IN THE GRAND COURT OF THE CAYMAN ISLANDS

IN THE MATTER OF THE PROCEEDS OF CRIME LAW (2020 REVISION)

AND IN THE MATTER OF AN APPEAL PURSUANT TO REGULATION 55ZK OF THE ANTI-MONEY LAUNDERING REGULATIONS (2020 REVISION)

CAUSE NO: GC68 OF 2020

BETWEEN:

ETIENNE BLAKE

APPELLANT

AND:

CAYMAN ISLANDS LEGAL PRACTITIONERS ASSOCIATION

FIRST RESPONDENT

CAYMAN ATTORNEYS REGULATION AUTHORITY

SECOND RESPONDENT

CIVIL REGISTRY PAYMENT $200 APR 15 2020 351083 CAYMAN ISLANDS GOVERNMENT

GRAND COURT CIV-01 CAYMAN ISLANDS

CLERK OF COURT CIV-01 APR 15 2020 Cayman Islands Government

APPLICATION FOR LEAVE TO APPEAL

To the Clerk of the Court, Law Courts, George Town, Grand Cayman

Name, address, and description of Applicant(s)	The Appellant is: Etienne Blake; by Partners (1) Vaughan Carter; and (2) Anthony Akiwumi of 3rd Floor, Bayshore Centre, 31 Warwick Drive, George Town, Grand Cayman, Cayman Islands
Name, address and description of the Respondent(s)	The Respondents are: (1) Cayman Islands Legal Practitioners Association c/o Ogier Global (Cayman) Limited, 89 Nexus Way, Camana Bay, Grand Cayman, Cayman Islands; and (2) Cayman Attorneys Regulation Authority of 2nd Floor, Century Yard, Cricket Square, Grand Cayman, Cayman Islands
Judgment, order, decision or other proceeding in respect of which relief is sought	An appeal is sought with respect to: A Fine Notice Issued on 16 March 2020, issued pursuant to the Anti-Money Laundering Regulations (2020 Revision) and the fine purported to be imposed therein

Interim Relief Sought

i. Stay of any further proceedings in respect of the Fine Notices Issued on 16 March 2020 pursuant to the Anti-Money Laundering Regulations (2020 Revision) by First and/or Second Respondent;
ii. Protective Costs Order with respect to this Appeal

Relief Sought

i. That the Appeal be allowed and orders made quashing the decision of the First and/or Second Respondent to unlawfully issue fine notices against the Appellant and barring any further action against the Appellant by either of the First or Second Respondent;
ii. Declarations that the First and/or Second Respondents acted unlawfully contrary to section 4(9) of the Proceeds of Crime Law (2020 Revision);
iii. Declarations that neither the First nor Second Respondent has any legal authority to supervise,

regulate or to issue fines or other penal sanction or take any form of enforcement action as against the Appellant;

iv. Declarations that the First and/or Second Respondent acted unlawfully and have acted or intend to act in contravention of sections 7, 9, 12, 15, 16, and 19 of the Cayman Islands Constitution Order, 2009 as against the Appellant;

v. A Declaration that the First Respondent at no material time enjoyed the legal authority to create the Second Respondent as a separate supervisory authority;

vi. A Declaration that the First Respondent has not and cannot delegate the assignment of duties of supervisory authority to the Second Respondent, and;

vii. The Second Respondent does not enjoy separate legal status or adjudicatory independence from the First Respondent.

Signed Etienne Blake. Dated: 14 April 2020

SUBJECT MATTER OF APPEAL

The matter for which the Appellant seeks leave to appeal is the decision of either or both of the First and Second Respondent to issue a "Discretionary Fine" pursuant to Regulation 55R and 55S of the Anti-Money Laundering Regulations (2020 Revision) ("the AMLR's"), in the sum of CI$78,000.00 as against the Appellant, for its failure to register with the Second Respondent, which the Second Respondent purports is required by 55F of the AMLRs. Such Discretionary Fine was notified to the Appellant by way of an emailed "FINE NOTICE" sent on 16th March to email addresses: vaughan.carter@etienneblake.com and anthony.akiwumi@etienneblake.com) by one Jody Woodward, purportedly acting on behalf of the Second Respondent.

LEAVE TO APPEAL

Pursuant to Regulation 55ZK (1) of the AMLRs, a party who receives a fine notice for a discretionary fine may apply within thirty days after receiving the fine notice for leave to appeal against the original decision. Leave is hereby sought in respect of the decision to issue such fine, pursuant to Regulation 55ZK (2), on the basis that the decision was unlawful on the grounds set out herein.

Introduction

1. The Appellant is an independent, locally based law firm, licenced to practice Cayman Islands Law.

2. The First Respondent is a private company limited by guarantee and incorporated on 2nd October 2018.[1] By the objects of its Memorandum the First Respondent's remit, insofar as the supervision and monitoring of terms Anti Money Laundering, was, at inception and until 16th December 2019, limited to its members only.

3. Whilst not required to, the First Respondent, at incorporation, filed a Memorandum which detailed, at Object (m) the following:

   (m) "to act as a "supervisory authority".(as defined in the Anti-Money Laundering (Designated Non Financial Business and Professions) (No.1) Regulations 2017) for firms of attorneys at-law who are also members of CILPA, being an authority which CILPA must cause to be supported by a suitably-financed supervisory executive."

4. At the hearing of this Appeal, the Appellant will rely on the preclusionary effect of Object (m) of the First Respondent's Memorandum.

[1] The First Respondent is a private sector association pursuant to Schedule 3 of the Monetary Authority Law (2020 Revision).

5. The Second Respondent is not, by its own admission a legal entity.[2] It claims, as a sub-committee of the First Respondent, to be the lawful delegatee, from the First Respondent of the Supervisory Authority powers designated to the First Respondent by the by the Cayman Islands Government pursuant to section 4 (9) of the Proceeds of Crime Law (2020 Revision) (the "PCL").

6. As a sub-committee of the First Respondent, the Second Respondent, at all material times, was governed by Regulations issued by the First Respondent namely, "Regulations in respect of CARA dated 29th May 2019 as amended on 27th January 2020".

7. The Regulations are subject to the following proviso which states: state, *inter alia*, as follows:

"7 The terms of reference of the CARA Board ("the Board") are

(1) In relation to Anti-Money Laundering and related fields, in respect of firms of attorneys, to exercise educational, monitoring, regulatory, investigative, adjudication, disciplinary, enforcement, supervisory, civil litigation and cost recovery powers and functions vested in CILPA or the Council under regulation 55B(c) Anti-Money Laundering Regulations (2020 Revision), as amended, in its capacity as designated supervisory authority for AML;

(2) To exercise the following other functions –

(a) consenting on behalf of CILPA in its approved regulator capacity, and

(b) <u>making any application that relates to regulatory functions delegated to the Board or to regulatory arrangements relating to the discharge of those functions and providing the application is not –</u>

<u>(i) to regulate persons not presently regulated or to cease to regulate persons;</u> or

(ii) to change CILPA's position as an approved regulator." [Our emphasis]

8. The Appellant has <u>never</u> been a member of First Respondent.

[2] See Third Respondent's Minute of Meeting dated 29th May 2019 where the following Resolution was effected: "IT WAS RESOLVED that CARA be established as a subcommittee of CILPA and the Regulations adopted ...". See Further CILPA Regulations in respect of CARA dated 29th May 2019 as amended on 27th January 2020.

9. The Appellant avers that, at all material times proximate to the issuance by the Second Respondent of a Regulation 55F Registration Notice[3], [the Anti Money Laundering Regulations (2020 Revision) hereafter the "AMLR's"] the First and Second Respondents were bereft of any legal capacity to regulate non-members of the First Respondent.

10. The Second Respondent's capacity to act on its Regulations, as aforesaid, was subject, always to the fulfilment, by First Respondent of section 22A of the Legal Practitioners Law 2018 (the "LPL"); a statutory condition precedent imposed by the Legislature, on the First Respondent; it required the First Respondent to amend its Objects clause so as to extend its jurisdiction, to monitor compliance with the AMLR's, to all attorneys licenced to practice law, in the Cayman Islands, regardless of their membership of the First Respondent.

11. The issuance by the Respondent of Registration Notices to the Appellant, on 18th November 2019, was *ultra vires* the the First and Second Respondents' own Regulations as hereinbefore pleaded.

