Before the Financial Services Review Panel

2017 FSRP 4

In the matter of –

RB **Applicant**

v

Financial Services Commission **Respondent**

DETERMINATION

Background

1. The Applicant was a director of R Ltd and a compliance officer of B Ltd. R Ltd held a Category One Global Business Licence, an Investment Adviser (Unrestricted) Licence and a CIS Manager Licence. B Ltd held a Management Licence from the Respondent and R Ltd was under its management.

2. The Applicant was served a notice dated 30 September 2015 (the "2015 Notice") (**Annex 1)** under the hand of the Secretary of the Enforcement Committee ("EC"). The 2015 Notice inter alia –

   (a) referred to –

      (i) an investigation conducted by the Respondent into the business of B Ltd as from 30 March 2015;

      (ii) the suspension of the Management Licence held by B Ltd, with immediate effect, on 29 April 2015;

      (iii) the suspension of the CIS Manager Licence held by R Ltd on 30 March 2015;

(iv) the Applicant's former positions as director of R Ltd and Compliance Officer of B Ltd; and

(b) informed the Applicant that his former positions as officer of B Ltd and R Ltd had been referred to the EC.

3. In the 2015 Notice, the EC noted that:

3.1 R Ltd had:

i. breached section 105(1) (c) of the Securities Act 2005 ("SA"), since its directors have served their own interests to the detriment of those of the investors;

ii. infringed section 105(1) (g) of the SA insofar as many identified breaches committed in L Ltd and F Ltd were not reported to the FSC;

iii. failed to act in accordance with Regulation 34(d) of the (Collective Investment Schemes and Closed-end Funds) Regulations 2008[1] ("CIS Regulation 2008"), since the it did not take all reasonable steps and exercise due diligence to avoid the assets of the collective investment schemes to which it provided CIS management services from being invested in contravention of the CIS Regulations 2008; and

iv. contravened Regulation 66 of the CIS Regulations 2008, which prohibits the borrowing and lending of money between cells of a protected cell company.

3.2 B Ltd had:

i. breached section 30 of the FSA[2] since it failed to file the audited financial statements for the year ending 31 December 2014;

ii. failed to comply with Circular Letter CL010705 since the composition of the Board of Directors of B Ltd was not in accordance with the National Code of Corporate Governance;

iii. contravened paragraph 3.1 of the Code on the Prevention of Money Laundering and Terrorist Financing (the "Code") as B Ltd did not implement a system of

[1] The correct citation should have been the Securities (Collective Investment Schemes and Closed-end Funds) Regulations 2008.

[2] Financial Services Act

internal controls as well as other measures to combat money laundering and the financing of terrorism;

iv. infringed paragraphs 4.1 and 4.3 of the Code since it failed to apply appropriate Customer Due Diligence ("CDD") measures on the business relationship, including identifying and verifying the identity of clients under its administration and failed to maintain certified CDD documentation on its client companies;

v. contravened paragraph 4.2 of the Code as it did not take appropriate measures to ascertain the source of funds of its client companies;

vi. failed to carry out the risk profiling of its client companies in accordance with paragraph 5.1 of the Code;

vii. breached paragraph 6.1 of the Code inasmuch as it did not conduct on-going monitoring of the business activities of its client companies; and

viii. infringed paragraph 7.1 of the Code as it never provided any Anti-Money Laundering and Combatting the Financing of Terrorism training to its employees.

4. According to the EC, given that the above breaches had been committed during the Applicant's tenure in office as Compliance Officer, the EC had reasons to believe that the Applicant was not a fit and proper to hold position as officer in any licensee of the FSC and was thus contemplating to disqualify him from holding position as Officer in any licensee of the FSC for a period not exceeding five (5) years, pursuant to sections 52(3) and 7(1) (c) (iv) of the FSA.

5. The Applicant submitted his written representations (**Annex 2**) as requested in the 2015 Notice and attached a number of documents.

6. By Notice dated 21 December 2016, (2016 Notice) (**Annex 3**) the EC, referring to the Applicant's representation, concluded that the Applicant was not a fit and proper person to hold position as officer in any licensee of the FSC and disqualified him from holding position as officer of any licensee of the FSC for a period of one year, pursuant to sections 7(i) (c) (iv) and 52(3) of the FSA.

The grounds for Application

7. The Applicant is seeking a review of the decision on the following grounds:

7.1 Generally

7.1.1 The matters which were noted by the EC at paragraphs 3.1 and 3.2 were vague, lacked precision, did not give the respective dates and/or periods of the alleged breaches, infringements, failures and contraventions, did not specify how and/or in what manner there were (if any) such breaches, infringements, failures and contraventions, thereby denying the Applicant the opportunity to make effective written representations, thus undermining the conclusions reached by the EC in the 2016 Notice.

7.1.2 The EC had failed to give any reasons as to why it reached the conclusions it did and sanctioned the Applicant as notified in the 2016 Disqualification Notice, the more so since the EC is a specialized body set up by law.

7.1.3 As an aggrieved party dissatisfied with the conclusions and sanction decided by the EC, the failure of the EC to give any reasons as to why it reached the conclusions and sanction it did as notified in the 2016 Notice prevented him from assessing the judiciousness and correctness of the decision making process and the decisions itself thereby causing prejudice.

7.1.5 The decision, to sanction the Applicant by a disqualification from holding position as officer of any licensee of the FSC for a period of 1 year was harsh, excessive, ultra vires, wednesbury unreasonable, disproportionate and unfair.

7.1.6 The EC breached the Applicant's right to a fair determination within a reasonable delay inasmuch as it took more than 14 months to reach a decision after the Applicant had submitted his written representations.

