IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO: 158 OF 2021 (NSJ)

BETWEEN:

INTERTRUST CORPORATE SERVICES (CAYMAN) LIMITED

APPLICANT

AND:

CAYMAN ISLANDS MONETARY AUTHORITY

RESPONDENT

ON THE PAPERS

Before:	**The Hon. Mr Justice Segal**
Appearances:	**Colin McKie QC of CDM Chambers** **And Guy Manning, James Austin-Smith and Jeremy Durston of Campbells for Intertrust**
Draft judgment circulated:	**18 June 2021**
Judgment delivered:	**23 June 2021**

DECISION ON APPLICATION FOR LEAVE TO APPEAL AND FOR THE GRANT OF A STAY

Introduction

1. On 11 June, 2021, Intertrust Corporate Services (Cayman) Limited (***Intertrust***) filed an *ex parte* application for leave to appeal against the decision of the Cayman Islands Monetary Authority (the ***Authority***) to issue a fine notice dated 13 May 2021 (the ***Fine Notice***) (and the decision to impose discretionary fines on Intertrust) in the aggregate sum of CI$4,232,607.50. In addition to the application for leave to appeal, Intertrust applied, on the assumption that the Court granted leave, for a stay of the fines pending a further order of the Court made following either the hearing of any application by the Authority to set aside any stay granted by the Court or the hearing of Intertrust's appeal.

2. The applications were supported by the First Affidavit of Daniel Rewalt, who is one of the two co-managing directors of Intertrust. Intertrust is represented by Colin McKie QC of CDM Chambers and Campbells.

3. Campbells, in a letter sent to the Court with the applications, stated that the procedure applicable to an application for leave to appeal against the Authority's decision to impose a fine, and therefore Intertrust's application for leave to appeal in relation to the Fine Notice, was governed by the provisions of regulations 19 and 20 of the Monetary Authority (Administrative Fines) Regulations (2019 Revision) (as amended) (the ***Regulations***) and that regulation 20(1) provided:

> *"The Grand Court Rules 1995 and the Court's practice directions about judicial reviews apply to an appeal, with necessary changes, as if the appeal were an application for judicial review."*

Campbells noted that applications for judicial review are governed by GCR O.53 and that GCR O.53, r.3(2) required that an "*application for leave must be made ex parte to a Judge…"*, and that GCR O.53, r.3(3) provided that "*The Judge may determine the application [for leave] without a hearing, unless a hearing is requested in the notice of application*". They confirmed that Intertrust did not request a hearing. In accordance with GCR 53, r.3(2)(a), the application for leave was made by filing a notice in Form No. 53 of Appendix I to the GCR which included a statement of the relief sought and the grounds upon which it was sought. While regulation 20(1) refers to the procedural rules (in the GCRs and practice directions) governing judicial review applications as being applicable to "*an appeal*" rather than an application for leave to appeal and appeals, I consider that regulation 20(1) is intended to apply those procedural rules to all aspects of the appeal process including the leave stage. I have therefore accepted that

GCR O.53, r.3(2) and GCR O.53, r.3(3) are applicable to Intertrust's application for leave and that in the circumstances I should deal with the *ex parte* application on the papers without a hearing.

4. I have concluded that the application for leave to appeal should be granted. I have also concluded that the application for a stay should be granted, with the stay to remain in place until further order of the Court. The Authority shall have liberty to apply to set aside the stay, so that the stay would end if the Authority makes such an application and it is successful. Failing that it will last until the hearing of Intertrust's appeal. I set out below a brief summary of the relevant facts, of Intertrust's submissions and my reasons for granting the applications (although, this being an application for leave to appeal and seek judicial review, I only provide a short outline of my reasoning).

The background

5. Pursuant to Part VIA of the Monetary Authority Act (2020 Revision) (the ***Act***), the Authority is given the power to impose administrative fines on a person who breaches, *inter alia*, the Anti-Money Laundering Regulations (2020 Revision (as amended) (the ***AMLRs***). The matters relevant to the determination of whether to impose an administrative fine and its amount and the procedure that the Authority must follow in relation to the imposition of such fines are set out in the Regulations. The Regulations prescribe that the Authority must follow certain steps before imposing a fine. These include giving the party a breach notice, giving the party an opportunity to reply to the breach notice, in the event that a reply is received, reconsidering its position and considering the matters raised in the reply and then, if the Authority still considers that a fine can and should be imposed, issuing a fine notice. Furthermore, the Authority has described the policies and procedures it will follow when deciding whether to impose an administrative fine in the Enforcement Manual – The Procedure for Administering Administrative Fines (the ***Manual***). There are two types of fine. A fixed fine and a discretionary fine. For serious and very serious breaches, the Authority has a discretion whether or not to apply a fine and the amount of the fine. For serious breaches the maximum fine amount is CI$100,000 for a body corporate. For very serious breaches it is CI$1 million for a body corporate. The total amount payable by a person subject to such a fine may be made of two elements. First, disgorgement of the benefit received as a result of the breach and secondly a financial penalty reflecting the nature and seriousness of the breach.

6. The Authority's investigations of Intertrust had commenced with an inspection in 2019. On 6 August 2019 the Authority issued an inspection report which stated that the inspection had "*revealed deficiencies in Anti-Money Laundering policies and Procedures*" and imposed four requirements to remediate these deficiencies. It also required Intertrust to provide monthly update reports "*until the requirements have been fully implemented*." Subsequently, on 12 February 2020 the Authority indicated that it was going to conduct a further inspection "*to assess the Licensee's systems and controls as it pertains to anti-money laundering and ascertain its compliance with Regulation 12 of [the AMLRs]*." That inspection took place between 18 and 28 February 2020 and the Authority issued its inspection report on 15 July 2020 (the ***2020 Final Report***). The 2020 Final Report identified a number of alleged deficiencies with regard to the AMLRs and imposed a further six requirements to address these over three months. Intertrust says that prior to the 2020 Final Report being issued it had suspended from all services every entity in respect of which the Authority had identified any concerns, pending analysis and remediation of these concerns. The Authority once again required monthly updates and these were provided for the following three months (the last of these was delivered on 15 October 2020).