12. The Appellant avers that the First and Second Respondents' Regulations were first issued on 29th May 2019; between that date and 18th November 2019 and in circumstances where the First Respondent had failed to comply with the condition precedent as aforesaid; to that extent, any and all Regulation 55F Registration Notices issued to non-members of the First Respondent were of no effect and a nullity.

13. In the premises any subsequent Breach Notices and / or Discretionary Fine Notices premised on the purported exercise by the First and Second Respondents' asserted Regulation 55F Registration Notice power was unlawful and *ultra vires*.

Executive and Legislative History

14. By a decision dated 19th February 2019 and notified in writing, by the Honourable Attorney General (the "HAG") to the First Respondent on 1st April 2019, the Cabinet exercised a power, granted to it by section 4 (9) of the Proceeds of Crime Law (2017 Revision) (the "PCL") to

[3] 18th November 2019.

designate the First Respondent as the authority for monitoring compliance by firms of attorneys of the regulations stipulated by the AMLR's.

15. The HAG's 1st April 2019 letter to the First Respondent expressly refers to the First Respondent's appointment pursuant to Regulation 55B (c) which stipulates as follows:

"The following bodies are designated as Supervisory "of the following for the purposes of this Part —
a public body or self-regulatory body assigned by Cabinet by Order - for firms of attorneys at law that engage in or assist other persons in the planning or execution of relevant financial business, or otherwise act for or on behalf of such persons in relevant financial business".

16. The HAG's 1st April 2019 letter and the Extraordinary Gazette published on 9th April 2019, to like effect, are the only documents issued by the HAG and the Cabinet purportedly authorising the First Respondent as a Supervisory Authority for AMLR purposes.

17. The Appellant avers that the power exercised by the Cabinet appointing the First Respondent was at all material times:

(i) Subject to the fulfillment, by the First Respondent, alone, of the condition precedent imposed by the Legislative Assembly (the "LA") pursuant to its passage of The Legal Associations (Miscellaneous Amendments Law, 2018 ("LAPAM") passed on 16th November 2018 which, by Schedule 2 amended the Legal Practitioners Law (2015 Revision) by inserting the following provision:

"22A. The objects of the Cayman Islands Legal Practitioners Association shall include the regulation of attorneys-at-law to ensure their compliance with anti-money laundering and counter-terrorism legislation."

(i) Subject to the First Respondent satisfying Cabinet of compliance with the statutory condition precedent, anterior to the exercise by the Cabinet of its appointment power as aforesaid; and,

(ii) Subject, at all events, to ensuring that in exercising its powers, it did not infringe the Appellant's fundamental rights protected by the Cayman Islands Constitution Order, 2009 and the Bill of Rights therein (the "BOR") namely, section 12 (freedom of association), section 19 (lawful administration) as read together with section 16 (non-discrimination).

18. The Appellant avers that the condition precedent imposed by section 22A as aforementioned was:

(i) On the basis that the LA was cognisant of the restrictions imposed by Object (m) the effect of which was to limit the scope First Respondent's AMLR supervision to its members only;

(ii) In part, to prevent a breach of Section 12 of the BOR, by inadvertently sanctioning membership, by compulsion, of the First Respondent, of attorneys of all attorneys admitted and licenced to practice Cayman Islands Law.

(iii) On the basis that the LA was cognisant of the fact that compulsory membership of predecessor organsations, such as the Cayman Bar Association or the Cayman Islands Law Society formed no part, hitherto, for the admission and licensing of attorneys-at-law to practice Cayman Islands Law. (NB right to practice under LPL and deregistration under AMLR engaging property rights pursuant to the BOR and the Convention).

(iv) On the basis that the First Respondent, by agreement, obtained membership of all Cayman Islands based practicing attorneys-at-law.

19. The Appellant avers that notwithstanding the omission, by the First Respondent, to fulfill the statutory condition precedent as aforesaid, Cabinet purported to exercise, unlawfully and in breach of section 19 and 24 of the BOR, its power under section 4 (9) of the PCL thereby subverting the clear will / intention of the Legislature.

20. The Appellant further avers that Cabinet's power of designation, under section 4 (9) of the PCL, is circumscribed by and limited to monitoring compliance with AML and precludes any roles by a supervisory authority with respect to monitoring compliance with counter terrorism financing, CTF. To that extent, the HAG's 1st April 2019 letter and the exorbitant mandate claimed by the

First and Second Respondents, namely the supervision of attorneys-at-law in the context of CTF is thereby asserted to be unlawful and in breach of section 19 and 24 of the BOR.

21. The First Respondent's failure to comply with the statutory precedent remained until 16th December 2019, thirteen months (13) after the LA's prescription. In the period intervening and in an effort to remedy the First Respondent's failure as aforesaid, the HAG and Cabinet, on 10th October 2019, tabled the Legal Practitioners (Amendment) Bill, 2019 ("the LPAB"), which Bill proposed to provide for the compulsory membership by all attorneys-at-law in the First Respondent for the purposes of AML regulation, by deeming all attorneys to be members of the First Respondent.

22. Implicit in the HAG's and Cabinet's actions was their recognition that the First Respondent had failed, despite the passage of 11 months since LPAM had received His Excellency the Governor's Assent, to comply with section 22A of the LPL.

23. The Appellant avers that it was unlawful and in breach of section 19 and 24 of the BOR, for Cabinet to subvert the clear intention of the legislature which required the First Respondent, only, to give effect to the section 22A condition precedent having, concomitantly fulfilled, its corollary obligation to obtain the consent of all attorneys at law licenced to practice Cayman Islands Law.

24. Further or alternatively, by tabling the Bill to amend the LPL as aforesaid, the HAG and Cabinet conceded:

    (i) That the First Respondent could not fulfill the condition precedent; and,

    (ii) That the alternative of compelling membership, by all Cayman Islands attorneys-at-law, of the First Respondent, engaged important points of constitutional principle (not the least of which was section 12 of the BOR as aforesaid) which required considered debate and deliberation by the Legislative Assembly.

25. This strong constitutional imperative notwithstanding, the HAG and Cabinet neglected, at best, to meaningfully and / or substantively engage and / or consult the Appellant in circumstances

where they ought, appropriately, to have been consulted; this failure, prior to the tabling of the Bill, as aforesaid, was contrary to the Appellant's lawful administration rights prescribed by section 19 of the BOR as aforesaid.

26. As a matter of record, the HAG's and Cabinet's proposed amendment of the LPL was strongly opposed by the Appellant. Having been presented to the LA by the First Respondent, it was summarily "deferred" on or around 6th December 2019.

27. Anterior to this purported "deferral", on 2nd December 2019, the Association of Legal Professionals and Advocates ("ALPA") sent a detailed memorandum (with cover letter and authorities) to the HAG (copied to members of the LA) highlighting the vice of the proposed amendment to the LPL namely, that membership by compulsion of the First Respondent and how, by consequential submission to the Second Respondent the rights of ALPA's members, particularly their right to Freedom of Association, protected by section 12 of the BOR would be infringed.

The Second Defendant's Status and Unlawful Acts

28. The Appellant reiterates paragraph 5 of this Application for Leave to Appeal.

29. The Appellant avers that neither the HAG's 1st April 2019 letter, the 9th April 2019 Extraordinary Gazette or the penal provisions of Part XIIA of the AMLR's expressly convey any AMLR powers to the Second Respondent. This fatal paucity of specific statutory authorisation notwithstanding, the Second Respondent asserts that it is unrestrained from:

    (i) Holding itself out as a Supervisory Authority for the purposes of Part XIIA of the AMLR's with powers to effect and enforce compliance by a Designated Non-Financial Services Businesses ("DNFB's") with the AMLR's;

    (ii) Claiming, in its enforcement capacity, the ability (without express consent or waiver of rights) to levy "administrative fines" (a penalty) pursuant to Regulation 55R to 55Z of the AMLR;

(iii) Levying a minimum administrative fine of CI$50,000 with respect to any breaches of the AMLR's in respect of which it shall be prosecutor, judge, jury and executioner, contrary to the *nemo iudex* principle;

(iv) Asserting a power to levy fines, administratively broader, than permitted of a Judge of the Summary Court, with established due process protections) under the applicable law;

(v) Having the sole authority to determine whether and in what context it will make a reference to the Director of Public Prosecutions of the Cayman Islands for further action including prosecutions of DNFB's in breach of the AMLR's;

(vi) Having the sole power under section 55G to cancel the registration of DNFBP.