7.2 With regard to R Ltd

7.2.1 The 2015 Notice referred to breaches allegedly committed during the tenure in office of the Applicant as Compliance Officer. Hence his representations were made as such and not as Director of R Ltd. Consequently, the conclusion of the EC with regard to alleged breaches (if any) during his directorship was wrong.

7.2.2 The Applicant denied having served his own interests as Director of R Ltd during his directorship to the detriment of those of the investors, and pointed out that he had not taken any director fees or any other type of remuneration from R Ltd during his directorship.

7.2.3 The Applicant denied that during his tenure in office as Director, there was any breach of Section 105(1) (g) of the Securities Act 2005 ("SA") insofar as many of the identified breaches committed in L Ltd and F Ltd were not reported to the FSC during his directorship of R Ltd.

7.2.4 The Applicant denied that during his tenure in office as Director of R Ltd, there was any failure to act in accordance with regulations 34(d) of the Collective Investment Schemes and Closed-end Funds Regulations 2008 ("CIS Regulations 2008"), because he did not take all reasonable steps and exercise due diligence to avoid the assets of the collective investment schemes ("CIS") to which it provided CIS management services from being invested in contravention of the CIS Regulations 2008.

7.2.5 With regard to the alleged contravention under regulation 66 of the CIS Regulations 2008, the Applicant averred that on 5 January 2011, the FSC had itself granted a blanket exemption to comply with regulations 65 and 66 of the CIS Regulations.

7.3 With regard to B Ltd

7.3.1

(i) The decision of the EC must be quashed, reversed and/or set aside because the EC was wrong to disqualify him from holding position as officer in any licensee of the FSC for a period of 1 year pursuant to section 7(1)(c)(iv) because:

(ii) An officer as defined under the Financial Services Act is:

"*a member of the board of directors, a chief executive, a managing director, a chief financial officer or chief financial controller, a manager, a company secretary, a partner, a trustee or a person holding any similar function with a licensee"; and*

(iii) "The decision, to sanction alleged breaches by him in his capacity as a compliance officer, by a disqualification from holding position as officer of any licensee of the FSC for a period of 1 year is ultra vires and also harsh, excessive, wednesbury unreasonable, disproportionate and unfair."

7.3.2 The audited financial statement for the year ending 31 December 2014 could only be prepared after the end of the financial period, i.e. as from 1 January 2015, and be filed up to 30 June 2015. Given that he was the compliance officer of B Ltd from July 2009 to December 2012, he could not be held responsible for the alleged breach.

7.3.3 The Applicant denied that he failed to comply with circular letter CL010705. In any event, paragraph 4 of the circular letter CL010705 provides that: "*The board of directors or the governing body is the main player in the governance structure of a company and is ultimately accountable and responsible for the performance and affairs of the company*."

7.3.4 Furthermore, during the inspection carried out in October 2012, there was no findings of any failure to comply with the said letter**.**

8. The other grounds raised by the Applicant need not be set out.

The basis for resisting the application

9. The Respondent is resisting the application on the following grounds:

9.1 The 2015 Notice issued by the EC complies with section 52(3) of the FSA, and contains all the information necessary to enable the Applicant to present his case and to have recourse to a fair hearing and the Applicant provided lengthy written representations in his capacity as compliance officer and director, demonstrating that the notice was clear enough. Accordingly, the EC had all the information required to reach an informed decision. The Applicant cannot claim to have been denied the right to make effective written representations, inasmuch as the Applicant was fully able to submit written representations in reply to the 2015 Notice.

9.2 The EC referred to Applicant's former positions as director of R Ltd and Compliance Officer of B Ltd, the Applicant's written representations and, all relevant documents and information to reach an informed decision. At paragraphs 3 and 4 of the disqualification Notice, the EC does in fact give clear explanations and reasons as to how and why it decided to impose the disqualification sanction.

9.3 The Respondent has, pursuant to the powers conferred upon it by sections 7 (1) (c) (iv) and 52 (3) of the FSA, concluded that the Applicant was in breach of section 53(1) (g) of the FSA.

9.4 The penalty for breach of section 53(1) (g) of the FSA is governed by section 90 of the FSA.

9.5 The Applicant "*was well aware of the circumstances surrounding his disqualifications and cannot now pretend to be ignorant of the positions held by him*." The Respondent referred to the onsite inspection, conducted into the business of B Ltd in October 2012, in the presence of the Applicant, who was immediately apprised of the findings of the examiners. The Respondent thereafter communicated the official report dated 27 March 2013. At paragraph 20 of the report, it is apparent

that the Applicant was present during the inspection and had therefore ample opportunity to provide his comments or to question the examiners.

9.6 The Applicant should, in the circumstances, be barred from complaining that he was not in presence of sufficient details or that the particulars provided were vague.

9.7 The law does not impose a delay within which the EC has to give an informed decision to the parties.

9.8 In the light of the complexity and technicality of the matters before the EC, the latter had to consider and examine carefully and diligently all the documents in the possession of several companies for the past five years, before reaching such an important decision that have repercussions not only on the Applicant but on other related companies as well. Furthermore, the Applicant's case was not the only case under consideration. The EC receives a number of cases on an ongoing basis. A decision after a time period of 14 months is not unreasonable in those specific circumstances.

9.9 The question of whether there has been a fair determination is a question of the appreciation of facts by the EC. It is absurd to claim that the decision to disqualify the Applicant was impacted by the length of time taken to investigate into the matters.

9.10 The Respondent conceded that only the title of "Compliance Officer" (which is a clerical mistake) is mentioned in the 2015 Notice but the Respondent's intention was clearly conveyed in that at paragraphs 1, 2, 5 and 6 of the Notice, (i) the Respondent was all along referring to the Applicant's positions as Director of R Ltd and Compliance Officer of B Ltd and (ii) the Applicant was well aware of the purport of the letter in the light of his written representations, in relation to his positions as director of R Ltd and compliance officer of B Ltd, to the Enforcement Committee.

