IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA

COMMERCIAL JURISDICTION

2023-HC-DEM-CIV-W-1881

In the matter of the **Securities Industry Act Cap. 73:04**

- **and -**

In the matter of the **Judicial Review Act Cap 3:06**

BETWEEN:

BANKS DIH LIMITED

First Applicant

BANKS DIH HOLDINGS INC

Second Applicant

- **and –**

GUYANA SECURITIES COUNCIL

Respondent

APPEARANCES:

Mr. Claude Denbow SC, Mr. Neil Boston SC and Ms. Donna Denbow for the Applicants
Mr. Nigel Hughes, Mr. Jed Vasconcellos, Mr. Shawn Shewran and Mr. Michael Jagnanan for the Respondent

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2024: July 4

Amended and Reissued on 9th July 2024

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[1] The 1st and 2nd Applicants ("BDIH and BDIHHI") seek a judicial review of the Respondents' alleged refusal or omission to consider applications made by them on 8th September 2023 and of other matters.

[2] This dispute mainly surrounds the application and interpretation of the **Securities Industries Act** Chapter 73:04. ("**the SIA**"). BDIH made a decision to restructure its business and in furtherance of this decision incorporated BDIHHI with a view to this being the new holding company of BDIH shares. A

Scheme of Arrangement ("**SOA**") was drafted and approved by shareholders. The SOA obtained judicial approval following an application made by BDIH for this purpose.[1]

[3] There was an exchange of correspondence between the Applicants and the Respondent prior to 8th September 2023. On 8th September 2023 BDIH and BDIHHI made applications to the Respondent for BDIH, currently a 'reporting issuer" under the **SIA,** to be "deregistered" and for BDIHHI to be registered as a "public company" and "reporting issuer" under the **SIA**. This was followed by a further exchange of correspondence. It is these applications and the alleged treatment of them by the Respondent which have spurned these judicial review proceedings.

[4] The parties filed written submissions. By order dated 18th April 2024 the court directed the Respondent to file a further affidavit (in relation to evidential matters) and further submissions based on matters contained in the order. The Respondent filed further submissions.[2]

The Law

[5] The **Judicial Review Act**[3] ("**the JRA")** provides for applications to be made for relief against administrative acts or omissions. An "administrative act or omission" is defined as:

> "an act or omission of a Minister, public body, public authority, tribunal, board, committee, or any person or body, exercising, purporting to exercise or failing to exercise any public power or duty conferred or imposed by the Constitution, any written law, instrument of incorporation, rules or bylaws of any corporate or incorporate body or under a non- statutory scheme that is funded out of monies appropriated by Parliament."

[6] The grounds upon which the court may grant relief include:

a. That an administrative act or omission was in any way unauthorized or contrary to law.
b. excess of jurisdiction.
c. failure to satisfy or observe conditions or procedures required by law.
d. breach of the principles of natural justice.
e. unreasonable, irregular or improper exercise of discretion.
f. abuse of power.
g. bad faith, improper purposes or irrelevant consideration.
h. error of law, whether or not apparent on the face of the record.

[1] Action 2023-HC-DEM-CIV-FDA-1023
[2] Filed on 3rd May 2024
[3] Act No 3 of 2010

i. absence of evidence on which a finding or inference of fact could reasonably be based.

j. breach of or omission to perform a duty.

k. breach of the principle of proportionality.

l. error of fact.

m. deprivation of a legitimate expectation; and

[7] Judicial review may not only be sought of a *"decision"* but also in relation to a *failure to make a decision*. Section 14(1) of the **JRA** states:

> "Where -
>
> (a) person has a duty to make a decision to which this Act applies; there is no law that prescribes a period within which the person
>
> (b) is required to make that decision; and
>
> (c) the person has failed to make that decision
>
> A person who is adversely affected by the failure may apply for judicial review in respect of that failure on the ground that there has been unreasonable delay in making that decision."

[8] In **Chief Constable of North Wales Police v Evans**[4], Lord Brightman said:

> "Judicial review is concerned not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will …… under the guise of preventing an abuse of power, be itself guilty of usurping power".

[9] In **Marks v Minister Of Home Affairs**[5], Sir Alastair Blair-Kerr P noted (at 109):

> 'This court does not and cannot inquire into the merits of the Minister's decision. There is no appeal to this court against the Minister's decision on its merits. This court can only examine the legality of the process adopted to reach a decision. It can declare the decision a nullity if the decision has not been reached according to law.'

[10] In judicial review proceedings the court is not enquiring into the merits of a decision but rather the decision-making process.

[4] (1982) 1 W.L.R 1153, 1173
[5] (1984) 35 WIR 106

RELIEF 1- Declaration that the Respondent is a public body whose administrative acts or omissions are subject to the provisions of the JRA

[11] There is no dispute that the Respondent is a public body established under the provisions of the **SIA**.[6] In **R v Panel on Take-Overs and Mergers ex parte Datafin plc** [7] the Court of Appeal held:

> "In determining whether the decisions of a particular body were subject to judicial review, the court was not confined to considering the source of that body's powers and duties but could also look to their nature. Accordingly, if the duty imposed on a body, whether expressly or by implication, was a public duty and the body was exercising public law functions the court had jurisdiction to entertain an application for h judicial review of that body's decisions. Having regard to the wide-ranging nature and importance of the matters covered by the City Code on Take-overs and Mergers and to the public consequences of non-compliance with the code, the Panel on Take-overs and Mergers was performing a public duty when prescribing and administering the code and its rules and was subject to public law remedies. Accordingly, an application for judicial review of its decisions would lie in an appropriate case.

