



THE GOVERNMENT GAZETTE OF MAURITIUS

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LEGAL SUPPLEMENT

See General Notice No. 641

General Notice No. 655 of 2023

Before the Financial Services Review Panel

2021 FSRP 1

In the matter of-

HLL

Applicant

v

The Financial Services Commission

Respondent

In the matter of-

MK

Applicant

v

The Financial Services Commission

Respondent

(Published by the Financial Services Review Panel under section 66(7) of the Financial Services Act)

DETERMINATION

A single determination is being given in these 2 applications to the extent that they share similar features.

Both Applicants were issued with communications from the Secretary of the Enforcement Committee dated 21 December 2016 and titled "Notice under section 53(3) of the Financial Services Act 2007". Paragraph 4 of the communications are identical in all material respects and read as follows -

In light of the above breaches and your written representations, the EC has concluded that you are not a fit and proper person to hold position as officer of any licensee of the FSC and has no alternative other than to disqualify you from holding position as officer of any licensee of the FSC for a period of five (5) years, pursuant to sections 7(1) (c) (iv) and 52(3) of the FSA.

Although it would have been an important matter to mention, the communication does not state when the disqualification starts and in the absence of a definite date, we take it as

starting on 21 December 2016. On this basis, therefore, the disqualification will end on 20 December 2021.

Messrs. HLL and MK each lodged an application against the decision of the Enforcement Committee with the Review Panel on 09 January 2017 and the matter has been ongoing since. At the sitting of 16 July 2020, the Applicants through their Counsel made the following motions –

With regard to Mr. HLL

As per the notice of the Enforcement Committee dated [...] (edited for confidentiality), the EC contemplated the disqualifications of Mr HLL, amongst others, in his capacity as director and MLRO of B Ltd;

As per the notice of disqualification dated [...] (edited for confidentiality), the EC disqualified Mr HLL, amongst others, by reason of his former position as director and secretary of B Ltd;

It is submitted that the notice dated [...] (edited for confidentiality) never made any reference to the position held by Mr HLL as Secretary and Applicant was deprived of the opportunity to make any submission on this matter.

With regard both Mr. HLL and Mr. MK

- 1. The EC has acted ultra vires its mandate in as much as the referral from the Chief Executive to the Enforcement Committee was on specific grounds, limited to specific areas of the Fit and Proper Test and a specific section of the law while the notice of the EC dated [...] (edited for confidentiality) and the subsequent disqualification of the Applicants was of a general nature and covered all limbs of the Fit and Proper test.*
- 2. The notice of the EC dated [...] (edited for confidentiality) and the subsequent disqualification was in breach of natural justice in as much as the Applicants were not informed of the specific limbs of the Fit and Proper Test on which they were disqualified and the acts and omissions of the Applicant which was the subject matter of the referral of the Applicants by the Chief Executive to the Enforcement Committee.”*

In the face of the several motions that have been made in the course of hearing this application and that have occasioned delays in the determination of this matter, the Review Panel has time and again called attention to the time elapsed since the applications had been lodged, the need to bring closure to the present proceedings, as well as the risk that any determination in these matters might become academic given that the term of the disqualification would have been served by 20 December 2021.

Although the Review Panel itself invited written submissions on the above motions, the last written submission being received on 2 September 2020, it has taken time to anxiously consider these two applications and does not feel, at this stage, that justice will be done by

delivering yet another interlocutory determination in this matter, knowing full well that the term of the disqualification would have been served in some 7 months.

The next question with which the Review Panel was faced was whether to reserve the questions raised in the motions of 16 July 2020 and hear the applications on the merits of with a view to making a final determination.

Having gone through the record, the Review Panel is of the opinion that it is in presence of sufficient matters that go to the root of these applications in such a way as to enable it to make a final determination at this stage. The matters we are referring to here are process and proportionality.

One striking thing about the two matters at hand is not only the length of the disqualifications (5 years in both cases) but also the nature of the disqualification (a disqualification from holding position as officer of any licensee of the Respondent). Lengthy disqualifications that have an impact on an individual's livelihood raise two important questions. Firstly, has the proper process been followed? And secondly, is the disqualification proportionate having regard to the breach?