9.11 The Respondent referred to paragraph 2 of the Disqualification Notice which reads, "*We also refer to your former positions as director of R Ltd and Compliance Officer of B Ltd*."

9.12 Paragraph 3 contains ample details of breaches, committed during the Applicant's tenure in office as compliance officer and during his directorship.

10. It is clear that the breaches, committed during the Applicant's directorship, have been put to him and he submitted representations in relation to these breaches. The Applicant cannot claim ignorance of the breaches imputed to him in his capacity as director of R Ltd.

11. The Respondent maintained that the alleged breaches were directly attributable to the failure of the Applicant to discharge his duties. The breaches identified did not occur at the time of inspection or investigation but they occurred well before, since the time the Applicant was a director of R Ltd. The Respondent's power to sanction an officer under section 7 (1) (c) of the FSA includes past officers, so that the Respondent was fully empowered to impose a sanction on the Applicant even if the latter did not hold the position of director at the time of investigation.

12. The Applicant was a Director of R Ltd and as such he was duty bound to uphold the functions of R Ltd as CIS Manager. The investigation conducted in 2015 delved into the affairs of R Ltd when the Applicant was a director. The Applicant merely denied the alleged breach without producing any supporting document.

13. Irrespective of the date during which the investigation was carried out by the Respondent, the breaches for which the Applicant was sanctioned, did not arise overnight. As per the evidential records gathered during the investigation, the breaches clearly occurred during the Applicant's tenure in office. The Applicant therefore, knew or ought to have been aware of same, especially given his position as compliance officer.

14. The Respondent "*withdrew its contention at paragraph 3.1.4 of the disqualification Notice*" in the light of the evidence produced by the Applicant with regards to the exemptions granted by the Respondent. The seriousness of the breaches committed by the Applicant should not be measured by this admission only. (We understand

that the Respondent meant that it conceded that the conclusion of the EC in respect of paragraph 3.1.4 is wrong).

15. When dealing with clients wishing to set up Global Business Companies ("GBCs"), a Compliance Officer must be in a position to adequately assess the associated Anti Money Laundering/Combatting Financing of Terrorist risk, as provided in the Code. Whilst the onus is on B Ltd, as a licensee of the Commission, to conduct and assess the risk in respect of anti-money laundering on all its clients, under the Code, the Respondent is of the view that it is the duty of the Compliance Officer to provide guidance to the Board of B Ltd/any Committee (i.e. Risk Committee) set up by the Board.

16. The Code prescribes that licensees should undertake AML/CFT risk assessments on an on-going basis. The investigation revealed that most of the GBCs were non-compliant with the various provisions of the Code. This demonstrates that, B Ltd, as Management Company and Company Secretary of those GBCs, failed to observe minimum standards of integrity and fair dealing in the conduct of their clients' business and this implies that the Compliance Officer has equally failed to fulfil his obligations with due skill care and diligence.

17. The Compliance Officer failed to ensure that B Ltd and its client companies were operating according to applicable regulatory requirements, operating processes and policies. This infers that the Applicant also failed to perform his duties inasmuch as he failed to align compliance program with the business of B Ltd in order to improve its overall performance and deploying more than just a regulatory program. The Applicant also failed to encourage business conducted by and for B Ltd based on responsibility and ethical behaviour. The Applicant, as compliance officer, also failed to convince staff and even management of B Ltd that expanding business is important but not at any price.

18. The financial statement of A Ltd had not been submitted since 2011. At page 2 paragraph (iv) of his written representations, the Applicant admitted that there had been a breach of paragraph 4.1 of the Code during his tenure in office as compliance officer but remedial actions had been taken. Hence, it is implausible for the Applicant

to altogether deny that he was accountable for the breaches committed during his tenure in office.

19. The Respondent acted within its statutory powers and discharged its duty to act fairly in all circumstances. By virtue of sections7 (1) and 52 (3) of the FSA, the Respondent is fully empowered to sanction the Applicant in his capacity as compliance officer.

20. The Respondent did not identify all breaches during the inspection carried out in October 2012, as an inspection is less thorough than an investigation. The investigation carried out in 2015, revealed breaches of Circular Letter CLO10705, which was issued in 2005 and the requirements of which should have been adhered to by the Applicant during his tenure in office as compliance officer.

21. Under the FSA, the EC is empowered to disqualify any person who is an officer in terms of the FSA. The Respondent conceded at paragraph 63 of its statement of defence – "*The office of "compliance officer" is not listed under the definition of "Officer". However, the list provided under section 2 of the FSA is not exhaustive in that it caters for other "persons holding any similar function with a licensee". The Respondent holds a discretion to decide which office/position falls within the category of officers under section 2 of the FSA.* According to the Respondent, the Applicant was an officer within the FSA.

22. In conclusion, the Respondent submitted that it carried out an assessment of fitness and propriety based on the criteria outlined under section 20 of the FSA. It considered breaches committed by R Ltd under the directorship of the Applicant and breaches committed by R's Management Company namely B Ltd in which the Applicant was compliance officer.

23. According to the Respondent, the Applicant ought to have been aware that compliance with the Code, such as Customer Due Diligence Measures (para. 4.1 -4.2 of the Code), Identification of Source of Funds (para. 4.2 of the Code), Risk Profiling (para. 5.1 of the Code), suspicious transaction monitoring (para. 6.1) and MLRO Training (para. 7.1 of the Code) ought to be ongoing processes, regardless of when or how they have been originally implemented. Therefore, the Applicant cannot

again seek to hide behind the cloak of his three-and-a half year of tenure as compliance officer to escape from accountability for failure to perform his duties as compliance officer.