[12] The Respondent is a creature of statute carrying out statutory powers. It is a body subject to judicial review.

RELIEF 2 - A declaration that the refusal and or omission of the Respondent

(a) **To consider the applications made by letters dated 8th September 2023 by the 1st Applicant to deregister it as a reporting issuer pursuant to Section 56 (6) of the SIA; and**

(b) **To register the 2nd Applicant as a reporting issuer pursuant to Sections 56 (1) and 57 (1) of the SIA without the production of documentary evidence**

was contrary to law and amounted to or constituted an unreasonable , irregular and improper exercise of discretion , an abuse of power, bad faith, founded on improper purposes or irrelevant considerations and a breach of

[6] Admitted by the Respondent in its affidavit in defence
[7] [1987] QB 815

or omission to perform a duty within the meaning of Section 5 (1) of the JRA having regard to the statements embodied in his letter of 22nd June 2023.

The Application to Deregister BDIH as a reporting issuer

[13] The first letter dated 8th September 2023 by BDIH to the Respondent headed "***Application for Deregistration of Banks DIH Limited as a Reporting Issuer following Shareholder Approval and Judicial Sanction of the Scheme of Arrangement"*** requested the Respondent to deregister BDIH as a Reporting Issuer pursuant to Section 56 (6) of the **SIA.** The Respondents' early attention is requested to facilitate the completion of the process by the end of the financial year in September 2023 to "*enable the new holding company to formally generate financial statements which it is unable to do at the present time."*

[14] The Respondent, by letter dated 21st September 2023, acknowledged receipt of the letter and stated that the application "is still under review.". After reciting the content of sections 56 (6) and 3 (2) (f) of the **SIA** the Respondent requested that the applicant provide documentary evidence:

a. That BDIH had ceased to be a public company pursuant to section 56 (6) of the SIA.

b. Of the manner in which BDIH has "*effected the terms of the scheme at Clause 4.3 or Schedule A of the Scheme of Arrangement as referenced in the Orders of Court dated 4th September 2023."*

[15] BDIH, by letters dated 26th September 2023, responded to the Respondents' letter and stated, among other things , that:

a. The request for documentary evidence that BDIH has ceased to be a public company "*is devoid of any legal basis. This is because an application is being made to the council that having regard to shareholder and judicial approval of the scheme of arrangement, the position has now been reached where to implement the scheme, the council is being requested to approve of BDIH ceasing to be a public company and being replaced by BDIHI. It is a matter for the council to act and the documentary evidence will be generated by the council acting."*

b. Documentary evidence of the manner in which BDIH has effected the terms of the scheme at clause 4.3 of schedule a of the scheme of arrangement can only be generated by the

approval of the council of BDH ceasing to be a public company and BDIHI replacing it as a public company.

[16] By letters dated 29th September 2023 the Respondent responded to the letters of 26th September 2023. This was followed by letters in response by BDIH dated 6th October 2023 and then a further letter by the Respondent to BDIH on 13th October 2023 in which the Respondent responded to both letters dated 6th October 2023. In its letter dated 23rd October 2023 the Respondent stated, among other things, that:

> "…Banks DIH Holdings Inc. is an applicant, applying to be registered under the SIA and Regulations. Having made unequivocal statement that Banks DIH Holdings Inc is not a public company, clearly supports the request by the GSC for Banks DIH Holdings Inc to provide the documentary evidence for registration as a 'reporting issuer' as set out under the SIA and Regulations. Further, it is almost ludicrous that Banks DIH Holdings Inc. expects to be registered as a "reporting issuer" before becoming a 'public company' which is a recognised legal entity that can be registered as a 'reporting issuer' under the SIA and Regulations thereunder.
>
> …should Banks DIH satisfy the GSC that it meets the requirements as set out in the SIA and Regulations and more specifically referenced in the GSC's letters of the 29th and 21st September 2023 then it can be deregistered at any time

[17] The Applicants assert that the Respondent has failed *to consider* its applications. The word consider is defined as "*to think about, or to ponder or study and to examine carefully*"[8] or "*to think about carefully ' "to think of especially with regard to taking some action*."[9]

[18] The Respondent acknowledged receipt of the applications by BDIH and BDIHHI application to be deregistered . The Respondent cited section 56 of the **SIA** which states:

> "(1) From the date of commencement of this Part, all public companies shall become reporting issuers and shall, within 90 days from that date, file with the Council a registration statement in the prescribed form.
>
> (6) where a reporting issuer ceases to be a public company, the council may on its own motion or on an application by the issuer or another interested person make an order declaring, *subject to such conditions as it considers appropriate,* that the issuer is no longer a reporting issuer.

[8] Blacks Law Dictionary
[9] Merriam-Webster Dictionary.

[19] A “public company” is defined as a company:

a. Any of whose issued shares or debentures are or were part of a distribution, or an offer, to the public; or

b. that is the issuer of a security that is beneficially owned by more than 50 persons.