7. The Authority issued a breach notice dated 22 January 2021 (the ***Breach Notice***). The Breach Notice was issued by the Authority pursuant to sections 42A and 42B of and the Regulations. It gave Intertrust notice that the Authority proposed to impose a cumulative discretionary fine of CI$4,296,007.50 for sixty-seven alleged breaches of the AMLRs, which were listed in the Breach Notice. The Breach Notice identified fines for each breach representing the nature and seriousness of the breach (totaling CI$2,631,100 for all sixty seven breaches) together with a disgorgement amount of CI$1,664,907.50.The Breach Notice confirmed that Intertrust had thirty days from 22 January 2021 within which to make representations to the Authority about whether it should impose the fine, the proposed amount of the fine or both.

8. Following the issue of the Breach Notice, Intertrust's legal advisers Intertrust Law (Campbells have subsequently been appointed as Intertrust's attorneys and act on the applications) wrote to the Authority on 2 February requesting that the Authority:

> *"inform [it] of the manner in which the Authority calculated the following category of fines which are proposed to be levied against [Intertrust]:*

(i).	*Serious*	*KYD16,600*
(ii).	*Very Serious*	*KYD41,500*
(iii)	*Disgorgement*	*KYD1,664,907.50"*

9. On 10 February 2021, the Authority replied in the following terms:

> "*The Authority wishes to draw your attention to Part II of the Enforcement Manual – The Procedure for Administering Administrative Fines ("Manual") titled "Calculating the Administrative Fine." In addition, the Authority wishes to draw your attention to Schedule 1 of the Manual. The Authority confirms that it complies with the Manual, in particular Part II and the relevant weighting in Schedule 1, when calculating the relevant category of fines."*

10. On 20 February 2021 (the ***20 February Letter***), Intertrust Law wrote to the Authority setting out Intertrust's representations in response to the Breach Notice. The 20 February Letter was nine pages long and attached a discussion draft document entitled "*Our Commitment and Proposed Approach to the Remediation*" together with a copy of a letter from PricewaterhouseCoopers (***PwC***) setting out its proposed work plan and role with respect to the remediation plan. Intertrust Law summarised the matters covered by the 20 February Letter as follows:

> *"[in providing formal representations] we present additional facts and circumstances in relation to (i) the proposed findings (ii) mitigation in respect of the quantum and attribution of proposed penalties (iii) updates on steps taken since the February 2020 inspection and report and (iv) outline plans for an extensive remediation exercise to meet the Authority's comments. In considering these Representations, we invite the Authority to exercise its discretionary powers to reconsider the terms of the Notices prior to taking any further actions. The Licensee is anxious to resolve the terms of the Notices with the Authority in a prompt and mutually acceptable manner in order that resources and focus can be applied to the remediation project, which the Licensee views as being of primary importance"*

11. In the 20 February Letter, Intertrust Law gave a large number of responses to the Breach Notice. The 20 February Letter contains a wide ranging challenge to the Authority's proposed findings in the Breach Notice. For example, Intertrust Law confirmed that they had been instructed by Intertrust to conduct an in-depth independent analysis of the proposed finding in the Breach Notice; stated that they understood that the application of the disgorgement principle, which is one of the bases of the Authority's penalty-setting regime, was justified in a case in which the success of a licensee's entire business model was dependent on the licensee breaching the

Authority's rules, but disputed that Intertrust's business model was so dependent; noted that the Authority considered that the amount of a discretionary fine should be linked to the revenue generated from a particular product line or business area involved in or related to the asserted regulatory breach but that it was unclear how the Authority had interpreted the reference to "*particular product line or business area*" in this case and in relation to Intertrust and submitted that the amount of the proposed fines was disproportionate to the revenues actually received during the period in which it had been engaged by the clients to which the alleged breaches were attributable. They also stated that:

> *"**9.8 Factors relating to the impact of a breach***
>
> *With reference to the considerations set out in the Enforcement Manual in respect of factors relating to the impact of a breach, we submit that:*
>
> *(i) there is no evidence of a significant level of benefit gained or loss avoided, or intended to be gained or avoided, by the Licensee, either directly or indirectly;*
>
> *(ii). there is no evidence of loss or risk of loss, as a whole, caused to consumers, investors or other market users in general;*
>
> *(iii). there is no evidence of loss or risk of loss caused to individual consumers, investors or other market users;*
>
> *(iv). there is no evidence of any of the breaches having an effect on particularly vulnerable people, whether intentionally or otherwise;*
>
> *(v). there is no evidence of an inconvenience or distress caused to consumers; and*
>
> *(vi). there is no evidence that the breaches had an adverse effect on markets.*
>
> ***9.9 Factors relating to the nature of a breach***
>
> *The breaches are generally related to (a) risk assessments, (b) collection of CDD, and (c) monitoring and maintenance. The Licensee acknowledges and understands that, pursuant to the Monetary Authority (Administrative Fines) (Amendment) Regulations 2020, these breaches are categorised as serious and very serious breaches.*
>
> *Having conducted the in-depth independent investigation outlined above, we are of the view that the issues raised by the Authority are not due to a systematic failure of the Licensee's policies or procedures, but have arisen due to failings in the oversight and review activities in relation to (a) client onboarding (b) client KYC collection and verification and (c) in the review process including the monitoring, management and escalation for moderation or remediation of identified issues.*
>
> *The Licensee wishes to confirm that there are no internal investigations, no evidence of any financial crime, or potential financial crime facilitated, occasioned or otherwise attributable to any of the breaches.*

The Licensee continues to conduct its business with integrity or in a fit and proper manner. It has robust compliance policies and procedures in place and has never relied on the evasion of its legal responsibilities to benefit in any way.