24. The Applicant emphasised his purported good faith and character, e.g. the 'whistleblowing' since October 2014, in the form of the Suspicious Transaction Reports (STRs) and various other correspondence to the MLRO of B Ltd, to the EC and the FSC, in 'mitigation' are to no avail given the serious nature of the breaches. The Respondent further submitted that it rightly referred the matter to the EC and the EC also complied with its duty to call for written representations from the Applicant. The EC, objectively and impartially, reached its decision after giving due consideration to the Applicant's written representations.

25. The Respondent concluded that the EC did not err in imposing the disqualification on the Applicant and moved that the application for review be dismissed.

26. In his statement of case, the Applicant maintained the contentions in his application for review.

27. The Respondent also maintained the stand taken in its objection to the application.

28. The Applicant was no longer a Director of R Ltd nor a Compliance Officer of B Ltd when the investigation was conducted. (Albeit a past officer can be sanctioned for breaches committed during his tenure in office)

29. From the statements of case of both parties, it appears that the Applicant was not informed of the outcome of the investigation conducted as from 30 March 2015, nor was a copy of the referral letter communicated to him.

30. The Panel requested for a copy of the investigation report and the referral letter. In its letter dated 13 June 2017 (**Annex 4)** , the Respondent stated at page 2 paragraph 5:
"*In practice, the FSC does not disclose these documents for the following reasons:*

a) *Firstly, under the Financial Services Act ("FSA"), the investigator submits his report to the Chief Executive who shall transmit the report to the Board together with his observations, comments and recommendations. There is no requirement under the FSA to submit the report of the company under investigation.*
b) *Following an investigation, any contemplated action is disclosed to the licensee and the opportunity to submit representations is also provided, in accordance with S53 of the FSA.*
c) *The FSC regularly gathers intelligence from its foreign counterparts and information imparted is often subject to nondisclosure clauses;*
d) *It is important for the FSC as a regulator to protect its sources and investigative techniques so as to be able to detect financial crimes; and*
e) *These documents usually contain information on other officers of the company concerned.*

   In view of the sensitivity of these documents, edited copies of same are herewith provided as follows:

   - *Referral of B Ltd (which includes relevant of the investigation report dated 30 March 2015 – refer to page 7 of the Referral Letter) at* ***Annex 5****; and*
   - *Referral of R Ltd at* ***Annex 6***

Kindly note that some annexures to the disclosed documents are confidential and not relevant to the present case, and therefore they have not been enclosed."

The Respondent annexed the following:

(a) Report dated 27 March 2013;
(b) Annex in respect of Inspection of August – September 2013, investigations from 12-18 November 2013 and inspection 20 November 2013; and
(c) Letter dated 01 April 2014 addressed to the Chief Executive from M Chambers.

31. In his reply to the June 2017 letter, the Applicant contended that the referral letter specified that the onsite inspection and investigation took place on 16 October 2012 and as from 30th March 2015 respectively. The Respondent could not, therefore, go beyond its terms of reference to look into document B ("*Bringing in Annex B at this stage before the FSRP is tantamount to the Respondents moving the goalposts and it is respectfully submitted should not be condoned by the FSRP*"). When submitting his

representations, the Applicant was not aware of the issues which had been put before the EC, behind his back. The mandate of the Enforcement Committee is based on the referral letter. The said letter referred to the inspection carried out in October 2012 (report submitted in March 2013) and the investigation conducted in March 2015. The referral letter (**Annex 4**) was never communicated to him. He was not even aware of the investigation conducted as from 30 March 2015, he was neither consulted for nor contributed to the representation made through the legal representative of B Ltd.

The Applicant's written submissions

32. The Applicant offered written submissions which are summarised below.

32.1 He reiterated all the facts and matters stated in:

(a) his written representations to the EC;

(b) his application for review; and

(c) his statement of case.

32.2 He further submitted that the particulars / details / documents communicated by the Respondent to the FSRP in June 2017 were not made known to him as being the alleged basis of the charges contained in the 2015 Notice, when the Applicant replied to the 2015 Notice.

32.3 The Referral Letter was not edited when communicated to the EC. The Applicant and the FSRP are not privy to the contents which have been edited. The possibility that the edited contents being prejudicial to the Applicant cannot be overlooked.

32.4 The Referral letter and other documents communicated to the EC by the Respondent were never copied to the Applicant.

32.5 The EC also failed to communicate the contents of the Referral Letter to the Applicant when serving the 2015 Notice on the Applicant, despite that the Applicant had to meet strict deadlines to respond to the 2015 Notice. Such

conduct by the Respondent and the EC is in serious breach of the rules of fairness which binds any tribunal including the EC.

32.6 The Applicant was never given the opportunity to reply to the Referral Letter which formed the backbone of the Respondent's case. Such lapsus is a serious breach of the rules of natural justice.

32.7 Even after having received the Applicant's representations, the Respondent did not take any corrective measure to seek further explanations from the Applicant in his capacity as a director of R Ltd on account of a so called clerical mistake. The only conclusion is that there was no clerical mistake and the Respondent's mistake was that it sanctioned the Applicant as Director, whereas the Respondent did not "in the first place" seek his representations as such.

32.8 The Respondent is precluded at this very late stage from relying on an alleged clerical mistake to justify its decision when the Applicant was never requested to make representations in his capacity as a (past) Director.

32.9 The Respondent could not have sanctioned the Applicant on any of the alleged breaches under paragraphs 5(i), (ii), (iii), (iv) of the 2015 Notice when no explanation or representation was ever requested.

32.10 The Respondent cannot rely on its own conclusions as set out in the disqualification Notice to justify ex post facto its alleged clerical mistake when the letter is, in fact, a notice under section 53(3) and therefore sets out the very decision itself and not the clerical mistake in the 2015 Notice.

