referring to High Court appeals from a Master or Registrar to a Judge in Chambers under Order 58 rule 1. On those appeals, the judge treated the matter as though it came before him for the first time. The parties were able to bring forward fresh evidence which had not been before the Master unconstrained by restrictions applicable to the Court of Appeal. The judge hearing the appeal was able to exercise any discretion afresh. As Lord Atkin said in *Evans v. Bartlam* [1937] A.C. 473 at 478:

“I wish to state my conviction that where there is a discretionary jurisdiction given to the Court or a judge the judge in Chambers is in no way fettered by the previous exercise of the Master's discretion. His own discretion is intended by the rules to determine the parties' rights: and he is entitled to exercise it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the Master: but he is in no way bound by it.”

90. Rehearings on appeal under RSC Orders 55 and 59 were well understood not to extend to rehearings in the fullest sense of the word. The court did not hear the case again from the start. It reviewed the decision under appeal giving it the respect appropriate to the nature of the court or tribunal, the subject matter and, importantly, the nature of those parts of the decision making process which were challenged.

14. Thus, unlike appeals from the Registrar to the Judge in Chambers under RSC Order 58 which are brought simply by serving on every other party to the proceedings a notice to attend before the judge on a specified date in the notice without stating the grounds of appeal, appeals under Order 55 are brought by originating motion which must state the grounds of the appeal. The reason for the distinction is that under Order 58, the Judge in chambers exercises a fresh discretion unfettered by the decision of the Registrar although the Registrar's decision is given the weight it deserves. On the other hand, in appeals under Order 55, the court reviews the decision under appeal. In reviewing the Decision, I must give the Decision the respect appropriate to a tribunal which is comprised of persons who are not directly connected with the securities industry in the Bahamas but have a background in law, banking, government, accountancy or economics, the type of breaches which the Panel was considering and the fact that the appeal is against the entirety of the Decision.

Background

15. The Panel had before it, inter alia, the Exhibits at Tab 1 of the Record which formed a part of the Complaint. The following facts are gleaned from the Exhibits at Tab 1 of the Record:

- (i) Accuvest was licensed on 15 January 2003 as a Restricted Investment Fund Administrator pursuant to the now repealed Mutual Funds Act ("MFA") and re-licensed on 16 December 2003 as a Restricted Investment Fund Administrator ("RIFA") pursuant to s.34 of the IFA.
- (ii) SAIF was incorporated on 23 February 2000 and was administered by Winterbotham Trust Company Limited ("Winterbotham"), an Unrestricted Mutual Fund Administrator under the MFA.
- (iii) On 14 December 2004, Winterbotham licensed SAIF as a SMART Fund SFM003 ("SFM003") under the IFA.
- (iv) Winterbotham resigned as administrator sometime in 2005 and cancelled the licence of SAIF. By letter dated 14 June 2006 ("PS 3") SAIF advised the Commission that SAIF had appointed Accuvest as its Investment Fund Administrator in succession to administration provided by Winterbotham. The letter was signed by Mr Nottage, who at the time was a Director and General Counsel of Accuvest.
- (v) As a RIFA, Accuvest could not licence the funds it administered and had to make application to the Commission to have any funds it administered licenced.

- (vi) By letter dated 7 July 2006 ("PS4") the Commission acknowledged receipt of Mr Nottage's letter of 16 June 2006 and advised Mr Nottage that in addition to informing the Commission of the transfer of the administration of SAIF from Winterbotham to Accuvest, SAIF was required to provide the Commission with "the particulars prescribed in Schedule 9 of the Investment Funds Regulations, 2003 "and requested that "the necessary information be submitted in accordance with the legislation".
- (vii) Undercover of letter dated 31 January 2007 ("PS 6") Mr Nottage, on behalf of Accuvest forwarded cheque in the amount of \$500 representing "the Annual Principal Office fee payable with respect to our providing the principal office to [SAIF]"
- (viii) Almost a year later, undercover of letter dated 27 April 2007 ("PS 5") Mr Nottage, on behalf of Accuvest submitted their application for the "re-licencing" of SAIF. That letter is set out in full below.

"27 April 2007

BY HAND

**The Securities Commission of The Bahamas
Authorizations Department
Charlotte House
3rd Floor
Charlotte Street
P. O. Box N-8347
Nassau, Bahamas**

Re: South American Investment Fund – Application for Re-Licencing

Dear Sir/Madam:

Enclosed please find our application for the re-licencing of South American Investment Fund Limited (the "Fund").

