



THE GOVERNMENT GAZETTE OF MAURITIUS

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SPECIAL LEGAL SUPPLEMENT

See General Notice No. 878

LEGAL SUPPLEMENT

See General Notice No. 879

General Notice No. 901 of 2023

Before the Financial Services Review Panel

2021 FSRP 10

In the matter of -

HPS

Applicant

V

The Financial Services Commission

Respondent

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

DETERMINATION

1. The present matter arises out of the indictment and conviction of AC before the United States District Court (Eastern District) of New York for money laundering conspiracy.
2. AC was at all material times the General Manager of XYZ and it is not disputed that he reported to the Applicant as Director of XYZ.
3. It is also not disputed that on 28 February 2018, XYZ was jointly indicted with AC before the United States District Court (Eastern District) of New York, their indictment being in relation to their involvement between March 2014 and February 2018 in schemes and transactions that amounted to criminal offences under the laws of the United States. We gather these facts from the Notice dated [edited for confidentiality] from the Chief Executive of the Respondent to the Applicant, indicating the intention of the Respondent to refer the matter to the Enforcement Committee, which Notice forms part of the Applicant's Statement of Case. The existence of the indictments is otherwise also confirmed in various parts of the Respondent's Statement of Defence, which parts stand unrebutted. We have otherwise no indication of the fate of the indictment of XYZ.
4. It is against this backdrop that on [edited for confidentiality], the Enforcement Committee found that the Applicant no longer met the fit and proper person requirements under section 20(1)(a)(iii) of the Financial Services Act and disqualified her from holding position as

officer in any licensee of the Respondent for a period of 9 years. The Applicant is asking this Panel to review the decision of the Enforcement Committee.

5. The basis for the review is set out as follows in the application for review dated 7 January 2021 -

"5. The EC wrongly decided that I no longer meet the fit and proper person requirements to hold position as officer in any licensee of the FSC. In that respect,

- i. the EC failed to identify in what respects I have failed in my duties as officer of XYZ;*
- ii. the EC failed to address its mind to whether I have failed to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances;*
- iii. the EC erred in finding that I no longer meet the fit and proper person requirements simply because XYZ allegedly committed certain breaches during my tenure as director; and*
- iv. the EC failed to consider, address and respond to the written representations that I made in the relation to the above.*

- 6. Further, in reaching the conclusion that I have been unable to perform my "relevant functions" as director of XYZ properly and efficiently as required under section 20(1)(a)(iii) of the FSC,*

- i. the EC failed to identify which "relevant functions" I alleged failed to perform properly and efficiently;*
- ii. the EC's decision and its letter dated [edited for confidentiality] requesting me to provide written representations do not disclose any failure on my part as a director of XYZ; and*
- iii. the EC failed to consider, address and respond to the written representations that I made in relation to the above.*

- 7. The EC also failed to consider that several of the alleged breaches by XYZ that are identified in its letter of [edited for confidentiality] involve relatively small transactions (ranging from EUR 641.52 to EUR 35,000) and alleged deficiencies that are not even particularised in its letter so that no one could even gauge the gravity of such deficiencies or whether they were at all established. In that respect, it was wholly inappropriate for the EC to disqualify me to act as officer of a licensee of the FSC on the basis of vague and unparticularised allegations and that might relate to relatively insignificant amounts."*

6. We have duly considered the written submissions of both the Applicant and the Respondent and are unable to agree with the Applicant.
7. We say so for the following reasons.
8. We find that the Applicant has been given ample notification of the breaches identified by the Enforcement Committee not only in the "minded to" letter dated [*edited for confidentiality*] but also in the Investigation Report dated 3 February 2020 and the "Notice of the intention of the Financial Services Commission (the "Commission") to refer the matter to the Enforcement Committee" dated [*edited for confidentiality*].
9. At all material times, AC, acting under the aegis of XYZ and reporting to the Applicant, employed complex structures in order to conceal the identity of an ultimate beneficiary. It was those schemes employed to conceal the identity of an ultimate beneficiary that led to his conviction for money laundering conspiracy before the United States District Court (Eastern District) of New York.
10. The Review Panel has no competence to give an opinion in law on the conviction of AC for money laundering conspiracy before a court in the United States. However, there being no evidence of the conviction having been overturned in the course of appellate proceedings, such conviction has, for all intents and purposes, to be taken as correct under the laws of the United States.
11. It is not disputed that the Applicant was copied in almost all the emails provided to the investigators of the Respondent, which emails recounted those actions taken by AC which led to his conviction before a court in the United States. It is therefore not open to the Applicant to plead ignorance to these actions for the following reasons. First, the Applicant at all material times held 75% of the shares of the company. In addition, it is worth noting that the board of directors of XYZ at all material times consisted of 3 directors: the Applicant, Mr. SHM (a resident of the United Kingdom) and Mr. CYPY. It is not disputed that during her interview on 7 March 2018 by investigators of the Respondent in the presence of Applicant's Counsel, the Applicant had the following to say:

"AC reports to the Board of Directors, which comprises of three persons. One of them resides in the UK and was an employee of BS and the other director, Mr. CYPY, is not quite involved. Mr. CYPY is a non-executive independent director. So this is why AC reports to me."

