Easter Term
[2015] UKPC 15
Privy Council Appeal No 0065 of 2013

JUDGMENT

Rainbow Insurance Company Limited (Appellant) *v* The Financial Services Commission and others (Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Neuberger
Lord Mance
Lord Kerr
Lord Clarke
Lord Hodge

JUDGMENT GIVEN ON

20 April 2015

Heard on 26 and 27 November 2014

Appellant
Sir Hamid Moollan QC
Iqbal Moollan
Salim Moollan
(Instructed by Mr Omar I A Bahemia Solicitor)

Respondent (1)
Mr Désiré Basset SC
Nandraj Patten
Jean-Gaël Basset
(Instructed by Blake Morgan LLP)

Respondent (2)
Geoffrey Cox QC
Edward Risso-Gill
(Instructed by Royds Solicitors)

Co-Respondent
Rishi Pursem SC
(Instructed by Fladgate LLP)

LORD HODGE:

1. The Financial Services Commission ("the FSC") regulates the developing non-banking financial services industry of Mauritius. On 24 September 2007 the FSC suspended with immediate effect the registration of Rainbow Insurance Co Ltd ("Rainbow") as an insurer for general insurance and life insurance business and appointed an administrator over its business. That suspension followed (a) an earlier decision by the FSC on 1 March 2007 directing Rainbow not to issue new insurance policies or to renew such policies and proposing to suspend Rainbow's registration and (b) the decision by the Minister of Finance and Economic Development ("the Minister") on 21 September 2007 to support the FSC's proposal. Rainbow challenged the decision of the Minister and the FSC's decision of 24 September 2007 by judicial review application, which the Supreme Court in Mauritius refused in a judgment dated 18 October 2010. It appeals to the Board with the leave of the Supreme Court.

2. Rainbow has mounted a wide-ranging challenge to those decisions. The challenge may be summarised under several headings, namely (i) procedural unfairness because the decision to suspend registration was effectively made on 1 March 2007 without proper consultation, (ii) illegality and abuse of power as the FSC had no lawful basis to suspend Rainbow's registration and because of an improper delegation of powers, (iii) irrationality because Rainbow was treated in a discriminatory manner in the calculation of its expected recoveries from third parties by subrogated claims ("recoverables"), and because of the speed with which the FSC acted, and (iv) breach of Rainbow's legitimate expectation that it would be given sufficient time to adapt to the FSC's new regulatory requirements. There are also factual disputes which the Board cannot resolve but they are not central to the challenge. At the heart of Rainbow's complaint is the assertion that it was not given a proper opportunity to formulate and agree with the FSC a turn-around plan before its business was suspended.

3. In order to address Rainbow's complaints it is necessary to summarise the relevant legislation and, because the first and fourth challenges are concerned with the history of the FSC's regulatory involvement, set out at some length the events which led to the impugned decisions.

The legislation

4. At the relevant time the Insurance Act 1987 ("the 1987 Act") governed the regulation of the insurance industry in Mauritius. Over time, and in response to international developments in corporate governance and financial regulation, Mauritius has implemented further reforms. The Financial Services Development Act 2001

("FSDA") established the FSC as the regulator of non-banking financial services. The Companies Act 2001 required all companies other than small private companies to use international accounting standards. After a report by the International Monetary Fund and the World Bank following an assessment of the financial sector in 2002 and 2003, Parliament enacted the Insurance Act 2005, which replaced the 1987 Act and came into operation on 28 September 2007, which was after the principal events with which this appeal is concerned.

5. Part IV of the 1987 Act (sections 18-29) concerned the regulation of insurers. Section 20(1) of the 1987 Act required every insurer to maintain a margin of solvency. Section 20(3) prohibited an insurer from taking on any new risks of any kind while it did not have the minimum margin of solvency. The Third Schedule to the Act set out the required margins. Para 1(c) required an insurer carrying on general insurance business to have a margin by which the value of its admitted assets exceeded the amount of its admitted liabilities. Section 25 required every insurer carrying on general insurance business to have a reserve fund at a specified minimum level. Section 26 provided that every insurer carrying on long term insurance business should have and maintain a long term insurance fund and section 26(6) provided that the fund:

> "shall not be liable or chargeable for or in respect of any contract or transaction of the insurer other than that of the long term insurance business carried on by the insurer, and shall not be applied directly or indirectly for any other purpose."

As we shall see, section 26(6) created difficulties for Rainbow because its principal asset was the office, Rainbow House, at 23 Rue Edith Cavell, Port Louis. Rainbow carried on business from there and leased part of it to others, from whom it derived income. Rainbow had mortgaged Rainbow House to fund its then loss-making activities, reducing the value that could be attributed to the margin of solvency and breaching section 26(6).

6. Section 27 required an insurer carrying on general insurance to invest funds in Mauritius of an amount not less than (a) its reserve fund in respect of general business and its share capital and (b) 75% of its funds in respect of its long term insurance business within Mauritius (section 27(1) and (2)). Section 27(6) required that not less than 30% (or other prescribed percentage) of those investments was to be invested in prescribed securities. Section 27(7) provided:

> "The [FSC], having regard to such matters as he considers relevant, may, by notice in writing, permit an insurer to utilize any investment for any purpose specified in the notice, subject to such conditions and restrictions as he may specify."

As we shall see, section 27 also is relevant to the difficulties arising from Rainbow's dependence on its office, its principal asset, as part of its reserve fund and subsection (7) is relevant to its argument that the FSC had the power to allow Rainbow time to adapt and diversify its assets in order to meet regulatory requirements.

7. Part VII of the Act (sections 41-53) concerned the investigation and suspension or cancellation of registration of an insurer. Section 41 provided that, if it appeared to the FSC that an insurer had failed to comply with any of the provisions of Part IV, it might serve a notice in writing on the insurer calling on it to show cause why the FSC should not investigate the insurer's business by appointing an inspector to report to it. Section 44 required the inspector on completion of his investigation to transmit to the FSC his final report and a summary of his conclusions and to transmit the summary to the insurer. Section 44(1)(b) provided that:

> "the [FSC] may … issue such directions … as it thinks necessary or proper to deal with the situation disclosed by the report, including, in particular, directions prohibiting or regulating the issue of new policies, the renewal of existing policies or the entering into of any new contract of insurance."

Subsection (2) provided that such a direction could not remain in force for more than 12 months, although subsection (3) empowered the FSC to re-issue a direction with modifications. Section 44 was the basis on which the FSC issued its direction of 1 March 2007.

