

BEFORE THE FINANCIAL SERVICES REVIEW PANEL

2017 FSRP 1

In the matter of –

R (a company)

Applicant

v/s

The Financial Services Commission

Respondent

DETERMINATION

1. The Applicant held a Global Business Category 1 Licence, an Investment Adviser (Unrestricted) Licence and a CIS Manager Licence with the Respondent.
2. By letter dated 21 November 2016, the Enforcement Committee notified the Applicant that it:
 - (a) had breached section 105(1) (c) of the Securities Act ("SA") inasmuch as from the information collected during the inspection, it was observed that its directors served their own interests to the detriment of those of the investors - as evidenced by the fact that loans granted to entities owned and controlled by the directors were motivated by the personal interests of these directors;
 - (b) had contravened section 105(1) (g) of the SA and regulation 34(k) of the Securities (Collective Investment Schemes and Closed-end Funds) Regulations 2008 (the "CIS Regulations 2008") insofar as several breaches were identified during the inspection and it was noted that the Applicant did not make any reporting to the Financial Services Commission (the "FSC") with regards to the identified breaches;
 - (c) had breached regulation 34(e) of the CIS Regulations 2008 insofar as there were grounds to believe that in Two Seasons PCC, there was significant manipulation of the Net Asset Value ("NAV") which was being calculated using predetermined NAV figures while the offer document stated otherwise;

- (d) had failed to comply with regulation 34(j) of the CIS Regulations 2008 since the Applicant failed to keep such books, records and other documents as set out in the Eighth Schedule to the CIS Regulations 2008, required for the proper recording of its business transactions and financial affairs and the transactions which it executed on behalf of the collective investment schemes ("CIS") under its management or participants of those CIS;
- (e) had breached regulation 63 of the CIS Regulations 2008 which states that all transactions carried out by or on behalf of the CIS must be at arm's length, especially when the transactions involve the directors of the CIS as the other parties. (According to the Enforcement Committee, the number of related party transactions entered into and the terms thereof which seemed to favour the borrowers to the detriment of the CIS such as, the substantial amounts of money being loaned out without any collateral, loans being given interest free, the fact that failure for the borrowers to repay the sum does not carry any penalty and the continuing extension of repayment period for the loans are all suggestive that the Applicant disregarded the legal requirement), and
- (f) had acted in breach of regulation 66 of the CIS Regulations 2008 inasmuch as the inspection revealed specific instances whereby both the cells of the L PCC and those of the FE PCC had acted as lender and borrower to each other.
3. The Respondent revoked the Global Business Category 1 Licence, the Investment Adviser (Unrestricted) Licence and the CIS Manager Licence held by the Applicant pursuant to sections 52(3) and 7(1) (c) (vi) of the Financial Services Act (the Act).
 4. The Applicant was informed of its right to apply to the Financial Services Review Panel ("the Panel") for a review of the decision and the procedural formalities in accordance with section 53(4) of the Act.
 5. The Applicant is seeking a review of the decision.
 6. By letter dated 14 December 2016, the Panel sought the stand of the Respondent, informed both the Applicant and the Respondent that the case would be mentioned on 20 December 2016 and requested both parties to be present.

7. At the meeting of 20 December 2016, the Panel referred to Section 53(4) of the Act and drew the attention of Counsel that the timeframe to submit the application lapsed on 12 December 2016. It is here apposite to state that at no time did the Panel mention that the application was made outside the prescribed delay.
8. Learned Counsel for the Respondent took a preliminary objection on the ground that the Applicant failed to comply with the provisions of section 53(4) of the Act, as the application for review was made on 13 December 2016 which was outside the prescribed timeframe.
9. The Panel invited written submissions on the preliminary objection raised.
10. The gist of the submissions of the Applicant are set out below:
 - (a) the objections raised have no foundation at all, are untenable, frivolous and vexatious in law and should not be a bar to the application;
 - (b) the objections are prematurely taken - as under section 62(c) of the Act, such objections should be taken at the hearing of the application;
 - (c) the Panel is not an Appellate Court and , therefore, it is not empowered to decide the objections raised;
 - (d) in accordance with Section 53(4) of the Act, the Applicant forwarded its application by registered post to the Panel on 12th December 2016 at 13:22 and at the same time, it forwarded a copy to the Respondent;
 - (e) the application was forwarded within 21 days as provided by Section 53(4) of the Act;
 - (f) according to Learned Counsel since neither the Act nor the Interpretation and General Clauses Act (“IGCA”) defines the word “forward”, the word “forward” should be given the ordinary dictionary meaning, defined as “dispatch or send (a document or goods)”, regardless of whether the document is received.

