

**Before the Financial Services Review Panel**

**In the matter of:**

**Denis Serge Rivalland**

**Applicant**

**v/s**

**The Financial Services Commission**

**Respondent**

**DETERMINATION**

**0.1 Direction to remove Applicant from his employment**

On 24 April 2009 the Applicant applied to the Financial Services Review Panel ("the Review Panel") for the review of a decision taken by the Chief Executive of the Financial Services Commission ("the Commission") dated 23 March 09. The decision was a direction given by the Chief Executive of the Commission to City Brokers Ltd ("CBL") requesting CBL to terminate the contract of service of the Applicant. The Applicant was at that time, since 02 May 08 in fact, an employee of CBL. The direction of the Chief Executive was given pursuant to section 46 of the Financial Services Act ("the Act").

Under section 46(1) of the Act, the Chief Executive may issue such a direction where he has "reasonable cause to believe" that such a direction is "necessary or desirable to protect the interest of clients of a licensee". CBL was at the material time an insurance broker registered with the Commission. It was therefore a licensee.

Under section 46(2)(f) of the Act, the Chief Executive may direct a person to remove or to take steps to remove a specified officer or employee of the licensee from office or employment, or ensure that the specified officer or employee of the licensee does not take part in the management or conduct of the business of the licensee except as permitted by the Commission.

In addition to the above, the Chief Executive must be 'satisfied' that the officer or employee has contravened a "relevant Act" or has been knowingly concerned in financial crime. The Insurance Act is "a relevant Act" (see section 2 of the Act).

It is pertinent to point out that the Applicant was not an "officer" of CBL but only an employee – a Client Executive whose job was to handle insurance programmes. Next, the removal of the Applicant from CBL was not concerned with anything he did at CBL but with

his involvement with another company - Coverage Co. Ltd ("Coverage"). However, the functions which he occupied at CBL are relevant.

## **0.2 Coverage and Applicant**

The Applicant has deponed to the effect that he has all in all worked for some 25 years in the insurance sector and is conversant with the regulatory law relating to 'officers'. He has worked for two local insurance companies and also in South Africa. He set up Coverage in the year 1998, but the company went into liquidation in the year 2008. According to the Applicant, the winding up was not a voluntary one but a creditor's winding up. The Review Panel finds on the evidence before it that there was first a voluntary resolution to wind up and this was followed on the same day by a creditors' resolution. The Review Panel is not in presence of copies of the two resolutions, the agenda relating thereto and the publicity, if any, which was given. A liquidator was appointed on 05 May 08 by Coverage.

The winding up of Coverage must have been in the air in March or earlier even. But what is surprising is that the Commission was not informed at the time of the impending winding up and/or the cessation of business. The Act requires an advance notice of one month because the Commission has certain duties under the law. The Commission learned of the appointment of the liquidator from the liquidator himself on 09 May 2008.

## **0.3 Events leading to the institution of an investigation**

On 31 March 08 the Applicant had a meeting with Mauritius Union Assurance Co. Ltd ("Mauritius Union"). He informed the Company that Coverage was going into voluntary winding up and he would be joining CBL and take up all his clients with him.

On 03 April 08, Mauritius Union wrote to inform CBL of the meeting and that –

- (a) there was a balance which was long overdue from Coverage;
- (b) Coverage was not complying with section 73 of the Insurance Act (regarding remittance of premiums to insurers within 30 days of their receipt);
- (c) Mauritius Union would inform all policy holders of Coverage who had not settled their premiums to contact the Applicant at the seat of CBL.

On 14 April 08 Albatross Insurance Co. Ltd ("Albatross") notified Coverage of its termination of the agreement with them. Coverage had apparently written to CBL on 09 April 08.

On 25 April 08 the Commission wrote to the Managing Director of Coverage, attention of the Applicant and enclosed the letter of Mauritius Union dated 03 April 08 and that of Albatross dated 14 April 08. The Commission enquired about the status of the closing down operations of Coverage and drew attention to section 111 of the Insurance Act.