8. Section 46 provided for the suspension or cancellation of registration. The grounds on which the FSC could suspend or cancel an insurance company's registration included the insurer's failure to satisfy an obligation under the Act (section 46(2)(b)) and its failure to carry on its business in accordance with sound insurance principles (section 46(2)(d)). Subsection (3) provided that the FSC could not suspend or cancel the registration of an insurer unless (i) it had given written notice that it proposed to do so and the reasons for that proposal, and (ii) if the insurer lodged and did not withdraw a notice of intention to refer the case to the Minister for review, the Minister decided that the registration should be suspended or cancelled. Section 48 gave the insurer 60 days to refer the case for review to the Minister, who had to decide whether or not to support the proposal. Subsection (4) required that the FSC give the insurer notice in writing of the Minister's decision. Section 53 provided for the FSC to give the insurer notice of the suspension or cancellation of its registration. Section 49 prohibited an insurer, whose registration had been wholly suspended or cancelled, from carrying on any insurance business and section 50 empowered the FSC to appoint an administrator to manage the business after the suspension or cancellation of the registration.

9. These provisions in Part VII are relevant to (i) the proposal to suspend Rainbow's registration in the letter of 1 March 2007, (ii) the Minister's decision dated 21 September 2007 to support the proposal and (iii) the FSC's decision of 24 September 2007 suspending Rainbow's registration and the appointment of Mr Amrit Hurree as its administrator.

The factual background to the enforcement action

10. Rainbow was registered to conduct general insurance business from 1976 and long term insurance business from 1978. While it was primarily a motor insurer, it conducted both forms of insurance business from then on. In 2004 after its examination of the audited accounts, statutory returns and other statements which Rainbow had provided, the FSC decided to conduct an on-site inspection. It wrote to Rainbow on 12 August 2004 to inform it that a Mr Oree and three officers of the FSC would carry out the inspection. The purposes of the inspection included ascertaining whether Rainbow complied with relevant laws, codes and regulations and evaluating its financial solvency and performance. The inspection was carried out between 31 August and 17 November 2004. At a meeting on 23 December 2004 the inspectors gave Rainbow a draft of the report and an opportunity to comment on it. On 3 February 2005 Rainbow submitted its comments and on 28 March 2005 the FSC gave Rainbow its final inspection report, which contained the draft findings, Rainbow's comments and the FSC's responses. In the final report the FSC expressed concerns about, among others, failures to comply with international accounting standards, the inadequacy of Rainbow's financial and accounting records, and inadequate management controls.

11. Of particular relevance to later events were the FSC's concerns expressed in its final report (i) that Rainbow's assets were too concentrated on illiquid assets, such as land and buildings (ie Rainbow House), contrary to sound insurance principles, (ii) that its solvency depended upon recent revaluations of Rainbow House, which the FSC did not accept as accurate, and (iii) that an independent actuarial valuation of Rainbow's policy liabilities suggested that Rainbow was insolvent. The FSC had instructed Mr Mark Wharton to prepare an independent actuarial report, which he produced in January 2005 and in which he suggested that if the company did not take corrective measures, including the re-structuring of its assets and the obtaining of an injection of capital, there might have to be a closure to new business, restriction of benefits or a winding up. The FSC had also instructed an independent valuation of Rainbow's office building which suggested that Rainbow had overvalued it. On the basis of those reports, the FSC stated that Rainbow was insolvent by at least Rs 85.2m. The FSC also concluded that Rainbow had overstated its recoverables and ordered it to exclude such recoverables from its admitted assets. It expressed concerns about the lack of records to support such recoverables, under-provision for bad debts, and Rainbow's failure to balance its recoverables with a provision for its liability in pending court cases. It required Rainbow to appoint an independent auditor to assess the recoverables, its potential liabilities from court cases and the adequacy of its provision for bad debts in order to calculate its

margin of solvency. Also relevant were Rainbow's comments on the concern that it had over-concentrated on property investment: it acknowledged that the new Insurance Act would require it to diversify its assets and it had appointed a sub-committee to embark on that diversification. It is not clear why Rainbow thought that such diversification could await the commencement of the new Act because it later became clear that the concentration of its assets in Rainbow House breached provisions of the 1987 Act.

12. Counsel for Rainbow in this appeal pointed out that Mr Wharton had qualified his report by stating the assumptions which he had made and they criticised him for not discussing his conclusions with Rainbow's consulting actuary before he submitted his report. But it is clear that by early 2005 Rainbow knew that (i) the FSC was concerned about (a) the over-concentration of its assets in Rainbow House, contrary to sound insurance principles, (b) a suggested over-valuation of that office building, (c) the inclusion within Rainbow's accounts of the recoverables and (d) Rainbow's solvency, and (ii) the FSC required a report from an independent auditor.

13. On 15 October 2004 and on 9 November 2004 Rainbow granted floating charges over all of its assets and also fixed charges over Rainbow House to the Mauritius Post and Cooperative Bank Ltd ("the bank") to secure borrowings of up to Rs 15m. Later, on 28 June 2005 Rainbow executed in favour of the bank a further floating charge over all of its assets and a fixed charge over Rainbow House to cover borrowings of Rs 45m. Rainbow granted further floating charges over its assets to the bank on 18 May 2006 and 5 July 2006 for Rs 5m. These securities are relevant to the ring-fencing of the long term insurance fund (1987 Act, section 26(6)).

14. In June and July 2005 the FSC corresponded with Rainbow's consulting actuary, Mr Williams of QED Actuaries & Consultants (Pty) Ltd ("QED"), who challenged the values that Mr Wharton had placed on the policy liabilities of the life fund and confirmed the values of the actuarial liabilities which he had certified. In his letter of 25 July 2005 Mr Williams stated that using his valuation of actuarial liabilities and the valuations of assets on its financial accounts, Rainbow was solvent at 31 December 2003.

15. There was a continuing dispute over the valuation of Rainbow House. The Government valuer, whom the FSC had instructed, valued it at Rs 82m on 17 January 2005, whereas Rainbow's 31 December 2003 accounts showed a value of Rs 150m. On 15 July 2005 the FSC's chief executive had a meeting with Rainbow's managing director, Mr Pravin Ramburn, and, on the same day, sent him the Government's valuer's report. In the correspondence which followed both parties recognised the significance of a mutually accepted valuation to the assessment of Rainbow's solvency. Eventually at a meeting on 15 May 2006 between the FSC's chief executive and Rainbow's legal adviser, Sir Hamid Moollan QC, it was agreed to obtain a fresh valuation from another Government valuer. That valuation, which was produced in June or July 2006,

suggested that the property was worth Rs 127m as at 31 December 2005, a figure which was much closer to Rainbow's estimate than to the previous government valuation.