[20] All companies falling within the definition of a “public company” are deemed to be a reporting issuer. A company that ceases to be “public company” may by order of the Council be declared to no longer be a reporting issuer.

[21] The Respondent, on receipt of the application, requested documentary evidence that BDIH had ceased to be a “public company”. Ceasing to be a “public company” is the basic criteria which must be established for the Respondent to determine whether or not to exercise its discretion and make an order declaring that the company, which has ceased to be a public company, is no longer a reporting issuer. The Respondent may make its order subject to conditions.

[22] The letters by the Respondent to the Applicant requesting documentation to establish that BDIH has ceased to be a “public company” shows in my view that the Respondent has examined and given deliberate thought to the application by BDIH. There was refusal or omission to “consider” the application as contended by the Applicants.

[23] I find merit in the Respondents’ contention that there was no decision made in relation to the application by BDIH to be “deregistered” as a reporting issuer. It is “decisions” of public bodies which are susceptible to judicial review. While the failure to make a decision is also susceptible to review, there is no challenge by BDIH on the basis that there was a failure to make a decision in a reasonable time.

[24] It is clear that the Respondent is a statutory body conferred with a power to make decisions. It must therefore either *grant* or r*efuse* applications in *a timely manner* and provide reasons for its decision. The Respondent cannot await requested documents indefinitely , particularly where there is an indication that some of the requested documentation cannot be provided. This results in an application being “in limbo’. The Respondent must carry out its statutory function of making a decision in a reasonable time.

The Application to Register BDIHHI as a Reporting Issuer

[25] The second letter dated 8th September 2023 by BDIH to the Respondent headed " THE APPLICATION OF THE HOLDING COMPANY BANKS DIH HOLDINGS INC. (BDIHHI) TO REPLACE BANKS DIH LIMITED (BDIH) AS A PUBLIC COMPANY AND REPORTING ISSUER UNDER THE SECURITIES INDUSTRY ACT" requests the Respondent to :

a. Make an order declaring that BDIH will cease to be a public company and reporting issuer subject to the condition that "it is replaced by BDIHHI as a public company and reporting issuer, which is obliged to issue shares to the present shareholders of BDIH in replacement for their shares in BDIH, which have been exchanged and cancelled."

[26] The letter states that the BDIH is aware of the requirements of sections 56 (1) and (57 (1) of the **SIA** to complete the registration statement set out in the First and Second Schedules of the **Securities Industry (Registration of Issuer and Securities) Regulations** to the SIA and that certain documents should accompany those statements. It opines that both schedules are designed to secure information in relation to a company engaged in the sale or proposed sale of shares to the public which is not the position of BDIHHI which (a) was not a public company at the time the **SIA** came into force and (b) was not involved in offering securities to the public but rather dealing with a judicially sanctioned SOA where shareholders of BDIH exchange their shares for shares in BDIHHI.

[27] The letter further states that the BDIHHI is "*in no position to provide any financial statements in terms of a balance sheet , profit and loss account or auditors report because it has not active existence as yet. It was incorporated in January 2023 and is still to be activated. It would only be able to provide "financial statements when approval of the Council for this corporate restructuring has been granted."*

[28] The Respondents' response was contained in a letter dated 21st September 2023. The letter stated:

a. An application for registration as a reporting issuer must be made pursuant to section 56 of the SIA.

b. The interpretation and application of section 56 was established in **Trust Company (Guyana) Limited v The Guyana Securities Council** [2021] CCJ 11.

c. A company which becomes a public company must register as a reporting issuer within 90 days of the date on which it becomes a public company.

d. An application to register securities by BDIHHI must be made pursuant to Section 57 (1) of the **SIA.**

e. Regulation 2 (2) of the **Securities Industry (Registration of Issuer and Securities) Regulations** states that a Registration Statement filed by a reporting issuer shall be accompanied by a copy of the articles of incorporation and by-laws, copies certified by the director of the reporting issuer to be true copies of its last balance sheet and last profit and loss accounts and a copy of the auditor's report on the financial statements.

[29] The Respondent requested BDIHHI to provide : (a) documentary evidence that it had become a public company as defined in the SIA for registration as a reporting issuer under section 56 (1) and (b) ; and (b) copies certified by the director of the reporting issuer to be a true copies of its balance sheet and last profit and loss accounts and a copy of the auditor's report on the financial statement as required by the Regulations.

[30] By letter dated 26th September 2023 the Applicants responded and asserted that:

a. In its previous letter of 8th September 2023, it pointed out that sections 56 (1) and 57 (1) do not apply to BDIHHI since it is not a "public company" at the time the SIA came into operation. Further, these provisions deal "*with an application for registration of the securities being offered to the public. Our case is simply one where judicial sanction has been obtained for a SOA which involves the present shareholders of BDIH exchanging their shares for shares in BDIHHI , the new holding company."*

b. The "*foregoing are the relevant considerations which the Council is required to take into account , but obviously has not. In view of the foregoing , we once again consider the request you have made to be devoid of any legal foundation having regard to the special circumstances of this case*."

c. In response to the request for documentary evidence to be provided that BDIHHI has become a public company it is stated:

> "It is clear from all the forgoing that BDIHHI can only become a public company with the approval of the Council. Accordingly, it is wholly irrelevant, if not absurd, to make such a request because everything depends on actions taken by the Council."

d. The request for copies of the last balance sheet and auditor's report is "again absurd as it fails to take into account the unique nature of this transaction."