Herein, we apply for the re-licencing of the Fund following the transfer of the administration of the Fund to Accuvest Fund Services Limited. As your records will show, this fund previously held licence #61-SFM003-002, which was issued by The Winterbotham Trust Company Limited, the Fund's

former administrator. This re-application is, however, for the licencing of the Fund as a SMART Fund #5 (SFM005, Rule 3, The Investment Funds (SMART Fund) Rules, 2005).

Apologies are made by the undersigned for the tardy filing of this application. Responsibility for overlooking the need to re-apply, and the delay in doing so, rests solely with the undersigned; the same being caused, in large part, by adverse personal circumstances.

Yours faithfully,

D. Sean Nottage,
Director & General Counsel
The Accuvest Group

Enclosures”

- (ix) On 27 May 2007 (“PS 7”) the Commission wrote to Mr Nottage as Director and General Counsel of Accuvest, acknowledging receipt of the application for the re-licencing of SAIF and advised him of the additional items which were required before the Commission would review the application.
- (x) By letters dated 29 June 2007 (“PS 8”) 31 July 2007 (“PS 9”), 2 January 2008 (“PS 10”), 14 March 2008 (“PS 11”) 22 April 2008 (“PS 12”) and 5 June 2008 (“PS 13”) respectively, the Commission requested from Accuvest the outstanding specified items in support of the re-licensing application of SAIF.
- (xi) By the letter dated 12 January 2008 (“PS 10”) the Commission also advised Accuvest through Mr Nottage that “the Commission is proceeding with disciplinary action for breaches of the Investment Funds Act 2003 in relation to the operation of the listed funds”.
- (xii) On 25 June 2008 SAIF was licensed as a SMART Fund SFM005 (“SMF005”).

16. The Commission conducted a routine inspection of Accuvest from 1 September 2007 to 28 September 2007 and found a number of breaches by Accuvest and SAIF. By letter dated 2 January 2008 ("PS10") the Commission informed Accuvest of its intention to proceed with disciplinary action for those breaches and served notice of a Disciplinary Committee meeting on 20 August 2009.

17. A Formal Complaint and Notice of Hearing dated 8 November 2010 (the "Formal Complaint") were sent to Accuvest under cover of the Commission's letter dated 11 November 2010. The documents referred to in paragraph 15 are exhibited to the Formal Complaint.

18. The alleged breaches together with the evidence on which the Commission relied in support of the allegations were set out in the Formal Complaint as follows.

(i) With respect of Accuvest:

BREACH 1

Accuvest is in breach of Section 42(2) of the [IFA] which states: "an investment fund administrator shall submit its financial statements in respect of the financial year of the administrator to the Commission within four months of the end of that financial year or within such extension of that period as the Commission may reasonably allow."

Evidence:

- (a) Accuvest failed to submit its annual financial statements ("AFS") within 4 months of the end of its financial year or at all for the periods ending 31 December 2005, 2006 and 2007 in breach of section 42(2) of IFA.
- (b) Accuvest failed to submit an application for an extension of time within which to file its AFS.
- (c) The Commission extended the time within which Accuvest was to file its 2008 AFS to 30 June 2009 yet Accuvest did not file its AFS for 2008 until 14 October 2009.
- (d) Following the Inspection in September 2007, Accuvest informed the Commission that it had not commenced operations and therefore had no

AFS to file. The Commission however, had evidence of Accuvest's operational activity with respect to at least one fund, namely SAIF.

BREACH 2

Accuvest is in breach of Section 26 of the Act which states: "The administrator of an investment fund shall use reasonable efforts to ensure that the investment fund does not carry on or attempt to carry on business as an investment fund contrary to provisions of this Act."

Evidence:

The Commission relied upon the correspondence passing between itself and SAIF and Accuvest set out at paragraph 15 hereof as evidence of Breach 2.

BREACH 3

Accuvest is in breach of Regulation 17(1)(g) of the Regulations, which states: "An investment fund administrator shall - ...

(g) Take all reasonable steps to ensure that operators are meeting their obligations and are complying with the [IFA] and these Regulations."

Evidence:

The Commission confirmed the operation of an unlicensed fund in non compliance with the provisions of the IFA and relied upon the correspondence passing between itself and SAIF and Accuvest set out at paragraph 15 hereof as evidence of Breach 3.