16. Meanwhile, the FSC and Rainbow corresponded about other issues raised in the FSC's final report. On 30 June 2005 Lark Associates, consulting actuaries, whom Rainbow had instructed to assist in its response to that report, completed a review of the final report. In that review they advised that Rainbow meet with its auditors to establish the credibility of its data, accounting practices and compliance with international accounting standards. Lark expressed surprise at "the extremely conservative" valuation of Rainbow House by the Government valuer but counselled that Rainbow set up a process to diversify its assets which were concentrated in Rainbow House. On 12 July 2005 Mr McCann, the deputy chief executive of the FSC, wrote to Rainbow, commenting on the Lark Associates' review. He reminded Rainbow that the FSC had required action in relation to inter alia capital adequacy, solvency and liquidity in its final report and demanded action without further delay. He offered a meeting between representatives of the FSC, Rainbow and its advisers to discuss an implementation plan but warned that if Rainbow did not progress an action plan by 15 July 2005 the FSC would have to consider directions to ensure compliance.

17. In response, and after the meeting on 15 July 2005 (para 15 above), Rainbow submitted an action plan, which the FSC rejected as not covering its requirements or specifying an acceptable completion date. The FSC submitted its own table of its requirements and demanded that it be completed within seven days or Rainbow would face formal regulatory action. Rainbow responded by letter dated 28 July 2005 in which it complained about the FSC's unreasonable behaviour and hostile action. Nonetheless, on 3 August 2005 it wrote to the FSC providing the filled in table. The FSC was not satisfied with the table. Over the following months, correspondence passed between the parties in which the FSC expressed concerns that transfers out of the life fund were breaches of section 26(6) of the 1987 Act, demanded the submission of monthly management reports and accounts and insisted that Rainbow exclude the recoverables from its "admitted assets". The FSC also repeated its demand that Rainbow appoint an independent external auditor to assess its recoverables and the adequacy of provision for bad debts. Rainbow resisted these demands, for example in its letter of 14 October 2005.

18. On 30 September 2005 Rainbow's auditors, KPMG, wrote to the acting chief executive of the FSC, in response to an enquiry, to intimate that in the course of their audit they had "come across a difference of professional opinion" which had not been resolved, that they had offered their resignation subject to a disclaimer from Rainbow, which had not been given, and that they construed from correspondence with Rainbow that they had been removed as auditors of the company. Thereafter the FSC corresponded with Rainbow, seeking without success an explanation for its change of auditor. On 19 December 2005 the FSC issued a requirement under section 8 of the

1987 Act that Rainbow provide information concerning the change of auditor by 30 December 2005.

19. On 26 December 2005, after a new Board and chief executive of the FSC had been appointed, the new chairman, vice chairman and chief executive met representatives of Rainbow to discuss the FSC's concerns and to urge Rainbow to take appropriate measures. It appears from later correspondence (para 25 below) that one of the matters discussed at this meeting was the FSC's concerns that Rainbow was not complying with its obligation under section 27(6) to hold prescribed securities. By letter dated 12 January 2006 Mr Ramburn of Rainbow sought to resolve the differences with the FSC over the valuation of its office and the actuarial valuation. If there were a capital shortfall, he said that it would be resolved by a cash injection. He stated:

> "The Commission can rest assured that, should the need arise, cash will be injected in consultation with and to the satisfaction of the Commission within a time frame in line with the new Insurance Act and elaborated with the Commission."

Similarly, he stated that if there were a shortfall of the investments in the prescribed securities required by section 27, Rainbow would propose a plan to make up the shortfall "within a time frame to be defined in consultation with and to the satisfaction of the Commission". He expressed confidence that all outstanding issues would be resolved by the end of February 2006.

20. The FSC replied on 6 February 2006, noting and recording the undertakings and proposing a meeting of the parties' valuers. The FSC also reminded Rainbow (a) that it had not had a reply to its letter of 19 December 2005 requiring information about the change of auditors and (b) that Rainbow had not submitted a plan to make up the Rs 19.5m shortfall of its investment in prescribed securities in relation to its long term insurance fund under section 27(6) of the 1987 Act. Thereafter there appears to have been no significant correspondence until the meeting on 15 May 2006 (para 15 above).

21. The FSC wrote to Rainbow on 24 July 2006, intimating that the Government valuer had valued Rainbow House at Rs 127m as at 31 December 2005. It referred to Rainbow's financial statements for the year ended 31 December 2005 and raised matters which it asked Rainbow to address immediately. First, it suggested that there was a shortfall of over Rs 1m in its investment in prescribed securities for the purposes of its general insurance business contrary to section 27(6) of the 1987 Act. Secondly, there was a shortfall of about Rs 19m in its investments in prescribed securities for the purpose of its long term insurance business contrary to the same statutory provision. Thirdly, it asserted that Rainbow's reserve fund for its general business had a shortfall of Rs 2.8m from its minimum level, requiring a transfer from profits and that the FSC

was empowered to act under section 46 because of that failure to comply with section 25(1) of the 1987 Act. Fourthly, the FSC expressed concern that Rainbow had bank borrowings and lease liabilities of Rs 53m secured on its assets, which included land and buildings that were part of the long term insurance fund. (The Board sees this as a reference primarily to Rainbow House.) This was contrary to section 26(6) as the life fund should not have been encumbered by liabilities relating to the company's general business. It required Rainbow to act immediately to restructure its loans and charged assets to create a life fund of unencumbered assets and to provide a plan with a time schedule as to how this would be done. The FSC also reminded Rainbow of its undertakings (a) to submit quarterly management accounts and (b) to put in place a plan to make up the shortfall in prescribed investments (under section 27) within a time frame to be agreed with the FSC.

22. In its response dated 25 August 2006, which followed a meeting between the parties on 28 July 2006, Rainbow requested a copy of the valuation of Rainbow House and stated that it would restate its 2005 accounts at the end of 2006. In relation to the shortfall on prescribed investments under section 27, Rainbow stated that the FSC had not raised the issue in the past and that it was unfair to raise the issue now. It stated that Rainbow House yielded a rental income and invited the FSC to exercise its discretion under section 27(7) to approve Rainbow's investment in the building. Rainbow accepted that there was a shortfall in its reserve fund under section 25, which it calculated as Rs 456,594, and undertook to transfer funds when the company returned to profitability. In support of its assessment of the shortfall Rainbow suggested that the FSC had erred in the calculation of total gross premiums for the purpose of assessing the minimum level of the reserve fund under section 25 and that the gross premium income should be net of the reinsurance premium which it paid to reinsurers. It denied any breach of section 26(6) as it asserted that its life business was not encumbered by loans taken for the general insurance business.