30. Additionally, neither the PCL, LAPAM, the AMLR's nor the HAG's notice to the First Respondent, as aforesaid, make any explicit reference to the specific designation of the Second Respondent as the Supervisory Authority empowered to supervise and or issue administrative fines in the circumstances stipulated in the AMLR's. This lacuna and lack of statutory warrant notwithstanding, the Appellant takes issue with:

(i) The legality and constitutionality of the "Administrative Fine" regime stipulated by Regulations 55G, and 55R to 55Z of the AMLR which, whether individually or collectively are a gross and unjustifiable infringement of section 7 (1)[4] of the BOR;

(ii) Further or alternatively, the severity of the minimum "fining power" permitted by the Regulations, as aforesaid, which is of such severity as to contravene settled precedent, namely *Engel v Netherlands*, a decision of the European Court of Human Rights and,

(iii) The absence of objectively justifiable reasons, by reference to express agreement / waiver of due process rights and / or on the administrative efficiency grounds justifying the egregious breach of the Appellant's section 7 BOR rights whether in subsidiary legislation or at all.

31. The Appellant asserts, as against the First and Second Respondents, that the breaches identified in paragraphs 29 and 30 ante, are a severe encroachment of their rights to due process / natural

[4] Fair trial 7.—(1) Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time.

justice protections pursuant to settled principles of administrative law and under section 7, as read together with section 19, of the BOR.

32. Further or alternatively, with respect to the Registration Notice ("Notice"), the Appellant claims that the First and Second Respondents acted unlawfully in circumstances where they knew that they had no warrant to issue a requirement to the Appellant to comply with Regulation 55F of the AMLR's.

33. The Notices were issued under the hand of the Claire Guile in her capacity as Head of Supervision of the Second Respondent on 18th November 2019. Citing the 2018 AMLR's the Claire Guile claimed that:

    (i) The Appellant was required to register with the Second Respondent pursuant to Regulation 55F of the AMLR's;

    (ii) That an extended deadline for registration was close of business Friday 29th November 2019;

    (iii) Failure to register, as aforesaid would be a breach of Schedule 2 of the AMLR's resulting in the invocation, by the Second Respondent of the administrative fine regime prescribed by the AMLR's.

34. When Claire Guile issued the Notice on the Second Respondent's behalf, she and the Second Respondent knew or must be taken to have known that they had no authority to issue the Notice and/ or that it had no legal effect by reason of the fact that the section 22A LPL condition precedent had not been complied with. The Appellant avers that by so doing, the Second and or alternatively the First Respondents acted unlawfully and in breach of section 19 and 24 of the BOR.

35. By issuing the Notice, the Second Respondent overtly, albeit unlawfully, claimed to be empowered by Regulations 55A 55F of the AMLR's to act. The Appellant relies on the fact that at the time of the Notice's issue, neither the First nor the Second Respondent had fulfilled the LPL

section 22A condition precedent, as aforesaid; nor had the First Respondent successfully obtained the amendment to the LPL as previously stated.

36. In the premises, the Appellant claims that the First and Second Respondent whether directly or through its agent, Claire Guile, acted unlawfully in circumstances where they knew and / or ought to have known that they had no warrant to issue a Notice to Appellant to comply with Regulation 55F of the AMLR's.

37. On 2nd December 2019, the Appellant wrote to the Claire Guile chasing responses to correspondence that had been outstanding since 28th August 2019 as aforesaid. Once again there was silence. The Appellant will, on the hearing of the Appeal, rely on this unanswered correspondence for its full terms and effect, not least by way of rebuttal of the Second Respondent and Jody Woodward's assertion that they received no correspondence in connection with the issue of the Notice and with respect to the issuance Discretionary Fine.

38. On 21st January 2020 a Breach Notice under the hand of the Jody Woodward was issued to the Appellant on the Second Respondent's behalf. In that Breach Notice the following was stated:

"Registration with CARA however is a distinct and separate process which is mandatory and required by law.
CARA has carried out the registration process in accordance with the Cayman Islands Anti-Money Laundering Regulations (2018 Revision) (as amended) and you were requested to register by the deadline, 29 November 2019.1
The deadline has passed, and our records show we have not received your registration.

Breach Notice

Due to your failure to register we attach a Breach Notice.
If you rectify the breach by registering with CARA within thirty days from the date of the Breach Notice, and provide written representations outlining the reason for the failure to register, we may not issue a fine, or any fine imposed may be discounted as appropriate.
Please note that you are not obliged to provide written representations.

We have enclosed our Enforcement Policy for your reference. You will find the section regarding how we exercise our discretionary powers when imposing an administrative fine in the Assessment of Fines and Penalties section (section 14) of the policy."

39. On 16th March 2020, under the hand of the Jody Woodward, the Second Respondent issued a Discretionary Fine Notice. In substance, via this document, predicated on an alleged failure by the Appellant to comply with the Second Respondent's Notice of 18th November 2019, the Second Respondent asserted the following:

"Firms are therefore required to register with CARA, as the designated Anti-Money Laundering Supervisory Authority for firms of attorneys-at-law within the Cayman Islands.

Registration with the Authority was required by 29 November 2019.

8. Despite correspondence with the party, and the issuance of a Breach Notice on 21 January 2020, the party has failed to register with the Authority to date, as required by the Anti-Money Laundering Regulations (2020 Revision).

The Authority views this as evidence of the party having failed to register. Therefore, the Authority is satisfied that the party is in breach of Regulation 55F of the Anti-Money Laundering Regulations (2020 Revision) due to this failure.

10. Moreover, as per the party's website, the party appears to be conducting relevant financial business, in addition to holding themselves out as compliance and regulatory specialists, including anti-money laundering."

40. By this Discretionary Fine Notice, a fine in the amount of CI$78,000 was purportedly imposed on the Appellant in circumstances where the Second Respondent and or Claire Guile and/ or Jody Woodward had no warrant.

41. Further the Appellant avers that the First respondent knew or ought to have known that with respect to the Notice and the enforcement actions taken thereafter, the Second Respondent had no warrant as against the Appellant by reason of its non membership and because of the failure, anterior to 16th December 2019, by the First Respondent to fulfill the statutory condition precedent as aforesaid. The Appellant will, at the hearing of this appeal rely on Regulation 7 (2) (b) (i) of the First and Second Respondents' Regulations for its full terms and effects.

42. As stated a paragraph 30 (*ante*) the Appellant challenges the lawfulness of the Enforcement Notices issued against it by the Second Respondent and / or the First Respondent issued under the hand of the Messrs. Guile and Woodward. In addition to the breaches hereinbefore particularised, the Appellant avers that the Notice and the Discretionary Fine breach established natural justice rights as well as section 7 of the BOR by reason of the fact that:

    (i) The Second Respondent is neither a court nor is it independent and impartial as prescribed by section 7 of the BOR;

    (ii) The fact that the Second Respondent purportedly relies on an opaque Chinese Wall between itself and the First Respondent is conclusive of its lack of independence from the Third Respondent;

    (iii) The existence of the device of a Chinese Wall is, *a fortiori*, conclusive of the lack of independence of the Second Respondent;

    (iv) Cumulatively, with respect to (i) to (iii) above, any derogation from the due process obligations, hereinbefore particularised and as mandated by section 7 of the BOR is subject to the requirement of an agreement in writing by which the Appellant would have expressly waived natural justice and / or fair trial rights as guaranteed by section 7 of the BOR;

    (v) There are no explicit lawful and / or constitutionally justified reasons that justify the abrogation, by secondary legislation, of the Appellant's due process rights protected by section 7 of the BOR; and

    (vi) Regulation 55R to 55Z are, *prima facie*, contrary to section 7 and 19 of the BOR and should be struck; alternatively, Regulation 55R to 55Z should be read as being subject to section 7 of the BOR.

43. In the premises the Appellant avers that that the Breach Notice and the Discretionary Notice should be struck on the grounds that they are respectively unlawful and / or a breach section 7 and 19 of the BOR.

44. The Appellant further avers that in issuing the Breach Notice and subsequently, the Discretionary Fine Notice, the First and Second Respondents acted unlawfully and expressly contrary to section 24 of the BOR.

45. On 12th February 2020, anterior to the issuance by the Second Respondent of its Discretionary Fine Notice, a letter before action, issued by the Appellant, was served on the Respondents (the "EB LBA").