32.11 In the Referral Letter, no mention is made regarding any breaches allegedly committed by him, in his capacity, as director of R Ltd. It is clear that it never was the intention of the Respondent to refer the Applicant to the EC in his capacity as director of R Ltd.

32.12 The circular letter CL010705 was addressed to the Directors of Management Companies. **Annex E** to the June 2017 letter clearly shows that the Boards and

Directors of Management Companies are responsible for the implementation of good governance. Compliance officers are answerable to their employers and not to the Respondent.

32.13 The respondent is wrong to opine that it holds a discretion to decide which office / position falls within the category of officers under section 2 of the FSA. Had it been the intention of the Respondent to approve the appointment of the Applicant under section 24 of the FSA, then this would have been specified in the various correspondences relating to the appointment of the Applicant as Compliance Officer. The Statement of Defence and the annexures submitted by the Applicant clearly show that there was no approval under section 24 of the FSA.

32.14 The 2016 Disqualification Notice refers to an alleged contravention under paragraph 3.1 of the FSC code as B Ltd did not implement a system of internal controls as well as other measures to combat money laundering and the financing of terrorism, during his tenure in office as Compliance Officer.

32.15 The Referral Letter provides at page 9 section 1.1.3.1 that "However the current internal control mechanism is not in line with the requirements endorsed under the Code." This means that, in fact there was a system of internal control.

32.16 Consequently, the Applicant was never asked for, nor given the opportunity to give his explanations as to why the internal control mechanisms were allegedly "*not in line with the requirements endorsed under the Code*".

32.17 The duty of monitoring on an on-going basis rests upon the officers (as defined in the FSA) and the board. Hence, the Applicant did not have any duty to monitor on an on-going basis.

32.18 The Applicant was not present during the investigations conducted as from 30 March 2015 (which reported breaches under para 4.1 and 4.3, 6.1 and 7.1 of the FSC Code) and was thus denied the opportunity to give any explanations or make any representations.

The Respondent's written submissions

33. The written submissions by the Respondent are set out below.

33.1 The Respondent referred the case to the EC as required under Section 53(1) of the FSA. The EC thereafter notified the Applicant of the breaches contained in the referral letter. Hence, the Applicant was made aware of the breaches found by the Respondent.

33.2 As far as edited contents of the referral letter are concerned, when the case was mentioned before the FSRP on 8th June 2017, Counsel for the Respondent explained that if the referral letter would be disclosed then an edited version would be provided, as the referral letter contained details relating to other officers of B Ltd. The Applicant was present and raised no objection. The FSRP also agreed.

33.3 The Respondent submitted that the FSRP invited for comments on the fact that the inspection report of March 2013 was communicated to B Ltd at the time when the Applicant no longer held office as Compliance Officer. The Respondent referred to **Annex B** to the letter only to show that though the Applicant was no longer in office as Compliance Officer, the Respondent still provided him with an opportunity to comment on the inspection report by sending the letter to the residential address of the Applicant. Consequently, the Applicant should not be allowed to claim ignorance of **Annex B** to the letter since Mr M, acting on behalf of the Applicant, submitted representations (**Annex C)** in reply to **Annex B**.

33.4 During an inspection or an investigation, the inspectors/investigators do not set themselves a time frame within which reviews are conducted. As a regulator, the Respondent has the responsibility and power to verify all records for the period it deems fit. The Applicant is wrong to claim ignorance of "dates" and "periods" as he was made aware of all findings at all times and these findings contain all necessary dates to enable him to take cognizance of the precise allegations.

33.5 The referral letter in respect of R Ltd (**Annex 6**) contains details of referral of the Applicant as Director of R Ltd.

33.6 The Respondent was informed of the appointment of the Applicant as Compliance Officer on 17 July 2009. The Respondent replied, by way of letter dated 31 July 2009, imposing certain requirements for the office of Compliance Officer, including an undertaking from the Applicant that the latter would adhere to "Guidelines for Management Companies" and to the Code issued under the FSA and the Financial Intelligence and Money Laundering Act. The Applicant replied on 11 August 2009 and signed an undertaking that he would comply with and enforce the requirements of the Code.

33.7 The Respondent was accordingly "fully empowered to enforce the breach of undertaking with respect to the alleged breaches of the Code".

33.8 The Respondent did not identify all breaches during the inspection carried out in October 2012 as an inspection is less thorough than an investigation. The investigation carried out in 2015 revealed breaches of Circular Letter CL010705, issued in 2005. Hence the requirements of the circular letter should have been adhered to by the Applicant, as compliance officer.

33.9 The Respondent imputed responsibility not only to the Applicant but to the Board of B Ltd as well, and maintained that the Applicant had a duty to ensure compliance in line with his functions and his undertaking given to the Respondent.

33.10 The Respondent did not err in imposing the disqualification on the Applicant and therefore this application for review should be dismissed.

The Applicant's reply

34. In reply to the Respondent's written submission, the Applicant submitted that:

34.1 The Respondent was wrong to affirm that the Inspection Report of March 2013 was communicated to the address of the Applicant.

34.2 The Respondent was equally wrong to affirm that the Inspection Report of March 2013 afforded the Applicant an opportunity to comment on the Report. The said Inspection Report was never sent to the Applicant nor delivered to him. The Applicant was therefore never given an opportunity to comment on the report.

34.3 **Annex B** to the June 2017 letter, refers to onsite inspection, conducted at the premises of B Ltd during August-September 2013 but does not relate to any matter in respect of the onsite inspection carried out in October 2012 and the corresponding March 2013 Report. **Annex B** is also outside the scope of the Referral letter of B Ltd. The said referral letter refers to onsite inspection and investigations conducted on 16 October 2012 and as from March 2015 only. No mention is made of the August and September 2013 inspection. It should therefore be discarded

34.4 The referral letter in respect of B Ltd contains 50 pages and annexures of not less than 200 pages, whereas the alleged breaches concerning B Ltd which were communicated to the Applicant in the 2015 notice requesting Applicant for explanations is barely of one page.