"It is clear from all the forgoing that BDIHHI can only become a public company with the approval of the Council. Accordingly, it is wholly irrelevant, if not absurd, to make such a request because everything depends on actions taken by the Council."

e. The insistence on documentary evidence indicates that the Council "*does not share our clear and unequivocal interpretation of the Securities law….Accordingly , having regard to your resolute insistence on the provision of documentary evidence, we intend to proceed to implement the scheme of arrangement in the manner set out at paragraph 3 (b) in our letter of even date dealing with the delisting of Banks DIH Limited within the next day so as to be in the position to provide you with a documentary evidence which you are insisting upon."*

[31] The application requests that BDIHHI *replace* BDIH as a "public company" and "reporting issuer" but curiously does not identify pursuant to which section of the **SIA** the application is made.

[32] As pointed out by the Respondent in its response, Section 56 is the provision dealing with registration of a "reporting issuer". Section 56 requires a "public company" and "a person who proposes to issue securities" to be reporting issuers. A "reporting issuer" is defined as " *an issuer that has filed a registration statement on this section 56 and has not been the subject of an order of the Council altering its status as a reporting issuer.*" If as contended by BDIHHI section 56 does not apply to it in that it was "not a public company" at the time the SIA came into operation" then under which section of the SIA is it contending that the Respondent ought to act and permit BDIHHI to "replace" BDIH as a "public company" and "reporting issuer" or register BDIHHO as a reporting issuer ?

[33] The initial contention by the Applicants that Section 56 does not apply to BDIHHI on the basis that BDIHHI was not a public company at the time the SIA came into operation is not sustainable having regard to the case of **Trust Company (Guyana) Limited v The Guyana Securities Council** [2021] CCJ 11 which held that section 56 applies to public companies which existed at the time the SIA came into effect and those which came into being after.

[34] While it was initially contended that Section 56 does not apply to BDIHHI because it was not a public company at the time the SIA came into operation, in BDIH's letter dated it asserts, in unfortunate tones, that BDIHHI was not yet a "public company" and would only become a public company "upon approval" by the Respondent. This is therefore an admission that BDIHHI is not a public company. Contrary to the assertion that BDIHHI would become a public company "upon approval" a company is a public company under the SIA if it falls within the definition set out in the **SIA** .

[35] The Respondents' request for BDIHHI to provide evidence that it was a "public company" is in keeping with the statute which requires this fact to be established as a prerequisite for registration as a 'reporting issuer.' The request for documents pursuant to the **Registration Securities Industry (Registration of Issuer and Securities) Regulations** is also in keeping with the statutory requirements. The Respondent has not requested documents not required by the statute for the purposes of registration as a reporting issuer.

[36] The Respondents' written responses establishes that the Respondent has examined and given deliberate thought to the application by BDIHHI. Its refusal to register BDIHHI without documentary evidence to establish that BDIHHI was a "public company' and without the production of the statutorily required documents is not unreasonable or contrary to law. In all the circumstances the court declines to grant this relief.

[37] If, as contended by the Applicants its situation is "unique" and not provided for in the **SIA** then unless the SIA gives the Respondent the power to waive compliance with the provisions of the **SIA** the Respondent is required to enforce the provisions of the **SIA**. Any amendment of the **SIA** is up to the legislature.

RELIEF 2 – A declaration that the Respondent, having outlined in its letter of 22nd June 2023 to BDIH that after obtaining approval of the Scheme of Arrangement that it was obliged to do the following:

(a) An application to deregister Banks DIH Ltd, as a reporting issuer pursuant to section 56 (6) of the SIA; and

(b) A Registration Statement of Issuers and Registration Statement of Securities of Banks DIH Holding Inc must be filed pursuant to Section 56 and 57 of the SIA;

"*and then subsequently suggesting in its letters of 29th September 2023 addressed to BDIH that any such involvement by itself at that stage on the approval exercise would be premature and it had no powers to do so was not only contradictory but also contrary to law, unreasonable, an improper exercise of its discretion a position subsequently adopted after its aforementioned letter of 22nd day of June 2023 in bad faith, for improper purposes and based on irrelevant consideration having regard to the provisions of Section 5 of the JRA.*

[38] Apart from being unable to ascertain the alleged contradiction in the Respondents' letter of 22nd June 2023 and its letter of 29th September 2023 I do not find that contradictory letters or taking different positions in letters, even if established, could by itself form the basis for judicial review.

RELIEF 3 - A declaration that the Respondents' insistence as a precondition to its consideration of the applications that it should be provided with documentary evidence that BDIH had ceased to be a public company, and that BDIHHI has become a public company before the applications could be considered was contrary to law, in breach of the principles of natural justice, and a position that was taken in bad faith, for improper purposes and based on irrelevant considerations having regard to the contents of the letter of 22nd of June 2023 from the Respondent.

[39] The court has already found that the Respondent has not failed to *consider* the applications. Insofar as this ground can be construed as contending that the Respondent's requirement for documentary evidence to be provided before a *decision* is made is unlawful, I find this ground without merit.