(g) the day the application was posted via registered post is the day the letter is “considered” to have been forwarded, i.e., the 12th December 2016 and not the 13th December 2016 as contended by the Respondent.

11. Learned Counsel found support from:

- (a) Section 19 of the Postal Services Act;
- (b) Section 40 of the IGCA;
- (c) the Case of **Heerasing A M & Anor v Cothundaramen S & Ors 2015 SCJ 124** where the Court stated:

“There is a process of posting whereby a postal packet, which includes a letter, must be deemed to be “in the course of conveyance from the time it is delivered to a licensee (the postal service here) or dropped in a posting box... to the time of its delivery to the addressee”.

“It is quite obvious from the above that “in the course of conveyance” denotes the process which starts with the posting, delivery to the postal services, or dropping in a posting ox which would amount to “sending” whereas at the other end is the delivery to the addressee, which is the “receiving” or “reaching”. Because of the inevitable usual lapse of time between the sending and the receiving the intermediate process is “the course of conveyance”, and to my mind, “sending” cannot by any stretch of the imagination be interpreted to mean “reaching” the addressee, simply because of the concept linking the two which is termed “in the course of conveyance by post.”

- (d) the case of **Coothen S v. The Ministry of Housing and Lands & Others 2007 SCJ 125**; and
- (e) the case of **Lam Po Tang v The Commissioner of Income Tax 2001 SCJ 172**, where the Appellant had lodged an application before the Tax Appeal Tribunal one day outside the prescribed time limit of 21 days, and the Court stated, inter alia, that:

“..no generalisation should be made about “the mandatory or directory character of time limits for fulfilling of procedural formalities”, whether these are prescribed in a main

enactment or in subsidiary legislation, as each case must be considered on its own merits.
(Emphasis added)

“...the application to the Tribunal was lodged only one day late. The Tax Appeal Rules 1984 allow an appellant to send his application by registered post so that under section 40 of the Interpretation and General Clauses Act regarding service by post, such an application may reach the Tribunal more than 21 days after the determination if it is sent on the last day, (at the utmost 23 days later, in the ordinary course of post). Therefore the appellant who has his application ready within 21 days and who chooses to effect service by an Usher of the Court should not be unduly penalised. In fact appellant’s attorney could have proceeded directly to the Tribunal on 27 September 1999 to lodge the application...”. (Emphasis added)

12. Learned Counsel further submitted that over and above forwarding the application by registered post, the Applicant caused a registered usher to serve a copy of the application on the FSRP and the Respondent respectively on 12 December 2016. The Applicant also sent a copy of the application by email to the Panel.

13. Whilst maintaining that the application was made within the prescribed timeframe, Learned Counsel submitted that the Panel has a discretion to accept to hear the Application pursuant to section 39 (*Extension of Time*) of the Interpretation and General Clauses Act (IGCA) as amended which reads as follows:

“Where a time is prescribed or allowed for doing any act or thing or taking any proceeding and power is given to a Court, public body , public officer or other authority to extend such time, such power may be exercised although the application for extension is made after the expiration of the time prescribe of allowed”.

14. Learned Counsel for the Respondent submitted that the objection was not prematurely taken. On the basis of the very nature of the preliminary objection namely a procedural issue, it would have been inappropriate to raise such an objection only at the hearing for the simple reason that the issue at stake is that the application for review, made outside the statutory delay, should not be receivable before the FSRP.

15. According to Learned Counsel, the word “forward” used in Section 53(4) of the Act cannot be interpreted in isolation but within the spirit of the Act. He also referred to section 53(5) of the Act provides:

(5) Where a licensee is unable to make an application within the period of 21 days referred to in subsection (4)(a) and he proves to the satisfaction of the Review Panel that his inability to do so was due to illness or any other reasonable cause, the Review Panel may accept to hear the belated application on such terms and conditions as it may determine.

16. Learned Counsel was of the view that the case of Lam Po Tang could be distinguished from the present one. The Income Tax Rules provide for two modes of service – (1) lodging an application with the Tribunal, and (2) sending an application by registered post, whereas, the Act provides only one mode of service, that is, by registered post.

17. The first issue to be determined is whether the objection raised by the Respondent is premature and taken before the wrong forum.

18. Albeit the Panel is but a Reviewing Authority, an Applicant wishing to seize the Panel must comply with the procedural threshold requirements. Therefore, it stands to reason that first and foremost the Panel must be satisfied that an Applicant has complied with the procedural requirement before proceeding to hear an application on its merits.