23. On 19 September 2006, the parties met again in the premises of the FSC in an attempt to resolve outstanding issues, including Rainbow's compliance with section 27 of the 1987 Act, its accounts, the dependence of its life fund on the mortgaged office building, and the submission of management accounts. There was a strong disagreement at the meeting. Rainbow again requested a copy of the valuation report on its building while the FSC stated that it had already disclosed all of the relevant parts of the report, omitting only a reference to a valuation as at 30 June 2006 (which was later disclosed as Rs 137m). In an affidavit, Mr Clifford Appasamy, a senior examiner in the FSC, gave evidence that Rainbow had not been cooperative at this meeting but had persisted in rejecting the view that it had failed to comply with the 1987 Act and proper insurance principles. This prompted the FSC to instigate a further investigation of Rainbow.

The second investigation and enforcement action

24. On 5 October 2006 the FSC gave Rainbow a notice under section 41 of the 1987 Act in which it referred to the correspondence and meetings concerning breaches of sections 27(6) and 26(6) of the Act and invited Rainbow to show cause why it should not investigate its business.

25. Rainbow responded in a letter dated 11 October 2006. In relation to its obligation to invest in prescribed securities (section 27(6)) Rainbow accepted that there were shortfalls of Rs 979,558 for general business and Rs 11,439,836 for its life business. It pointed out that the FSC and its predecessor, the Controller of Insurance, had not objected in the past to the nature of Rainbow's investments. It asserted that the FSC had not raised any question of compliance with section 27(6) before the meeting on 26 December 2005 and suggested that the FSC was estopped from making an issue of the investments. It provided a deposit certificate to make up its calculation of the shortfall for the general business and stated that it would need two years to invest in prescribed securities to remedy the shortfall for its life business. In the meantime it renewed its request for a dispensation under section 27(7), approving its existing investments. In relation to its obligation to have an unencumbered life fund (section 26(6)), it proposed to set up a co-ownership scheme for its building by a *reglement de copropriété* so that the life fund and the general business would hold separate and distinct proportions of the building and the securities would be over only the assets of the general business. It advised that the arrangement would need shareholder approval and could take six months to complete.

26. On the same date Rainbow sent the FSC a copy of its accounts to 31 December 2005 which it had informally re-stated to reflect the valuation of its office at Rs 127m and an actuarial certificate of solvency of its life fund which was based on its financial statements.

27. The FSC decided to appoint a chartered accountant, Mr Kirti Rambocus, who was a partner in Ernst & Young, to investigate Rainbow's business. He reported to the FSC on 28 February 2007. In the executive summary of his report, which the FSC sent to Rainbow on the day on which it received it, Mr Rambocus drew attention to Rainbow's dependence on the very competitive motor insurance business, its high cost base, its high level of debt to finance its loss-making activities and consequent finance charges, and its funds tied up in debtors and recoverables. He suggested that unless those issues were addressed the company's long term viability would be jeopardised. He expressed concerns about the quality of financial data available to Rainbow's management and suggested that that would have to be addressed in any turnaround plan.

28. In his balance sheet review Mr Rambocus stated:

> "First and foremost, the balance sheet as at FY05 shows a significant mismatch with short term liabilities being represented by long term illiquid assets including fixed assets and claims recoverable. This unusual situation for the Company has contributed to the level of indebtedness of the Company with short term financing being used to meet the liabilities. This is clearly not sustainable."

He also suggested that Rainbow had adopted aggressive accounting policies which in some instances had involved non-adherence to international accounting standards and that disagreement over such policies had contributed to the resignation of KPMG as the company's auditors in 2005. There had been insufficient provisions for claims and Rainbow had recognised recoverables contrary to IAS (international accounting standard) 37. His sampling of the latter suggested that most claims had been recognised without a legal advisor's report to support them. IAS 37 required that Rainbow did not recognise them and that the Rs 31.1m attributed to them in its accounts should be reversed.

29. In his legislation and regulation compliance review Mr Rambocus suggested that on the basis of his recommended adjustments Rainbow had a shortfall on its margin of solvency of Rs 24.7m as at 31 December 2005 before account was taken of further losses incurred in 2006. He also identified further breaches including: (i) an inadequate reserve fund (section 25), (ii) an encumbered life fund because the head office had been used as security for borrowings for the general business (section 26(6)), and (iii) a shortfall of prescribed securities to back the life fund (section 27(6)).

30. In his working capital and cash flow review, Mr Rambocus painted a bleak picture. He stated that management accounts indicated a loss of Rs 5.4m in the year to 31 December 2006 and indebtedness of around Rs 62m, excluding sums due to re-insurers. The Board states his conclusion in full:

> "I am therefore concerned about [Rainbow's] ability to meet its short term financial commitments including claims due to insured parties and policyholders. A significant capital injection is required in addition to a comprehensive restructure of the Company.
>
> However the heavy reliance on the motor business and high cost base could significantly impair any turnaround plans unless profitable line of business can be identified and pursued in the next few months. This would have to be supported by a major cost cutting exercise. The cost of the restructure (including any compensation package to employees) would have to be factored in

> and financed. I would also like to re-iterate the crucial role that will be played by the board of directors and management in this process.
>
> It is therefore important that the appropriate skills are hired to give a reasonable chance of success to any turnaround plan. Over and above adherence to the code of corporate governance, the setting up of a risk management committee with the necessary skills to put in place a risk management strategy and follow up on the implementation of the strategy might be expected."

31. On 1 March 2007 the FSC issued directions under section 44(1)(b) ordering Rainbow (i) not to issue or renew any insurance policy, (ii) not to use any money of the life fund for any purposes other than long term insurance and to pay all monies received for any class of long term business into the appropriate sub-fund and (iii) to submit to the FSC fortnightly statements of receipts and payments. In the letter containing the directions the FSC summarised its view of prior correspondence and meetings and stated that as a result of that and Mr Rambocus's investigation it "had reason to believe" that Rainbow was not conducting business in accordance with sound insurance principles and had committed serious breaches of the 1987 Act. It listed breaches of sections 20, 25, 26(6) and 27(6) and breaches of sound insurance principles, including the high concentration of the life fund in Rainbow's headquarters building. The FSC stated that the breaches of the 1987 Act and the conduct of business contrary to sound business principles constituted grounds for suspension under section 46(2) and proposed (pursuant to section 46(1)) to suspend Rainbow's registration in relation to the whole of its business.

32. On 15 March 2007 the chief executive and other representatives of the FSC met representatives of Rainbow, including its auditor and its financial adviser, to discuss the executive summary of Mr Rambocus's report, the directions and proposed suspension. In a letter on the following day Rainbow referred to those discussions, made submissions on the inspector's calculations of a shortfall on the margin of solvency, including his treatment of recoverables, and invited the FSC to re-consider its directions which had suspended Rainbow's underwriting. When the FSC did not respond, Rainbow wrote again on 21 March 2007 seeking an urgent response as the prohibitions were depriving it of income and prejudicing the re-funding of the company to meet any shortfall on the margin of solvency. On the same day the FSC responded to the letter of 16 March stating that it was maintaining its directions.