9.10 Factors tending to show the breach was deliberate

With reference to the considerations set out in the Enforcement Manual with respect factors tending to show the breach was deliberate, we submit that:

(i) there is no evidence that any breach was intentional, in that the Licensee's directors and/or senior management intended or foresaw that the likely or actual consequences of the Licensee's actions or inaction would result in a breach;

(ii). there is no evidence that the Licensee's directors and/or senior management sanctioned actions which were not in accordance with the Licensee's internal policies and procedures;

(iii). there is no evidence that the Licensee's directors and/or senior management sought to conceal any misconduct;

(iv). there is no evidence that the Licensee's directors and/or senior management committed the breaches in such a way as to avoid or reduce the risk that the breaches would be discovered;

(v). there is no evidence that the Licensee's directors and/or senior management were influenced to commit the breaches by the belief that they would be difficult to detect; and

(vi). there is no evidence that, at any time, the Licensee made any decision in contravention of any professional advice received.

9.11 Factors tending to show the breach was reckless or negligent

With reference to the considerations set out in the Enforcement Manual with respect to factors tending to show the breach was reckless or negligent, we submit that:

(i). there is no evidence that the Licensee's directors and/or senior management acted recklessly or negligently in failing to appreciate there was a risk that a breach could occur; and

(ii). there is no evidence that the Licensee's directors and/or senior management acted recklessly or negligently in omitting to ensure adherence with the Licensee's internal policies and procedures.

Based on the Representations made above, we respectfully submit that the proposed categorisation of the breaches fails to take into account the specific considerations set out in the Enforcement Manual on the basis of impact, nature, intent and recklessness. As such, we invite the Authority to exercise its discretionary powers to remove or reduce the discretionary fines proposed in the Breach Notice.

Finally, with respect to the discretionary fines proposed in the Breach Notice, our analysis of the findings and the prescribed provisions evidence that the 67 separate incidents set out in the Breach Notice are reflective of 9 discreet breaches. As a consequence, and in the alternative to the preceding Representations, we respectfully request that the Authority exercise its discretion to reduce the number of breaches to the 9 discreet breaches subject to the discretionary fines currently attributed to them in the Breach Notice. This approach would reduce the overall financial penalty to a level proportionate to the revenues generated from the relevant client engagements and would retain the Licensee's accountability for the finding in respect of each prescribed provision."

12. Intertrust Law confirmed that Intertrust was fully committed to investigating thoroughly the circumstances giving rise to the Breach Notice and to engaging constructively with the Authority in its remediation planning and execution in order to return Intertrust to good standing with the Authority.

13. The Fine Notice was issued by the Authority on 13 May 2021. It noted that:

"The Authority received [Intertrust's] response on 20 February to the Breach Notice for the Proposed Discretionary Fine. The Authority considered each response and has made a final determination [as set out in the Fine Notice]."

14. The Authority had decided to proceed to impose the discretionary fines for all sixty-seven breaches identified in the Breach Notice but to make a small reduction in the sum representing the nature and seriousness of the breach from CI$2,631,100 to CI$2,567,700. This was the result of the reduction in individual fines from the sum proposed in the Breach Notice of CI$16,600 and CI$41,500 to CI$16,200 and CI$40,500 respectively. The disgorgement amount was unchanged. Intertrust was notified of its right to appeal within thirty days after 13 May. In the section of the Fine Notice headed "*THE AUTHORITY'S REASONS*" (the ***Fine Notice Statement of Reasons***) the Authority stated as follows:

"Given the breaches of the AMLRs as identified in the [Intertrust] inspection conducted in February 2020, which relate to serious and very serious breaches; [Intertrust's] protracted history of non-compliance with the AMLRs and its failure to remediate these breaches, there is sufficient evidence for the Authority to conclude that [Intertrust] is carrying on business in a manner detrimental to the public interest, the interest of its depositors or the beneficiaries of any trust, or other creditors."

15. Following the service of the Fine Notice, Campbells wrote to the Authority on 25 May 2021. Campbells noted that the Authority had been required (by regulation 12(2) of the Regulations)

to consider the representations made in the 20 February Letter before imposing a fine but the Fine Statement Notice of Reasons contained no reference to these or any explanation as to how the Authority had considered and applied the thirteen criteria set out in regulations 5 and 6 of the Regulations which were applicable to the Authority's decision to impose a discretionary fine and the amount of such a fine or the five further criteria that applied to the amount of the discretionary fine. The Fine Statement Notice of Reasons contained no indication of whether or how the policies for calculation of financial penalties set out in the Manual had been applied and "*As a result Intertrust has absolutely no idea how the Authority reached the decisions it did to impose fines, set the level of those fines or whether it considered, accepted or rejected its written representations*."

16. Campbells asserted that full written reasons for the decisions to issue the Breach Notice and the Fine Notice should have been provided and that "*the failure to comply with these obligations has serious implications when considering the legality of the decisions made by the Authority."* Campbells noted that Intertrust had a right to appeal to this Court and that while its rights were reserved Intertrust requested the Authority to provide full written reasons for the decisions to issue the Breach Notice and the Fine Notice., with sufficient information to enable Intertrust to understand what information was taken into consideration when calculating the discretionary fines and the disgorgement amount and how each of these figures were calculated. They also requested copies of relevant contemporaneous documents. Since the deadline for the filing by Intertrust of an ex parte application for leave to appeal was 11 June 2021, Campbells asked for a response by 5pm on 28 May.

17. Campbells chased the Authority on 27 May and the Authority replied later that day saying that it was reviewing the contents of Campbells' letters dated 25 and 27 May and would "*respond substantively and promptly.*" On 11 June 2021, Campbells received a letter from Ogier confirming that they acted for the Authority, had seen the letters dated 25 and 27 May and were "*considering the contents of [those] letters with the Authority and will reply as soon as we are in a position to do so*." Campbells subsequently sent Ogier a copy of the notice assigning the applications to me. No further response from Ogier has yet been received

The application for leave to appeal – the statutory grounds and the grounds set out in Intertrust's statement

18. A party that receives a fine notice for a discretionary fine has a right to appeal to the Court pursuant to regulation 19(2) of the Regulations. This states that:

"*The Grand Court may only grant leave to appeal under this regulation if —*

(a) the party has grounds for seeking judicial review of the decision; or

(b) the decision was made with a lack of proportionality or was not rational."