19. We accordingly hold that the objection has been properly raised.

20. We shall now proceed to determine whether the application was made within the prescribed period of 21 days.

21. The following are admitted:

- (a) the Applicant caused a copy of the application to be served by a registered usher on the Panel and the Respondent respectively on 12 December 2016;
- (b) the Applicant sent by email a copy to the Panel on 12 December 2016;
- (c) the Applicant forwarded its application to the Panel and the Respondent by registered post on 12 December 2016;

- (d) the application was delivered on 13 December 2016;
 - (e) the time limit to submit the application lapsed on 12 December 2016.
22. We are of the view that the reasoning in the case of **Heerasing A M & Anor v Cothundaramen S & Ors 2015 SCJ 124** cannot be applied in the present case. The *course of conveyance* under the Postal Rules is not an issue in this case.
23. Section 53(3) of the Act prescribes only one mode of service, namely by Registered Post. Therefore, service by a registered usher is not in compliance with Section 53(3) of the Act, nor is sending an application by email.
24. We are of the considered view that the case of Lam Po Tang is no authority in regard to the effective date of service, where service by post is required by an enactment. In fact, the Court did not interpret section 40 of the Interpretation and General Clauses Act. The statement of the Learned Judges is an obiter dictum.
25. Service by Post is explained in Section 40:
- “40. Service by post*
Where an enactment authorises or requires a document to be served by post, whatever the expression used, the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document and be presumed to have been effected at the time when the letter would be delivered in the ordinary course of post.” (Emphasis added)
26. Section 40 creates two presumptions:
- (a) where an enactment authorises or requires a document to be served by post, the service shall be deemed to be effected by properly addressing, prepaying and posting; and
 - (b) be presumed to have been effected at the time when the letter would be delivered in the ordinary course of post.

27. Our reading of Section 40 is that service, “shall be deemed to be effected by properly addressing, prepaying and posting” and be presumed to have been effected at the time when the letter would be delivered in the ordinary course of post.
28. It is our considered view that service by post is effected when the letter *would be delivered in the ordinary course of post* and not at the time of posting as contended by Learned Counsel for the Applicant.
29. The Application was posted on 12 December 2016 at 13:22 and delivered on the 13th December 2016. It can safely be presumed that the letter was delivered in the ordinary course of post. It is not denied that the statutory delay lapsed on the 12th December 2016. Hence, service was effected outside the prescribed time limit.
30. Learned Counsel for the Applicant referred to Section 39 of the IGCA which provides:
- Where a time is prescribed or allowed for doing any act or thing or taking any proceeding and power is given to a Court, public body, public officer or other authority to extend such time, such power may be exercised although the application for the extension is made after the expiration of the time prescribed or allowed.*
31. With all due respect to Learned Counsel for the Applicant, the Panel does not have to seek guidance from the above provision regarding the extension of time inasmuch as section 53(5) confers a discretionary power on the Panel to entertain an application submitted outside the prescribed delay provided the Applicant proves to the Review Panel that his inability to do so was due to illness or any other reasonable cause.
32. The Applicant made no mention that it was submitting a belated application nor did it show that its inability to make the application within the period of 21 days was due to illness or any other reasonable cause. On the contrary the Applicant maintained all through that it submitted its application within the statutory time frame.
33. In the circumstances, we are not in a position to exercise our discretionary power provided under section 53(5) of the Act.
34. There is a long list of cases where the Supreme Court reaffirmed the well-established principle that on appeal non-compliance with any one of the required formalities within the prescribed delay is fatal to the hearing thereof unless such non-compliance

was due to no fault of the appellant (See for example the case of of **Rosunally B.B & Ors v The Mauritius Revenue Authority & Anor 2012 SCJ 380**)

35. It is also apposite to refer to the following passage from Maxwell on the Interpretation of Statutes 6th Edition at page 655:

“So, enactments regulating the procedure in Courts seem usually to be imperative and not merely directory. If, for instance, an appeal from a decision be given, with provisions requiring the fulfillment of certain conditions, such as giving notice of appeal and entering into recognisances, or transmitting documents within a certain time, a strict compliance would be imperative, and non-compliance would be fatal to the appeal.” (Emphasis added)

36. We accordingly hold that non compliance with the prescribed time limit is fatal and set aside the application.

R. N. Narayen

(Chairperson)

Mr. Y. Jean- Louis

(Vice - Chairperson)

Mr. S. Lalmahomed

(Member)

21 February 2017