[Emphasis is ours]

12. This is in stark contradiction with the Applicant's written representations to the Respondent dated 4 August 2020 wherein she states that in August 2016, AC took over the day-to-day affairs of XYZ LTD and she assumed a non-executive role in order to fulfil her full-time duties as a lecturer at the [*edited for confidentiality*].

13. It appears to us that the Applicant, as director, has inexorably attempted to shun responsibility for what eventually led to criminal violation of the laws of the United States by projecting AC at the fore, making this case highly reminiscent of the governance failures that characterised the infamous collapse of the Barings Bank in 1995. The collapse of the Barings Bank was an opportunity for the Court of Appeal of the United Kingdom to make some authoritative pronouncements on section 6 of the English Company Directors Disqualification Act 1986, which relates to the power of a court to make a disqualification order against a director where that director's conduct makes him or her unfit to be concerned in the management of a company. We are referring here to the case of Re Barings plc and others (No 5), Secretary of State for Trade and Industry v Baker and others (No 5) [2000] 1 BCLC 523, which, in our view, is very relevant to the matter at hand.
14. It is interesting to note that both the Applicant and the Respondent in this present matter have hinged their submissions around whether or not there was a breach by the Applicant of her duties as director. However, the issue of breach of directors' duties is immaterial in determining whether a person has ceased to be a fit and proper person under section 20 of the Financial Services Act. As stated at paragraph 35 of the case of Re Barings plc and others (No 5) (*op. cit.*):-

"[A] finding of breach of duty is neither necessary nor of itself sufficient for a finding of unfitness (..). As the judge observed a person may be unfit even though no breach of duty is proved against him or may remain fit notwithstanding the proof of various breaches of duty."

15. What needs to be demonstrated is that the Applicant has shown incompetence of such a high degree as should lead to a finding of unfitness - see Re Barings plc and others (No 5) at paragraph 77.
16. As a clear illustration of how this test is applied in practice, we have found it appropriate to reproduce the material part of paragraph 79 of the judgment of Re Barings plc and others (No 5), in which the Court of Appeal justified why it affirmed the decision of the High Court to find the Appellant, Mr. Baker, unfit to hold the position of director and why Mr. Baker could not plead ignorance to the acts of Mr. Leeson, the person who reported to him

"(..) If one stands back from all the detail into which the defence of Mr Baker required the judge to descend it can clearly be seen that the conduct of Mr Baker involved a serious abdication of responsibility by a senior director of the principal operating subsidiary of a major public company. At the material time Mr Leeson was 28. He had joined the back office of BFS in 1992 but by the end of 1993 was trading on the floor of SIMEX. If his reported revenues were to be believed he alone was contributing a surprisingly large proportion of the revenues of the group as a whole. Mr Baker did not take sufficient steps fully to understand the nature of the business Mr Leeson was carrying on. It took Mr Baker six months to ensure that at least some limits were imposed on the extent of the activities Mr Leeson was authorised to conduct. Thereafter Mr Baker

took no adequate step to ensure that such limits were observed. By May 1994 Mr Baker knew that Mr Leeson controlled both the back office and the front office yet he failed to cause those functions to be separated as well before as after the internal audit report. Even when the warning signals became so clear in January 1995 Mr Baker failed to heed them. Mr Baker hoped for the best but the worst occurred. It is plain that he did not perform his duty to BB&Co and was responsible to some degree for the causes of the insolvency of BB&Co. Mr Baker was by no means the only director at fault but that cannot excuse the effect of his own conduct by reference to which alone he was judged by Jonathan Parker J."

17. In this present matter, if XYZ conducted transactions that required compliance with the laws of the United States, AC as its General Manager should have taken such steps as not to fall foul of these laws to the extent of being found guilty of a criminal offence.
18. In turn, the Applicant, as holder of 75% of the shares in XYZ and Director to whom AC was reporting, ought to have been alert enough to know that the actions of AC would land him straight into a conviction for money laundering conspiracy under the laws of the United States in addition to causing significant reputational damage to XYZ through an indictment before a court of the United States. We are especially stunned by an un rebutted email of 14 September 2017 at 23.42 attached as Annex B to the Statement of Defence of the Respondent wherein AC writes to one, Mr. AW, a protagonist of the impugned schemes, with copy to the Applicant, stating in no uncertain terms -

"Some features of the bank in [edited for confidentiality]:

1. *Act Secure and Anonymously Operating from a restriction-free jurisdiction you can remain untrackable (sic) by local and international authorities."*

[Emphasis is ours]

19. Being in the loop of this clear offer of a service to escape the supervision of local and international authorities, the Applicant cannot now pretend to be blissfully ignorant of the activities of AC.
20. On this basis, we concur with the Enforcement Committee that the Applicant no longer meets the fit and proper person requirements to hold position as officer in any licensee of the Respondent. In view of Applicant's culpable involvement in the running of the affairs of XYZ, we hold that the disqualification for a period of 9 years is fully warranted.

Y. Jean-Louis

(Vice-Chairperson)

S. Lalmahomed

(Member)

21 December 2021