

Before the Financial Services Review Panel

2016 FSRP 2

In the matter of –

Kaviraj Rookny

Applicant

v

Financial Services Commission

Respondent

DETERMINATION OF THE POINT IN LAW RAISED IN GROUND 1

FX Primus Limited (“FXP”) held at all material times a Category One Global Business Licence.

The Applicant was at all material times a Director and a Money Laundering and Reporting Officer at FXP.

The Chief Executive of the Financial Services Commission (hereafter referred to as the “Commission”) was dissatisfied with the information gathered following an investigation carried out into the business of FXP by the Commission. He referred the matter to the Enforcement Committee.

The Enforcement Committee requested the Applicant to submit his representations in writing.

After due consideration of the Applicant’s representations, the Enforcement Committee informed the Applicant by notice dated 04 March 2016 that:

“as the Money Laundering Reporting Officer (“MLRO”) of FXP, you have failed to satisfy the EC that you have performed your duties in accordance with paragraph 3.4 of the Code inasmuch as you:

- (a) did not implement and monitor the day-to-day operation of the Anti-Money Laundering and Combating the Financing of Terrorism (“AMLCFT”) policy and procedures at FXP;*

(b) could not demonstrate that you have reported to the Board of Directors of FXP in relation to any material breaches of the internal AMLCFT policy and procedures or of the relevant AMLCFT related laws and the Code; and
(c) failed to prepare periodic reports for the Board of FXP.

4. Given that the above breaches have been committed during your tenure in office as director and MLRO of FXP, the EC came to the conclusion that you are not fit and proper to hold position as officer in a licensee of the FSC and hereby disqualifies you from holding position as officer in any licensee of the FSC for a period of two (2) years pursuant to sections 7(1) (c) (iv) and 52(3) of the FSA."

The Applicant is seeking the review of the decisions on five grounds.

Since the first ground challenges the power of the Enforcement Committee to disqualify the Applicant from holding position as Officer in any licensee of the FSC for a period of 2 years, the Panel deemed it appropriate to determine the point in law raised in Ground 1 before considering the other grounds.

Counsel for both parties agreed with the Panel.

Ground 1 reads as follows:

The Enforcement Committee erred in law and in principle, and has acted ultra vires by disqualifying the Applicant from holding position as officer in any licensee of the FSC for a period of two years.

In his reply to Ground 1, Learned Senior Counsel for the Respondent did not opine that the Applicant, having failed to object to the power of the Enforcement Committee regarding the sanction envisaged, is now debarred from challenging the power of the Enforcement Committee. However, in his address to the Panel, he raised the point.

According to Learned Counsel for the Applicant, that the Applicant submitted himself to the jurisdiction of the Enforcement Committee to sanction him does not oust the jurisdiction of the Panel to hear the matter given that it is a matter *d'ordre public*.

1. Is the Panel debarred from hearing the application?

“63. Powers of Review Panel

- (1) *For the purpose of reviewing a decision, the Review Panel may –*
- (a) *administer oath, affirmation or declaration;*
 - (b) *proceed in the absence of a party who, by notice, has been given a reasonable period to attend the proceedings; or*
 - (c) *from time to time, adjourn the proceedings.*
- (2) *The Review Panel may, for the purposes of a hearing, summon a person to appear before the Review Panel to –*
- (a) *give evidence; or*
 - (b) *produce documents in the possession, custody or control of the person or persons named in the summons.*
- (3) *A member of a Review Panel hearing an application for review may –*
- (a) *require a person appearing before the Review Panel to give evidence either on oath or affirmation; and*
 - (b) *administer an oath or affirmation or a declaration. ”*

The above provisions confer very wide powers on the Panel for the purposes of reviewing a decision. The role of the Panel is not to act as an appeal tribunal. It reviews the facts and matters which led to the decision of the Enforcement Committee and may also summon a person to give evidence or produce documents: it considers the matter completely afresh.

Therefore that the applicant submitted himself to the jurisdiction of the Enforcement Committee, does not debar the Panel from hearing the application.

The objection must accordingly fail.

2. Did the Enforcement Committee act ultra vires by disqualifying the Applicant from holding position as officer in any licensee of the FSC?

According to Learned Counsel for the Applicant, the wording of section 52(3) and section 7 (1) (c) of the Act is very clear. The Enforcement Committee has delegated powers to disqualifying the Applicant from a specified office as opposed to generally holding position as officer in a licensee and not in any licensee and that only the Commission has the power under section 24(7) of the Act to decide the fit and proper person test. (*Emphasis added*)

Learned Counsel found support from section 3 of the Interpretation and General Clauses Act.