46. The Appellant will, at the hearing of this Appeal, rely on the EB LBA for its full terms and effect.

47. In an undated letter addressed to the Appellant, the Second Respondent purported to provide a response to the EB LBA. In that letter, again under the hand of the Claire Guile, who is not as far as the Appellant is aware, a qualified attorney, the Second Respondent purports to opine on Cayman Islands law and justifies its existence by stating the following:

(i) The Second Respondent is not a separate legal entity from the First Respondent;

(ii) It is a lawfully constituted subcommittee of the First Respondent;

(iii) It is operationally independent; albeit, as a matter of fact, all its activities are funded via a Purchase Agreement entered into between the Second and First Respondent;

(iv) The fact that it is a subcommittee of the First Respondent is justified by the assertion that the self-adopted bifurcated regulatory model obtains in the UK (*sic*) which arrangement, it is asserted, received a positive Mutual Evaluation Report from the Financial Action Task Force;

(v) That Supervisory Authorities (*which the Second is not*) have powers to impose fines by virtue of Regulation 55R *et seq.*; and

(vi) The Breach Notice represent the Second Respondent's predetermination[5] of the seriousness of the breach of a particular Regulation (55F) and the maximum level of fine to be imposed;

48. The Appellant will, at the hearing of this Appeal, rely on the Second Respondent's response to the EB LBA as conclusive of:

(i) The First and Second Respondents' failure to consider the established principles of natural justice and / or the duties prescribed by sections 19 and 24 of the BOR;

(ii) The First and Second Respondent relying on an irrelevant fact, namely the statutory construct for the governance and regulation of solicitors and allied legal professions in England and Wales as justification for their breaches of their section 19 and 24 BOR duties;

(iii) The First and Second Respondents concerted effort to breach the Appellant's natural justice rights and / or its fundamental rights, namely section 7 and 16 of the BOR.

49. By a letter dated 2nd March 2020, the First Respondent, through its President, Mr. David Collins, purported to respond to the EB LBA. In its response, the First Respondent confined itself to what is describes as issue 2 namely:

"CILPA's authority to delegate its function under the AMLR to a committee such as CARA;"

50. The Appellant repeat paragraphs 26 to 48 as hereinbefore pleaded. Further the Appellant relies on the First Respondent's response to the EB LBA which fails to address:

(i) The First Respondent's failure to fulfil the statutory condition precedent, the statutory predicate for which any claim for authorisation is founded;

(ii) Notwithstanding (i) above, the breaches of regulations 7 and 10 of the First Respondent's Regulations as aforesaid;

[5] Expressly contrary to Sections 7 and 19 of the BOR.

(iii) Its failure to observe the principle of legality and / or the Cayman Islands Constitution as aforesaid and in particular the specific protected rights heretofore pleaded as rights and / or the fundamental rights prescribed by the BOR.

51. The Appellant avers that the First Respondent, whether directly or as principal for the Second Respondent and its officers and agents, namely the Claire Guile and Jody Woodward breached the Appellant's natural justice / and BOR rights and thereby acted unlawfully and / or contrary to section 24 of the BOR.

52. The Appellant avers that notwithstanding the matters pleaded at paragraphs 26 to 31 of this Appeal, neither the First Respondent's 1st April 2019 letter, the 9th April 2019 Extraordinary Gazette or the AMLR's expressly convey any supervisory authority powers to the Second Respondent.

53. The Appellant puts the First and Second Respondents to proof of the basis upon which the contend that they had lawful authority to act, specifically by reason of the failure to fulfil the section 22A LPL condition precedent and / or generally, as a matter of public law the basis upon which a private entity (which the First Respondent was up to and until 16th December 2019) is able to delegate statutory powers to a sub-committee contrary to primary legislation.

54. This paucity of specific statutory authorisation notwithstanding, the Second Respondent under the hand of the Messrs. Guile and Woodward, asserts that it is unrestrained from:

a) Holding itself out as a Supervisory Authority for the purposes of Part XIIA of the AMLR's with powers to effect and enforce compliance by a Designated Non-Financial Services Businesses ("DNFB's") with the AMLR's;

b) Claiming, in its enforcement capacity, the ability (without the consent or waiver of rights) to levy "administrative fines" (a penalty) pursuant to Regulation 55R to 55Z of the AMLR;

c) Levying a minimum administrative fine of CI$50,000 with respect to any breaches of the AMLR's in respect of which it shall be prosecutor judge jury and executioner, contrary to the nemo iudex principle;

d) Asserting a power to levy fines, administratively broader, than permitted of a Judge of the Summary Court, with established due process protections) under the applicable law;

e) Having the sole authority to determine whether and in what context it will make a reference to the Director of Public Prosecutions of the Cayman Islands for further action including prosecutions of DNFB's in breach of the AMLR's;

f) Having the sole power under section 55G to cancel the registration of DNFBP.

55. Additionally, neither the PCL, LAPAM, the AMLR's nor HAG's notice to the Third Respondent, as aforesaid, make any explicit reference to the specific designation of the Second Respondent as the Supervisory Authority empowered to supervise and or issue administrative fines in the circumstances stipulated in the AMLR's.

56. In addition to the matters aforesaid, at the hearing of this Appeal, the Appellant will rely on the First and Second Respondents breach of Regulations 7 and 10 of the First Respondent's Regulations as evidence of the named Respondents' breach of the Appellant's natural justice and / or prescribed rights guaranteed by sections 7, 12, 15, 19 and 24 of the BOR.

57. The Appellant repeats paragraph 48 and avers that:

(i) The Respondent's breaches were intentional and or alternatively reckless; and,

(ii) In targeting the Appellant, the Respondents deliberately acted unlawfully and / or contravened the Appellant's section 15 of BOR rights.

Relevant Statutory Scheme

58. Section 1 (c) of the Legal Associations (Miscellaneous Amendments) Law 2018 provides:

22A. The objects of the Cayman Islands Legal Practitioners Association shall include the regulation of attorneys-at-law to ensure their compliance with anti-money laundering and counter-terrorism legislation.

59. Section 4(9) of the Proceeds of Crime Law (2020 Revision) (hereinafter referred to as "the Law") gives the Cabinet the power to:

"... assign to the Financial Reporting Authority, a public body or a self-regulatory body the responsibility of monitoring compliance with money laundering regulations made under this Law in relation to persons conducting "relevant financial business", who are not otherwise subject to such monitoring by the Cayman Islands Monetary Authority."

60. The term "**relevant financial business**" is defined by Section 2 of the Law, as follows:

"relevant financial business" means the business of engaging in one or more of the following —
(a) banking or trust business carried on by a person who is for the time being a licensee under the Banks and Trust Companies Law (2020 Revision);
(b) acceptance by a building society of deposits made by any person (including the raising of money from members of the society by the issue of shares);
(c) business carried on by a co-operative society within the meaning of the Co-operative Societies Law (2020 Revision);
(d) insurance business and the business of an insurance manager, an insurance agent and an insurance broker, who is licenced pursuant to the Insurance Law, 2010 (Law 32 of 2010), that is connected with insurance business;
(e) mutual fund administration or the business of a regulated mutual fund within the meaning of the Mutual Funds Law (2020 Revision);
(f) the business of company management as defined by the Companies Management Law (2018 Revision), except that the services specified in section 3(4)(a) of that Law shall not be excluded for the purposes of Regulations made under this Law from the provision of the specified services as defined in subsection (2) of that section; and Section 2 Proceeds of Crime Law (2020 Revision)
(g) any of the activities set out in Schedule 6, other than an activity falling within paragraphs (a) to (f) of this definition;

61. Schedule 6 of the Law further defines the activities which are deemed to be "relevant financial business", thus:

"Activities falling within the Definition of "Relevant Financial Business"

Any activity related but not limited to —

1. Acceptance of deposits and other repayable funds from the public.

2. Lending.

3. Financial leasing.

4. Money or value transfer services.

5. Issuing and managing means of payment (e.g. credit and debit cards, cheques, traveller's cheques, money orders and bankers' drafts, electronic money).

6. Financial guarantees and commitments.

7. Trading in —

(a) money market instruments (cheques, bills, certificates of deposit, derivatives etc.);

(b) foreign exchange;

(c) exchange, interest rate and index instruments;

(d) transferable securities; or

(e) commodity futures trading.

