

**BEFORE THE FINANCIAL SERVICES REVIEW PANEL**

**2017 FSRP 2**

**In the matter of –**

- 1. P**
- 2. R**
- 3. T**
- 4. F (a company)**

**Applicants**

v

**The Financial Services Commission**

**Respondent**

**DETERMINATION**

1. Applicant No. 4 held, at all material times, a Category 1 Global Business Licence, an Investment Dealer (Currency Derivatives Segment) Licence and an Investment Dealer (Full Service Dealer excluding underwriting) Licence with the Financial Services Commission (“FSC”).
2. Applicant No. 1 was a Director of Applicant No. 4 from 14 November 2014 to 13 August 2015. Applicant No. 2 and Applicant No. 3 were at all material times Directors of Applicant No. 4.
3. Following investigations, on-site inspections, meetings with the FSC and representations from Applicant No. 4, its directors, Money Laundering Reporting Officer (“MLRO”) and Compliance Officer over a period of more than 2 years, on 28 May 2015, the Chief Executive suspended the licences of Applicant No. 4. Pursuant to section 53 of the Financial Services Act (“Act”), the Chief Executive referred the matter to the Enforcement Committee for such action as it may deem appropriate.

4. The Enforcement Committee considered the written representations submitted by all the Applicants, the Compliance Officer and the MLRO and concluded that Applicant No. 4:

*“(a) breached section 29 of the FSA since various inconsistencies were noted which confirmed that its records are incorrect, incomplete and unreliable;*

*(b) contravened condition no. 2 of its Global Business Category 1 Licence as it continued to trade with Malaysian residents without the relevant approval from the Malaysian Authority despite having submitted an undertaking on 29 December 2014 to exit all Malaysian clients by 31 March 2015;*

*(c) infringed the Code on Prevention of Money Laundering and terrorist Financing (the “Code”) inasmuch as Applicant No. 4 did not:*

*(i) undertake appropriate Customer Due Diligence measures on its clients in accordance with paragraph 4.1 of the Code;*

*(ii) ascertain the source of funds of its client companies as required under paragraph 4.2 of the Code;*

*(iii) apply enhanced due diligence measures in high risk business relationships, customers and transactions in line with the provisions of paragraph 5.2 of the Code.”*

5. The Enforcement Committee:

- (a) issued a private warning to Applicant No. 1;
- (b) disqualified Applicant No. 2 from holding position as Officer in any licensee of the Respondent for a period of 2 years;
- (c) disqualified Applicant No. 3 from holding position as officer in any licensee of the respondent for a period of 5 years;
- (d) revoked the Global Business Category 1 Licence, the Investment Dealer (Currency Derivatives Segment) Licence and the Investment Dealer (Full Service Dealer excluding underwriting) Licence of Applicant No. 4.

6. Aggrieved by the decisions of the Enforcement Committee, the Applicants are seeking a review of the said decisions.

7. The Respondent is resisting the applications.
8. At a sitting of the Review Panel on 20 October 2016, all parties agreed that their applications be consolidated as the sanctions imposed on Applicants 1, 2 and 3 are grounded on the alleged breaches committed by Applicant No. 4. The applications were accordingly consolidated.
9. The Review Panel will first determine whether the decision of the Enforcement Committee regarding the breaches committed by Applicant No. 4 should be confirmed, amended or cancelled.

**Did Applicant No. 4 breach section 29 of the Financial Services Act?**

10. Section 29 provides –

***“29. Record keeping***

- (1) Subject to subsection (3), every licensee shall –*

- (a) keep and maintain internal records of the identity of each of his customers; and*
- (b) keep in relation to his business activities, a full and true written record, whether electronic or otherwise, in the English or French language of every transaction he makes.*

- (2) (a) For the purposes of subsection (1)(a), guidelines issued by the Commission under any relevant Act or under section 18(1) of the Financial Intelligence and Anti-Money Laundering Act 2002 may specify the nature of customer identification documentation to be kept and maintained.*

- (b) Records under subsection (1)(b) shall include account files and business correspondence.*

- (c) Notwithstanding any other enactment, every record required to be kept under subsection (1) shall be kept for a period of at least 7 years after the completion of the transaction to which it relates.*

*(3) Except where otherwise required by the Commission or under any relevant Act or other enactment, the requirement under subsection (1) shall not apply to a Global Business Licence unless, the holder of the Global Business Licence also holds a licence, authorisation, approval or registration, for the conduct of financial services activity, under any relevant Act.”*

11. The Respondent contended that Applicant No. 4 acted in breach of the above provisions insofar as the records produced by Applicant No. 4 to the investigators proved to be incorrect, incomplete and unreliable inasmuch as –

- (a) L (a company) (“L”), being an entity incorporated in Seychelles, was not amongst the list of clients residing/operating from Seychelles;
- (b) Applicant No. 4 could not provide the investigators with an exact number of trading accounts held under the name of LGT.

12. It is at the outset noteworthy to recall the circumstances in which the Enforcement Committee came to its decision.

13. It is not disputed that over a period of time there had been breaches of Applicant No. 4’s record keeping obligations under section 29 of the Act.

14. Applicant No. 1 conceded at paragraph 31 of his statement of case that there were some deficiencies in the record keeping of Applicant No. 4. In **Document V produced in Applicant No. 1’s Statement of Case**, Applicant No. 1, on behalf of the directors, made reference to a letter from the Respondent (**Document R produced in Applicant No. 1’s Statement of Case**) and a meeting held on 09 March 2015, acknowledged that the records on L were incomplete but averred that L did not carry out any withdrawals and lost all the money on their trading account since 2013, following which they never funded their accounts again. According to Applicant No. 1, Applicant No. 4 had in vain tried to contact L to update its KYC records and he went on to say that –

*“However, the Company was still chasing L and the FSC should be duly advised upon receipt of any relevant document” (underlining is ours).*

15. The Panel further observes that in the written representations dated 11 February 2015 (**Document U produced in Applicant No. 1's Statement of Case**) submitted to the Respondent, the Board of Directors of Applicant No. 4 conceded at the second paragraph that the information sought was not readily available and at 1.2, last paragraph acknowledged that the system adopted by Applicant No. 4 may be subject to further improvements and undertook to review their procedures to further consolidate the compliance structure in place based on the findings of the investigation and explained that by virtue of the nature of the Company's operations and the manner in which the officers operated on a day-to-day basis, officers would automatically proceed with using the [DELETED ON GROUND OF CONFIDENTIALITY] account number rather than using the full name of the customer. It is only after queried further that they proceeded with advanced search.