As the abovementioned letter remained unanswered, the Commission sent a reminder on 20 May 08 and even referred to the penalty provided by section 94 of the Insurance Act for failure to comply.

On 15 May 08 CBL wrote to inform Albatross that the Applicant would be working for Albatross.

On 22 May 08 Albatross wrote to the Commission to protest against the employment of the Applicant by CBL or anyone else. It also called for an investigation and the suspension of the licence of the Applicant pending the investigation.

On 10 June 08 the Commission requested CBL to explain why it had not sought the approval of the Commission before employing the Applicant as an "officer".

On 11 June 08 CBL replied that the Applicant was not an officer and that the approval of the Commission would be sought if any management functions were to be assigned to him.

On 14 July 08 the Commission wrote to Coverage which was then under the care of the liquidator and referred to several matters such as failure to surrender licence, the need to keep premium account separate from other account and the remittance of premiums to insurers within 30 days of receipt. The Commission also enquired into the measures which were being taken to meet all liabilities, etc.

On 17 July 08 the liquidator wrote to the Applicant requesting for the handing over of the licence of Coverage which would have to be surrendered to the Financial Services Commission.

On or about 18 September 08 the Chief Executive of the Commission decided to institute an investigation and appointed two senior examiners to do so. Coverage was duly informed by letter of the same date and the letter specified the reasons for the investigation as follows:  
"The Commission has reasonable cause to believe that the company and/or its directors –  
(a) has committed, is committing or is likely to commit a breach of the Financial Services Act 2007 and the Insurance Act 2005,

(b) has carried on, is carrying or is likely to carry out any activity which may cause serious prejudice to its customers.”

#### 0.4 The investigation

The two senior examiners carried out their investigations and submitted a report to the Commission on 16 December 08. According to the investigator who deposed, the Applicant who had been convened by the liquidator, was present when they met the liquidator for the first time. The Applicant produced certain documents and gave certain explanations which are to be found in the Investigation Report. The Applicant was given or shown a copy of the letter of 18.09.08 setting up the investigation. The letter is important because it shows that the investigation did not concern Coverage alone but also the Applicant as the Managing Director of Coverage. The Applicant agreed to produce certain other documents but never did so. In fact he never bothered about the investigation.

The Review Panel has analysed the Investigation Report. Its findings are in the annexed Appendix.

#### 0.5 The removal of the Applicant from CBL

The investigation report was submitted to the Commission on 16 December 08. Following that, the Chief Executive wrote to CBL on 02 February 09 requesting CBL to show cause why the Applicant’s contract with CBL should not be terminated.

The letter specified the following reasons in support of the request –

- (a) Breach of section 73 (2) of the Insurance Act;
- (b) Breach of Section 73(3) of the Insurance Act;
- (c) Breach of section 28 (4) of the Financial Services Act and section 111 of the Insurance Act.

On 05 February 09 CBL wrote to the Chief Executive and asked for a meeting. The Director of CBL pointed out that he was not aware of the breaches of law referred to.

On 12 February 09 a meeting took place but nothing of any importance transpired there. The Director of CBL did not protest against the proposed action of the Chief Executive of the Financial Services Commission.

On 23 March 09 CBL was requested to remove the Applicant with immediate effect so as to ensure that he did not 'take part in the management or conduct of the business of City Brokers Ltd'.

#### 0.6 The objects of the Commission

It is necessary to draw attention to the following, amongst other, objects and duties of the Commission. The direction to terminate the services of the Applicant cannot, in the opinion of the Review Panel, be viewed solely from the point of view of the Applicant.

The objects of the Commission are –

- (a) to ensure the orderly administration of the financial services and global business activities;
- (b) to ensure the sound conduct of business in the financial services sector and in the global business sector;

Section 3(2) of the Insurance Act lays down the following, amongst other, objectives –

- (a) to maintain fair, safe, stable and efficient insurance markets for the benefit and protection of the public;
- (b) to promote confidence in the insurance industry.