19. As noted above, pursuant to regulation 20(1) of the Regulations, the GCRs relating to and the Court's practice directions about judicial reviews apply to such an appeal with necessary changes as if the appeal were an application for judicial review.

20. Intertrust submits that all three of the grounds set out in Regulation 19(2) apply in this case. Intertrust's case is that the Authority's actions were unlawful. Intertrust submits that at every stage of the process, the Authority failed to follow the requirements of the statutory regime, its own policies and procedures, and key administrative law principles and that these extensive and overlapping failings were so pervasive that the entire process was rendered unlawful and invalid and, consequently, so were its results.

21. Intertrust seeks an order that the Authority's decision to issue the Fine Notice be set aside and/or remitted to the Authority with appropriate directions from the Court and declarations that the Authority's actions were, and that the procedure set out in the Manual is, unlawful. I summarise below the grounds on which Intertrust seeks judicial review of the Authority's decision to issue the fines and the Fine Notice as set out in Intertrust's statement. The statement contains a detailed account of the relevant facts (by reference to Mr Rewalt's evidence) and Intertrust's legal submissions. The main thrust of Intertrust's case can be outlined as follows:

(a). the Authority had been under a duty to provide intelligible and sufficiently detailed reasons for its decisions at each stage of the process, both in respect of the Breach Notice and the Fine Notice, which it had breached. The duty arose at common law, pursuant to section

19(2) of the Cayman Islands Constitution and pursuant to the Authority's statutory duty under the Act.

(b). section 19(2) of the Constitution provides that:

> *"(1). All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.*
>
> *(2). Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act."*

(c). the Authority is a public official for these purposes. Intertrust had requested reasons for the Authority's decisions three times in writing and the Authority had failed to provide them. Section 24 of the Constitution applied. It made it *"unlawful for a public official to make a decision or to act in a way that is incompatible with the Bill of Rights unless the public official is required or authorised to do so by primary legislation, in which case the legislation shall be declared incompatible with the Bill of Rights and the nature of that incompatibility shall be specified.*" In this case there was no such primary legislation requiring reasons not to be provided, rather reasons were required in certain respects. The Authority in this case had repeatedly acted unlawfully and in breach of sections 19 and 24 of the Constitution.

(d). Parliament regarded "*transparency and fairness*" by the Authority when exercising its regulatory functions as being of such importance that it enshrined these requirements in s.6(3)(f) of the Act which stated that "*In performing its regulatory functions and its co-operative functions, the Authority shall .... recognise the need for transparency and fairness on the part of the Authority."* Similarly, in accordance with s.48 of the Act, Parliament required the Authority to create a regulatory handbook setting out, as far as is practicable, the policies and procedures to be followed by the Authority in performing the Authority's regulatory functions, which "*shall include policies and procedures for…giving reasons for the Authority's decisions*." Intertrust submitted that, in breach of the Act, the Manual did not include policies and procedures for the provision of reasons (save for a passing reference to keeping a record of board

decisions). Nevertheless, this breach of its own enabling legislation by the Authority did not absolve it of the legal requirement to provide reasons. Furthermore, the handbook states that "*The Authority will seek to exercise its enforcement power in a manner that is transparent, proportionate, and consistent with its publicly stated policies and guidelines*."

(e). the Authority had given Intertrust a deadline for providing an update on its remediation action but had issued the Breach Notice before the expiry of that deadline.

(f). the decision to issue the Breach Notice was made without complying with the procedures and requirements set out in the Act, the Regulations and the Manual.

(g). the Authority was under an obligation but failed to provide reasons for the issue of the Breach Notice.

(h). the Breach Notice included fines for breaches of the AMLRs which had been rectified.

(i). the Authority's failure to explain the basis on which it had calculated the amount of the fine related to the nature and seriousness of the alleged breaches deprived Intertrust of the ability to make meaningful responses to the Breach Notice.

(j). the process set out in the Manual for calculating discretionary fines was flawed and unfair. It requires the Authority to increase a previously calculated penalty by a further percentage to take account of factors that had already been considered at an earlier stage of the process. Following that process inevitably resulted in double counting and the procedures were therefore irrational, unlawful and produced disproportionate results.

(k). the calculation of the part of the fines that related to the nature and seriousness of the regulatory breaches and to the disgorgement amount was arbitrary and flawed and the amounts of the fines was disproportionate.

(l). since the Authority had failed to give any or adequate reasons in or after issuing the Breach Notice for the fines it proposed to impose, Intertrust had been unable to provide

a proper and considered response and reply to the Breach Notice so that the Authority had been unable to perform the duty imposed on it regulation 12(2) of the Regulations of reconsidering its position and reviewing matters which the party to be fined had raised after having a proper opportunity to do so.

(m). the Fine Notice did not comply with the requirements of the Act, the Regulations and the Manual.

(n). whilst the Regulations were clear that the Authority "*may, but need not, negotiate with a party*", the Authority's decision whether or not to do so must be reached on the basis of the usual administrative law principles, which included properly considering the issue and acting in accordance with its published policies. If a decision was taken not to engage in negotiations, the Authority might have been expected to reply and indicate as much. Furthermore, the law required the Authority's decision to be rational and proportionate and reasons to be given for the refusal. The Authority's actions (or lack of them) in failing to respond to Intertrust's offer to engage and have discussions about a remediation plan unlawfully deprived Intertrust of the opportunity of early settlement discussions and/or settlement itself.

(o). since the Authority had to date failed to provide any or adequate reasons for its decisions, Intertrust reserved the right to amend and/or amplify these grounds including by challenging whether breaches in fact took place or the severity of them, the level of any fines (and, if appropriate, to claim damages) upon provision of proper reasons and disclosure by the Authority, whether in late response to its unfulfilled obligations during the administrative fine process, as part of its duty of candour as a respondent in judicial review proceedings or, if necessary, an order of this Court.