It is, here, appropriate to recall that section 29(1) of the Financial Services Act provides that every licensee shall –

*“(a) keep and maintain internal records of the identity of each of his customers; and  
(b) keep in relation to his business activities, a full and true written record, whether electronic or otherwise, in the English or French language of every transaction he makes.”*

16. As per **Document Z produced in Applicant's No. 1's Statement of Case**, in response to the notice of suspension issued on 28 May 2015 (**Document Y produced by Applicant No. 1**), Applicant No. 2, in his capacity as Director, on behalf of the Board of Directors acknowledged the fact that the records were not properly kept and same led to the provision of inappropriate information to the Respondent. He extended apologies to and requested the Respondent not to consider the matter as a material breach given that the Company was in the process of liquidating its business in Mauritius and went on to say:

*“We take note of your point of this and would like to reiterate to the FSC that it was not the intention of the Company to mislead the FSC at any time. We have instead been working in collaboration with the FSC and requested for further information on the client called M. L. which, as per record held under such name, we found two demo accounts. However, after various communications with the FSC, we have extended our search and would like to confirm that our records show that the latter*

*is registered under the name L. M. W. and the email address of the latter is [DELETED ON GROUND OF CONFIDENTIALITY]. Client L.M. W. made a complaint and details of same were provided to the FSC along with the successful resolution around this matter.*

*We further noted that the email address [DELETED ON GROUND OF CONFIDENTIALITY] is also associated with the name M. L. We have carried out a broader search using the above information and we have noted 21 demo accounts associated thereto.*

*We acknowledge the fact that the records were not properly kept and same led to the provision of inappropriate information to the FSC and humbly extend our apologies for this and kindly request the FSC to not to consider this matter as a material breach given that the company is in the process of liquidating the business in Mauritius.”*

17. In their application at paragraph 3.5, Applicant No. 3 and Applicant No. 4 acknowledged “deficiencies in documents kept by corporate type accounts” (Underlining is ours).
18. We have given due consideration to the evidence produced. The Board of Directors acknowledged that the record keeping of Applicant No. 4 was flawed and that information sought was not readily available. The Directors tendered their apologies to the Respondent and requested the Respondent not to consider the matter as a material breach given that the Applicant No. 4 was in the process of liquidating its business in Mauritius.
19. In the light of the clear acknowledgement of the Board of Directors that the record keeping was flawed and the evidence produced, we find that Applicant No. 4 acted in breach of section 29 of the Act.

**Did Applicant No. 4 contravene Condition No. 2 of its Global Business Category 1 Licence?**

20. On 31 January 2013, the Financial Intelligence Unit submitted a report on Applicant No. 4 to the FSC. According to the report, Applicant No. 4 was listed on the Bank of Negara

Malaysia (“the Bank”), financial consumer alert list for unauthorized foreign currency trading since July 2012.

21. The Respondent, on the 6 March 2013, sought the following information from Applicant No. 4 –

- (a) full details on the reasons leading to Applicant No. 4 being listed on the financial customer alert list of the Bank;
- (b) full details of the transactions carried out by Applicant No. 4 causing it to have appeared on the financial customer alert list of the Bank, together with certified true copies of all documents secured accordingly; and
- (c) any measure taken by the Directors of Applicant No. 4 pertaining to the matter.

22. Applicant No. 4 submitted the following –

- (a) Applicant No. 4 was wrongly listed on the financial customer alert list of the Bank;
- (b) Applicant No. 4 neither conducted business in Malaysia nor solicited clients from Malaysia. Applicant No. 4 advertised its services through its website and accepted clients who wished to avail of its services after conducting full Know-Your-Client (KYC). A legal opinion was requested to that effect by the Company from [DELETED ON GROUND OF CONFIDENTIALITY], a legal firm based in Malaysia, to identify its legal obligation when accepting clients from Malaysia. The legal opinion confirmed that the opening of a trading account with the Company was solely the responsibility of the Malaysian clients, since Applicant No. 4 did not have any presence in Malaysia and all activities of account opening were carried out from Mauritius where Applicant No. 4 was licensed.
- (c) the directors of Applicant No. 4 also took up the matter to the Ministry of Finance of Malaysia which liaised with the Bank.

23. The on-site inspection carried out on 15 August 2013 revealed that Applicant No.4 had a large number of Malaysian clients.

24. The Respondent consequently requested Applicant No. 4 to furnish –

- (a) list of all active / inactive Malaysian clients that have opened accounts with F;  
and
  - (b) copy of the response from the Bank further to the request sent to the Ministry of Finance in Malaysia.
25. The Respondent also sought information from the Bank regarding the listing of Applicant No. 4 on its alert list.
26. As per information obtained from the Bank, Applicant No. 4 was then de-listed from the financial customer alert pursuant to the following two conditions –
- (a) to provide a written undertaking that it would not solicit or accept any foreign exchange currency deals from Malaysian residents; and
  - (b) to publish on the Company’s website a list of countries that allow the company to deal in foreign exchange currency trading (Malaysia should not be included in the list).
27. Considering the significant number of active Malaysian clients, the Respondent requested Applicant No.4 to confirm whether the Malaysian clients sought the prior approval of the Bank to trade in any transaction in gold and foreign currency with Applicant No. 4.
28. Applicant No. 4 denied that it was in breach of any laws in Malaysia and averred that it took all necessary steps to comply with the laws.
29. In January 2014, the Respondent was apprised that the securities legislation of Malaysia had been amended requiring any company to be licensed by the Bank in order to accept Malaysian residents to trade in foreign exchange currency. A confirmation on the aforementioned amendments in the securities legislation of Malaysia was received from the Bank. The Bank furthermore informed that though no written undertaking was received from Applicant No. 4 that it would not solicit or accept any foreign exchange deals from Malaysian residents, it proceeded with the de-listing of Applicant No. 4 from the consumer alert list due to the commitment displayed on Applicant No. 4’s website which stated, “in order to open a live trading account, a person must adhere to their local laws and regulations”.