The Review Panel believes that the decision of the Commission should be viewed against that background.

#### 0.7 The grounds of review

The grounds specified in the application made by the Applicant's attorney dated 24 April 09 are:

- (1) the Applicant was not given a hearing;
- (2) the decision of the Chief Executive is not justified and/or reasonable in the circumstances.

The grounds specified in the statement of case of the Applicant are –

- (1) the directive of the Respondent to remove the Applicant was illegal as the Applicant was not given a fair opportunity to be heard;



- (2) the directive was illegal as the members of the Review Panel had not been appointed at the time the directive was issued;
- (3) the directive was unjustified, arbitrary and unreasonable.

#### 0.8 **The Contentions of the Applicant**

The contentions of the Applicant may be summarized as follows –

1. The Applicant should have been given a hearing before CBL was required to terminate his services;
2. The Commission should have taken a less drastic measure against the Applicant;
3. The investigation report was unfair and unreliable in as much as –
  - (a) although the Applicant was the Managing Director of Coverage he was not called by the investigators;
  - (b) the report was flawed in various respects.
4. The Commission should have taken into consideration the market practice regarding the remittance of premiums to insurers;
5. The investigators failed to consider that the Applicant had withdrawn money from the premium bank account in excess of his entitlement for the period covered but the excess could have represented dues from a preceding period;
6. No objective investigation could have been carried out in the absence of the Applicant;
7. The Chief Executive did not give evidence to show how he satisfied the conditions specified in section 46 of the Financial Services Act;
8. It would have made no difference if CBL had given the Applicant a hearing as CBL was confronted with a 'fait du prince'.
9. He was not confronted with a copy of the report and the findings of the investigators before the Chief Executive issued its direction.

#### 0.9 **The first ground of review**

It was argued that the Chief Executive should have given the Applicant a hearing before issuing a direction to terminate his employment as there are two parties to a contract and it is not sufficient to hear the employer alone.

The Review Panel notes that the law does not provide for a hearing. What it provides is that the person to be directed must be given an opportunity to make written representations. This was done. CBL was also given a hearing but did not take up the defence of the Applicant. The representative of CBL said in his testimony that he had asked the applicant whether there was any problem relating to his functions at Coverage. The Applicant had replied in the negative.

Can it be said that notwithstanding the safeguards provided by section 46 of the Financial Services Act the Review Panel must add the *audi alteram partem* rule to it? The Review Panel does not think so. There is no unfairness involved at all in the scheme of the statutory provisions. Moreover the Applicant is not an employee of the Commission. The duty cast on the Commission is twofold -

- (a) to comply with section 46 of the Financial Services Act;
- (b) to comply with the objectives of the Act.

The Review Panel finds that the Commission has done both. We may add that it is the duty of an employer in the insurance business to ensure that he does not employ someone whose record is not straight.

#### 0.10 The second ground of review

The second ground is new and could be disallowed but it can be easily disposed of: the functions of the Chief Executive do not depend on the appointment of the members of the Review Panel.

#### 0.11 The third ground of review

This ground states that the directive of the Chief Executive was unjust, arbitrary and unreasonable in the circumstances. It is therefore necessary to look at all the circumstances.

All the contentions set out summarily in paragraph 0.8 above come into play. As far as the first contention is concerned, it has already been dealt with in paragraph 0.9.