[40] The Respondent's letter dated 22nd June 2023, in addition to seeking disclosures, stated that in addition, "*the following will be required, if the scheme of arrangement is approved by the shareholders of Banks DIH Limited:*

a. *An application to deregister Banks DIH Ltd. as a reporting issuer pursuant to section 56(6) of the Securities Industry Act 1998.*

b. *A Registration Statement of issuers and Registration Statement of Securities of Banks DIH Holding Inc (BDIHHI) must be filed pursuant to Section 56 and 57, respectively, of the Securities Industries Act 1998.*

c. *An application to the Guyana Association of Securities Companies an Intermediaries (GASCI) to delist Banks DIH Ltd. shares.*

d. *An application to GASCI to list BDIHHI shares on the stock exchange.*

Further, a certified copy of the articles of incorporation and bylaws another related documentation of BDIHI must be submitted to the council.

The council reserves the right to request further information pursuant to regulation 17 of the security industry disclosure by reporting issuers regulations 2002.

[41] The Respondents' letter of 22nd June 2023 therefore indicated to the Applicants that, among other things, an applications would have to be made for deregistration of BDIH and an application by BDIHHI pursuant to sections 56 and 57 of the **SIA** following approval of its SOA by ***shareholders.***

[42] The Respondents' letters to BDIH dated 29th September 2023 requested that documentary evidence be provided to establish that BDIH had ceased to be a public company and that BDIHHI was a "public company". Having regard to the fact that **the SIA** establishes the status of being a "public company" and "no longer being a public company" as the basis upon which registration and "deregistration" is to be based I do not find that the Respondent's request for documentary evidence to prove these matters is unlawful, unreasonable , taken in bad faith or in any way contrary to law.

RELIEF 5- A declaration that the refusal or omission by the Respondent " ***to answer two simple questions raised by the BDIH in its letters of the 6th day of October 2023 dealing with the deregistration of the BDIH as a reporting issuer and the registration of BDIHHI as reporting issuer in the following terms:***

" (i) what will be the response of the GSC to be DIH and BDIHHI proceeding to take the following steps

(a) all shareholders in BDIH will exchange their shares for shares in BDIHHI.

(b) The present share certificates will be replaced by share certificates issued by the new holding company BDIHHI.

(ii) completed the foregoing steps and provided evidence of same, will the GSC proceed to do the following:

(a) deregister BDIH as a reporting issuer pursuant to section 56 six of the SIA.

(b) Register BDIHHI as a public company and reporting issuer pursuant to sections 56 (1) and 57 (1)

amounted to or constituted to an omission which was unreasonable irregular or an improper exercise of discretion, an abuse of its powers and in breach of or omission to perform a statutory duty placed upon it to ensure the conduct of an orderly securities market

[43] Assuming, but not accepting, that a failure to respond to questions amounts to a breach of the duty to *"ensure the conduct of an orderly securities market"* I do not find that there was failure by the Respondent to respond to the questions raised by BDIH at paragraph 6 of its letter dated 6th October 2023.

[44] Paragraph 6 of BDIH's letter of 6th October 2023 seeks a response from the Respondent on whether it would , in essence, grant the applications if there was an exchange of shares between BDIH and BDIHHI and a replacement of BDIH share certificates with share certificates by BDIHHI.

[45] The Respondents' letter of 13th October 2023 , in response, states:

> "With regards to paragraph 6, unfortunately, the GSC makes no attempt to speculate or hypothesise its approach to this matter which, at all material times is to be guided by the SIA and Regulations thereunder."

[46] The Respondent appears to have viewed the query as speculative and indicated that it would be guided by the **SIA**. It should be noted that the exchange of shares and share certificates as proposed would not, by itself, necessarily meet the requirement for registration and "deregistration" since section 56 of the SIA and the **Registration Securities Industry (Registration of Issuer and Securities) Regulations** require not only that it be established that a company is a "public company' or has "ceased to be a public company" but also that the documents set out in the Regulations be provided before registration. Thus, even if the Applicants opt to exchange shares and share certificates as proposed, the grant of the applications does not automatically follow as the production of the statutorily required documentation and all other requirements of the SIA m for registration and "deregistration" must be satisfied.

[47] I decline to grant this relief.

RELIEF 6- A declaration that the Respondents' statement that it should have been made a party to the application to the High Court for judicial sanction of the SOA as set out in the following terms:

> **"Banks DIH Limited is registered as a reporting issue a under the SIA and regulations thereunder as such it would have been prudent, that any method touching a reporting issuer which requires necessary disclosure to the GSC, GASCI and its shareholders, ought to also include the GSC as a party to the application to sanction the scheme of arrangement (SOA) which could have assisted bank stage limited in its proposed SOE and reorganisation of its capital structure."**

is contrary to law man is an abuse of power within the meaning of Section 5 of the JRA.

[48] The statements referred to are contained in the Respondents' letter dated 13th October 2023. The Respondent did not assert in this letter or at all that there was a statutory requirement for it to be made a party to the High Court proceedings in which judicial sanction of the SOA was sought. I have been unable to identify any such statutory requirement in the **SIA.** The Respondent has opined that it would have been "*prudent"* for the Respondent to have been made a party to the proceedings. I share this opinion particularly having regard to the assertion by BDIH that the proposed reorganization is "unique" and unprecedented in Guyana. This Respondents' view as to what would be the more "prudent" step is not a decision suspectable to judicial review.