8. Participation in securities issues and the provision of financial services related to such issues.

9. Advice to undertakings on capital structure, industrial strategy and related questions and advice and services relating to mergers and the purchase of undertakings.

10. Money broking.

11. Individual and collective portfolio management and advice.

12. Safekeeping and administration of cash or liquid securities on behalf of other persons.

13. Safe custody services.

14. Financial, estate agency (including real estate agency or real estate brokering), legal and accounting services provided in the course of business relating to —

(a) the sale, purchase or mortgage of land or interests in land on behalf of clients or customers;

(b) management of client money, securities or other assets;

(ba) organization of contributions for the creation, operation or management of companies;

(c) management of bank, savings or securities accounts; and

(d) the creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

14A. Undertaking property development within the meaning set out in section 2 of the Trade and Business Licensing Law (2019 Revision) and the subsequent sale of that property without using a real estate agent or broker.

14B. Undertaking property investment without using a real estate agent or broker.

15. The services of listing agents and broker members of the Cayman Islands Stock Exchange as defined in the CSX Listing Rules and the Cayman Island Stock Exchange Membership Rules respectively.

16. The conduct of securities investment business.

17. Dealing in precious metals or precious stones, when engaging in a cash transaction that is equivalent to fifteen thousand United States dollars or more.

18. The provision of registered office services to a private trust company by a company that holds a Trust licence under section 6(5)(c) of the Banks and Trust Companies Law (2020 Revision).

19. Otherwise investing, administering or managing funds or money on behalf of other persons.

20. Underwriting and placement of life insurance and other investment related insurance.

21. Providing virtual asset services.

22. Operating a single family office.

62. Pursuant to Section 201 and pursuant to Section 145 of the Law (hereinafter "the enabling provisions"), Cabinet may make regulations, upon the recommendation of the Anti-Money Laundering Steering Group, the Monetary Authority and the Financial Reporting Authority, prescribing measures to be taken to prevent the use of the Islands Financial systems or facilities in or from within the Islands being used for criminal conduct.

63. Section 145 provides:

(1) The Cabinet may, upon the recommendation of the Anti-Money Laundering Steering Group, the Monetary Authority and the Financial Reporting Authority, make regulations prescribing measures to be taken to prevent the use of the financial system and any other facilities provided in or from within the Islands for the purposes of criminal conduct including measures —

(a) to utilise systems and train employees to prevent money laundering;

(b) to manage and mitigate any risks that may be involved in the course of business;

(c) to conduct the appropriate and adequate due diligence of a customer or a person with whom business is conducted;

(d) to ensure that proper and adequate records are kept;

(e) that may be required to be utilised in matters involving specific types of customers or activities which may include a politically exposed person or the transfer of currency;

(f) to maintain the prescribed obligations of a financial institution or a designation non-financial business or profession in the prevention of money laundering; and

(g) to ensure that proper and adequate reports are made to the relevant Authority in the Islands regarding any suspicious activity related to money laundering.

(2) Regulations made under subsection (1) may —

(a) make different provisions for different circumstances or cases and may contain incidental, supplementary and transitional provisions;

(b) provide that the contravention of any provision of those regulations constitutes an offence and may prescribe penalties for any such offence —

(i) on conviction on indictment, consisting of a fine and imprisonment for two years; or
(ii) on summary conviction, consisting of a fine of five hundred thousand dollars;

(c) prescribe the manner in which an administrative penalty system with a maximum penalty of two hundred and fifty thousand dollars may be implemented; and

(d) prescribe fees, subscriptions or other monies which may be payable by any person who is supervised in accordance with this Law and the regulations.

64. Section 53A of the AMLRs provides:

"(1) A Supervisory Authority may, by notice in writing, require a person carrying out relevant financial business to provide such documents, statements or any other information as the Supervisory Authority may reasonably require in connection with the exercise of its functions.

(2) A person carrying out relevant financial business, who receives a notice under paragraph (1), shall comply with that notice within the period and in the manner specified in the notice.

(3) A Supervisory Authority may, by notice in writing, require —
(a) a person carrying out relevant financial business;
(b) a connected person; or
(c) a person reasonably believed to have information relevant to an inquiry by the Supervisory Authority,
to attend before the Supervisory Authority to answer such questions or provide such information as the Supervisory Authority may deem necessary in connection with its inquiry.

(4) A person who is served a notice under paragraph (3) shall attend before the Supervisory Authority in accordance with the notice.

(5) In relation to information recorded otherwise than in legible form, the notice may require a copy of the information in legible form or in a form from which it can readily be produced in visible and legible form.

(6) Information required to be provided to the Supervisory Authority under this regulation shall be provided in the English language and any information required in a notice under this regulation which is not in the English language shall be translated into the English language before being provided to the Supervisory Authority.

(7) The production of a document does not affect any lien which a person has on the document."

Legal Submissions

65. The Appellant has reviewed the Legal Submissions, on the relevant statutory scheme, filed by the Appellant J Samuel Jackson on facts and circumstances exactly consistent with this Appeal. These Legal Positions are adopted, *mutatis mutandis* by the Appellant in the context of this Appeal and are set out in Appendix I herewith.

66. Additionally, the Appellant makes the following propositions of law:

(i) On the established principle namely *delegatus non potest delegare*, the First Respondent is in the absence of clear statutory fiat is disabled as a delegatee of a power from further delegating that power to the Second Respondent. The Appellant relies on the *General Medical Council v UK Dental Board (1936) Ch. 41.*

(ii) Further in this context, the Legislature, in stipulating the section 4 (9) PCL power of designation, cannot that once exercised, the delegatee would further delegate to the Respondent. The *Carltona Principle*, an exception to the rule of statutory construction heretofore stated, is the subject of qualification in the Cayman Islands context per the Court of Appeal in its decision in Re McCorckle where the following was stated:

> For the Attorney General it was submitted that on the principles of *Carltona Ltd. v. Works Commr. (1)*, Jason Carter was the alter ego of the Director of the Office of International Affairs. Such a use of the principle seems impermissible. It is a peculiarly English principle springing from the system of constitutional and administrative structures in England. It is presumed that Parliament is well aware that when powers are conferred upon Ministers who have charge of large departments such powers would not be exercised by the Minister in person. The powers would, in the normal course of affairs, be exercised by officers in their departments. The position is very different here. An official has been designated pursuant to treaty obligations to carry out important

functions in relation to those obligations. It would be expected that he or she would, on the face of the record, accept responsibility for the performance of these functions."

(iii) The outcome of the application of this principle to the facts of this case, namely the First Respondent's claimed unfettered ability to delegate its powers to the Second Respondent is more acute where, in this context, the Legislature required compliance by the First Respondent with the section 22A LPL condition precedent as aforesaid, and, by extension, any exercise by Cabinet of its section 4 (9) PCL power to delegate, was subject and subordinate to the condition precedent as aforesaid. In other words, the vires of Cabinet's delegation to the First Respondent and the vires of the subsequent sub delegation to the Second Respondent is contrary to established principle.

(iv) The First Respondent is disabled, as a matter of principle, from delegating its statutory authority to the Second Respondent. Segregating, for a moment the *vires* issue, it is axiomatic that a delegatee is disabled from sub-delegating a power it does not have; on the facts of this case, the First Respondent could <u>not,</u> in any event, delegate its purported Supervisory Authority powers beyond its members (assuming Cabinet's delegation was lawful [*which it was not*] and assuming an exception to the *delegatus non potest delegare*, until fulfillment of the statutory condition precedent.

(v) Further in light of the Legislative fetter on the exercise by Cabinet of the section 4 (9) PCL power, it must be presumed that the Legislature, in the context of the monitoring and enforcement of AMLR's, did not contemplate the First Respondent would structure a device, including the establishment of a Chinese Wall, through which it would perform its statutory obligations. Put another way, it is strongly arguable, that faced with a choice between this device and the establishment of an independent regulatory body, the Legislature would have opted for the latter obviating the need for the section 22A condition precedent.

67. For reasons previously stated, by reason of the failure to satisfy the Legislature's section 22A Condition Precedent, neither the First Respondent nor the Second Respondent had any jurisdiction over the Appellant. In the result, the Registration and Discretionary Fine Notices as

well as the CI$78,000 fine purportedly issued by the Second Respondent were *ultra vires* and a nullity.