33. As a result, on 26 March 2007 Rainbow applied to the Minister for a review of the FSC's proposal to suspend its registration and the directions. It asserted that the FSC had acted on a report that contained factual errors and had failed to respond to representations that pointed out the errors. It suggested that the FSC had abused its powers and had acted in a discriminatory manner and contrary to natural justice.

Rainbow argued that the FSC was estopped from asserting that investment in its headquarters office was not a prescribed security for its life fund but stated that it was prepared to provide funds to remove a shortfall in prescribed securities of Rs 11m within two years. It stated that it was willing to inject Rs 8m into the business within a week but that it had not been given an opportunity to identify the extent of the real shortfall in its margin of solvency. It also said that it was prepared to implement within three months a turnaround plan of the same date which its consultant, BDO De Chazal Du Mée, had prepared.

34. BDO's turnaround plan, which Rainbow gave the FSC at a meeting on 4 April 2007, recognised that the company was (i) loss-making, (ii) encountering a cash flow crisis having exhausted its bank facility and (iii) carrying excessive overheads. It proposed that Rs 25m should be invested as equity after rescheduling the company's borrowings, that the company dispose of its life business, and that there should be a significant exercise to cut the costs of its general business with a view to returning to profit in 2009. At the meeting, and as confirmed by a letter from Mr Ramburn on the same day, Rainbow's board of directors undertook to invest Rs 25m in instalments between April and 31 December 2007 if the FSC lifted the suspension of business. Rainbow proposed a compromise on the accounting treatment of recoverables, which, if accepted, would give it a margin of solvency. Rainbow offered to remove the previously calculated shortfall on its reserve fund (section 25) immediately. It repeated its offer to invest Rs 11m over two years to achieve sufficient prescribed securities for its life fund. It also suggested that it would take some months to set up a co-ownership scheme for its office and thus address the problem of an encumbered life fund under section 26(6). It invited the FSC to lift its suspension immediately.

35. There was a further meeting between the FSC and Rainbow on 16 May 2007 but no progress appears to have been achieved. On 28 June Mr Ramburn again wrote to the FSC asking for the suspension to be removed. He offered among other things to inject Rs 15m into the company immediately and to implement the turnaround plan. He also enclosed Rainbow's audited accounts for the year to 31 December 2006 which the FSC had requested. The accounts, which Bacha and Bacha CA had audited, disclosed continuing losses. The auditors' report was qualified as to the going concern basis of the accounts and recorded non-compliance in that period with sections 20, 25, 26(6) and 27(6) of the 1987 Act. The calculation of margin of solvency which accompanied the audited accounts recorded a deficit of Rs 14,510,452.

36. In reply to Mr Ramburn's letter the FSC wrote on 2 July 2007. It stated that, having considered his representations and Rainbow's audited accounts, the FSC maintained its directions because there had not been a sufficient change of circumstances to enable it to vary the decisions reached on 1 March 2007.

37. Matters then moved to a close. On 21 September 2007 the Minister wrote to the chief executive of the FSC to inform him that he supported the FSC's proposal to

suspend the registration of Rainbow. The FSC wrote to Rainbow on 24 September 2007 to intimate the Minister's decision and to notify it that its registration for both its general and long term business was suspended with immediate effect and that the FSC was appointing Mr Amrit Hurree as administrator of the company. Thereafter, on 10 December 2007 on the FSC's application the judge in bankruptcy appointed Mr Louis Appavoo as provisional liquidator.

Discussion

38. As stated in para 2 above, the Board cannot resolve in this appeal factual disputes such as whether Mr Rambocus was correct in his calculations when he reported to the FSC that Rainbow had a shortfall on its margin of solvency. But in this case such disputes are not central to the challenge which Rainbow mounts. Judicial review is concerned with the review of the legality of the decisions of public authorities, including regulators such as the FSC. In this case the impugned decisions are those of the FSC and the Minister. The challenge has focussed on their decisions after receiving the Rambocus report and then Rainbow's proposals in response to that report. But that challenge must be seen in the context of the earlier communications between Rainbow and the FSC.

39. Judicial review is not an appeal on the facts. There may be occasions in which, to achieve effective review of legality, the court will have to examine questions of disputed fact. See for example, *Manchester City Council v Pinnock (Nos 1 and 2)* [2012] 2 AC 104, paras 45-49 per Lord Neuberger MR; *Kennedy v Information Commissioner* [2014] 2 WLR 808, Lord Mance at paras 54 and 55. But in most cases it is not necessary to do so; and this is one such case. The court is not the primary decision-maker. The court can set aside a decision of a public authority if it is beyond that body's powers – ultra vires. It can do so if a decision is made for an improper purpose: *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997. It can set aside a decision also if the decision-maker has taken into account an irrelevant consideration or failed to take account of a relevant consideration. It can do so also where the decision is *Wednesbury* irrational. It can do so where the procedure adopted by the public authority is unfair – a breach of natural justice – and also where a public authority has acted unfairly, thwarting a legitimate expectation, which its words or actions have created. But counsel for Rainbow also invited the Board to adjudicate on alleged factual errors in the 2005 report on whether Rainbow had adhered to sound insurance principles and, in Mr Rambocus's report, on the treatment of recoverables and an alleged double counting of a provision for bad debt. The Board does not think that these challenges readily fall within the scope of judicial review: the facts are not uncontentious or established by verifiable objective information; questions such as the degree of certainty of the receipt of recoverables are a matter of professional and regulatory judgment in which the court must allow a margin of discretion to the regulatory authority. More significantly, the conclusions of the 2005 report are simply the background to later events and any alleged mistake as to the solvency of Rainbow in Mr Rambocus's report did not play a decisive role in the FSC's decision to suspend Rainbow's registration on

24 September 2007 as by then it had the 2006 accounts and the calculation of margin of solvency that disclosed a deficit. By then it was not in dispute that Rainbow was in significant breach of Part IV of the 1987 Act in several respects.

40. Rainbow's first challenge is that the FSC and the Minister were guilty of procedural unfairness, what counsel called "a breach of due process", (a) as the FSC had prohibited Rainbow from taking on new business on 1 March 2007 without consulting it and giving it an opportunity to respond to the Rambocus report and (b) in that thereafter, having made the effective decision on 1 March 2007, the FSC and the Minister had failed to respond to Rainbow's proposals including its turnaround plan and had given no reasons for that decision before suspending its registration. Counsel's principal complaint was that the FSC had not raised the question of Rainbow's margin of solvency between February 2006 and the decision on 1 March 2007. He referred to the judgment of Lord Wilson in *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947 in support of a common law duty to act fairly.