[49] The court declines to grant this relief.

RELIEF 7 - A declaration that is statement by the Respondent its letter of 22nd June 2023 that BDIH was in breach of the disclosure regulations made under the provisions of the SIA was contrary to law because:

(a) it did not involve any change in the capital structure of BDIH including the structure of the debt securities because all that was involved was that the shareholders of BDIH what exchanged is shares for shares in BDIHHI.

(b) That the aforementioned transaction would not bring about a material change in the price of BDIH shares since BDIH would cease to be a publicly traded company whose shares were on the stock market.

[50] The Respondents' letter to the BDIH dated 22nd June 2023 identifies what the Respondent contends are breaches of BDIH's disclosure obligation under the **SIA** and its Regulations. This in my view constituted a determination or decision by the Respondent that BDIH is in breach of the identified Regulations. The Applicants seeks a declaration that this finding by the Respondent was contrary to law.

[51] I remind myself that in judicial review proceedings *"a judge's jurisdiction is very narrow and is limited to evaluating the decision solely within the framework of administrative law principles. This entails considering the grounds of illegality, irrationality or Wednesbury unreasonableness and procedural impropriety."*[10]

[10] Magistrate Reynolds et al v Peter Hipployte et al SLUHCVAP2022/0019

[52] The basis upon which the Applicants seeks to review this finding by the Respondent does not in my view fall within the grounds of illegality, irrationality , unreasonableness or procedural impropriety.

[53] The Applicants contend that the SOA does not amount to a change in capital structure and did not bring about a material change in price of BDIH shares. This in my view is a disagreement with the substantive finding by the Respondent rather that a challenge to the process by which the Respondent arrived at the decision.

[54] Nevertheless, I go on to consider whether there is any basis established for the court to find that the finding by the Respondent that BDIH was in breach of the identified regulations should be declared null and void on the grounds of *illegality, irrationality , unreasonableness or procedural impropriety.*

[55] Regulation 4 of the Disclosure Regulations states:

> (1) An issuer shall, generally an apart from complying with all the requirements of these regulations, notify the securities exchange, the Council, and its members and other holders of its securities without delay of any major new developments in its sphere of activity which are not public knowledge and which information –
>
> (a) is necessary to enable them and the public to appraise the financial position of the issuer and its subsidiaries;
>
> (b) is necessary to avoid the establishment of a false market in its securities; or
>
> (c) would be likely to bring about a material change in the price of its securities.
>
> (2) Paragraph (1) shall not apply with regard to information about impending developments or matters in the course of negotiation where the securities exchange is satisfied by the issuer that disclosure to the public of such information might prejudice of the issuer's legitimate interests and the securities exchange grants a dispensation from the requirement of paragraph (1)"

[56] Regulation 4 requires an issuer to notify the Respondent, among others, of "*any major new developments in its sphere of activity which are not public knowledge"* AND which information falls within (a) to (c).

[57] The Respondents' finding that BDIH was in breach of the identified regulations was reiterated in its letter to BDIH dated 10th July 2023 in which it asserted that the proposed new SOA constituted *" a major new development"* pursuant to Regulation 4 of the **Disclosure Regulations.** The Applicants responded to the letter of 10th July 2023. By letters dated 12th July 2023 and 17th July 2023 the Respondent provided reasons for its position. For ease of reference I will set out the main contents of Respondents' letter dated 17th July 2023:

> "**The Council's Letter of the 22nd June 2023.**

Disclosure under Regulation 4

1. In the above letter the Council, in the comments column, the following observations were made by the Council *"(a) No disclosure was made at the time Banks DIH made the decision or contemplated the decision (b) No application to GASCI for dispensation of notice."*

2. Your response as set out in your letter of the 4th July 2023 in relation to paragraph 4 was the following "*8. None of these matters arise with respect to this transaction. Since BDIH's financial position is not affected, the question of establishing a market in its securities does not arise and the price of the securities is in no way affected. Accordingly, there has been no violation of our disclosure obligation in respect of Regulation 4.*
3. The purported opinion expressed and pronounced upon by the Reporting Issuer, Banks DIH, amounted to a refusal to provide the requested information. Banks DIH Ltd.'s opinion is not an opinion shared by the Council.
4. It is noteworthy that Regulation 4 also refers at (c) to "*would be likely to bring about a material change in the price of the security."* The pronouncements contained in your letter of the 4th July 2023 are no more than the expressions of an opinion by the Reporting Issuer that the price will be unaffected. It is the marketplace which determines whether the price of a security is affected.

5. In the proposed scheme in which the shares of the Reporting Issue are being exchanged for the shares of a currently unlisted private company, the price of the shares in the Reporting Issuer in the hand of a single shareholder i.e the parent company, whose By-laws have not been provided, is very likely to be affected by the proposed change. The loss of the rights to capitalization of profits by the shareholders as set out in By- law 139 of the Reporting Issuer is likely to impact the price of the replacement shares which are being issued by the Holding Company. The absence of the provision of any By-laws of the holding Company does not assist the Council.