34.5 The Applicant was not aware of the issues, which had been put before the EC behind his back, when he submitted his written explanations.

34.6 The Respondent was seeking refuge under section 53 (1) of the FSA to compensate for its failure that the 2015 notice was vague.

34.7 The Applicant correctly replied to the questions put to him as compliance officer. It was not for the Applicant to make guesses and to reply to the intentions of the Respondent.

34.8 The Respondent did not remedy its so called ‘clerical mistake’ and should therefore be barred from raising the issue that it was a clerical mistake.

34.9 The contentions of the Respondent that it holds a discretion to decide which office/position falls within the category of officers under section 2 of the FSA is wrong. No such discretion exists in favour of the Respondent under the FSA.

34.10 The Respondent claims that it did not identify all the breaches during its inspection. Had the Respondent failed in its inspection and audit of the books and records to check whether B Ltd, as a licensee, was complying or had complied with the requirements of any applicable enactment or guideline or the conditions of its licence, authorisation or registration and satisfied criteria or standards set out in or made under any of the relevant Act under which it is regulated, or any regulation, during its onsite inspection in 2012, the Applicant cannot now be penalised for same.

34.11 The responsibility to comply with circular letter CL010705 and the National Code of Corporate Governance rested upon the Board of B Ltd.

34.12 The Applicant noted that the Respondent had equally admitted that it had imputed the responsibility to the board of B Ltd but demurred that such responsibility should be imputed to him as well, given that this is not provided under the law, the circular letter CL010705 or the National Code of Corporate Governance.

34.13 The Applicant noted with concern the contradiction between the 2015 Notice inasmuch as it states that "*B Ltd did not implement a system of internal control as well as other measures to combat money laundering and the financing of terrorism" and the contents at page 9 section 1.1.3.1 of the Referral letter of B Ltd that "the current internal control mechanism is not in line with the requirements.."*

34.14 The contentions of the respondent that, the "whistle blowing" of the malpractices of B Ltd, the various Suspicious Transaction Reports filed by the Applicant to the MLRO, the case of the Applicant against its employer before the Industrial Court and the various correspondences of the Applicant to the

Respondent, does not have any bearing on the Applicant's case, is shocking and alarming to the professionals in the financial services industry.

34.15 It is equally alarming that the Respondent does not consider the action taken by the Applicant as important for the safeguard of the good repute of Mauritius.

Findings

35. At the outset, we note the following:

35.1 In the light of the letter produced by the Applicant, the Respondent conceded that paragraph 3.1.4 of the 2016 Notice was wrong. The relevant part is reproduced below:

"We refer to your letters dated 12 November 2010, 19 November 2010 and 10 December 2010. We wish to inform you that the Commission has no objection for the creation of the cell: Magma Fund Euro.

Please note pursuant to Regulation 67 of the Securities (Collective Investment Schemes and Closed-end Funds) Regulations 2008 (the "Regulations"), the Commission does not object to the Company's request for exemption from Regulations 65 and 66.
Also note that pursuant to Section 146 of the Securities Act 2005, the Commission does not object to the Company's request to depart from Regulation 68(2) of the Regulations."

It is a matter of regret that the FSC, as a Regulatory Body, was not aware that it had itself exempted R Ltd from complying with Regulations 65 and 66 of the CIS Regulations and became aware of its own decision only when the Applicant drew its attention to the letter. The decision in respect of paragraph 3.1.4 of the 2016 Notice is accordingly cancelled.

35.2 The Applicant erred when he stated that the Respondent referred only B Ltd to the EC. As per **Annex 6**, R Ltd as well was referred.

36. We propose to consider the grounds set out at paragraphs 7.1.1, 7.2.1 and 7.3.1, as our findings will dispose of the matter without having to determine the other grounds.

36.1 Were the matters noted at paragraphs 5 and 6 of the 2015 Notice so vague as to deny the Applicant the opportunity to make effective representations thus undermining the conclusions of the 2016 Notice? (Paragraph 7.1.1)

36.1.1 The Applicant contended that:

(i) The Referral Letter referred to the inspection carried out in October 2012 and the investigation conducted as from March 2015. Thus, the Respondent could not bring in:

a) an onsite inspection carried out in August - September 2013;

b) an investigation from 12 to 18 November 2013; and

c) an onsite inspection in November 2013.

(ii) He was not aware of the investigation conducted in March 2015 nor did the FSC seek his representations / explanations. He, however, submitted his representations as best as he possibly could.

36.1.2 The Respondent submitted that it had complied with the legal requirements under the FSA and the Applicant was well aware of the circumstances surrounding his disqualification given that he was present when the October 2012 inspection was carried out and he was apprised of the findings. The report was communicated to him. The Respondent has no duty to submit the investigation report to the Applicant. Under Section 44 (5) of the FSA, the Chief Executive should submit the report to the Board. The Applicant never requested for particulars, the Applicant merely denied the allegations but failed to produce any document in order to substantiate his contentions. He is consequently barred from raising the issue of vagueness. The Applicant submitted a lengthy written representation in his capacity as Director and Compliance Officer. Finally, the Applicant ought to have known the circumstances surrounding the alleged breaches.

36.1.3 After due consideration of the evidence before us and the submissions of Counsel, we find that:

(a) whilst the Licensee was requested to submit its explanation on the investigation carried out as from 30 March 2015, the Applicant was kept in the dark regarding the investigation which led to the suspension of B Ltd licence.