68. If, contrary to the preceding submissions, the First and Second Respondent had legal capacity and jurisdiction over the Appellant, all relevant powers exercised under PartXII A of the AMLR's were subject to the principle of legality. The classic statement of this principle is Lord Hoffman's in *Sec. of State for Home Department ex p. Simms [2000] 2 AC 115; [1999]* where the following was stated:

"I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. I agree with it and for the reasons which he gives I would allow the appeals and make the orders which he proposes. I add only a few words of my own about the importance of the principle of legality in a constitution which, like ours, acknowledges the sovereignty of Parliament.

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

The Human Rights Act 1998 will make three changes to this scheme of things. First, the principles of fundamental human rights which exist at common law will be supplemented by a specific text, namely the European Convention. But much of the Convention reflects the common law: see Derbyshire County Council v. Times Newspapers Ltd. [1993] AC 534, 551. That

is why the United Kingdom government felt able in 1950 to accede to the Convention without domestic legislative change. So the adoption of the text as part of domestic law is unlikely to involve radical change in our notions of fundamental human rights. Secondly, the principle of legality will be expressly enacted as a rule of construction in section 3 and will gain further support from the obligation of the Minister in charge of a Bill to make a statement of compatibility under section 19. Thirdly, in those unusual cases in which the legislative infringement of fundamental human rights is so clearly expressed as not to yield to the principle of legality, the courts will be able to draw this to the attention of Parliament by making a declaration of incompatibility. It will then be for the sovereign Parliament to decide whether or not to remove the incompatibility.

What this case decides is that the principle of legality applies to subordinate legislation as much as to acts of Parliament."

69. In *Simms*, the fundamental right to freedom of expression was engaged. In the context of this appeal the fundamental Common Law right natural justice (*Ridge v Baldwin*) and the rule against bias and / or the appearance of bias fall very much within the crosshairs of review. Notwithstanding the earlier identified jurisdictional and capacity deficiencies, the Second Respondent seeks refuge in Regulations 55R to 55Z of the AMLR's, subordinate legislation, seemingly shorn of fundamental Common Law protections. Regulation 55R states:

Power to impose administrative fines

55R. (1) A Supervisory Authority designated for a DNFBP *may* impose an *administrative fine*, under regulation 55S, on the DNFBP *if it contravenes a provision of these Regulations*.

(2) Where a DNFBP contravenes a prescribed provision in Column 1 of the Table in Schedule 2, the categories of breach in Column 2 of the Table in Schedule 2, shall be prescribed as minor, serious or very serious and the breach may be proceeded with under regulation 55S.

(3) A Supervisory Authority may issue guidance on the enforcement of administrative fines for a breach prescribed as minor under these regulations.

70. As was observed by Lord Steyn in *Sec. for Home Affairs ex p. Pierson* [1998]:

"There is no ambiguity in the statutory language. The presumption that in the event of ambiguity legislation is presumed not to invade common law rights is inapplicable. A broader principle applies. Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption. But this assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary. These propositions require some explanation.

For at least a century it has been "thought to be in the highest degree improbable that Parliament would depart from the general system of law without expressing its intention with irresistible clearness . . .": see the 4th ed. of Maxwell on the Interpretation of Statutes, (1905) at 121, and the 12th ed. of the same book, (1969), at 116. The idea is even older. In 1855 Sir John Romilly observed that ". . . the general words of the Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched . . .": Minet v. Leman (1855) 20 Beav. 269, at 278. This observation has been applied in decisions of high authority: National Assistance Board v. Wilkinson [1952] 2 All E.R. 255, at 259, per Lord Goddard, C.J.; Mixnam's Properties Ltd. v. Chertsey U.D.C. [1963] 2 All E.R. 787, at 798, per Diplock L.J. In his Introduction to the Study of the Law of the Constitution; 10th ed., London, (1968), Dicey explained the context in which Parliament legislates as follows (at 414):

"By every path we come round to the same conclusion, that Parliamentary sovereignty has favoured the rule of law, and that the supremacy of the law of the land both calls forth the exertion of Parliamentary sovereignty, and leads to its being exercised in a spirit of legality."

But it is to *Sir Rupert Cross that I turn for the best modern explanation of "the spirit of legality", or what has been called the principle of legality.* (The phrase "the principle of legality" I have taken from Halsbury's Laws of England, 4th ed., reissue, vol. 8(2), para. 6.) The passage appears in Cross, Statutory Interpretation, 3rd ed., at 165-166, which has been edited by Professor John

Bell and Sir George Engle, Q.C., formerly First Parliamentary Counsel, but it is worth noting that the passage is in all material aspects as drafted by the author: see Cross, Statutory Interpretation, (1976), 142-143. In the 3rd ed. the passage reads as follows:

"Statutes often go into considerable detail, but even so allowance must be made for the fact that they are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislators and drafters assume that the courts will continue to act in accordance with well-recognised rules . . . Long-standing principles of constitutional and administrative law are likewise taken for granted, or assumed by the courts to have been taken for granted, by Parliament. Examples are the principles that discretionary powers conferred in apparently absolute terms must be exercised reasonably, and that administrative tribunals and other such bodies must act in accordance with the principles of natural justice. One function of the word 'presumption' in the context of statutory interpretation is to state the result of this legislative reliance (real or assumed) on firmly established legal principles. There is a 'presumption' that mens rea is required in the case of statutory crimes, and a 'presumption' that statutory powers must be exercised reasonably. These presumptions apply although there is no question of linguistic ambiguity in the statutory wording under construction, and they may be described as 'presumptions of general application'. . . . These presumptions of general application not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate here as constitutional principles which are not easily displaced by a statutory text. . . ."

This explanation is the intellectual justification of the often quoted proposition of Byles J. in Cooper v. Wandsworth Board of Works 1863 14 C.B.N.S. 180 that ". . . although there are no positive words in a statute requiring that a party shall be heard, yet the justice of the common law will supply the omission": see Ridge v. Baldwin [1964] AC 40, at p. 69, per Lord Reid; and Bennion, Statutory Interpretation, 2nd ed., at 726-727.

71. Applying the principle of legality to the clear words of Regulation 55R, the Appellant contends that the legislation, subordinate as it is, is subject to the long established fundamental Common Law rights as necessarily modified / augmented by sections 7, 19 and 24 of the BOR.

72. In seeking, without capacity, to exert its authority on the Appellant, the First and Second Respondents and the impugned legislation were subject to the application of fundamental principles. Certainly, by its internal Regulations, the First Respondent stipulated a general power to prevent the Second respondent from breaching the established law of the Cayman Islands; see **CILPA Regulations in respect of CARA dated 29th May 2019 as amended on 27th January 2020:**

"10 *The CARA Board shall comply with a direction by the Council*, within the time specified for compliance in the direction where such a time is specified, *as to the exercise of any functions delegated to it under these Regulations if, and to the extent that, the exercise of the functions concerned in the manner specified in the direction is in the opinion of the Council reasonably necessary in order to-*

(1) Comply with, or avoid breaching, any specific or general rules or other requirements imposed on CILPA by

(a) the law and regulations from time to time in force; or

(b) any other body having statutory power to issue directions or impose requirements on CILPA in the exercise of any of its functions;

(2) Prevent the imposition of, or reduce the amount of, any fine or any other financial or non-financial penalty by any of the bodies referred to in (1); or

(3) Comply with the directions of any court or tribunal."

73. The Appellant contends that the Respondents in breach of their duty acted unlawfully by ignoring long established protective Common Law principles and subject to the issue of vires, the relevant Notices and Fines ought, respectfully to be quashed. Whilst the AMLR's does not define what "administrative" means in the context of Regulation 55R, there are no clear words within the legislation to oust fundamental Common Law rights of due process.

74. For all these reasons, the Appellant respectfully submits that the Notices and Fines should be quashed.

75. The Appellant has been privy to the Illegality arguments put forward in the J. Samuel Jackson appeal and adopts these for the purposes of completeness of these submissions in Appendix II.

Etienne Blake

Attorneys at Law

14 April 2020

Appendix I

1. Pursuant to the enabling provisions, since 2017, Cabinet has promulgated numerous amendments to the Anti-Money Laundering Regulations, culminating in the Anti-Money Laundering Regulations (2020 Revision) (hereinafter referred to as the "AMLR's"). Regulation 2 of the AMLR's reflects the language of Section 4 (9) of the Law by defining the term "Supervisory Authority" as follows:

   "the Monetary Authority or other body that may be assigned the responsibility of monitoring compliance with money laundering regulations made under the Law in relation to persons carrying out "relevant financial business" who are not otherwise subject to such monitoring by the Monetary Authority."