The circumstances which have been considered are as follows:-

- (a) Coverage did not give any advance notice to the Commission, as required by the law, of the decision to wind up Coverage;
- (b) the licence of Coverage was not surrendered to the Commission as required by section 28(4) of the Financial Services Act and section 111 of the Insurance Act;
- (c) the premium bank account of Coverage was grossly misused, contrary to section 73(3) of the Insurance Act, to effect payments which should not have been made out of that account;
- (d) the premium bank account was even overdrawn;

- (e) the Applicant did not reply to the letter of 25 April 08 . (He admitted in the course of his testimony that he must "en principe" have received it. This letter, be it noted, was sent to him one month before the liquidator was appointed);
- (f) after having met the investigator and the liquidator he chose not to participate any further in and not to bother about the investigation ordered by the Commission;
- (g) the insurers were entitled to their dues, i.e. premiums received from policy holders, and it might constitute the offence of embezzlement not to remit the amount received to the appropriate insurers;

There is no doubt that although the Applicant was the majority shareholder of Coverage and also in charge of its day-to-day administration he was not conducting the affairs of Coverage in a responsible manner. He was under a duty to inform the Commission at the measures he was taking to discharge the obligations of Coverage under existing insurance policies and to meet all its liabilities.

It has been argued that the Commission or the Chief Executive should have considered a less drastic action than the dismissal of the Applicant. In view of what had been said above, the Review Panel does not think that the action taken was unreasonable, arbitrary or unjustified. The Applicant did not give any valuable evidence that he was not to be blamed for all that happened.

The Application for Review is therefore set aside.

Date: 10.5.2011



## Appendix.

### **Part 1. On keeping of separate accounts.**

- i. At the hearing dated 11.8.2010 (pg 27), the senior examiner who deponed, informed the Panel that he enquired about the business process of "Coverage", how "Coverage" dealt with the clients and whether separate accounts were kept by "Coverage". He also stated that the Applicant produced cash book and bank statements to them.
- ii. At the same hearing (pg 34), the senior examiner confirmed the findings in the report to the effect that premiums from policy holders went in the client account but there were other payments which were made from the client account, which did not relate to the keeping of own funds. There were payments of loans, lease obligations and salaries which were charged to the client account. He further stated that this client account had an overdraft balance.
- iii. On basis of records submitted by "Coverage", it was also reported in the Investigation Report that there were two separate Cash books (No.1 for "Coverage" Account in A1 to A11 of the Investigation Report and No 2 for Clients Account in A12 to A46 of the Investigation Report) and Bank Statements (No1 "Coverage" Account in A47 to A67 and No 2 for Clients Account in A68 to A105 of the Investigation Report). Apparently all premiums received were deposited in one of them. However, some payments have been made directly in the Client Account, which are not related to commission on premium.
- iv. As per the Investigation Report (pg 11) and Appendix 23 therein, which details the day to day administration and management process of "Coverage", it is understood that payments received by "Coverage" against a policy in force is deposited into a bank account. At the end of every month, 15% of the amount deposited is transferred to another account, representing "Coverage" commission on the premium.
- v. The Panel has reviewed the Bank Accounts from 1 October 2007 to 16 April 2008 and confirms the findings of the investigation to the effect that "Coverage" Client Bank Account was used to make not only interbank transfers from "Coverage" Client Bank Account to "Coverage" Personal/Administration Bank Account but also expenditure on behalf of "Coverage". This is evidenced by loan repayments (Postings 146693, 146980, 148647,148890, 149167, 149538), Finance Leases from La Prudence (postings: 146661, 148627,149151,149528,

149759) CEB (Postings 146879, 148827), Staff salaries and parking fees (postings: 148098, 148099, 148146, 149665) and Syndic payments (146438) for period October 2007 to April 2008. These were confirmed by the Senior Examiner during examination (pg 43 of Hearing 11.8.2010)

- vi. The meeting of expenditure from "Coverage" Client's Accounts defeats the purpose of keeping separate bank accounts as required by the Insurance Act and is in breach of Section 73(2) of the Insurance Act.