41. As Lord Wilson said in that case (at para 24), "Fairness is a protean concept, not susceptible of much generalised enlargement". There is no general common law duty on a public body to consult persons who may be affected by a proposed measure before it is adopted: *Moseley* (above) para 35 per Lord Reed; *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139, paras 43-47 per Sedley LJ. There may be an obligation to consult arising out of a statutory scheme or as a consequence of having created a legitimate expectation. The Board considers the latter in its discussion of the fourth challenge. But if there were a duty to consult before making a determination under section 44(1)(b), that consultation would have had to (a) take place while the proposal was at a formative stage, (b) give sufficient information of the proposed course of action and the reasons for it to allow Rainbow to consider and make an intelligent response, and (c) allow adequate time for the preparation and submission of that response; and the FSC would conscientiously have to take account of the response before making its decision: *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, at paras 108 and 112 per Lord Woolf MR; *Moseley* (above) at para 25 per Lord Wilson. Such consultation achieves better decisions and may avoid a sense of injustice: *R (Osborn) v Parole Board* [2014] AC 1115, paras 67 and 68 per Lord Reed.

42. Did the statutory scheme envisage such consultation in all circumstances before the FSC reached a determination under section 44(1)(b)? In the Board's view it did not. The origin of the decision of 1 March 2007 lies in section 41. That section empowered the FSC, where it appeared that the insurer had failed to comply with Part IV of the Act, to serve a notice in writing on the insurer to show cause why it should not investigate "the whole or any part of" its business. It was open to the insurer at that stage to demonstrate that it had complied with Part IV. If the insurer did not do so, it fell to the FSC or its appointed inspector to carry out the investigation. When conducting that investigation the FSC or its inspector had extensive powers to require the production of information and could employ the services of an actuary, auditor or lawyer if necessary

(section 42). The 1987 Act did not limit the scope of the investigation to the issues specified in the section 41 notice which preceded it. Section 44 governed what happened when the investigation was complete: the inspector sent his final report to the FSC and a summary to the insurer. The FSC was then empowered to issue interim directions, which remained in force for up to 12 months, "as [it] thinks necessary or proper to deal with the situation disclosed in the report" (section 44(1)(b)).

43. The determination of 1 March 2007 (para 31 above) had two elements. First it contained directions, including the prohibition on the issue of new or renewed insurance policies. That direction was obviously very damaging to the prospects of Rainbow continuing in business. But because Mr Rambocus had concluded that there was a shortfall in its margin of solvency (para 29 above), the FSC was obliged to make that direction in support of the prohibition in section 20(3) (para 5 above). The second element was the proposal to suspend Rainbow's registration. That proposal did not take immediate effect and the suspension of registration was a decision which the FSC could take only after the insurer had had an opportunity to refer the case for review to the Minister (sections 46(3) and 48), an opportunity which Rainbow took.

44. The Board considers that the statutory scheme envisaged that the insurer had an opportunity to engage with and make representations about the proposed section 46 suspension in the context of the ministerial review. It did not provide for consultation prior to the section 44 directions and fairness did not require such consultation, especially where the findings of the report gave rise to the section 20(3) prohibition. The Board is not persuaded that the FSC and the Minister acted unfairly after 1 March 2007 in not responding constructively to Rainbow's proposals to turn around its business. It addresses that challenge below in its discussion of the fourth challenge on the related issue of fairness and thwarted legitimate expectations.

45. Rainbow's second challenge was that the FSC acted illegally and in an abuse of its power as (a) in its letter of 1 March 2007 (para 31 above) it claimed only that it had "reason to believe" that Rainbow had not conducted its business in accordance with sound insurance principles and had failed to meet its obligations under the Act and (b) it had delegated the decision of 1 March 2007 to Mr Rambocus.

46. In the Board's view, there is no substance in either branch of this challenge. The letter of 1 March 2007 (a) made only temporary (although very significant) directions and (b) proposed the suspension of Rainbow's registration. As the FSC had reason to believe from Mr Rambocus' report that there were breaches of Part IV of the Act, it was entitled to make the proposal and Rainbow had the opportunity to demonstrate that that belief was incorrect in the context of the ministerial review before a final decision was taken. In the Board's view it would not be correct to infer from the speed of the FSC's decision after it received Mr Rambocus' report that it did not address its mind to the decision which it then took. Mr Appasamy gave evidence that Mr Rambocus had discussed his preliminary findings with members of the FSC before he finalised his

report. In its dealings with the FSC after 1 March 2007 (paras 32–35 above) Rainbow did not deny that there were breaches of Part IV of the Act or failures to conduct business in accordance with sound insurance principles. Indeed, in Rainbow's accounts for the year to 31 December 2006 its auditors recorded extensive breaches of Part IV of the Act (para 35 above). By the time the FSC took the decision to suspend Rainbow's registration on 24 September 2007 the fact that there were breaches was not in dispute even if their extent was contested. Secondly, Mr Rambocus did not take any decision. He was the fact finder as sections 42 and 44 of the Act envisaged and the FSC responded to his report appropriately.

47. Rainbow's third challenge, that the FSC's decisions were irrational and discriminatory, rested on its assertion that there were flaws in Mr Rambocus' report, that the FSC did not need to act immediately, and that the FSC acted in a discriminatory manner in not allowing Rainbow to include the recoverables within its assets. Counsel submitted that most of the recoverables arose out of motor insurance claims and were therefore straightforward.

48. Again, the Board is satisfied that there is no substance in any of the branches of this challenge. First, while it was open to Rainbow to challenge Mr Rambocus' findings, the FSC was entitled to act on the finding of a shortfall in the margin of solvency because of the section 20(3) prohibition. Secondly, the FSC's disallowance of the recoverables followed its expression of concern about the vouching of those claims because of the inadequacies of Rainbow's record keeping and the lack of legal support for the claims and also Rainbow's failure to balance the recoverables with a provision for its liabilities from pending court cases. The FSC had raised these concerns in its final report in January 2005 (para 11 above). It then demanded the independent audit of the recoverables (para 17 above) and was concerned that a disagreement over their treatment had contributed to the termination of KPMG's contract as Rainbow's auditors (paras 18 and 20 above). Mr Rambocus confirmed the FSC's concerns in his report (para 28 above) finding that the recognition of the recoverables was in the circumstances contrary to IAS 37. He explained in his affidavit that the international accounting standard required that the recovery had to be "virtually certain" of being paid before it could be treated as an admitted asset. Other insurance companies accounted for expected recoveries at lower percentages of their current assets and only when vouched so as to meet the "virtual certainty" standard of IAS 37. In the light of this evidence the Board cannot conclude that the treatment of Rainbow in this matter was discriminatory.