BREACH 4

Accuvest is in breach of Regulation 53 of the Regulations, which states: "The annual declaration made by an investment fund administrator pursuant to section 36(4) of the [IFA] shall be in Form B in Schedule 11 and shall be submitted to the Commission at the time of payment of the prescribed annual fee for the administrator."

Evidence:

The Commission asserted that Accuvest was legally obligated to submit annual declarations to the Commission pursuant to Regulation 53 of the Regulations and the Commission had not received any declaration from Accuvest to the date of the Complaint.

(ii) With respect to SAIF :

BREACH 1

SAIF was unlicensed yet operational and therefore breached Section 3 of the [IFA] which states: "An investment fund shall not carry on or attempt to carry on business unless–

- (a) It is licensed as –**
 - (i.) A professional fund;**
 - (ii.) A SMART fund; or**
 - (iii.) A standard fund; or**
- (b) It is registered as a recognised foreign fund."**

Evidence:

The Commission relied upon the correspondence passing between itself and SAIF and Accuvest set out at paragraph 15 above as evidence of Breach 1.

BREACH 2

Alternatively, SAIF is in breach of Section 5(1) of the [IFA] which states: "Notwithstanding section 3, a SMART fund shall not carry on or attempt to carry on business unless –

- (a) It complies with any written rule of the Commission establishing the parameters or requirements in respect of the category, class or type of investment fund; and**
- (b) The prescribed fees have been paid in respect of the investment fund."**

Evidence:

The Commission relied upon the correspondence passing between itself and SAIF and Accuvest set out at paragraph 15 above as evidence of Breach 2.

BREACH 3

While operating as a SMART fund model SFM003 as outlined above, SAIF is in breach of Regulation 52 of the Regulations, which states: "The annual declaration made by an investment fund under section 27(1)(a) of the [IFA] shall be in Form A in Schedule 11 and shall be submitted to the Commission at the time of payment of the prescribed annual license or registration fee."

Evidence:

The Commission asserted that SAIF was legally obligated to submit annual declarations to the Commission pursuant to Regulation 52 and the Commission had not received any declaration to the date of the Complaint.

19. The Appellants written Answer to the Complaint dated 13 December 2010 is at Tab 2 of the Record. At the hearing of the Complaint, the Appellants were represented at all material times by Mr Nottage, Director and General Counsel of Accuvest and Director of SAIF, and Robert P Jensen, Director of Accuvest and SAIF, respectively. The Respondent was represented by Mr Ward.

20. Mr Nottage made the following admissions and "qualified admissions" before the Panel, which mirrored closely the Appellants response to the allegations set out in the Answer.

21. As regards to Breach 1 against Accuvest, Mr Nottage made a qualified admission. He stated that for the periods ending 31 December 2005, 2006 and 2007 no administration services were being carried out by Accuvest and therefore no AFS were produced. He also stated that letter PS3 was merely the formal notification that administration services would be taken over by Accuvest once re-licencing of SAIF was completed and that the re-licencing process was not completed until the financial year 2008. As to the filing of the AFS for the financial year ended 31 December 2008, Mr Nottage admitted that the filing had not taken place because of unavoidable delays in the completion of the AFS. (See transcript at Flag 7 of the record, at page 7 line 16 to page 8 line 9)

22. Mr Nottage, by way of explanation, told the Panel that the assertion by the Disciplinary Committee that at the time of the inspection in September 2007 it had discovered evidence of Accuvest's operational activity in connection with SAIF was most likely a reference to the evidence that SAIF's holding were kept by Accuvest's third party consultant, Western B Charles & Co., and that "the administrative records had not commenced within Accuvest itself". (See transcript at Flag 7 of the record, at page 8 lines 10 to 19.)

23. Breach 2 against Accuvest was denied by Mr Nottage, who submitted that at the relevant time SAIF "was either licensed as a SMART Fund or was in the process of re-registering as a SMART Fund once the transfer to Accuvest was announced". He admitted, however, that the time between the announcement of the change in the administrator and the licensing of [SAIF]" was protracted. (See transcript at Flag 7 of the record, at page 9 lines 1-8.)

24. As regards Breach 3 against Accuvest Mr Nottage made a qualified admission. His explanation with respect to Breach 3 pretty much mirrored the explanation given for Breach 2.