30. The Respondent issued a show cause letter to Applicant No. 4 on 29 May 2014 informing it, inter alia, that Applicant No. 4 was acting in breach of condition 2 of its licence by accepting Malaysian residents as its clients without a proper licence with the Malaysian Authority. Applicant No. 4 was required to provide an undertaking that it would comply with all relevant laws of Mauritius and Malaysia and a detailed action plan which Applicant No. 4 intended to adopt to remedy the breach. In its representations dated 9 June 2014, Applicant No.4 submitted that its advisors were currently evaluating whether it would be possible and feasible to apply for a relevant licence in Malaysia so that Applicant No.4 might accept Malaysian clients or otherwise, an exit strategy would be developed for the Malaysian clients.
31. An investigation carried out by the Respondent into the business affairs of Applicant No. 4 on 17 December 2014 revealed that Applicant No. 4 was still acting in breach of its licensing condition 2 insofar as it did not secure the relevant approval from the Bank and it continued to on-board new Malaysian clients. (as from 1 June 2014, the Company has on-boarded 1653 new Malaysian clients and had at this time around 3300 Malaysian clients). An undertaking, that Applicant No. 4 would exit all Malaysian clients at latest by 31 March 2015 by transferring them to a new entity in the Republic of Cyprus, was submitted on 29 December 2014.
32. At this stage, it is worth noting paragraphs 3.16, 3.17 and 3.18 of the application of Applicants No. 3 and 4.
- “3.16. As mentioned in our letter dated 16 June 2015, all accounts of Malaysian clients were indeed closed by the Company by 31 March 2015.*
- 3.17. Any Malaysian client on boarded after 31 March 2015 was done under the F Cyprus entity and which is completely separate from F Mauritius.*
- 3.18. As noted, the [DELETED ON GROUND OF CONFIDENTIALITY] Trading Platform was being used jointly, as the manufacturer of [DELETED ON GROUND OF CONFIDENTIALITY] [the trading platform] would not allow a complete transfer (in name) of the platform to Cyprus until the complete sale to F Cyprus had taken place, which did not take place until 30 June 2015. Again, though, absolutely no Malaysian client was on boarded after the 31 March 2015 onto F.”*

33. A reading of paragraph 3.18 above clearly indicates that Applicant No. 4 could not have transferred its Malaysian clients to its Cyprus entity (“F Cyprus”) until 30 June 2015. The irresistible inference that can be drawn is that Applicant No. 4 did not exit all its Malaysian clients by 31 March 2015, as undertaken.
34. At paragraph 3.19 of their application, Applicants No. 3 and 4 sought to place reliance on a legal opinion from the external advisor of Applicant No. 4. We have to point out that the legal opinion relates, as averred in their application, to the onboarding of Malaysian clients from Applicant No. 4 to F Cyprus. The legal opinion does not shed any light on the legality of Applicant No. 4 onboarding Malaysian clients.
35. Our analysis would not be complete without considering paragraphs 3.22-3.24 of the application:
- “3.22. When BNM mentions “foreign currency” only as opposed to foreign currency assets, they usually mean foreign currency CASH and not the balance in the client’s bank account,*
- 3.23. Authorized dealers of foreign currency CASH in Malaysia are Malaysian Banks and licensed money changers.*
- 3.24. In the present case, the Malaysian client has a foreign currency asset and is therefore allowed to invest in such assets subject to the above condition.”*
36. We are of the view that the distinction sought to be made on behalf of Applicants No. 3 and 4 between foreign currency “cash” and foreign currency “assets” is an artificial one. The nature of the transaction shows that the Malaysian clients of Applicant No. 4 were in effect trading in foreign exchange currency without the approval of the Bank.
37. Notwithstanding that the directors of Applicant No.4 were informed in January 2014 that the law in Malaysia had been amended such that any company was required to be licensed by the Bank in order to accept Malaysian residents to trade in foreign exchange currency as at 27 December 2014, the Applicant No. 4 was still on-boarding Malaysian clients and this without a licence from the Bank. Applicant No. 4 conceded that it could not have transferred its Malaysian clients to F Cyprus until the 30 June 2015. It is therefore clear that despite its undertaking, Applicant No. 4 was still holding foreign currency accounts on behalf of its Malaysian clients after the 31 March 2015. The Panel

therefore has no difficulty to conclude that Applicant No. 4 was in breach of Condition No. 2 of its Category 1 Global Business Licence.

**Non-compliance with the Code on Prevention of Money Laundering and terrorist Financing (the “Code”)**

38. The Enforcement Committee concluded that Applicant No.4 did not:

- (a) undertake appropriate Customer Due Diligence measures on its clients in accordance with paragraph 4.1 of the Code;
- (b) ascertain the source of funds of its client companies as required under paragraph 4.2 of the Code;
- (c) apply enhanced due diligence measures in high risk business relationships, customers and transactions in line with the provisions of paragraph 5.2 of the Code.

39. Applicant No.2 in his capacity as Director acknowledged the shortcomings identified and appealed to the Respondent not to consider the matter as a material breach as the Company indeed held on file the KYC of its clients, with the exception of the ones mentioned which were incomplete.