22. I provide further detail below of the main grounds relied on by Intertrust.

23. As regards the Breach Notice:

(a). prior to issuing the Breach Notice, the Authority had written to the Applicant on 20 January 2021 asking for an update on the remediation actions required in the 2020 Report. That update was requested by "*no*

later than Friday 22 January 2021." However, without waiting for that deadline to expire, the Authority had issued the Breach Notice at 11:21 AM on 22 January 2021. Intertrust submitted that even if it were to be argued that the Authority had no *obligation* to offer that opportunity to provide an update, it had clearly exercised its *discretion* to do so; having requested that update Intertrust had a legitimate expectation that it would be allowed to reply and that that reply would be considered before any further action was taken. The Authority, Intertrust says, should have allowed Intertrust to respond in accordance with the timetable it had set and then considered the contents of that response before issuing the Breach Notice.

(b). Intertrust submits that the evidence shows or it can be inferred from the evidence that the Authority failed, when deciding whether to issue the Breach Notice to act in accordance with the requirements of the Act, the Regulations and the Manual. The only reason why the Authority would have written to Intertrust on 20 January 2021 requiring a further update was because it was still considering the matter and needed that updated information to make its decision. If the decision had not been made to issue the Breach Notice on 20 January 2021 this means that the Authority had made its decision to do so within the following two days, within which time the Authority would have had to have conducted the entire Breach Notice decision-making process. Intertrust submits that it would not have been possible for the Authority to do so properly in such a short time.

(c). the Authority had failed to provide reasons for its decision to issue the Breach Notice. It was required to do so, as a matter of law by reason of section 19(2) of the Cayman Islands Constitution, the Act, the terms of the Authority's handbook and the obligation to provide reasons at common law. In circumstances where a person was likely to be adversely affected by a decision or consultation process the decision-maker was required to give reasons for his findings and proposed decision to enable the affected party to provide a proper response. This was particularly important where, as in the present case, there is a statutory right to make submissions prior to a final decision. Furthermore,

despite a request to do so, the Authority had failed to provide reasons after the fact for the decision to issue the Breach Notice.

(d). in the Breach Notice the Authority had stated that it proposed to fine Intertrust for breaches of the AMLRs in respect of entities which were the subject of the inspection in 2020 and which were identified by name. But the 2020 Final Report had already required actions to be taken in respect of these entities to bring them into compliance with the requirements of the AMLRs and such action had been taken. Intertrust had a legitimate expectation that it would not face enforcement action in respect of these entities if it rectified the issues which had been identified.

24. In addition, Intertrust submitted that the Authority's failure to provide an explanation of how it had calculated the amount of the sixty-one fines for "*very serious*" breaches of the AMLRs (calculated to be CI$41,500.00 each and a total figure of CI$2,631,100.00). This failure amounted to a breach of the requirement to provide reasons so that Intertrust could know the basis for the Authority's decision. Intertrust had been deprived of the ability to make meaningful submissions by the Authority's refusal to explain its decisions. Given the Authority's complete lack of disclosure it was impossible for Intertrust to identify how these fines were calculated and the extent to which the criteria established by the Regulations had been properly weighed and taken into account and whether the process provided for in the Manual had been complied with. Intertrust reserved the right to amend its grounds of appeal after any disclosure by the Authority but argued that even without further information, it was clear for a number of reasons that the correct process had not been followed. For example, the proposed fines for six "*serious*" breaches were all in an identical sum, CI$16,600.00. Intertrust submitted that it was not possible that, after undertaking the detailed assessment process required by the Regulations and the Manual the Authority could properly conclude that these six breaches would all be of identical severity such as to attract identical fines. Furthermore, similar difficulties were apparent in relation to the sixty-one "*very serious*" breaches. Determination of these required the Authority to undertake the same detailed assessment process. All sixty-one were calculated to be at an identical level, CI$41,500.00, even though they relate to eleven different entities and to alleged breaches of (coincidentally) of eleven different requirements of the AMLRs. Intertrust submitted that this could not be a result of the correct process having been followed. The inference that no proper analysis of the relevant

criteria was undertaken was strengthened by the fact that the figure calculated for the "*very serious*" fines was precisely 250% of the amount of the "*serious*" fines (a proportion which remained when the Fine Notice was issued, even though the fine figures within it were different.) The clear inference (particularly in light of the unlawful refusal to provide reasons for how these fines were calculated) was that these figures were arrived as a result of an entirely arbitrary decision-making process to select a blanket penalty without consideration of the facts and circumstances of each individual case. Such a process and any subsequent decision would be, Intertrust says, unlawful and would mean that most, if not all, of the proposed fines were also unlawful as disproportionate – no proper analysis of proportionality having been undertaken as required by the law.

25. Intertrust submitted that the Authority must be taken to have failed to follow the correct procedure for determining the disgorgement amount. The Authority will seek to deprive a person of all financial benefit derived from the relevant regulatory breaches where the success of that person's entire business model is dependent on breaching the Authority's rules or other requirements of the regulatory system and the breach is at the core of the person's regulated activities. Intertrust argued that the Authority's failure to provide reasons for how it arrived at a figure of CI$1,664,907.50 for the disgorgement amount and to explain how this figure reflected the statutory goals upon which such a decision had to be based, of itself made the decision unlawful as it was impossible for Intertrust to conduct an intelligent evaluation of the penalty and provide an intelligent response to the proposed fine. Furthermore, there were grounds for concluding that the basis for the Authority's determination was flawed. Intertrust Law in the 20 February Letter had set out the total *lifetime* revenue derived from the entities in respect of which fines were issued, namely US$278,485. The disgorgement amount was over seven times this figure. It followed that the Authority must have determined three things: (a) that breaches of the regulatory system related to the success of Intertrust's entire business model; (b) that that business model was dependent on breaching the regulatory system; and (c) that the breaches in question were at the core of Intertrust's business activities. But these would have been extraordinary findings to have made in respect of a major financial institution and would have required substantial evidence to support them. That evidence has never been identified by the Authority and Intertrust says that it simply does not exist. Conversely, ample evidence was available to the Authority to refute such a conclusion. In 2020, Intertrust provided services for approximately 14,000 entities. The Authority inspected twenty-five of them (0.18%) and issued fines in respect of eleven of them (0.08%). Intertrust argues that this sample

could not have provided any basis for the Authority reasonably to have arrived at such far-reaching conclusions. Equally, the Authority knew of the extensive steps that Intertrust had taken to address the issues identified by the Authority. This included suspending all services from every entity in respect of which the Authority had identified concerns prior to the issue of the 2020 Final Report.