(b) although in the referral letters, the FSC referred to the October 2012 inspection, the investigation as from 30 March 2015 and the inspection from 12 to 16 January 2015, the EC, in its wisdom, referred only to the investigation carried out as from 30 March 2015, in the 2015 Notice. Accordingly, the Respondent cannot rely on the October 2012 inspection and the report dated March 2013 thereof and still less on the onsite inspection carried out in August to September 2013, the investigation from 12 to 18 November 2013 and the onsite inspection in November 2013 nor the January 2015 inspection which led to the suspension of the licence of R Ltd. In any event the March 2013 report does not disclose any shortcoming. The purposes of the report was firstly to inform the Applicant of the outcome of the inspection visit and secondly to invite the Applicant to comment on the findings of the inspection and the off-site review.

(c) The licence of R Ltd was suspended on 30 March 2015. It follows that the investigation conducted as from 30 March 2015 could not have led to the suspension. This is evident from the Referral Letter in respect of R Ltd **(Annex 6)** – 1st paragraph at Page 13 which reads:

"*Following the onsite inspection conducted on the business operation of L and F from 12 to 16 January 2015 (the "inspection") and revocation of the GBL 1s of L and F, the FSC had reasonable grounds to believe that R Ltd failed in its duties and responsibilities towards the two CIS with regard to the deficiencies noted in L and F.*

Furthermore, based on the findings of the inspection, the FSC was of the view that R Ltd has acted in breach of…"

(d) From the referral letters (**Annex 5** and **Annex 6)** it appears that B Ltd was requested to submit its explanations on the investigation carried out as from March 2015, and R Ltd was requested to submit its explanations on the January 2015 inspection. But no explanation / comment was sought from the Applicant as "Officer" of R Ltd and a (past) Compliance Officer of B Ltd. It is indeed a matter of regret that the Respondent did not deem it appropriate to seek the Applicant's explanations, and that the Applicant was not even informed of the outcome of the January 2015 inspection and the March 2015 investigation.

(e) The assumption of the Respondent that the Applicant ought to have known the circumstances of the case, defeats the principle of natural justice. In all fairness to the Applicant, the FSC ought to have sought his representations or explanations on the report of the 2015 investigation.

(f) We have duly considered the circumstances surrounding the case. We find that this ground is well taken.

36.2 Was the EC right to have concluded that the Applicant as a Director of R Ltd was liable for the breaches allegedly committed by R Ltd given that in the 2015 Notice the Respondent sought his representations as Compliance Officer only? (Paragraph 7.2.1)

36.2.1 The Respondent conceded that only the title of "Compliance Officer" (which according to the Respondent is a clerical mistake) is mentioned but submitted that the Respondent was all along referring to the Applicant's positions as Director of R Ltd and Compliance Officer of B Ltd and the intention was clearly conveyed at

paragraphs 1, 2, 5 and 6 of the 2015 Notice. The Applicant was well aware of the purport of the notice given that he submitted his representations, in relation to his positions as director of R Ltd and compliance officer of B Ltd, to the Enforcement Committee.

36.2.2 That the Applicant understood clearly the intention conveyed as alleged by the Respondent, does not cure the omission. Taking into consideration that under Section 53 of the FSA, the EC may take any action it may deem appropriate whenever a matter is referred to it, just like, the EC referred only to the investigation conducted as from 30 March 2015 and did not refer to the inspection carried out in October 2012 and to the inspection carried out in January 2015, we cannot rule out that the EC might very well have deemed it appropriate to seek explanation from the Applicant only in his capacity as Compliance Officer but not as Director, although at paragraph 2 of the 2015 Notice mention is made of his former positions as Director and Compliance Officer.

36.2.3 It would be too easy for the Respondent to get away from a serious flaw in the 2015 Notice, by relying on the Applicant's representations with regards to R Ltd. Such an approach would be contrary to the principle of natural justice.

36.2.4 We accordingly conclude that the Respondent's failure to seek the representations of the Applicant in his capacity as an officer of R Ltd in the 2015 Notice is such a serious flaw that it is contrary to the rules of natural justice. Hence, the conclusion of the EC in respect of R Ltd is wrong.

36.2.5 This ground accordingly succeeds.

36.3 Is a Compliance Officer an Officer as defined under section 2 of the FSA? (Paragraph 7.3.1)

36.3.1

a) The Respondent conceded that "the office of "*compliance officer*" is not listed under the definition of "Officer", but submitted that (i) the list provided under section 2 of the FSA is not exhaustive in that it caters for other "persons holding any similar function with a licensee" and (ii) the Respondent holds a discretion to decide which office/position falls "within the category of officers under section 2 of the FSA". According to the Respondent, a Compliance Officer is an officer within the FSA.

b) In its statement of defence, the Respondent averred at:

(i) Paragraph 73

That it was informed of the appointment of the Applicant on 17 July 2009. The Respondent replied, by way of letter dated 31 July 2009, imposing certain requirements for the office of compliance officer, including an undertaking from the Applicant that the latter would adhere to "Guidelines for Management Companies" and to the Code issued under the FSA and the Financial Intelligence and Money Laundering Act ("FIAMLA"). The Managing Director of B Ltd replied on 11 August 2009, enclosing an undertaking from the Applicant that he would comply with and enforce the requirements of the Code.

and

(ii) Paragraph 74

That it was fully empowered to enforce the breach of the undertaking with respect to breaches of the Code committed by the Applicant as Compliance Officer of B Ltd.

c) The Applicant argued that "the definition of officer under Section 2 of the FSA does not include a compliance officer and that the Respondent is wrong to opine that it holds a discretion to decide which office / position falls within the category of officers under section 2 of the FSA. The Applicant was never approved as an officer under section 24 of the FSA which deals with approval of officers, and this is borne out by **Annexes E, F** and **G** to the statement of defence."

d) Section 2 of the FSA defines an officer as follows:

"officer" means a member of the board of directors, a chief executive, a managing director, a chief financial officer or chief financial controller, a manager, a company secretary, a partner, a trustee or a person holding any similar function with a licensee;

e) The role of a Compliance Officer is not defined under the FSA. Hence we have no yardstick that would enable us to decide whether the role of Compliance Officer is similar to that of a *director, a chief executive, a managing director, a chief financial officer or chief financial controller, a manager, a company secretary.*

f) Taking into consideration that (i) nowhere is the role of a Compliance Officer defined, (ii) the penalty that the EC is empowered to impose for the alleged breaches (iii) the Board of Directors is and remains accountable and responsible for the performance and business of the company and (iv) that the alleged breaches are offences under Section 90 of the FSA, we find that it cannot be the intention of the legislator to give such a leeway to the Respondent.

g) Furthermore, at the request of the Respondent, the Applicant was made to sign an undertaking to apply and enforce the requirements of the relevant code in the internal procedures of the Management Company and in his dealings with clients. If the Respondent were, indeed, convinced that a Compliance Officer falls within the definition of "Officers" such an undertaking would have been superfluous.

h) Section 24 of the FSA reads as follows:

24. Approval of officers

(1) Without prejudice to any other enactment or to anything stated as a condition attached to a licence, no person shall be appointed as an officer of a licensee without the prior approval of the Commission.

(2) Any appointment in contravention of subsection (1) shall be of no effect.

(3) An application for the Commission's approval in terms of subsection (1) shall –

(a) be accompanied by full particulars of the person to be appointed and such other information as may be required by the Commission;

(b) not be proceeded with by the Commission unless all information under paragraph (a) have been submitted;

(c) be deemed to be approved where the Commission has not objected to the proposal within 15 days of having received the application, or any information required under paragraph (a), whichever is later.

(4) Where the Commission objects to a proposed appointment, it shall give the officer and the licensee an opportunity to make representations within such reasonable time as the Commission may specify.

(5) The Commission may, after having considered the representations submitted pursuant to subsection (4), withdraw its objection to the proposed appointment.

(6) A licensee shall forthwith notify the Commission of any removal or resignation of any officer and shall provide particulars of such removal or resignation as may be required by the Commission.

(7) 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.

i) Under the above provisions no person can be appointed as an officer of a licensee without the prior approval of the Commission and any appointment in contravention

of subsection 1 shall be of no effect. As per letter dated 17 July 2009 the managing director of B Ltd had informed the Respondent of the "resignation of Mr V M from the post of compliance officer of B Ltd and the appointment of Mr RB in replacement thereof".

j) In its reply dated 31 July 2009, the Respondent stated the following:

"The FSC will consider the above appointment subject to the confirmation/submission of the following:
(a) detailed CV of the proposed appointee;
(b) that the Company has conducted its own due diligence and as a result of that research is satisfied that the information submitted in relation to the above appointee are complete and correct and that he is a person of integrity;
(c) that the Company is satisfied that the appointee is either already adequately qualified to enable him to undertake and fulfill his duties; or if not, that the Company has already taken or will undertake appropriate measures to ensure that he is provided adequate training;
(d) that the appointee has been provided with copies of the Guidelines for Management Companies and the Code on the Prevention of Money Laundering and Terrorist Financing intended for Management Companies ('the Code) and has been asked to confirm (in writing) the following:
(i) safe receipt of the Guidelines and the Code; and
(ii) adherence to those Guidelines and the Code (including any future amendments)."

k) The last paragraph of the letter dated 11 August 2009 signed by the Managing Director of B Ltd and addressed to the Chief Executive reads as follows:

"We hereby confirm the following:
*• We have conducted our own due diligence and we are satisfied that the information obtained on the **Appointee** are complete and correct and that he is a person of integrity;*
*• We are satisfied that the **Appointee** is adequately qualified to enable him to undertake and fulfill his duties;*
*• The **Appointee** has been provided with copies of the Code."*

l) In letter dated 18 August 2009 addressed to the Director of B Ltd, the Respondent stated that:

"*Appointment of Mr. RB as Compliance Officer.*

1. We refer to your letter dated 11 August 2009 relating to the above proposed appointment.

2. Based on the Management Company's submissions contained therein, the Financial Services Commission has no objection to the appointment of Mr. RB as Compliance Officer of the Management Company."

m) From the above letters, it is clear that the Applicant had already been appointed as Compliance Officer and the Respondent was so informed. The question of seeking approval of the Respondent for the appointment of the Applicant as Compliance Officer was never in issue.

n) Indeed the Respondent was informed of the appointment of Applicant as Compliance Officer in replacement of Mr V M who had resigned. Hence, letter dated 17 July 2009 is certainly not a proposed appointment and this is what the Respondent also understood since it referred to Applicant as "appointee". We find that, in its 18 August 2009 letter, the Respondent erred when it referred to the 11 August 2009 letter relating to "the proposed appointment". It never was question of "*proposed appointment*". The heading of the letter does not state "proposed appointment" but only "appointment". When the Respondent stated that it has no objection to the appointment of Mr RB, we understand that it meant that the Applicant had already been appointed. As rightly submitted by the Applicant, the Respondent nowhere referred to section 24 which provides for approval of proposed officer. In any event, any appointment in contravention with Section 24(1) shall be of no effect. In the correspondence dated 11 August 2009, the Respondent made no mention of section 24. From the statement of case and submissions of the Respondent, it is admitted that the Applicant was Compliance Officer from July 2011 to December 2012.

For the reasons given we find that a Compliance Officer is not an officer under the FSA.

For all the reasons given, we cancel the decision of the EC and the sanction imposed on the Applicant.

R. N. Narayen (Mrs.)

(Chairperson)

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Y. Jean-Louis

(Vice – Chairperson)

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S. Lalmahomed

(Member)

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Date: 06/11/2017

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