40. The material part of the letter reads as follows: :

*“As communicated in the letter dated 11 February 2015, bearing reference [DELETED ON GROUND OF CONFIDENTIALITY], we have already engaged in taking the following remedial actions to correct the weaknesses highlighted by the FSC:*

*(...)*

*(3) Review of CDD on all customers with balances ranging from USD 1,000 to USD 10,000 who have never been subject to a withdrawal;*

*(4) Review of CDD on all customers with balances less than USD 1,000 who have never been subject to a withdrawal;*

*(5) Review of CDD on Attorneys and Introducers;*

*(6) Closure of Accounts held by Malaysian clients;*

*(7) Verify CDD on new clients;*

*(...)”*

41. One, Mr C in his capacity as Compliance Officer [of Applicant No. 4] acknowledged in **Document S produced by Applicant No. 1** that there were weaknesses in the CDD verifications conducted by S (a company) (“S”). He however explained that he focussed his attention on conducting CDD at withdrawal stage whereas S was responsible for conducting CDD at on boarding. He also acknowledged that he should have queried L further, in relation to its source of funds and requested additional information in relation to A (a company) and Mr G. But, given that the pattern of transaction of L did not raise any reasonable doubts, no further action was taken.

42. Applicant No. 1, in his capacity as director acknowledged that the CDD procedures on clients ought to be reviewed to ensure compliance with the relevant laws and regulations of Mauritius (**Document V produced in Applicant’s No. 1 Statement of Case**).

43. The findings of the investigations and the inspections conducted, coupled with the clear acknowledgement of the Board of Directors and the Compliance Officer, clearly establish that Applicant No. 4 had infringed para 4.1, 4.2 and 5.2 of the Code.

44. The explanations submitted by the Board of Directors do not justify the wrongful acts.

45. We shall now consider the grounds for review of each applicant.

#### **Grounds for review on behalf of Applicant No. 1**

46. The following grounds were raised by Applicant No. 1 –

## GROUND 1

*“the decision of the Enforcement Committee of the Commission to issue a private warning to the Applicant based on the findings that the Company has committed the breaches listed in paragraph 32 of this Application is wrong, unfair and unreasonable inasmuch as such conclusions have been drawn out of wrong evaluation and assessment of the evidence, documents and clarifications provided by the Company;”*

## GROUND 2

*“the decision of the Enforcement Committee of the Commission to issue a private warning to the Applicant for failure to perform the relevant functions as director of the Company is wrong, unfair and unreasonable inasmuch as the breaches which have been allegedly committed by the Company have not all occurred and / or had not originated during his tenure in office as director of the Company;”*

## GROUND 3

*“the decision of the Enforcement Committee of the Commission to issue a private warning to the Applicant for failure to perform the relevant functions as director of the Company is wrong, unfair and unreasonable inasmuch as the Applicant has acted diligently, in good faith and in the best interests of the Company at all times during his short tenure as director.”*

47. Suffice it to say at this stage that in the light of our findings, that there is evidence establishing that Applicant No. 4 committed the alledged breaches. The second part of Ground 1 accordingly fails.

48. We shall now proceed to consider the submissions on behalf of Applicant No. 1 and the Respondent.

49. It was submitted on behalf of Applicant No. 1 that he apprised the Respondent that shortly after his appointment, he was absent from Office during the whole month of December, that is, during the investigation. He got married on the 10<sup>th</sup> of December, and resumed work beginning of January 2015 (**Vide Document HH produced in Applicant**

**No. 1's Statement of Case**). In the light thereof, Applicant No. 1 submitted that he was **not** a director at all material times.

50. It was further submitted that there was no concrete fact or evidence that Applicant No. 1 acted in breach of his statutory duties as director.

51. In paragraph 49 of its Statement of Case, the Respondent pointed out that the breaches originated in 2013 but, averred that they remained unresolved during Applicant No. 1's tenure in office. As the directors' duties extended to the complete business of the company, the ongoing matters had to be handled by the existing board.

52. Applicant No. 1 admitted that upon his appointment, he had to handle ongoing matters and this he did between January 2015 up to 13 August 2015:

- (a) by following up with the other directors on various occasions ensuring that remedial action be taken;
- (b) by appointing N (a company) in support of S for the CDD and KYC on on-boarding of clients (**Vide Document CC produced in Applicant No. 1's Statement of Case**);
- (c) by sitting on the Board on 6 March 2016 and reminding the members of the Board of the responsibility and consequences of non-compliance with the undertakings (**Vide Document CC produced in Applicant No. 1's Statement of Case**).

53. In support of her submissions, Learned Counsel referred to:

- (a) Section 160 (1) of the Companies Act 2001 which reads as follows:

*“Every officer of a company shall exercise –*

*(a) the powers and discharge the duties of his office honestly, in good faith and in the best interests of the company; and*

*(b) the degree of care, diligence and skill that a reasonably prudent and competent executive in that position would exercise in comparable circumstances.”*

- (b) the case of MCB v. Lesage and ors 2010 SCJ 222, where it was held that:

*“The standard of care and liability of the officers of the company, including directors, secretaries and the executives are provided for under section 160 of the Act. As we have already pointed out earlier, the acts of the officers bind the company and the officers are liable if they are tortfeasors and for this reason section 161 of the Act provides indemnity and insurance for the faute of the directors as well as employees.”*

54. According to the Respondent, it is empowered under Section 7(1) (c) (i) to issue a private warning. The relevant section reads:

***“7. Powers of Commission***

*(1) The Commission shall have such powers as are necessary to enable it to effectively discharge its functions and may, in particular –*

*(c) 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 –*

*(i) issue a private warning;”*

55. The breaches and / or deficiencies identified, though originated in 2013, were still unresolved during the tenure of office of the Applicant. As a director, the Applicant had a statutory duty to ensure that Applicant No. 4 was compliant, his duties on the board of a company are not restricted to matters arising during his tenure of office but extend to the complete business of the company, so that ongoing matters have to be handled by existing board, irrespective of whether these matters originated before the appointment of directors.

56. On the whole, the Respondent submitted that it acted within its statutory powers and discharged its general obligations to act fairly in all circumstances. The Respondent has a statutory obligation to protect the good repute of Mauritius as a centre for financial services and it has as function to take measures for the better protection of consumers of financial services.