Learned Senior Counsel for the Respondent did not subscribe to the views of Learned Counsel for the Applicant. Drawing support from section 24 of the Act, Learned Senior Counsel argued that accepting the submissions on behalf of the applicant as correct would only mean that the end result of the sanction would be postponed. Learned Senior Counsel submitted that assuming that the applicant were disqualified from holding a specified office in FX Primus Limited (where applicant held offices at the time of the sanction) and that the applicant subsequently applied for a position in another licensee of the FSC, the FSC would perforce hold that applicant was not a fit and proper person to hold that position and not approve the appointment of the applicant as an officer of that other licensee under section 24. Learned Senior Counsel further submitted that under the Interpretation and General Clauses Act, the Respondent was perfectly entitled to disqualify the Applicant from holding position as officer in any licensee.

The Enforcement committee is set up by the Board of the Commission under sections 52(1) and 52(3) of the Act.

Section 52(1) reads as follows:

(1) The Board shall set up an internal committee which shall be known as the Enforcement Committee.

And section 52(3) provides that:

(3) The Enforcement Committee may exercise the disciplinary powers of the Commission under section 7(1)(c) to impose an administrative sanction on a licensee.

The Applicant, an officer of the FXP at all material times, was disqualified under section 7(1)(c) (iv) which provides that:

"The Commission shall have such powers as are necessary to enable it to effectively discharge its functions and may, in particular[,] with respect to a present or past licensee or any person who is a present or past officer, partner, shareholder, or controller of a licensee[,] in the case of an officer of a licensee, disqualify the officer from a specified office or position in a licensee for a specified period;"

Under section 5(5) of the Interpretation and General Clauses Act:

"Or", "other" and "otherwise" shall be construed disjunctively, and not as implying similarity unless the word "similar" or other word of like meaning is added.

Therefore, under the above provisions, the Enforcement Committee could:

- (i) disqualify the officer (Applicant) from a specified office for a specified period; or
- (ii) disqualify the officer (Applicant) from holding position as an officer from a licensee for a specified period.

The Panel agrees with Learned Senior Counsel for the Respondent that the second option must be distinguished from the first one. Whereas the first one is restricted to a *specified office*, in the present case Director and MLRO, under the second option, the powers conferred on the Enforcement Committee is more general. The Panel accordingly holds that the Enforcement Committee was perfectly entitled to apply the second option.

3. Was the Enforcement Committee empowered to disqualify the Applicant from holding position as officer in any licensee as opposed to a licensee?

As per the definition section 5(2) of the Interpretation and General Clauses Act:

(a) *Words in the singular shall include the plural.*

(b) *Words in the plural shall include the singular.*

Applying the meaning that *words in the singular shall include the plural*, the Panel finds that the Enforcement Committee did not act outside its powers.

One last point raised by Counsel for the Applicant in his arguments, but not mentioned in his grounds of appeal calls for consideration namely only the Commission has the power to declare that an officer is not a fit and proper person and that the Enforcement Committee did not limit itself to the power conferred upon it under section 7(1)(c) but encroached on the power of the Commission under section 24(7).

An officer should throughout his tenure in office satisfy the Commission that he is a fit and proper person.

Section 24(7) of the FSA provides that:

"(...) where, at any time, the Commission is not satisfied that an officer of a licensee is a fit and proper person, it may, after giving such officer and the licensee an opportunity to make representations thereon, direct the licensee to remove such officer."

In the present case, the Chief Executive acting within the powers conferred upon him under section 53(1) of the Act referred the matter to the Enforcement Committee for such actions as the Enforcement Committee may deem appropriate. It is here apposite to point out that under section 53(1)(g) of the Act, the Chief Executive may make such referral where he has reasonable cause to believe that a licensee is not a fit and proper person.

At paragraph 4 of the decision, the Enforcement Committee stated that:

"given that the above breaches have been committed during your tenure in office as director and MLRO of FXP, the EC came to the conclusion that you are not fit and proper to hold position as officer in any licensee of the FSC..."

At this stage, suffice it to say that the Enforcement Committee did not usurp the general power of the Commission but acted within the framework of section 7(1)(c) of the Act.

Whether the conclusion of the Enforcement Committee was justified is another matter.

For all the reasons given above, Ground 1 must fail.

Date: 20.09.16