6. We invite your attention to sections 52 (5) and section 53 of the Companies Act. For clarity section 52 (5) " *Where a particular company becomes a subsidiary of another company, any dividend paid to the other company out of profits of the particular company, acquired before it became a subsidiary of the other company, shall be treated as capital of the acquiring Company*."

   Section 53 "*Where a company acquires all or enough of the shares of another company to control all of the other companies activities, the pre acquisition profits of the acquired company shall be treated as a capital of the acquiring company."* In either scenario the price of the security of the Reporting Issuer is likely to be affected by its pre-acquisition profits being treated as capital of the acquiring company and not as an asset of the Reporting Issuer.
7. In paragraph numbered 1 in your letter of the 12th July 2023 Banks DIH repeated its refusal to provide the requested information by referring to the previously expressed opinion of the Reporting Issuer

"*that it was not a major new development."* The Council is unable to find any provision in either the Securities Industry Act 1998 or Regulations which states that the opinion of the Reporting Issuer constitutes that of the Council.

Disclosure under Regulation 13 (d)

8. The statements and commentary settled in paragraph 10 of your letter of 4th July 2023, in particular, "*It could not be clearer there is absolutely no change in the capital structure of BDIH arising from the Scheme of Arrangement"* are contradicted by the provisions of section 53 stated above, which provides for the pre-acquisition profits of an acquired company to be treated as the capital of the acquiring company. This is a transfer and treatment of the pre-acquisition profits (assets of the Reporting Issuer) and its conversion into the capital of the parent. This is a change of the capital structure of the Reporting Issuer. The audited financial statements of Banks DIH as at 30th September 2022 disclose a reserve of $49,663.9M. There has been no statement on how this will be treated.
9. In the premises the requests of the Council set out in letter dated 22nd June 2023 in relation to Regulation 13 remains unanswered.

Disclosure under Regulation 14

10. In your letter of 4th July 2023 in relation to the above regulation to reporting issue as stated "*Having regard to the foregoing, we reiterate that there has been no breach of any disclosure obligation under the Regulations*."
11. Reference is made to the Council's position as set out above at #5 above, particularly the contents of section 53 of the Companies Act which deems the pre-acquisition profits of the Reporting Issuer as that of the Holding Company, a matter of immediate impact to the capital structure and assets of the Reporting Issuer.
12. This request by the Council also remains unaddressed unanswered.
13. The Council's letter dated 12th July 2023 reminded Banks DIH Ltd. that queries set out in the letter dated 22nd June 2023 remained unanswered."

[58] The letters of 12th and 17th July 2023 provided reasons for the Respondents' conclusion that the proposed SOA was a "*major new developments in its sphere of activity which are not public knowledge"* which information " *would be likely to bring about a material change in the price of its securities."* The letter also gave reasons for the Respondents' conclusion that there would be a change in the capital structure

[59] Having considered the reasons provided by the Respondent for arriving at the conclusion that BDIH was in breach of the identified Disclosure Regulations the court finds no basis for finding that the finding

should be declared null and void on the grounds of illegality, irrationality , unreasonableness or procedural impropriety

RELIEF 8- A declaration that the Respondents' continuing insistence and taking into consideration what it alleged to be breaches of the disclosure obligations as reflected in its letters of 17th July 2023 and 29 September 2023 indicated that it took into account irrelevant considerations which influences decision not to proceed with the approval of the applications.

[60] The applications by the Applicants are dated 8th September 2023 and thus the letter of 17th July 2023 pre-dates the applications. Further, that the Respondents' letters dated 29th September 2023 was written in response to the Applicants' letter dated 26th September 2023. The reference to the duty to disclose contained in the letter dated 29th September 2023 was a direct response to assertions made by the Applicants at paragraph 2 of the Applicants' letter dated 26th September 2023. [11]

[61] Having perused the correspondence between the parties I do not find that the Respondent made a "*decision not to proceed*" with the approval of the applications for the reasons alleged. The Respondents' position, as outlined in numerous letters, is that the Applicants must provide documentary evidence that BDIH had ceased to be a "public company" and documentary evidence that BDIHHI was a "public company" accompanied by copies of the other documents requested. The Applicants have been unable or unwilling to provide the requested information and have asserted that the evidence can only be "*generated by the approval of the Council of BDIH ceasing to be a public company and BDIHHI replacing it as a public company. The generation of documentation therefore depends on the actions of the Council."*

[62] The correspondence between the parties does not show that the instances of non-disclosure identified by the Respondent have been a factor in the alleged "decision not to proceed" with the applications. As clearly stated by the Respondent in its letter dated 13th October 2023 "*a distinction is made as to the disclosure obligations by a reporting issuer under the SIA and Regulations as against an application to register/deregister."* The Respondent, as regulator, has a separate power under **the SIA** to impose sanctions where it finds that the disclosure regulations have been contravened[12].

RELIEF 9- A declaration that the Respondent is not authorised or empowered to be made a party to the applications made by BDIH for judicial sanction of the SOA referred to.