57. The Respondent afforded numerous opportunities to Applicant No. 4 and its officers to remedy the deficiencies and breaches but the Respondent was not satisfied of the outcome. In view of its statutory obligations as a Regulator, the Respondent submitted that the private warning given to Applicant No. 1 should be maintained; and
58. Respondent had been fair and reasonable in all circumstances.
59. Section 52(3) of the Act provides that the Enforcement Committee may exercise disciplinary powers of the [Financial Services] Commission under section 7(1)(c) to impose an administrative sanction on a licensee.
60. Section 7(1)(c)(i) in turn 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, issue a private warning.
61. Under the Act, an officer includes a member of the board of directors of a licensee and the Enforcement Committee clearly has the power to issue a private warning to the Applicant.
62. The reason given by the Enforcement Committee is that the breaches committed by Applicant No. 4 were committed during the Applicant's tenure in office as director.
63. The question that needs to be posed is whether a director of a licensee company should, where the company has committed breaches of the Act, invariably attract a sanction under sections 7(1)(c) and 52(3) of the Act where the breaches have been committed during that director's tenure in office.
64. The passage of Slade LJ in the case of **C. Evans & Sons Ltd v Spritebrand Ltd [1985] 1 WLR 317 at page 329** is helpful in answering that question:

*“[A] director of a company is not automatically to be identified with his company for the purpose of the law of tort, however small the company may be and however*



*powerful his control over its affairs [...]. In every case where it is sought to make him liable for his company's torts, it is necessary to examine with care what part he played personally in regard to the act or acts complained of.*” (Underline is ours)

65. In the present matter, we are not in the realm of tort but in the realm of a regulatory breach that attracts a disciplinary sanction and not the payment of damages, but, the same principle of law is applicable in respect of the responsibility of an Officer.

66. It is here appropriate to reproduce paragraph 49 of the Respondent's Statement of Case:

*“In the circumstances, as regards Applicant's contention that the breaches committed did not originate during his tenure of office as director, it is submitted that the breaches and/or deficiencies identified, though originated in 2013, were still unresolved during the tenure of office of the Applicant. As a director, the Applicant had a statutory duty to ensure that F was compliant. The Respondent further submits that a director's duties on the board of a Company are not restricted to matters arising during his tenure of office but extend to the complete business of the Company, so that ongoing matters have to be handled by existing board, irrespective of whether these matters originated before the appointment of directors.”*

67. Applicant No. 1 produced evidence which establishes his good faith from January 2015 up to August 2015.

68. We accordingly hold that during his short tenure in office, Applicant No. 1 acted diligently and in good faith. Applicant No. 1 having discharged his duties in good faith and diligently, the sanction imposed was therefore unwarranted.

69. The private warning issued by the Enforcement Committee is cancelled.

## **Grounds for review on behalf of Applicant No. 2**

70. Ground 1 reads as follows: **“The Enforcement Committee erred in law and in principle, and has acted ultra vires by disqualifying Applicant No. 2 from holding position as officer in any licensee of the FSC for a period of two years.”**

71. This ground has already been determined on 20 September 2016.

72. Ground 2 has been couched in the following terms: **“the vague nature of the request for explanations of the Enforcement Committee and the confusing amalgamation of allegations against Applicant No. 4 and Applicant No. 2 have consistently been in breach of the Applicant No. 2’s fundamental rights to know with certainty the case that he has to meet.”**

73. It was submitted on behalf of Applicant No. 2 that it is an elementary principle of criminal justice that *“a person charged with an offence is entitled to know with certainty and precision all the facts and circumstances so that he may be enabled to judge whether they constitute an offence and to determine the species of defence”* – vide Ip Fan Yong v Queen [1971 MR 28] at p.31

74. It was further submitted that likewise elementary principles of law suggest that a defendant to a civil suit, or even an employee before a disciplinary committee must know in sufficient detail the case that he/she has to answer in order to be able to fairly prepare a defence.

75. In the Notice dated 17 September 2015 (**Annex 1 produced in Applicant No. 2’s Statement of Case**) addressed to Applicant No. 2 in his capacity as Director and MLRO of Applicant No. 4, the Respondent informed him that:

*“4) The EC has reasons to believe that Applicant No. 4 has:*

- a) Breached of section 29 of the FSA since various inconsistencies were noted which confirmed that its records are incorrect, incomplete and unreliable;*
- b) Contravened condition no. 2 of its Global Business Category 1 Licence as it continued to trade with Malaysian residents without the relevant approval from the Malaysian Authority despite having submitted an undertaking on 29 December 2014 to exit all Malaysian clients by 31 march 2015;*

*c) Infringed the Code on Prevention of Money Laundering and Terrorist Financing (the “Code”) inasmuch as F did not:*

- i) undertake appropriate Customer Due Diligence (“CDD”) measures on its clients in accordance with paragraph 4.1 of the Code;*
- ii) ascertain the source of funds of its client companies as required under paragraph 4.2 of the Code;*
- iii) apply enhanced due diligence measures in high risk business relationships, customers and transactions in line with the provisions of paragraph 5.2 of the Code.*

*5) In addition, it has been observed during the abovementioned investigation and on-site inspection that, as director, you lacked adequate knowledge and understanding in relation to the basic transactions of F.*

*6) Furthermore, as the Money Laundering Reporting Officer (“MLRO”) of F, you have failed to satisfy the FSC that you have performed your duties in line 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 F;*
- b) could not demonstrate that you have reported to the Board of Directors of F 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 F.*

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

*8) You are hereby informed that you are entitled as of right to make written representations to the EC within a period of 21 days from the date of this notice as to*

*why you should not be disqualified from holding position as officer in any licensee of the FSC for a period not exceeding five (5) years. You may wish to refer to the provisions of the FSC regarding the proceedings of the EC.”*