26. As regards the Fine Notice:

(a). Regulation 12(2) of the Regulations is in the following terms:

"[The Authority] ... has a duty to —
(a). reconsider whether it still holds the belief stated in the breach notice, in the light of all matters raised in the reply concerning that belief; and
(b). if the notice was for a discretionary fine, consider the matters raised in the reply to the extent they are relevant to exercising fine discretions."

(b). the Authority's refusal to provide an explanation of how the proposed fines had been calculated meant that Intertrust had been required to respond to the Breach Notice without an understanding of the rationale for those proposed fines.

(c). the Fine Notice failed to comply with the requirements of the Act, the Regulations and the Manual because, in particular it failed to give:

(i). "*the reasons for the amount of the fine*."

(ii). "*the Authority's findings on each matter raised in the reply that addressed the issue of whether a fine should be imposed*."

(iii). "*the Authority's findings on each relevant matter raised in the reply*" in respect of the amount of the fines.

(d). these were fundamental failures in respect of every one of the sixty-seven fines imposed and every submission made on behalf of Intertrust in the 20 February

Letter. In addition to the breaches of the statutory requirements, the Fine Notice breached the constitutional and common law requirements to provide reasons.

(e). in addition to failing to address the matters raised in the 20 February Letter, the Authority also failed to comply with the statutory requirements to set out reasons for the decision to impose a fine in each case and the level of each fine. These were further fundamental breaches of the law that rendered the entire process unlawful due to its illegality and procedural unfairness.

(f). the Fine Statement Notice of Reasons indicate that the Authority decided to issue the Fine Notice and the fines for four generalised reasons, namely (i) that it had identified breaches of the AMLRs; (ii) that Intertrust had failed to remediate these breaches; (iii) that Intertrust had "*protracted history of non-compliance with the AMLRs*"; and (iv) that there was "*sufficient evidence for the Authority to conclude that the [Applicant was] carrying on business in a manner detrimental to the public interest, the interest of its depositors or of the beneficiaries of any trust, or other creditors*". However, the first reason could not have been an operative factor as otherwise the fines would have been imposed and notices issued when these were first identified in 2020. The second reason could not have been operative as the Authority knew that some of these alleged breaches had already been remediated and could not have been aware of the status of the rest; the third reason was unsupported by the evidence (the Authority had issued two reports, eleven months apart, and identified breaches of the AMLRs with respect to an unparticularised number of clients in its 2019 report and eleven clients in the 2020 Final Report; set against the size of Intertrust's business such a disproportionately small sample of files over such a short timescale could not be said to be evidence of a "*protracted history of non-compliance*"); and the fourth reason was only a repetition of a statutory test for the exercise of powers under the Banks and Trust Companies Act (2021 Revision) (which also applied to the third reason). Accordingly, the reasons provided by the Authority were not only inadequate to meet its statutory obligations but were indicative of inherently unreasonable analysis.

The application for leave to appeal – discussion and decision

27. Regulation 19(1) states that "*A party that receives a fine notice for a discretionary fine may apply to the Grand Court for leave to appeal against the original decision within thirty days after receiving the notice*." As noted above, the grounds on which the Court may grant leave to appeal are set out in and limited by the Regulations. Regulation 19(2) stipulates that (underlining added):

"*The Grand Court may only grant leave to appeal under this regulation if —*

(a) the party has grounds for seeking judicial review of the decision; or

(b). the decision was made with a lack of proportionality or was not rational."

28. Intertrust's statement did not cite any authority dealing with, or provide any analysis of, the interpretation of regulation 19(2). I am therefore left to interpret the regulation as a matter of first impression without the assistance of any authority.

29. As I have also noted above, the procedure to be adopted for an appeal under regulation 19 is that governing applications for judicial review. Regulation 20(1) provides that the procedural rules applicable to a judicial review application are to be applied "*as if the appeal were an application for judicial review*." It seems to me that this provides relevant context for the purpose of interpreting regulation 19(2) and the approach that the Court should adopt on an application for leave to appeal. While regulation 19(2) identifies the grounds on which leave to appeal may be granted, and the GCRs applicable to applications for leave to apply for judicial review do not do so, and while regulation 19(2) must be given effect in accordance with its terms, it seems to me that the general approach adopted by the Court to dealing with applications for leave to apply for judicial review apply to applications for leave to appeal under regulation 19(2). That approach was summarised at 53/14/55 of the Supreme Court Practice 1999 (which cites the relevant authorities) as follows:

> *"Leave should be granted if on the material then available the court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant. In R v Secretary of State for the Home Department, ex. p. Rukshanda Begum [1990] C.O.D. 107, the [English] Court of Appeal held that the test*
>
> *to be applied in deciding whether to grant leave to move for judicial review is whether the judge is satisfied that there is a case fit for further investigation at a full inter partes hearing of a substantive application for judicial review...."*

30. There is, of course, a considerable body of subsequent authority on the approach that the Court should adopt on applications for leave to apply for judicial review but it seems to me that the commentary in the White Book still captures the key elements of that approach and is sufficient for the purpose of this application. An application for leave to appeal is, as is an application for leave to apply for judicial review, generally to be dealt with by way of an *ex parte* hearing on the papers. The Court's function is not to make findings of fact or determine points of law but rather to act as a filter and be satisfied that the applicant has at least an arguable case that the grounds laid down by regulation 19(2) are satisfied and that the case is sufficient to justify being allowed to proceed to an *inter partes* hearing. The fact that regulation 19(2) speaks in unqualified terms about the applicant having grounds for seeking judicial review and or the Court being satisfied that the Authority's decision was made with a lack of proportionality or was not rational does not, in my view, mean that the Court is required to adopt a different approach to that applied on an application for leave to apply for judicial review and that a higher threshold must be satisfied than that applied in judicial review proceedings. "*Has grounds*" means that the applicant has put forward grounds that are capable of justifying relief by way of judicial review and that are at least arguable. The requirement that the Court be satisfied that there was a "*decision [which] was made with a lack of proportionality or was not rational*" means that the applicant has put forward an arguable case that the challenged decision was so made or was irrational.