[11] Letter dated 26th September 2023 captioned " Application for Deregistration of banks DIH Limited as a Reporting Issuer
[12] Regulations 18 ,19 and 20 of the Disclosure Regulations

[63] This relief is not clear. The Respondent has not asserted that there is any statutory requirement for it to be made a party to proceedings for judicial sanction of the SOA and I have been unable to identify an express provision to this effect. In this sense it can be perhaps be stated that the Respondent, is not "authorised" or "empowered' by the **SIA** to be made a party to the proceedings for judicial sanction of the SOA. Apart from statutory requirements as to who should be made a party, generally, all "interested parties" ought to be made a party to proceedings. A determination of the persons who are parties to a proceeding is made by the parties to the proceedings naming the parties and, ultimately, by the court hearing the proceedings using its power to add , remove or substitute parties.

[64] To the extent that this relief seeks a declaration that the **SIA** does not expressly require the Respondent to be made a party to proceedings for judicial sanction of a SOA , this has not been disputed by the Respondent and I have not been able to identify any such express provision. To that extent it is declared that the **SIA** contains no express provision for the Respondent to be made a party to applications for judicial sanction of a SOA.

RELIEF 10- A declaration that the Respondent is lawfully bound to deregister BDIH as a Reporting Issuer pursuant to section 56 (6) of the SIA and to register BDIHHI as a reporting issuer pursuant to section 56 and 57 of the SIA after receiving documentary evidence from BDIHHI that in conjunction with its new holding company BDIHHI it has taken the following steps:

(1) all shareholders in BDIH have exchanged their shares for shares in BDIHHI;

(2) the present share certificates held by shareholders of BDIH have been replaced by share certificates issued to such shareholders by BDIHHI

RELIEF 11- An order that the Respondents shall deregister BDIH as a Reporting Issuer pursuant to section 56 (6) of the SIA and register BDIHHI as a public company and reporting issuer pursuant to section 56 one and 57 one of the SIA after receiving documentary evidence from BDIH that in conjunction with its new holding company it has taken the following steps:

(1) all shareholders in BDIH have exchanged their shares for shares in BDIHHI;

(2) the present share certificates held by shareholders of BDIH have been replaced by share certificates issued to such shareholders BY BDIHHI

[65] The Respondent is not obligated by the **SIA** to deregister BDIH as a Reporting Issuer pursuant to section 56 (6) of the SIA and register BDIHHI as a public company and Reporting Issuer pursuant to section 56 one and 57 *based solely on the steps identified*. The Respondent has a duty to register a

company which falls within the definition of a "public company" as defined by the **SIA** and which satisfies the requirements set out in the **SIA** for registration. Equally, the Respondent has a discretion to make an order declaring that a reporting issuer which has ceased to be a "public company" (as defined in the **SIA)** is no longer a reporting issuer if satisfied that the reporting issuer has ceased to be a public company and satisfies any other requirements in the SIA. This order may be made subject to conditions. I decline to grants these reliefs.

[66] The court therefore makes the following orders:

a. It is declared that the **Guyana Securities Council** created under the provisions of the **Securities Industry Act** Cap 73:03 is a public body whose administrative acts or omissions are subject to judicial review.

b. It is declared that the **Securities Industry Act** Cap 73:03 provides no express provision for the **Guyana Securities Council** to be made a party to applications for judicial sanction of a Statement of Arrangement.

[67] While the Applicants have not specifically sought an order for the Respondent to make a decision on its applications, based on the Respondents' own position that it is yet to make a "decision" on the applications made on 8th September 2023, I find that the Respondents' duty to make a decision includes a duty to make a decision within a reasonable time. Reasonableness is determined by the facts in each case. In this case the Respondents' position is that the delay in making a decision has been caused by the failure to provide requested information. Notwithstanding, as stated, the Respondents' duty is to make a decision.

[68] The court therefore makes the following further order:

a. The Respondent shall give the Applicants *at least* 7 days notice to provide all requested information in relation to the applications filed by the Applicants on 8th September 2023 which said notice shall be served on the Applicants no later than 16th July 2024.

b. The Respondent shall within 14 days of the expiration of the time fixed for the submission of the information by the Applicants make a decision on the applications made by the Applicants on 8th September 2023.

Costs

[69] The Applicants have been unsuccessful in obtaining most of the reliefs sought. I therefore find that it is the unsuccessful party.

[70] Pursuant to Part 56.04 (4) of the **Civil Procedure Rules 2016** costs are to be assessed if not agreed within 21 days. In the event that costs are not agreed, the Respondent shall file an application for costs to be assessed which application shall comply with Part 64.05 of the **Civil Procedure Rules 2016**

Postscript

[71] While the court has declined to grant most of the reliefs sought the court finds it most unfortunate that this matter has progressed in this manner. The tone of the written correspondence, particularly from the Applicants, is unfortunate. Banks DIH Ltd is a well-established company with a long history in this country. It has evidently expended significant time and resources in seeking to make changes to its business structure. The Respondent is a statutory body which must operate within the confines of statute. Its functions include creating and promoting such conditions in the security market as deemed necessary and appropriate to ensure the orderly growth and development of the capital market. In the interest of all parties and the general commercial environment, if, as contended by the Applicants the provisions of the SIA do not easily facilitate the implementation of its SOA, then it appears to me that the way forward is for the parties to engage in less emotive and combative discourse about the way forward. If this requires amendments to the legislative framework (including Regulations) then efforts to have this done in a timely manner would not only be in the interest of the Applicants but in the interest of the Respondent being viewed as being responsive to a continuously changing commercial environment.

Fidela Corbin Lincoln
Puisne Judge