76. Applicant No. 2 contended that on the basis of the wording of the notice dated 17<sup>th</sup> September 2015, the charge / complaint against him was unclear and uncertain so that he could not know exactly the case that he had to meet in order to set up his defence.
77. In his submission to the Respondent's amended statement of case, he reiterated the arguments already submitted.
78. In reply to Applicant No. 2's statement of case, the Respondent submitted that the case of Ip Fan Yong v Queen must be distinguished as it referred to a criminal offence whereas we are in presence of an administrative sanction, and as a public body, the Respondent followed the procedures set out under the law.
79. The Respondent denied paragraphs 3.2 to 3.4 of Applicant No. 2's statement of case and averred that Applicant No. 2 was informed of the breaches imputed to him, in sufficient detail via the letters dated 17<sup>th</sup> September 2015 and 4<sup>th</sup> March 2016 (**Annex V produced in Respondent's amended statement of case**). But the Applicant failed to identify/rectify/prevent the flaws (**Annex W produced in Respondent's amended statement of case**)
80. The Respondent further submitted that Applicant No. 2, as a Director of Applicant No. 4 was aware and should have been aware of, (i) the various correspondences between Applicant No. 2 and the Respondent since 2013; (ii) the onsite inspection and investigation carried out by Respondent; (iii) the remedial actions purportedly taken by Applicant No. 4. Hence, Applicant No. 2 was informed since 2013 about all the details which culminated into breaches.
81. We have duly considered the statement of case of parties, the annexes and the documents produced and the submissions of Counsel for both parties. We find that Applicant No. 2, as a Director of Applicant No. 4, was aware of (i) the various correspondences between

Applicant No. 2 and the Respondent since 2013; (ii) the onsite inspection and investigation carried out by the Respondent; (iii) the remedial actions purportedly taken by Applicant No. 4. Hence, Applicant No. 2 cannot plead ignorance of the alleged breaches.

82. Applicant No. 2 was sanctioned in his capacity as Director and MLRO of Applicant No. 4 for breaches committed by Applicant No. 4, during his tenure in office. The evidence produced shows that Applicant No. 2 did not pay proper heed to the requests of the Respondent. He at first even denied that Applicant No. 4 was acting in breach of the provisions of the Act. It was only when the Respondent issued the Notice dated 17 September 2015 warning him that he would be disqualified for a period not exceeding 5 years that he acknowledged the shortcomings, tendered his apologies and requested the Enforcement Committee not to take sanction against him (**Document Z produced in Applicant No. 1's statement of case**).

83. Ground 2 accordingly fails.

84. Ground 3 reads as follows: **“The Enforcement Committee failed to duly consider the explanations put forward by Applicant No. 2 in response to the letter of the Enforcement Committee dated 17 September 2015.”**

85. It was submitted on behalf of Applicant No. 2 that notwithstanding the vague and confusing nature of the request for explanations from the Enforcement Committee, as explained under Ground 2, he had furnished detailed explanations to the best of his abilities. Applicant No. 2 invited the Panel to peruse the said explanations/representations, as set out in his letter dated 06 October 2015 (**Annex 2 produced in Applicant No. 2's statement of case**), and *“trusts that the Review Panel, in its objective and impartial appreciation of facts, will subscribe to his submission that had the EC given due consideration to the said representations, it would not and could not have reached the Impugned Decision.”*

86. The Respondent denied paragraph 4.1 of Applicant No.2's statement of case and submitted that it acted within its statutory powers and discharged its general obligation to

act fairly in all circumstances. The matter was referred to the Enforcement Committee, which is an internal committee set up under section 52 of the Act and under Section 53 of the Act, the Respondent was required to invite representations from Applicant No. 2 and to consider them. The Respondent complied with its statutory obligations.

87. In the notice dated 04 March 2016 issued by the Respondent, it is stated at paragraph 2 –

*“After due consideration of your written representations, the EC has concluded ...”*

88. We have perused **Annex 2 produced in Applicant No. 2’s statement of case**. We cannot subscribe to the contention of the Applicant. Ground 3 accordingly fails.

89. Ground 4 reads: **“Having requested for explanations from Applicant No. 2 within the perimeter of his capacity as Director and MLRO of a specified entity, the Enforcement Committee erred in imposing a sanction outside such perimeter and further erred in amalgamating the breaches and sanctions of Applicant No. 4 with those applicable to the Applicant No. 2.”**

90. According to Applicant No. 2, the investigation conducted by the Respondent and thereafter referred to the Enforcement Committee was one “into the business of F”. Applicant No. 2 submitted that he had all along been addressed as the “Director and MLRO” of Applicant No. 4, as opposed to his personal or any other capacity. The impugned decision affected Applicant No. 2’s ability to hold an office in any licensee of the Respondent, when neither such licensee nor the Applicant No. 2’s exercise of any office in such licensee was the subject matter of the enquiry leading to the impugned decision. The Legislator has, under section 7(1)(c)(iv) of the Act, not contemplated a situation whereby someone’s ability to hold office in all licensees of the Respondent could be affected.

91. He found support from the provisions of section 24(7) of the Act, which reads as follows:

*“Notwithstanding any other enactment, 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.”*

92. According to Applicant No. 2, in amalgamating the breaches and sanctions of Applicant No. 4 with those applicable to Applicant No. 2, the Enforcement Committee had usurped the powers of the Respondent in holding that Applicant No. 2 was not “a fit and proper person” and eventually reaching the impugned decision.

93. It was submitted on behalf of the Respondent that it could not have addressed Applicant No. 2 in any capacity other than the director and MLRO of Applicant No. 4. The Respondent further submitted that it referred the matter to the Enforcement Committee under section 53 which provides:

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

94. The Respondent contended that it was entitled to proceed under section 53 and not under section 24 (7) of the Act and reiterated that it followed the procedures laid down under sections 52 and 53 of the Act and therefore the impugned decision was one which was allowed and contemplated by the Act.

95. Finally, the Respondent submitted that the breaches committed by Applicant No. 4 were committed under the directorship of Applicant No. 2. Therefore, Applicant No. 2 ought to have been aware of the breaches and as a director, had the duty to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The Enforcement Committee did not usurp the powers of the Respondent as the Enforcement Committee was fully empowered under section 52 (3) of the Act to exercise the disciplinary powers of the Commission under section 7(1)(c) to impose an administrative sanction on a licensee.