31. Intertrust relies on a wide-ranging challenge. It relies on what it claims to be the inadequate and unlawful conduct of the Authority in the process leading up to the decision to impose the fines and issue the Fine Notice, on the alleged failures of the Authority in coming to that decision and the process relating to the issue of the Fine Notice and, in addition, the inadequacies of the Authority's own policies and procedures as they related to the giving of reasons for its decisions, which Intertrust says are not in accord with the statutory duties imposed on the Authority.

32. In my view, the application raises serious and substantial issues which merit consideration with the benefit of full evidence at an *inter partes* hearing. It seems to me that Intertrust has presented an arguable case with respect to each of the grounds on which it relies. Those grounds fall within both regulation 19(2)(a) and (b). I am satisfied that in on the basis of the evidence filed by Intertrust the application for leave to appeal should be granted.

33. Of course, at this stage, the Authority's position, response and evidence is not available (which is one of the principal complaints made by Intertrust). The Court is therefore required to consider and test the grounds relied on by Intertrust by reference to the evidence it has filed, which includes a significant body of contemporaneous documentary evidence.

34. I do not propose to discuss in detail each argument made by Intertrust. I will confine myself to the following brief comments on what seem to me to be the main grounds and arguments relied on by Intertrust.

35. First, it seems to me that it is at least arguable that the Fine Notice failed to satisfy the requirements set out in the Regulations and the Manual. In particular, regulation 15(4) requires the Authority to set out, if a reply was giving in time by the party subject to a breach notice, "*the reasons for the way in which the fine discretions were exercised*." It seems to me to be at least arguable that the Fine Statement Notice of Reasons were inadequate in the circumstances, particularly in light of the detailed response provided by Intertrust in the 20 February Letter. The Fine Statement Notice of Reasons were brief and close to perfunctory. There was no attempt to address the issues raised by Intertrust. So it is at least arguable that there was an inadequate statement of the reasons for the way in which the fine discretions were exercised which seriously prejudiced and undermined Intertrust's ability to challenge the fines. It is true that regulation 15(4), which deals with discretionary fines, does not include the specific requirement contained in regulation 15(2)(a) with respect to fixed fines, that the Authority should, where the party to be fined has provided a timely reply in response to the breach notice, state why the Authority still holds the belief stated in the breach notice. But the requirement to give reasons in the Fine Notice needs to be read by reference to the Authority's statutory duty in regulation 12(2), which applies to discretionary fines where there has been a timely reply after the breach notice, to "*reconsider whether it still holds the belief stated in the breach notice*" and to "*consider the matters raised in the reply, to the extent they are relevant to exercising fine discretions*." The requirements of regulation 12(2) are reflected in the procedure set out in the Manual at [6.1(v)]. It seems to me at least arguable that in order to give adequate reasons, the Authority must address the responses given by the fined party and explain at least briefly why those responses did not affect its preliminary reasoning and decision to impose the fines. Furthermore and importantly, the form of fine notice (dated March 2019) set out in the

Manual makes it clear that where there has been a response to "*the warning notice of the discretionary fine, [the Authority must] state the Authority's findings* <u>*on each relevant issue in response*</u>" (underlining added). The statement in the Fine Notice that *"The Authority received [Intertrust's] response on 20 February to the Breach Notice for the Proposed Discretionary Fine. The Authority considered each response and has made a final determination [as set out in the Fine Notice"* combined with the Fine Statement Notice of Reasons appear to me, at least at this stage and based on a preliminary view based on the evidence presented to date, to fail to address in any substantive way the issues raised by Intertrust in the 20 February Letter.

36. Secondly, it is arguable that the Breach Notice failed to satisfy the requirements set out in the Manual and that the Authority failed to respect and act in accordance with Intertrust's constitutional right to be given written reasons for the Authority's decision to issue the Breach Notice. The Manual requires that the description in a breach notice of the facts and circumstances relied on by the Authority "*describe facts in sufficient detail for the party to* <u>*understand*</u> *the basis for the fine*" (underlining added). It seems to me to be arguable that this covers not only the event giving rise to the relevant regulatory breach which justifies the imposition of a fine but (at least some) matters relevant to the calculation of the discretionary fine (for example, what particular features of the case is relied on and is considered relevant by the Authority for the purpose of putting the fine within a particular financial range). If a party who is notified that the Authority proposes to issue a discretionary fine is to have a reasonable opportunity of responding to the breach notice, and of understanding the basis for the fine, it must be given sufficient information to enable it to understand the Authority's thought process (at least in outline) and the core elements of the Authority's decision and justification for imposing a fine of a particular sum. It is arguable that the Breach Notice failed to do so. Furthermore, the Authority's failure to provide proper written responses to the requests made on Intertrust's behalf in the letter of 2 February 2021 from Intertrust Law and in Campbells' letter of 25 May 2021is arguably a breach of Intertrust's constitutional (and common law) rights. I accept that the requests were made in the context of the fine process laid down and regulated by the Regulations, that the Authority was seeking to act pursuant to and to follow the procedural steps laid down by that process and those Regulations and that the validity and justifiable manner of the exercise of the relevant constitutional and common law rights has to be judged in the context of that process and the Regulations. However, these factors do not seem to me at this stage to justify the Authority's conduct and failure to provide proper reasons.