2. Section 4(9) of the Law specifically provides for Cabinet to assign to the (1) the Financial Reporting Authority; or (2) a public body or (3) a self-regulatory body, the responsibility of "monitoring compliance" with money laundering regulations made under the Law in relation to persons conducting "relevant financial business" who are not otherwise subject to such monitoring by the Cayman Islands Monetary Authority. These provisions only permit an assignment as specifically provided, but not otherwise. Therefore, any assignment to an entity that cannot be described as falling within one of the three identified categories is *ultra vires*. Further, any such assignment or subsequent empowerment which goes beyond the scope of "monitoring compliance with money laundering regulations" is *ultra vires*. Further, such monitoring cannot be extended to persons who are not engaged in relevant financial business (as defined by the Law and Schedule 6), otherwise

such monitoring would be *ultra vires*. Furthermore, there is no express or implied authority provided by Section 4 (9) of the Law for Cabinet to further assign or delegate such assignment to any other person or entity other than the named Supervisory Authority.

3. It is particularly unhelpful that the Law does not define the term "monitoring compliance", as that would have created the definition and certainty required to determine the *vires* of any subsidiary legislation promulgated by Cabinet, which subordinate legislation would not have the benefit of the full parliamentary process. Such would have ensured full public debate by the Legislative Assembly as to the scope and limit that would be imposed on the powers granted to a statutorily appointed Supervisory Authority, by defining what constitutes "monitoring compliance", as well as it would have allowed parliamentary debate on the implications for small local practices such as the Appellant's by allowing such unfettered authority by Cabinet to craft regulations to define such term as it saw fit. This sort of legislative lacuna lends itself readily to the disproportionate and irrational expansion of ostensible remit of assignees such as the First Respondent, beyond the plain, clear and logical scope of the primary legislation, by effectively allowing Cabinet *carte blanche* to write subordinate legislation as it deems fit, to the extent that such subordinate legislation extends into the realm of ultra vires.

4. In regards to the assignment of the duties of supervisory authority pursuant to Section 4 (9) of the Law, it is averred that Cabinet would have to have determined that the First Respondent was in fact a "self-regulatory body", since it is neither the Financial Reporting Authority, nor is it a public body. The term "self-regulatory body", like the term "monitoring compliance", is also, quite unhelpfully, undefined by the Law or the AMLR.

5. That being the case, both terms must be interpreted on their plain reading, as provided by Section 3 (2) of the Interpretation Law, thus:

   (2) Every local law of the Islands shall be carried out and applied according to the plain reading, and not according to any private construction, and any private construction influencing a decision in any case shall be deemed a sufficient cause for appeal or new trial or counter prosecution.

6. The provisions Section 3 (2) of the Interpretation Law resonate with the opinion of the author of the authoritative text of *Bennion* on Statutory Interpretation, who notes that one of the maxims of statutory interpretation is that words be given their plain, natural meaning and that this meaning be read in the context of the legislation. With no clear statutory definition in the Law the Court will be required to look at the plain natural meaning of the word and the context in which it is used in the Law.

7. In the English decision of Regina v. Panel on takeovers and Mergers ex parte Datafin PLC and Another some guidance is provided with respect to the term "self-regulation", the word is described follows:

   "Self regulation" is an emotive term. It is also ambiguous. An individual who voluntarily regulates his life in accordance with stated principles, because he believes that this is morally right and also, perhaps, in his own long term interests, or a group of individuals who do so, are practising self-regulation. But it can mean something quite different. It can connote a system whereby a group of people, acting in concert, use their collective power to force themselves and others to comply with a code of conduct of their own devising. This is not morally wrong or contrary to the public interest, unlawful or even undesirable. But it is very different."

8. It is asserted by the Appellant that whilst self-regulation may be permitted in certain circumstances, given the plain, natural meaning to the term "self-regulation" logically dictates that any entity described as such can therefore only impose their regulatory regime on the persons who belong to that entity. The Appellant is not and has never been a member of the First Respondent, and by extension is not subject to the regulatory regime, which the Second Respondent purports to enjoy.

9. Such being the case, the Appellant contends that prior to assigning the duties of Supervisory Authority to the First Respondent, Cabinet would have to have properly determined that the First Respondent was in fact an established self-regulatory body, since that is the plain, logical and obvious connotation of the undefined term "self-regulatory body". Given that the First Respondent was a very recent creation prior to its assignment of the duties of Supervisory Authority, there is neither evidence to prove, or even reason to believe, that the First Respondent had any experience

or was functioning or has even to date functioned as a de facto "self-regulatory body". Quite to the contrary, aside from its recent creation and lack of establishment as a regulator per se, it is a matter of record that the First Respondent, by its various overt acts, correspondence and utterances, has demonstrated that it is not, and never has been, a "self-regulatory body" and does not possess either the desire or ability to be a "self-regulatory body". The clear implication of the various machinations of both the First Respondent and Cabinet which resulted in the creation of the fictional "regulatory authority" that comprises the Second Respondent, is that either or both Cabinet and/or the First Respondent recognized and decided that the so-called bifurcated subcommittee comprising the Second Respondent, styled in such a manner as to hold itself out as a legitimate independent statutory regulator, was necessary in order to try to ameliorate the glaring conflicts of interest that arise with regards to self-regulation without any form of statutory mandate. This, in and of itself, is the best evidence of the First Respondent's tacit admission that it could not properly perform the duties assigned to it by Cabinet.

10. It is therefore contended that the First Respondent, by its own overt acts in "establishing" the Second Respondent and simultaneously unlawfully abdicating its Supervisory Authority functions to the Second Respondent, has confirmed that it cannot function as the Supervisory Authority and that therefore the assignment of such designation to it by Cabinet was unlawful and inappropriate. It is further contended by the Appellant that, in any event, the First Respondent cannot regulate persons such as the Appellant who are by choice not members of the First Respondent.

11. It is therefore asserted by the Appellant that the First Respondent was, at the time of its assignment under Section 4 (9), a newly formed company, with no established record or experience of regulation or supervision of the legal profession, which company's membership does not include all attorneys in the legal profession, which company was not created by primary legislation with the consent and participation of the entire profession, but instead whose membership in fact is disproportionately populated largely by representatives of the largest law firms in Cayman who, as a matter of public record formed and who effectively control the First Respondent and by extension the Second Respondent, thereby presenting a myriad of potential conflicts of interest which would operate to prevent the First or Second Respondent from performing the duties of Supervisory Authority fairly, rationally or proportionately. It is contended by the Appellant that the very creation of the Second Respondent and the simultaneous purported delegation by the First Respondent of its

assigned supervisory authority functions to the Second Respondent is, ipso facto, at least a tacit admission by the First Respondent of its inability or unsuitability to perform its assigned function as Supervisory Authority.

Appendix II

1. The fines which are the subject matter of this appeal are predicated on a "Breach Notice" alleging a breach of Regulation 55F of the AMLR, which provides for, inter alia, a failure to register with the Supervisory Authority. on 21st January 2020, the Appellant received a letter from the one Jody Woodward, purportedly acting on behalf of the Second Respondent, which letter bore the caption "Breach Notice for Failing to Register with Cayman Attorneys Regulation Authority" and which letter stated, inter alia, that Cabinet had "appointed" CILPA as the Supervisory Authority for anti-money laundering, counter-terrorism financing and counter-proliferation financing" and that CILPA had "delegated' such authority to CARA. The letter further repeated the assertion given by the "Head of CARA" in her letter of 18th November 2018, to wit: that the addressee "must register with CARA, even if you do not choose to register to become a member of CILPA". The Appellant contends that there was no legal obligation imposed on him at that or any other time to register with the Second Respondent, or to provide any information to the Second Respondent, since:

    (i) The Second Respondent does not exist as an entity, let alone a statutorily empowered entity, and therefore has no legitimate authority to require anyone to register with it, as it was not assigned the duties of Supervisory Authority pursuant to Section 4 (9) of the Law;

    (ii) Any purported delegation of the duties of Supervisory Authority by the First Respondent to the Second Respondent is an unlawful delegation of those duties, since, on the basis of the delegatus non potest delegare principle, the First Respondent had no lawful authority to so delegate;

    (iii) Further and in the alternative, if the First Respondent has been lawfully assigned the duties of Supervisory Authority and has not effectively delegated those duties as Supervisory Authority to the Second Respondent, then its permitting or procurement of the Second Respondent or the persons who hold themselves out as constituting and/or representing the Second Respondent, constitutes an unlawful abdication of those assigned duties;

(iv) Further and in the alternative, even if such delegation was lawful, there is no requirement for an attorney who does not conduct relevant financial business to register with either the First or Second Respondent, and;

(iv) Notwithstanding Cabinet's amendment of Regulation 55B of the AMLR to eliminate the words "that engage in the planning or execution of relevant financial business, or otherwise act for or on behalf of such persons in relevant financial business" seemingly on the basis that such words were tautologous, such amendment does not and cannot expand the authority of a Supervisory Authority beyond the scope of Section 4 (9) of the Law. Therefore the notion that all attorneys are deemed to be DNFBPs is misconceived and erroneous in law;

(v) Regulation 53A of the AMLR makes it clear that a Supervisory Authority only has power to request the production of information from persons carrying out "relevant financial business". It is contended that this is both logical and resonates with the clear legislated intent of Section 4 (9).