In the present matters, it suffices for us to deal with the issue of process.

We have found it necessary to append to this determination the show-cause letter as well as the disqualification notice in respect of both Applicants. [*Show cause letters and disqualification notices not reproduced due to confidentiality*]

On the face of it, both applicants have been given the opportunity to show cause why they should not be disqualified but the show cause letters deserve greater scrutiny.

A perusal of the show cause letters reveal that they have identical structures in both cases. They start off at paragraph 1 by referring to the investigation conducted by the Respondent into the business of B Ltd from 30 March 2015 and to the suspension of the Management Licence of B Ltd with immediate effect on 29 April 2015. They go on, at paragraph 2 to set out the former positions of the applicants in B Ltd and other companies, with some slight variances in the case of each applicant.

In the case of Mr. HLL, paragraph 2 of the show cause letter reads as follows -

2. We also refer to your former positions in the following companies:

- i Director and Money Laundering Reporting Officer of B;*
- ii Director of L ;*
- iii Director of F ;*
- iv Director of T ;*
- v Director of C;*
- vi Director of M;*
- vii Director of E;*
- viii Director of G ; and*

ix R.

It is very peculiar to note that the show cause letter does not specify the former position of Mr. HLL in R.

In the case of Mr. MK, paragraph 2 of the show cause letter reads as follows -

2. We also refer to your former positions in the following companies:

i Director and Secretary of B;

ii Director of L;

Hi Director of F;

iv Director of T ;

v Director of C;

vi Director of M;

vii Director of E;

viii Director of G; and

ix R.

It is also very peculiar to note that the show cause letter in the case of Mr. MK equally does not specify the former position he held in R.

Be that as it may, the show cause letters in both cases go on, at paragraph 3, to inform the applicants that-

"your former positions as officer of the above-named companies have been referred to the Enforcement Committee ("EC"). "

It is here appropriate to cite section 53(1) of the Financial Services Act which provides as follows-

(1) Where the Chief Executive has reasonable cause to believe that a licensee -

(a) has contravened any relevant Act, any direction or order issued under a relevant Act or any condition of the licence;

(b) is carrying out his business in a manner which threatens the integrity of the financial system of Mauritius or is contrary or detrimental to the interest of the public;

(c) has committed a financial crime;

(d) no longer fulfils any condition or criterion specified under the relevant Act for the grant of a licence;

(e) no longer carries out the business activity for which it is licensed;

(f) has failed to commence business within 6 months from the date on which it is licensed;

(g) is not a fit and proper person,

he may refer the matter to the Enforcement Committee for such action as the Enforcement Committee may deem appropriate.

When we read paragraph 3 of the show cause letters in the light of section 53(1) of the Financial Services Act, the legal basis for the referral to the Enforcement Committee is not immediately obvious. We understand, however, when we read paragraph 14 of the show cause letters that what is being reproached to the applicants is that they are not fit and proper persons pursuant to section 53(1)(g).

Moving on, paragraph 4 of the show cause letters set out the powers of the Enforcement Committee under sections 52(3) and 7(1)(c) of the Financial Services Act.

Paragraphs 5 though to 13 of the show cause letters recite several breaches that would have been committed by B, L, F, T, M, E, G and R and conclude as follows at paragraph 14 -

Given that the above breaches have been committed during your tenure in office as director, the EC [Enforcement Committee] has reasons to believe that you are not fit and proper to hold position as officer in any licensee of the FSC [Financial Services Commission] and is thus contemplating to disqualify you from holding position as officer in any licensee of the FSC [Financial Services Commission] for a period not exceeding five (5) years, pursuant to sections 52(3) and 7(1)(c)(iv) of the FSA [Financial Services Act].

Paragraph 15 of the show cause letters invites the applicants to make written representations to the Enforcement Committee within 21 days from the date of letter as to why they should not be disqualified from holding office or position in a licensee of the Respondent for a period not exceeding five (5) years.