37. I have referred to the Manual's requirement in the form of draft breach notice that the description in a breach notice of the facts and circumstances relied on by the Authority must "*describe facts in sufficient detail for the party to understand the basis for the fine*" and suggested that this arguably relates to the facts relevant to a determination of there having been a breach of the applicable regulatory rules the AMLRs) and to the facts relied on and relevant to the determination of the quantum of the fine. This guidance for completion of the breach notice might therefore be said to impose an obligation of some kind to give reasons (by identifying facts from which the party to be fined can understand the basis for the fines) and therefore to rebut Intertrust's argument that the Manual did not include policies and procedures for the provision of reasons. However, I accept that it is arguable that the Manual fails in relation to breach notices to satisfy the requirements of section 48(3)(b) of the Act, which requires the Authority's handbook to include (sufficient and adequate) policies for giving reasons for the Authority's decisions. But further consideration will need to be given as to why the Regulations do not impose an obligation to give reasons in a breach notice (it is true that the breach notice does not represent a final decision by the Authority but it does represent a decision of a kind, to issue a breach notice, and one would have thought that reasons supporting its proposed imposition of the fines should be included to enable the party to be fined to have a proper opportunity to respond) and the basis for the design of the fine process.

38. These failures are capable of constituting grounds for judicial review, on the basis that they resulted in the Authority acting unlawfully and in breach of the principle of legality; the defeat of legitimate expectations and a breach of the requirement of procedural fairness and the duty to give reasons.

39. It also seems to me that Intertrust has raised a number of serious and credible challenges to the basis on which the quantum of the discretionary fines has been calculated. These challenges are capable of constituting grounds for judicial review and of demonstrating that the Authority's decisions were made with a lack of proportionality or were otherwise not rational.

40. I am less convinced that Intertrust has grounds, based on the evidence currently filed, for challenging the Authority's decision not to engage in negotiations. Whether that decision can be challenged on the basis that it was neither rational nor proportionate will depend on the basis on which the decision was made, as to which there is currently no evidence available.

41. At this stage, I do not propose to address the question of what form of relief Intertrust would be entitled to in the event that its appeal were to succeed (for example whether the Authority's decision to impose the fines and the Fine Note would be quashed so that the Authority would need to take a decision as to fines afresh or whether the Authority would be required to give proper reasons).

42. I must conclude with an important caveat. Intertrust's application obviously raises major issues regarding the manner in which the Authority acts when considering whether to impose and determining discretionary fines, the performance of the Authority's regulatory functions and the extent to and manner in which the Authority must provide explanations for its decision making to those accused of serious and very serious breaches of the AMLRs. The exercise of the power to impose such fines involves the exercise of wide ranging regulatory discretions and on occasions difficult and sensitive judgment calls in the context of giving effect to the enforcement of anti-money laundering regulations, which involves implementing a very important policy objective. I recognise that the Authority must be permitted to perform its regulatory functions properly and to exercise its discretion with sufficient flexibility and the Court must be cautious before intervening in regulatory decision making of this kind. Before forming a final view on Intertrust's appeal, it will be important to hear from the Authority and to consider the fine process and regulatory regime more widely as to hear more detail as to the Authority's decision making process in this case. However, at this stage, for the reasons I have given, it seems to me that the appeal must be allowed to proceed.

The stay application

43. Regulation 22 of the Regulations provides that:

> *"(1) An appeal does not stay the operation of the original decision.*
>
> *(2). However, the Grand Court may, on the appellant's application, order that the fine imposed by the original decision be stayed to secure the effectiveness of the appeal.*
>
> *(3). The stay ordered by the Grand Court —*
>
> *(a). may be given on conditions that the Court considers appropriate;*
>
> *(b). operates for the period fixed by the Court; and*

(c). may be amended or revoked by the Court.

(4). The period of a stay shall not extend past when the Grand Court decides the appeal."

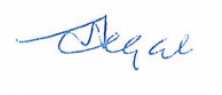
44. Intertrust submitted that the balance of convenience clearly favoured a stay of the fines and invited the Court to order a stay, at least until the matter can be considered at an *inter partes* hearing should the Authority wish to contest the issue.

45. Intertrust argued that each of the grounds of appeal it relied on was very strong and that it had put forward an overwhelming case. In these circumstances, it said, it would be wrong to require Intertrust to pay over a vast fine (the largest known to have been issued by the Authority) when there was a strong likelihood that it will have to be paid back. Further, Intertrust would incur significant financial losses if it had to pay the fine since the funds that would be used to pay the fine were currently on deposit earning interest at 2.34%. The loss equated to over CI$100,000.00 annually. Intertrust submitted that the Court had no power to compensate it for these losses if it were to be successful in its appeal. As a result, the appeal would be rendered ineffective in respect of this financial harm. Conversely, in the event that the appeal was unsuccessful the Authority's position was completely preserved since under regulation 25 of the Regulations compound interest at five percent a year accrues while all or any part of a fine continues to be owing. Regulation 25(4) made it clear that interest continues to accrue even while the fine is stayed.

46. Regulation 22(2) stipulates that a stay may be granted "*to secure the effectiveness of the appeal.*" In my view, a stay is appropriate in a case where requiring a fine to be paid pending the appeal will or is likely to result in the appellant suffering an irrecoverable loss in the event that they are successful. Their appeal would be undermined and rendered ineffective at least to some extent since success in the appeal would result in it suffering unnecessary loss and prejudice.

47. The statements made regarding the loss which Intertrust would suffer are supported by Mr Rewalt's evidence (see [58]-[60] of his First Affidavit). It seems to me that in light of that evidence, I should accept Intertrust's submissions and grant the stay. However, the Authority

must have the opportunity to challenge the grant of the stay if it so wishes and I shall therefore grant it liberty to apply to do so.



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Mr Justice Segal

Judge of the Grand Court