2. The letter from the Second Respondent contained a section titled "Breach Notice" whereby it threatened the imposition of an administrative fine for failing to register with "CARA". Included with the emailed letter was two other attachments, including a document titled "Breach Notice" another titled "Enforcement Policy", which purports to be some form of subsidiary legislation promulgated by the Second Respondent. This document purported to be a formal document created pursuant to the "Enforcement Policy" purportedly promulgated by the Second Respondent and outlined a proposed "minor fine" as against each addressee for the "suspected breach of Regulation 55F of the Anti-money Laundering Regulations". Regulation 55F provides a requirement for registration with a Supervisory Authority, yet, the Breach Notice were purportedly issued in respect of the Addressee's failure to register with the Second Respondent, as if it were the legally assigned Supervisory Authority.

3. The "Breach Notice", which was addressed to "Jackson Law" as the named party, asserted that the breach was categorized as "serious" and threatened a fine of up to CI$100,000. It is contended by the Appellant that even if the Breach Notice was valid and was issued by a duly authorized

Supervisory Authority, the quantum of the threatened fine was, on the face of Section 55S (3) the AMLRs, incorrectly assessed, as that provides for a fine of up to CI$50,000, not CI$100,000. It would appear from the name on the Breach Notice, being "Jackson Law" and the quantum of the fine threatened, that the Notice was erroneously served on the presumption that the relevant party was a body corporate, rather than the Appellant. The Appellant contends that with a minimum amount of due diligence, by consulting the Judicial Department, the person or persons who issued the erroneous Breach Notice could easy have ascertained that the relevant party was not a body corporate, but the Appellant.

4. The attachment titled "ENFORCEMENT POLICY" bore the "Cayman Attorneys Regulation Authority name and "CARA" logo, which document provides for a detailed regulatory regime, including provisions for the exercise of purported discretionary powers by the Second Respondent regarding the imposition and determination of administrative fines, all of which, it appears, the Second Respondent has invented for its own convenience and empowerment for the purpose of carrying out of the duties which it purports have been delegated to it by First Respondent, as explained in the letter accompanying the Breach Notice.

5. It is asserted by the Appellant that this purported "CARA Enforcement Policy" document is in its entirety a legal nullity, as the First Respondent does not have any legal authority to develop such a policy itself, and certainly could not have any authority to have delegated such legislative authority to the Second Respondent. It is contended by the Appellant that the creation of such an "enforcement policy" would be tantamount to the promulgation of subordinate legislation, which would be either a function reserved for the Legislative Assembly in the first instance, and, subject to the terms of the enabling provisions in the Law, to Cabinet by way of creation of either an amendment to the AMLRs or by way of separate subordinate legislation, which would have to conform to the scope and remit of the Law and in particular the enabling provisions in the Law. Whilst there is some vague provision found in Regulation 55R (3) of the AMLR for a Supervisory Authority to "issue guidance on the enforcement of fines for a breach prescribed as minor under these regulations", such provision firstly cannot be applied to any proposed fine which is prescribed as "serious" or "very serious" and in any event such authority is reserved to the actual properly appointed Supervisory Authority and, it is contended by the Appellant cannot be construed so as to

allow either the First Respondent and especially the Second Respondent to promulgate its own legislation, whether in the form of an Enforcement Policy or otherwise.

6. Further and in the alternative, it is contended by the Appellant that in the event that the First Respondent could somehow delegate its purported functions as Supervisory Authority to the Second Respondent, and if it somehow has legitimate authority to promulgate its own legislative provisions in the form of the "CARA Enforcement Policy, such policy cannot be enforceable with regards to persons of the same status as the Appellant, who at no time has been a member of the First Respondent. It is therefore contended that in any event, regardless of the legality of the assignment of the duties of Supervisory Authority to the First Respondent, or its delegation of such duties to the Second Respondent, and regardless of the legal status of the Second Respondent, neither of the Respondents have any legal jurisdiction to supervise, regulate or sanction the Appellant.

7. On 16th March 2020 the Ms. Woodard of the Second Respondent sent via email to an email address that has never been provided to her, the Second Respondent or the First Respondent by the Appellant, a document entitled "Fine Notice for a Discretionary Fine". Such Notice indicated that the Second Respondent had exercised its discretion to assess and impose a fine on the Appellant in the amount of CI$52,000.

8. The Appellant contends that the decision to issue such fine is unlawful, to wit:

(i) Such decision is null and void, as the Second Respondent is a legal nullity, and has no lawful authority to perform any function as a Supervisory Authority;

(ii) Alternatively, the Breach Notice upon which the Fine Notice was predicated, as well as the Fine Notice itself, exceeds the statutorily prescribed maximum for a fine imposed on an individual, as the Appellant is an actual person, not a "body corporate";

(iii) Alternatively, the Breach Notice and the Fine Notice are both nullities, as they are issued against an entity that does not exist, but is actually simply a tradename of the Appellant;

(iv) The Second Respondent does not exist as a legal entity, let alone a statutorily empowered entity, and therefore has no legitimate authority to impose a fine as against the Appellant, as it was not assigned the duties of Supervisory Authority pursuant to Section 4 (9) of the Law;

(v) Any purported delegation of the duties of Supervisory Authority by the First Respondent to the Second Respondent is an unlawful delegation of those duties, and on the basis of the delegatus non potest delegare principle, the Second Respondent has no lawful authority to impose any discretionary fine;

(vi) Further and in the alternative, even if such delegation was lawful, there is no requirement for an attorney who does not conduct relevant financial business to register with either the First or Second Respondent, and so there is no breach of the regulations by the Appellant;

(vii) The Appellant further contends that he has a constitutional right pursuant to Section 12 of the Constitution of freedom of association, which right the Appellant has, along with the other members of ALPA, asserted vigorously both with Cabinet and with the Respondents. Such right is indefeasible and includes the concomitant right to not associate. Given that the Constitution is the supreme legislation in this jurisdiction, which governs all other legislation and each and all creatures of the Constitution as provided for therein, no primary legislation, let alone subordinate legislation can supplant or displace the right to freedom to associate, unless as provided for in the Constitution, otherwise that legislation and any attempted enforcement of it would contravene Section 12 (1) of the Constitution. The Appellant asserts that regardless of what the AMLR may provide in terms of purported mandatory registration with the First Respondent, who is the actual assigned Supervisory Authority, there is none of the circumstances made out as provided in Section 12 (2) which would make such contravention reasonably justifiable in a democratic society. Therefore, the Appellant asserts that he has a constitutional right to refuse to register with the First Respondent, and by extension, its unlawfully appointed alter ego, namely the Second Respondent,

and that the various threats and demands of the Respondents constitute unlawful behavior, for which the Appellant intends to seek redress in separate collateral proceedings.

(viii) It is further contended by the Appellant that as it seems clear, on the bases advanced herein that to some extent the powers with which the First Respondent has been imbued by Cabinet vis-à-vis the AMLRs are ultra vires, then any decision of the First Respondent or its alter ego, the Second Respondent, which is posited or predicated upon any of those ultra vires provisions would be tainted or nullified by illegality, thereby rendering the decision itself unlawful and unenforceable, if not entirely void ab initio.