## **Part 2. On Remittances of premiums to the Insurers.**

- i. The Panel took note of the difficulty of the investigation team in the conduct of its investigation as sufficient records were not kept and the investigation had to rely on statements submitted by insurers concerning amount due to them (pg 35-36 of Hearing 11.8.2010).
- ii. As per the Investigation Report (pg 12), the Applicant has stated that "Coverage" adopted 'market practices'. These practices include agreements with all insurers to remit premium within 30 to 90 days and credit facilities for remittances of premiums. In the opinion of the Panel, by adopting the above practices, "Coverage" was not acting in compliance with section 73(3) of the Insurance Act regarding remittances of premium to the insurers.
- iii. At the hearing dated 11 August 2010 (pg 27), the Panel took note that the investigation team has inquired from the Applicant about how premiums were being remitted by "Coverage" to insurance companies and if they were in accordance with the Insurance Act. The Senior Examiner informed the Panel (pg 35) that following the compliance review, as highlighted at Section 7 of the Investigation Report, he observed that premiums actually received were not remitted within the 30 days prescribed in the law and in some cases were not remitted at all.
- iv. At Section 7 on Compliance Review (on pages 17 to 23) of the Investigation Report, the two Examiners have submitted a comparison of amounts received by "Coverage" from Policyholders and deposited on "Coverage" clients Bank Account with outstanding amount as a result of non-remittances to insurers.
- v. At the hearing on 11 August 2010, a sample of these cases was taken to evidence the non-remittance of premium to insurers although payment was

received by "Coverage" from policy holders (pg 47 to 56). Appendices 25 to 41, as also specified on page 16 of the Investigation Report, contain evidences of payments to "Coverage" for which amounts were still outstanding as per insurers statements (pg 37.-38 of the Hearing 11.8.10). These insurers' statements were referred to at page 14 of the Investigation Report and the Panel has reviewed appendices 14, 19, 20 from Swan Insurance, Mauritian Eagle, SICOM and corresponding documents submitted as evidences by Respondent. The Respondent has submitted documents during hearings (marked Doc B1) to support the findings of the Investigation Report (pg 39 of the hearing 11.8.10).

- vi. The Panel has also reviewed the Investigation Report and noted that premium received by "Coverage" was long overdue to insurers. For period October 2007 to May 2008, a total of Rs 15.4 m was placed with 7 insurers by "Coverage" but a total amount of Rs 7.1 m was due to them by "Coverage" on insurance business placed by "Coverage" for same period (pg 14 and 15). The total outstanding amount represented 46% percent. It was reported in the Investigation Report that the insurers found that Coverage received premiums from the policyholders but did not remit the same to the insurer.
- vii. In the opinion of the Panel, despite that the Applicant has tried to highlight few discrepancies in names and figures (pg 15, 16, 19, hearing of 18.8.10), the investigation has clearly evidenced that money was received by "Coverage" from policy holders as per its Clients cash book but was not remitted to insurers as per Insurer's Statements of outstanding amounts.
- viii. In forming this opinion, the Panel has also reviewed the letter from Albatross Insurance dated 22 May 2008, stating that "Coverage" was indebted as at May 2007 in the sum of Rs1.75m and it was only after the service of a legal notice, a threat to initiate legal action and a cancellation of agreement that "Coverage" settled the outstanding amount. However, in the same letter dated May 2008, it was mentioned that "Coverage" was once again indebted to Albatross in the sum of Rs 1.254m representing premium for December 2007 to March 2008 (See Annex H of Statement of Case of Respondent). Similarly, on 3 April 2008, Mauritius Union also raised the issue that "Coverage" had a long overdue balance with it (Annex E1).
- ix. From the Senior Examiner's statement (pg 44) and the Investigation Report, the Panel took note that total amount transferred from the Cash Book for clients was computed as some Rs 6m in the Investigation Report and according to the investigator, this represents commission equivalent on premium of Rs 39 m on

basis of 15% commission while only Rs 18 m were actually remitted to insurers during the period of investigation (pg 44 of Hearing 11.8.2010).