After hearing the representations of the applicants, they were issued with the "Notices under section 53(3) of the Financial Services Act 2007" dated 21 December 2016 which are at Appendices 2 and 4 [*Appendices 2 and 4 are not reproduced due to confidentiality*].

The disqualification notice to Mr. HHLL starts off by referring to the show cause letter and the representations. It then goes on to refer to his former positions as director of B Ltd, C Ltd, M Ltd and E Ltd (paragraph 2) and recites breaches said to have been committed by the companies during the directorship of Mr. HHLL. It then concludes as follows –

In light of the above breaches and your written representations, the EC has concluded that you are not a fit and proper person to hold position as officer of any licensee of the FSC and has no alternative other than to disqualify you from holding position as officer of any licensee of the FSC for a period of five (5) years, pursuant to sections 7(1)(c)(iv) and 52(3) of the FSA.

Likewise, the disqualification notice to Mr. MK starts off by referring to the show cause letter and the representations. It then goes on to refer to his former positions as director of B, L, F, T, C, M and E, recites breaches said to have been committed by the companies during the directorship of Mr. MK and concludes in the same way as the disqualification notice to Mr. HLL.

What both the show cause letters and the disqualification notices fail to do is to state the precise part played by the Applicants in the breaches said to have been committed by the companies. If a person is to be disqualified from holding a position as an officer in any licensee of a regulator, and this for a period of 5 years, that person must be informed of the precise breaches that he or she has committed and be given a full opportunity to show cause why he or she should not be disqualified for these breaches. We find it here appropriate to quote the following passage from the decision of the Supreme Court in **The Grand Bay Pharmacy Ltd v The Pharmacy Board & Anor 2018 SCJ 221** -

The duty to act fairly will be assessed by reference to a wide range of factors including the nature of the individual's interest and the impact of the decision upon it, the type of decision being given, whether the decision is preliminary or final, the subject matter of the decision, and the terms of any relevant statutory provisions. [Halsbury's Laws of England Fourth Edition 2001 Vol. 1(1) at para. 96].

*In that connection, the need to afford a fair and adequate opportunity to be heard was highlighted in **Ridge v Baldwin [1963] 2 All ER 66 at 81**. The Court observed that: "The body with the power to decide cannot lawfully proceed to make a decision until it has afforded the person affected a proper opportunity to state his case.*

The duty to act fairly in affording a proper opportunity to be heard is even more pronounced where a decision affects directly a person's property rights or his livelihood [Melnes v Onslow Fane [1978] 3 All ER 211].

[Emphasis is ours]

In the light of the above, we hold that the Applicants have not been properly informed of the breaches that they would have committed and given a proper opportunity to state their case.

Coming to the whole decision of the Enforcement Committee to disqualify the applicants from holding positions as officers in any licensee of the Respondent for a period of five (5) years, we find the following useful guidance from the Handbook of the Financial Conduct Authority (FCA) of the United Kingdom -

EG 2.11.2 The FCA recognises that cases against individuals are very different in their nature from cases against corporate entities and the FCA is mindful that an individual will generally face greater risks from enforcement action, in terms of financial implications, reputation and livelihood than would a corporate entity. As such, cases against individuals tend to be more strongly contested, and at many practical levels are harder to prove. They also take longer to resolve. However, taking action against individuals sends an important message about the FCA's statutory objectives and priorities and the FCA considers that such cases have important deterrent values. The FCA is therefore

committed to pursuing appropriate cases robustly, and will dedicate sufficient resources to them to achieve effective outcomes.

DEPP 6.2.6B The FCA may take disciplinary action against an individual where there is evidence of personal culpability on the part of that individual. Personal culpability arises if the individual's behaviour was deliberate or below the standard which would be reasonable in all the circumstances at the time of the conduct concerned.

Aside from denying the Applicants a proper opportunity to state their case, the Enforcement Committee has also failed in its subsequent disqualification notices to set out any personal culpability on the part of the Applicants. For these reasons, we cancel the decisions of the Enforcement Committee dated 21 December 2016 quoad both Applicants.

Y. Jean-Louis

(Vice-Chairperson)

S. Lalmahomed

(Member)

24 May 2021