49. The fourth challenge was that the FSC had thwarted Rainbow's legitimate expectations by suddenly altering its practice on (a) the accounting treatment of recoverables, (b) what could be treated as prescribed investments, (c) the granting of securities over Rainbow House and (d) the treatment of gross premiums under section 25. Counsel referred to the judgment of Laws LJ in *R (Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755 in support of his proposition. He submitted that the FSC had by its past conduct led Rainbow to believe that its practice on those matters would continue at least for a reasonable period to provide a cushion

against the policy change. Counsel argued that the FSC had to notify and consult in order to allow Rainbow a reasonable time to adapt its business to the new policies which the FSC was promoting. The Board also addresses in this context the suggestions, in the first challenge, (a) that the question of Rainbow's margin of solvency had been settled by February 2006 and (b) that the FSC and the Minister failed to respond to Rainbow's representations about the Rambocus report and its proposals to turn round its business.

50. In the view of the Board there are formidable hurdles, both legal and factual, which these submissions cannot surmount. It addresses each in turn.

51. The courts have developed the principle of legitimate expectation as part of administrative law to protect persons from gross unfairness or abuse of power by a public authority. The constitutional principle of the rule of law underpins the protection of legitimate expectations as it prohibits the arbitrary use of power by public authorities. Such expectations can arise where a decision-maker has led someone to believe that he will be consulted or be given a hearing before a decision is taken which affects him to his disadvantage (a "procedural legitimate expectation") or that he will retain a benefit or advantage (a "substantive right legitimate expectation"). The source of the expectation may be either an express promise given on behalf of the public authority or an established practice which the claimant can reasonably expect to continue: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 401 per Lord Fraser. The expectation of a continuance of a substantive right is not absolute, even in the strongest cases such as *Ex p Coughlan* (above), because a sufficient public interest can still override a legitimate expectation to which a representation had given rise. In this appeal counsel founds his argument on what Laws LJ in *Niazi* (above) has described as a "secondary case of procedural expectation", which arises where the public authority has given no assurance of consultation or as to the continuance of a policy but its past conduct has been "pressing and focussed" on potentially affected persons and there is at least

> "an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to ensure for their particular benefit: not necessarily for ever, but at least for a reasonable period, to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult." (Laws LJ in *Niazi* at para 49)

Laws LJ in formulating this expectation was considering unusual circumstances where, absent a representation that the policy would continue, an abrupt change of policy was held to be so unfair as to amount to an abuse of power. A classic example is *R v Inland Revenue Commissioners, Ex p Unilever plc* [1996] STC 681. In that case the Inland Revenue Commissioners on thirty occasions over twenty years had exercised their lawful discretion to entertain late claims for loss relief against corporation tax and then

suddenly, without notice or consultation and for no good reason, refused such claims as out of time. The Board does not need to address questions of taxonomy by deciding whether this is a separate head of legitimate expectation or whether it is a particular example of what Lord Fraser described as an established practice which the claimant could reasonably expect to continue. It is enough to observe that there are cases in which fairness requires that a change in policy cannot be made abruptly because it would defeat the legitimate expectations of an individual or group. In such cases, as Sedley LJ stated in *Niazi* at para 70, it is not the alteration of the policy but the way in which it is done which is capable of frustrating a legitimate substantive right expectation.

52. The courts will enforce an expectation only if it is legitimate. There is an established line of authority that nobody can have a legitimate expectation that he will be entitled to an ultra vires relaxation of a statutory requirement: *R v Attorney General, Ex p ICI plc* (1986) 60 TC 1, p 64G per Lord Oliver; *R v Inland Revenue Commissioners, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, p 1569 per Bingham LJ, p 1573 per Judge J, *Ali Fayed v Advocate General for Scotland* 2003 SLT 747, para 135 per Lord Justice Clerk Gill, 2004 SLT 798, paras 115-119 per Lord President Cullen. Those cases are all concerned with tax legislation and the Board recognises that, as Judge J stated in *MFK* (above) the correct approach to legitimate expectation in any particular field of public law depends on the relevant legislation. But what is at stake here is the principle of legality. In *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, the Court of Appeal considered an argument that the Secretary of State was required to exercise his discretion to continue to fund a primary school pupil's education at a private school until her secondary education was complete under an assisted places scheme which the Government had abolished by legislation, because an announcement by the governing party when in opposition had created a substantive right legitimate expectation. The court's principal reason for rejecting that submission was that an undertaking to allow all children in the position of the claimant's child to continue in an assisted place was contrary to the limited discretion which the statute had given the Secretary of State. There could be no legitimate expectation that the Secretary of State would act contrary to the statute: Peter Gibson LJ at p 1125D-G, Laws LJ at p 1129E, Sedley LJ at p 1132B. See also *R (Sovio Wines Ltd) v The Food Standards Agency* [2009] EWHC 382 (Admin), paras 95-98 per Dobbs J.

53. The Board notes that there are obiter dicta in the decision of the Court of Appeal in *Rowland v Environment Agency* [2005] Ch 1 that fairness might prevail over legality in the context of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights (specifically *Pine Valley Developments Ltd v Ireland* (1991) 14 EHRR 319 and *Stretch v United Kingdom* (2003) 38 EHRR 196). But the Board is not concerned with that context in this case. Further, in that context, it agrees with the editors of De Smith's Judicial Review ((7th ed) paras 12.078-12.079) that (a) the law should be slow to weaken the principle of legality and (b) "an unlawful representation should not prevail where third party interests were or might be compromised". In this case in which the FSC was exercising regulatory powers in the

interests of policy holders and others, third party interests were clearly engaged. Thus on any view there could be no legitimate expectation that the FSC would act in a way which was contrary to its statutory obligations, which included "[taking] measures to suppress illegal … practices": section 6 of FSDA.

54. Turning to the individual factual challenges, the Board considers that the FSC gave Rainbow ample notice about its concerns over the treatment of recoverables and its requirement that they be removed from its admitted assets (see paras 11, 17, 18, 20 and 48 above).

55. Secondly, the FSC had warned Rainbow of its overdependence on its office building, which was an illiquid asset, in its final report in 2004 (para 11 above). It demanded immediate action in its letter of 12 July 2005 (para 16 above). It discussed its concern that Rainbow was not complying with the requirement under section 27(6) for prescribed securities at the meeting on 26 December 2005 (para 19 above) and called for Rainbow to produce its plan to acquire the prescribed securities in its letter of 6 February 2006 (para 20 above). It raised the matter again in its letter of 24 July 2006 (para 21 above) and treated Rainbow's failure to co-operate thereafter as the trigger for its section 41 notice which led to the investigation by Mr Rambocus (para 24 above). In the Board's view the FSC was obliged to enforce the requirements of section 27(6) and a dispensation under section 27(7) would have been contrary to the aims of the statute. The FSC allowed many months to pass after the meeting of 26 December 2005 before it suspended Rainbow's licence on 24 September 2007. In law and in fact there was no thwarting of a legitimate expectation on this ground.