- x. To ascertain the above findings and form an opinion, the Panel has also reviewed the "Coverage" Client's Cash Book, for period 1 October 2007 to 16 April 2008 and noted that some Rs 26 m were remitted to "Coverage" as premium by policy holders (A46). The commission on this amount has been computed as Rs 3.9 m but the amount transferred from "Coverage" Client's Bank Account to "Coverage" Personal Bank Accounts was more than Rs 5.7m in form of bank transfers of Rs 4.65 m and expenses charged to "Coverage" Client's bank account e.g Repayment of Loans and lease of assets, etc. It is to be noted that according to the Senior Examiner, the total withdrawal was Rs 5.9m which includes VAT of Rs 166,062. However, the panel is of the view that "Coverage" is not liable to VAT on its commission income and VAT is chargeable to insurance companies and has been correctly deducted from Client account. Details of the transfers of Rs 4.6m, which have been confirmed from the Senior Examiner (pg 41 of Hearing 11.8.2010) during examination, are as follows:

| Ref          | Date  | Amount<br>Rs     |
|--------------|-------|------------------|
| A16          | 24.10 | 175,486          |
| A16          | 24.10 | 233,825          |
| A17          | 29.10 | 380,000          |
| A25          | 5.12  | 499,995          |
| A27          | 13.12 | 350,000          |
| A28          | 19.12 | 49,995           |
| A29          | 24.12 | 165,000          |
| A31          | 04.01 | 202,676          |
| A31          | 04.01 | 239,045          |
| A31          | 11.01 | 56,845           |
| A33          | 24.01 | 60,995           |
| A35          | 31.01 | 282,495          |
| A37          | 12.02 | 99,995           |
| A38          | 26.02 | 79,995           |
| A41          | 19.03 | 999,995          |
| A42          | 03.03 | 474,955          |
| A44          | 01.04 | 299,995          |
| <b>TOTAL</b> |       | <b>4,651,292</b> |

- xi. The Applicant expressed opinion on some discrepancies between the premium and amount received (pg 15 of Hearing 18.8.2010). In the opinion of the Panel

these discrepancies refer inter-alia to commission payable to "Coverage" and VAT payable by insurers.

- xii. The Applicant referred to the letter from Albatross to express the opinion that "Coverage" had agreements with the insurers to effect payments within 90 days (pg 34). However, the letter was referring to payments on premium which have remained due and Clause 2(c) to nonpayment of premium (Annex H1 of statement of Case).
- xiii. The Applicant also highlighted that the Investigation did not try to establish whether there were written agreements or not between "Coverage" and the Insurers (pg 29). Another argument presented by the appellant was that when FSC issued a licence to "Coverage" in February 2008, "Coverage" client account was in overdraft of more than Rs 6m (pg 37 of Hearing 18.8.2010). However, the Panel noted that investigating the practice in the insurance sector and the conditions under which the licence was issued were both as outside the scope of the investigation.
- xiv. During cross examination of the investigator, the applicant expressed an opinion that it could have been possible that "Coverage", having received premium prior to 1 October 2007, decided to withdraw the premium during after 1 October 2007 (pg 13 – hearing 18.8.10). However, this opinion does not seem to hold due to the following findings.
- xv. To ascertain the above opinion, the Panel has reviewed "Coverage" client's Bank Account and noted that "Coverage" was operating with credit balances as per Client Cash Book for the same period, indicating clearly that the client's account has been overcharged as a result of withdrawals represented by expenses not pertaining directly to client's insurance businesses as well as interbank transfers which were altogether in excess of commission receivable by "Coverage". In the opinion of the Panel, "Coverage" has withdrawn more than its entitlement in terms of commission and expenditure on behalf of "Coverage". This is not in strict compliance with Section 73(2) of the Insurance Act.
- xvi. Moreover, interest on overdraft was charged to the Client Account (e.g Postings 146704, 146705, 148645, 148646) and this overdraft occurs because of withdrawals in excess of the commission fees allowed to "Coverage". This was further confirmed by the investigator during examination (pg 45 of Hearing 11.8.2010).