96. Applicant No. 2 was a Director and MLRO of Applicant No. 4. We agree with the submissions of Learned Counsel for the Respondent. It follows that the Respondent

could not have addressed him in any capacity other than the Director and MLRO of Applicant No. 4. Ground 4 accordingly fails.

97. Ground 5 reads: **“The sanction imposed by the Enforcement Committee is wrong in principle, manifestly harsh and excessive, and disproportionate in the circumstances.”**

98. According to Applicant No. 2, the Enforcement Committee found that he had failed to satisfy the Enforcement Committee that he had performed his duties in accordance with paragraph 3.4 of the Code.

99. The Code on the Prevention of Money Laundering and Terrorist Financing, issued under section 7(1)(a) of the Financial Services Act 2007 and section 18 (1) of the Financial Intelligence and Anti-Money-Laundering Act 2002 provides the following at paragraph 1.3:

*“Non-compliance with the Code will expose the Licensee to regulatory action i.e. a direction under section 7(1)(b), section 46 of the FS Act or section 93 of the Insurance Act 2005 to observe the Code. Failure to comply with the direction shall amount to an offence under section 91 of the FS Act and may further lead to sanctions imposed by the Enforcement Committee pursuant to section 53 of the FS Act.*

*The sanctions available to the Enforcement Committee to look into breaches include:*

- *issuing a private warning;*
- *issuing a public censure;*
- *disqualifying a Licensee from holding a licence or a licence of a specified kind for a specified period; in the case of an officer of a Licensee, disqualifying the officer from a specified office or position in a Licensee for a specified period;*
- *imposing an administrative penalty; and*
- *revoking a licence.*

*Where a Licensee has difficulty in complying with any aspect of this Code, it should proactively advise the FSC. Nonetheless, Licensees should note that compliance with*



*the Code will not constitute a defence to a prosecution for an offence under the FIAML Act and/or under FS Act.”*

100. According to Applicant No. 2, the Enforcement Committee had breached the relevant provision of the Code, the Enforcement Committee was only empowered to give and / or ought to have given him a direction. It is only after failure to comply with such a direction that the Enforcement Committee could contemplate whether to impose a sanction. Hence, the impugned decision was wrong in principle.
101. Applicant No. 2 finally submitted that paragraph 1.3 of the Code, especially the last part thereof, is at least indicative of the level of a breach of the Code in a scale of seriousness, such that a sanction of the type imposed on the Applicant would necessarily be manifestly harsh and excessive, and disproportionate in the circumstances.
102. The Respondent submitted that the findings of the Enforcement Committee should be read as a whole. The Respondent reiterated that the breaches committed by Applicant No. 4 were committed under the directorship of the Applicant.
103. The Respondent afforded numerous opportunities to Applicant No. 4 and its officers to remedy the deficiencies and breaches but the Respondent was not satisfied of the outcome. In view of its statutory obligations as a regulator, the Respondent submitted that the disqualification of Applicant No. 2 should be maintained. The Respondent has a statutory obligation to protect the good repute of Mauritius as a centre for financial services and it has as function to take measures for the better protection of consumers of financial services.
104. The Respondent submitted that the number of breaches committed, taken as a whole, seriously impacted on the fitness and propriety of Applicant No. 2 to hold office in any of its licensees and was of the view that the sanction imposed was warranted.
105. The Respondent submitted that it had the power to disqualify the Applicant under section 7 (1) (c) (iv) which reads as follows:

## *7. Powers of Commission*

*(1) The Commission shall have such powers as are necessary to enable it to effectively discharge its functions and may, in particular –*

*(c) 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 -*

*(iii) disqualify a licensee from holding a licence or a licence of a specified kind for a specified period;*

106. We agree with the submissions of Learned Counsel for the Respondent that the Respondent is empowered under section 7(1)(c) of the Act to disqualify Applicant No. 2 and that the sanction imposed is justified. Furthermore, the Respondent has a statutory obligation to protect the good repute of Mauritius as a centre for financial services and it has as function to take measures for the better protection of consumers of financial services. Applicant No. 2 acknowledged the shortcomings brought to his attention by the Respondent and in no way showed that he did not personally play any role in the breaches committed by Applicant No. 4. If anything, Applicant No. 2 was at all material times a resident director playing an active role in the affairs of Applicant No. 4.

107. The decision of the Enforcement Committee is accordingly confirmed.

### **Grounds for Review on behalf of Applicants No. 3 and No.4**

108. The first ground is to the effect that the decision to revoke Appellant No. 4's licence is manifestly wrong and abusive in that:

- a) The considerable delay taken by the EC of the FSC in replying to Applicant No 4 and Applicant No 3, that is nearly 5 months was not only abusive but amounted to a material breach of fair hearing in the circumstances;
- b) The Notice issued by the EC of the FSC on 4<sup>th</sup> March 2016 remains silent as to the reasons which could have prompted it to consider that Applicant No. 4 had breached s.29 of the FSA, condition 2 of its GBL1 Licence and the AML/CFT Code of the

FSC. The failure to give proper reasons for its conclusions is in clear breach of natural justice;

- c) No referral was made in the aforesaid notices to the representations made by the Company on 7<sup>th</sup> October to the EC of the FSC, thereby creating an element of bias in the circumstances;
- d) In any event, the company avers that the sanction imposed is manifestly harsh and excessive having regard to the fact that:
  - i. Most of the purported offences levelled against the company relate mostly to compliance issues and not to any fraud related offences;
  - ii. The company has never ever been the subject of any sanction and/or penalty prior to the present matter.