25. Mr Nottage neither admitted nor denied Breach 4 against Accuvest. He informed the Panel that at all times Accuvest was under the impression that the annual declarations for all funds administered by Accuvest were fully complaint and that he had not been able to verify if they were all complaint.

26. Breach 1 against SAIF was denied by Mr Nottage. He informed the Panel that SAIF "had an original SMART fund licence when administered by a previous administrator and at the time Accuvest was unaware of the need to re-register SAIF until informed of the fact by the Commission when Accuvest informed the Commission that it would be taking over the administration of SAIF. (See transcript page 10 lines 17 to 24). Mr Nottage also informed the Panel that the delay in completing the re-registration process was caused largely by special circumstances.

27. Mr Nottage denied Breach 2 against SAIF. He informed the Panel that at all relevant times SAIF was either a licenced SMART fund while it was administered by a previous administrator (i.e. Winterbotham) or in the process of complying with the requirements and that the protracted time it took to SAIF to comply with the requirements was due to special circumstances.

28. According to Mr Nottage, the reason for the protracted nature of the application for re-registration of SAIF "as well as many of the facts and circumstances stated in the formal complaint are due in very large part to the special circumstances mentioned before". (See transcript at Flag 7 of the record, at page 9 lines 9-14)

29. Mr Nottage neither admitted nor denied breach 3 against SAIF. Mr Nottage informed the Panel that the allegation surprised them as at all relevant times the Accuvest was under the impression that the annual declarations for all funds operated by Accuvest were fully up-to-date. He stated that he had not been able to find evidence to the contrary as stated in the Commission's complaint.

The Ruling of the Panel

30. After considering the evidence before it the Panel found Accuvest and SAIF guilty of all of the breaches in the Complaint and imposed sanctions against Accuvest and SAIF and Accuvest. The Decision of the Panel is at Tab 5 of the Record. The actual Ruling appears at page 5 line 10 through page 7 line 29. The Sanctions imposed by the Panel appear at page 6 line 11 to page 7 line 26. SAIF is referred to as "the Fund" in the Ruling. It is only those parts of the Decision of the Panel that relate to the actual Ruling and the Sanctions imposed by the Panel that are reproduced below :

"RULING

The Panel, having deliberated on the above matter following the hearing of same, rules as follows:

Accuvest

The Panel had found Accuvest guilty of the breaches in the Complaint based on the evidence presented, including the correspondence exhibited by the Executive Director which evidence their operations. From the evidence presented, Accuvest was operational and failed to submit its audited annual financial statements for 2005 through 2007, inclusive. They also failed to submit the statutory annual declaration for 2006.

The defendants indicated that special circumstances rendered one of their operators unable to perform his duties, a result of which was the breaches referred to. In making this submission however, Accuvest all but outright acknowledged the breaches referred to. The defendants referred to the special circumstances as being the main reason for the occurrence of the breaches. As indicated on this page at lines 5-7 above, the defendants also told the Panel what was done afterward to prevent a recurrence of these breaches. However, there was no indication as to what, if any, efforts were made at the time in question to prevent the commission of the breaches by Accuvest and the Fund. Generally, while the Panel accepts circumstances may result in hindrances or obstacles to any operation, reasonable efforts must be made to ensure that regulatory obligations are met in a timely manner.

It is the Panel's view that Accuvest did not use reasonable efforts to ensure the Fund and its operators did not carry on business contrary to the Act. They also failed to meet their obligations and comply with the Act and Regulations.

The Fund

The Panel has also found the Fund guilty of the breaches in the Complaint based on the evidence presented. The Panel noted that once the former administrator resigned the Fund's license could no longer subsist. As a RIFA, Accuvest could not license the Fund and therefore was obliged to ensure that the required documentation was submitted to the Commission to license the Fund. The evidence presented by the Executive Director indicates that the Fund did not cease operations pending its submission of all of the documentation required for it to be licensed. The Panel notes the Commission's repeated requests for the required documents, and that it took the defendants about two (2) years to submit those documents.

The Panel finds that the Fund was operating without a license and also failed to submit its annual declaration for the year 2008. As indicated at line 36 on page 4 above, the Executive Director presented an alternative offence. The Panel determined however that the Fund was operating without a license, and is therefore guilty of Breach 1 in the Complaint.

SANCTIONS

In making its decision, the Panel considered the prevailing circumstances such as these being first-time violations and whether the actions complained of are