56. Thirdly, and similarly, there was a statutory requirement in section 26(6) that the life fund was not encumbered by securities relating to the general business of the insurer (para 5 above). The FSC had a duty to enforce that prohibition to protect policy holders who had an interest in the life fund. Rainbow granted securities over its assets, including Rainbow House (para 13 above). The FSC appears to have become aware of this by the meeting on 24 July 2006 as it requested the immediate restructuring of Rainbow's assets (para 21 above). In its letter of 11 October 2006 Rainbow promised to implement a co-ownership scheme which would take six months to complete (para 25 above). It does not appear to have implemented that scheme as the BDO turnaround plan produced in April 2007 envisaged that it would take several months to put the scheme in place (para 34 above). Over 11 months passed between the proposal to implement a scheme to comply with section 26(6) and the suspension of Rainbow's registration. Again, both in law and fact the FSC did not thwart any legitimate expectation.

57. Fourthly, it is not clear on the evidence that the FSC altered its approach to the presentation of total gross premiums in the calculation of the minimum level of the reserve fund in section 25(6). As counsel for the FSC pointed out, regulation 11 and Form 14A of the Insurance Regulations 1988 required insurance companies to produce documents which showed the total gross premium before deducting the premium on

reinsurance business ceded. It is not necessary for the Board to determine the correct approach to the statement of total gross income. It suffices to note (a) that the Board has not been furnished with evidence of Rainbow's practice in stating its total gross premium in its calculation of the minimum level of the reserve fund in earlier years, of the FSC's awareness of that practice, or that the FSC altered its approach on that issue and (b) it is not in dispute that at the end of 2006 Rainbow remained in breach of section 25. See the auditors' report for the year ending 31 December 2006 (para 35 above). In the view of the Board this dispute played only a minor role in the sequence of events which led to the impugned orders.

58. Turning to the matters left over from the first challenge, the reason for the direction of 1 March 2007 which prohibited Rainbow from issuing or renewing insurance policies was Mr Rambocus' conclusion that it did not have the necessary margin of solvency. Counsel attacked the FSC for relying on this conclusion because Rainbow asserted that the issue of the margin of solvency had been resolved by February 2006 and the FSC had not raised it again before issuing the direction. The FSC in its letter of 6 February 2006 had noted Rainbow's undertaking to inject cash "within a time frame in line with the new Insurance Act and elaborated with the Commission" (paras 19 and 20 above) and the matter was left alone thereafter. Although counsel argued this point with some force, the Board is satisfied that it is incorrect. The issue of the margin of solvency remained unresolved after February 2006. First, the valuation of Rainbow House was not resolved until July 2006 (para 21). Rainbow had to re-write its 2005 accounts to reflect the reduced value of the building. Secondly, the dispute about the inclusion of recoverables in Rainbow's balance sheet also had not been resolved. The FSC's consistent stance was that all recoverables should be excluded; and Rainbow continued to challenge that after 1 March 2007 (para 34 above). The matter remained live when the FSC made the final order suspending Rainbow's registration. Thirdly, Rainbow's auditors in the accounts to 31 December 2006 recorded its failure to maintain the margin of solvency (para 35 above). By 28 June 2007, the matter of the margin of solvency was established adversely to Rainbow's position.

59. Counsel also criticised as a breach of due process the FSC's failure to respond to Rainbow's proposals after 1 March 2007. Sections 46(3) and 48 gave an insurer the opportunity to make representations once it has applied for a ministerial review. In the Board's view while the FSC could have made greater efforts to engage with Rainbow by putting its views in writing, it was not under a legal duty to be constructive in responding to its proposals. It was primarily the task of Rainbow's management to ensure that their company complied with its statutory obligations. If one stands back from the detail, it is clear that since the inspection of 2004-2005 (paras 10 and 11 above), the FSC had been attempting to ensure that Rainbow complied with its statutory obligations (paras 14 to 23 above). The FSC had formed the view that the management of Rainbow were not cooperative. When the FSC gave notice under section 41 to show cause why there should not be an investigation, Rainbow's response offered no short or medium term solution to its concerns. It asserted estoppel, suggested that it would take two years to make the necessary investments in prescribed securities and proposed that

the co-ownership scheme would not be in place for six months (para 25 above). There was no evidence that Rainbow took any steps thereafter to implement the co-ownership scheme or that the proposal was a practicable solution to the problem as it required the co-operation of the bank, including the release of assets from its fixed and floating charges.

60. In discussions after 1 March 2007 there was no meeting of minds on the treatment of recoverables which were an important component of the calculation of Rainbow's margin of solvency. It cannot have been a surprise to Rainbow's management that the FSC refused to lift the directions in its letter of 21 March 2007. Thereafter in its submissions to the Minister Rainbow again asserted estoppel as a basis for not fulfilling its statutory obligations. BDO's turnaround plan (para 34 above) revealed Rainbow's economic predicament and the need for a major equity investment. But the offer by Rainbow's directors to invest during 2007 depended on the FSC's immediate recall of the direction that suspended its business. While the Board can understand the reluctance of the directors to invest in a business in crisis without first having restored its ability to conduct new business, it was the task of the FSC to ensure that Rainbow had the necessary margin of solvency before it could allow it to take on new business. When the FSC wrote to Rainbow on 2 July 2007, it had considered Rainbow's audited accounts to 31 December 2006 and the auditors' report which acknowledged its failures to comply with its statutory obligations, including the maintenance of a margin of solvency. It also had the appended calculation which showed a deficit on the margin of solvency. Rainbow can have been in no doubt as to the basis of the FSC's refusal to lift the prohibition, which was based not only on the insolvency but also on other breaches of Part IV of the 1987 Act and of sound insurance principles, or of the ultimate decision to suspend its registration.

61. The Board concludes that the FSC did not act unfairly towards Rainbow in the period of over six months between 1 March 2007 and the eventual suspension of its registration on 27 September 2007.

Conclusion

62. While Rainbow has not succeeded on any of the points raised in its appeal, the Board would like to acknowledge the skilful and well-constructed arguments which Mr Salim Moollan presented. The Board is grateful to him and to all parties' counsel for the skilful presentation of their cases in this appeal.

63. For the reasons set out above the Board dismisses the appeal.