109. On 10 November 2016, the Panel received the following additional written submissions:

- 1. “F and T submit that given that they have not been given an opportunity to be heard before the Enforcement Committee of the Financial Services Commission, this has caused manifest prejudice to their right to appeal the decisions reached by the Enforcement Committee of the Financial Services Commission.
- 1.1. It is the contention of F and T that until now they have not been given an opportunity to appear before the Enforcement Committee of the Financial Services Commission so that they could explain their position and the various ways in which they have endeavoured to remedy the alleged breaches pointed out by the Enforcement Committee of Financial Services Commission.
- 1.2. Given that the decision to revoke the company's licence and the disqualification of T as director would, in actual fact, result in shutting down the company and denying T to act as a Director, the Enforcement Committee of the Financial Services Commission ought to have given an opportunity to the latter to explain themselves before the said Enforcement Committee of the Financial Services Commission viva voce.

1.3. It is the submission of F and T that in denying F and T of their right to be heard before the Enforcement Committee of the Financial Services Commission, this constitutes an abuse of the appeal process and a denial of natural justice.”

110. It is the submission of the Respondent that –

- (1) “The delay of 5 months does not amount to a material breach of fair hearing, given the complexity of the case and the number of cases referred to the Enforcement Committee, the delay for determination is not unreasonable.
- (2) The Applicants are alive as to the reasons why the licence of Applicant No. 4 has been revoked, having regards to the admission of breaches, and cannot therefore plead that there is a breach of natural justice.
- (3) The allegation of bias against Applicant No. 4 is frivolous and wholly unsubstantiated. The Respondent maintains that, at all material times, it has discharged its duties independently, in accordance with the law, and has made a proper balancing exercise in the determination of the sanction.
- (4) The “purported offences” did not relate to compliance only. The Respondent referred to paragraph 29(d) of its Statement of Case and averred that Applicant No. 4 provided false and misleading information to the Respondent in breach of section 44(8) of the FSA. Applicant No. 4 stated that Mr O.Y.K was not approved or registered to act as a money manager and that he was not known to Applicant No. 4. However, the Respondent gathered information which indicated that Mr O.Y.K had several accounts with the Applicant No. 4 and that the latter paid huge commissions to Mr O.Y.K on a regular basis.
- (5) The Applicant No. 4 also stated that Mr O.Y.K was not an employee of TV (a forex investment company) and that he was appointed by the clients directly. However, the email address of Mr O.Y.K namely [DELETED ON GROUND OF CONFIDENTIALITY] indicated that the said person might be related to TV (a forex investment company) and the Curriculum Vitae of Mr O.Y.K, submitted to the

Respondent on 9 January 2015, indicated that Mr O.Y.K became the Chief Executive Officer of TV (a forex investment company) as from November 2013.

(6) The Respondent further referred to paragraphs 19 to 24 of its Statement of Case and submitted that Applicant No. 4 informed that it did not hold any relationship with TV (a forex investment company). However, the Respondent then gathered intelligence from a blog wherein Mr M. S., one of the beneficial owners of Applicant No. 4, was promoting a partnership event of TV (a forex investment company) and Applicant No. 4, a fact which was not disclosed to the Respondent.

(7) The fact that the Applicants averred that the “purported offences” related to compliance as opposed to fraud and that the Applicants had never been the subject-matter of any sanction, did not mitigate the seriousness of the said breaches of the law and the fact that it failed to take necessary action when given the opportunity to do so. Weighed against the above, the sanction was entirely warranted.

(8) The Respondent reiterated that its decision to revoke Applicant No. 4’s licence was not “manifestly wrong and abusive” but entirely justified in the circumstances.”

111. We agree with the submissions of the Respondent that given the complexity of the case, the delay of five months does not amount to a denial of fair hearing.

112. The Applicant No. 4 knew all along why the Respondent was contemplating to revoke its licence. As required by law, the Applicants were invited to make their written representations.

113. The Respondent after due consideration of the written representations concluded that Applicant No. 4 committed the alleged breaches. The Respondent had therefore discharged its duties in accordance with the law.

114. As required by law, the Applicants were informed of their right to make written representations. As per their written representations, it is clear that the Applicants

were fully aware of the case they had to meet. The law does not require the Enforcement Committee to hold oral hearings.

115. The Respondent has a statutory obligation to protect the good repute of Mauritius as a centre for financial services and it has as function to take measures for the better protection of consumers of financial services. In these circumstances, we find that the revocation of Applicant No. 4's licence was fully justified. The decision is accordingly confirmed.

116. Ground 2 challenges the decision of the Respondent regarding the disqualification period imposed on Applicant No. 3 inasmuch as the sanction is manifestly harsh and disproportionate in comparison to that of the Resident Director, Applicant No. 2, the Managers, Mr C [the Compliance Officer of Applicant No. 4] and Applicant No. 1.

117. The Applicant was disqualified for a period of 5 years, the maximum provided under the Act. In order to determine whether the sanction imposed was disproportionate, we have to compare like with like. The sanction imposed on Applicant No. 1 and Mr C, the Compliance Officer cannot be used as the yardstick. Both Applicant No. 1 and Mr C, were in office for a very short period. Furthermore, as already determined, Applicant No. 1 has established that he acted in good faith and diligently during his directorship.

118. Applicant No. 2 and Applicant No. 3 were directors of Applicant No. 4 from day one. Both of them was actively involved in the business of the Company at least until Applicant No. 2 were removed from office in August 2013, and Applicant No. 3 remained the sole director of the Company.

119. We have carefully considered the evidence produced and the submissions of Counsel. We find that Applicant No. 3 just like Applicant No. 2 failed to exercise the degree of care and diligence required of a Director of a Company, leading to the breaches committed by Applicant No.4.

120. There is nothing on record to show that the involvement of Applicant No. 2 in the breaches committed by Applicant No.4 was of a lesser degree compared to that of Applicant No.3.

121. Everything being equal, in fairness to Applicant No. 3, we are of the view that the sanctions imposed on him regarding the disqualification period was unreasonable compared to that imposed on Applicant No.2.

122. We accordingly amend the sanction imposed on Applicant No. 3 and substitute thereof “the applicant is disqualified from holding any position as officer in any licencee of the Respondent for a period of 2 years.”

**R. N. Narayen**

(Chairperson)

**Y. Jean-Louis**

(Vice – Chairperson)

**S. Lalmahomed**

(Member)

**21 February 2017**