

BEFORE THE FINANCIAL SERVICES REVIEW PANEL

2018 FSRP 1

In the matter of –

XYZ Limited

Applicant

v

The Financial Services Commission

Respondent

DETERMINATION

1. By notice dated 28 September 2017, XYZ Limited was informed that the Enforcement Committee (“EC”) has decided to issue a public censure pursuant to sections 7(1)(c)(ii) and 52(3) of the Financial Services Act (the 'FSA') in relation to the following breaches said to have been committed by XYZ Limited:
 - (a) breach of paragraph 11 of the Guidelines for Management Companies, since it was providing services as Registered Agent to a client company without having entered into a valid management agreement with the client;
 - (b) causing its client, holding a Global Business Category 2 licence, to contravene section 73 of the FSA by authorizing the funds of the client to be invested through a domestic company; and
 - (c) investing the funds of a client in a manner which was in contravention of the client's business plan.

2. The Applicant is seeking a review of the decision of the EC to issue a public censure.
3. According to the Applicant, the breaches do not justify a public censure.
4. The Applicant gave assurance to the Financial Services Review Panel (“Review Panel”) that remedial measures have been taken to reinforce its internal policies and procedures to ensure that there will be no recurrence of such breaches.
5. The Applicant gave a list of actions taken and a series of measures which are being implemented to avoid shortcomings in the future.
6. The Applicant further requested that the decision of the EC be not published whilst the application for review was being considered.
7. The Applicant annexed the following documents:
 - (a) Application Form for a Global Business Licence – Category 2;
 - (b) Payment Checklist; and
 - (c) Transaction Checklist.
8. On 20 October 2017, the Review Panel enjoined the Respondent not to implement the decision of the EC and the matter was fixed to 24 October 2017 at 13.30 PM to hear the Respondent on whether the implementation of the decision of the EC should be suspended on such terms and conditions as the Review Panel may determine, pursuant to section 53(7) of the FSA.
9. At the hearing, Learned Counsel for the Respondent did not object to the motion.
10. The Review Panel accordingly granted the motion.

11. The matter was referred to the EC in January 2017. It was only on the 8th September 2017 that the EC invited the Applicant to submit his written representations. By letter dated 12th September 2017, the Applicant submitted its written representations. The decision of the EC was delivered on 28 September 2017.

Applicant's submissions

12. We set out below the gist of the Applicant's submissions.
13. The company cooperated fully with the Respondent during the investigation; it explained the circumstances in which the regulatory breaches occurred; and took prompt remedial actions in order to ensure that there is no recurrence of such breaches.
14. Neither the EC in its decision of 28 September 2017, nor the Respondent in its letter dated 30 October 2017 made any comment on the remedial actions taken by the Applicant. The Applicant, accordingly, considered that the measures taken were to the satisfaction of the Respondent.
15. According to the Applicant, there is no history of the EC or the Respondent issuing a public censure in situations where there have been technical regulatory breaches such as the ones, subject of the present application. Searches on the website of the Respondent show that no public censure has so far been issued. Public notices have been issued for enforcement actions such as (i) revocations of licences; (ii) disqualification of officers; (iii) suspension of licences; and (iv) appointments of administrators in relation to companies, whose licences have been suspended, revoked or otherwise terminated. The websites of regulatory authorities in other jurisdictions show that public censures are reserved for egregious breaches by licensees.

16. The Applicant went on to submit that both the EC in its decision of 28 September 2017 and the Respondent in its letter dated 30 October 2017 have merely listed the regulatory breaches but have not considered and explained why a public censure (as opposed to a private warning) is an appropriate sanction. No mention has been made of the cooperation of the Applicant, its explanation as to the circumstances in which each breach occurred and the prompt remedial actions taken in order to prevent recurrence of such breaches.

Respondent's submissions

17. The Respondent resisted the application and offered the following submissions.

Public Censure - Criteria / parameters used by the EC to issue a public censure

18. The EC carried out a study at international level, considering in particular, the Financial Conduct Authority, United Kingdom ("FCA") and Dubai Financial Services Authority ("DFSA").
19. The public censure was issued to the Applicant based on the fact that the breaches committed were considered less serious for a disqualification but too serious for a private warning, taking into account the facts of the case especially that there has been financial prejudice. For less serious offences, the EC would have issued a private warning while for more serious offences, it would have disqualified the licensee.

How did the EC compare this case with previous decisions - what motivated the decision for a public censure in this case as compared to other previous cases?

20. There is no previous decisions where public censure has been issued. This is the first time that the EC issued such a sanction.

21. According to the Respondent, in this case, the Applicant acted beyond its parameters which resulted in a financial loss to a company under its administration in addition to the breaches committed.

Comparison with other jurisdictions

22. The EC conducted a benchmarking exercise in relation to the application of public censures in other jurisdictions, namely in the United Kingdom and Dubai. The Respondent annexed the following to its submissions:
- (a) the Decision Procedure and Penalties Manual- Chapter 6 – Financial Conduct Authority;
 - (b) example of public censure issued by the Financial Conduct Authority;
 - (c) example of public censure issued by the Dubai Financial Services Authority; and
 - (d) what it considered relevant sections of the Financial Services and Markets Act 2000.
23. According to the Respondent, the Applicant is responsible for the appropriateness and effectiveness of the internal controls in place. Furthermore, in accordance with good governance principles, the board of the Applicant is also responsible for the setting up of ethical standards within the management company in order to comply with the relevant Acts (as defined in the FSA). In the Respondent's view, the Applicant, as Registered Agent of Y Limited has acted improperly with regards to the investments made on behalf of Y Limited, which raises concern on the operations of the management company and the capabilities of its directors and prays that the application be dismissed.

Applicant's Reply to Respondent's submissions

24. The Applicant reiterated the grounds for review of the decision and offered further submissions set out below.
25. Respondent's written submissions gave some insight into the apparent reasons why the EC was minded to issue a public censure against the Applicant. In its letter dated 28 September 2017 in which the EC informed the Applicant of its decision to issue a public censure, no written reasons were given.
26. The Applicant fully explained what it termed the unfortunate circumstances of the breaches to the Respondent, the EC and the Review Panel. It duly cooperated with the Respondent and the EC at all stages of the investigations.
27. Whilst the Respondent contended that the remedial measures were duly considered and acted as "mitigating circumstances" for the Applicant, it appeared that the decision to impose a sanction was nevertheless motivated by the fact that serious breaches have been committed by the Applicant and that the Applicant acted beyond its parameters which resulted in financial loss to the client company. It was the first time that the Applicant learnt of such reasoning on the part of the Respondent.
28. According to the Applicant, the conclusion of the Respondent was based on the contents of the legal notices from E, the attorneys for Y Limited. The basis on which the Respondent relied to impose the sanction was incorrect and highly prejudicial to the Applicant, for the following reasons:
- (a) the Applicant strongly disputed the contents of the legal notices from E and maintained that all investments were made with the consent and authorisation of Mr G;

(b) the disputes between the Applicant and Y Limited (amongst other parties) were now the subject of a plaint with summons lodged before the Commercial Division of the Supreme Court and bearing cause number SC/COM/PWS/XXXX/20YZ (the "Supreme Court Case") – the Applicant, along with other Defendants in the case, would be defending the allegations and claims levelled against them by Y Limited and the other plaintiffs and the case was following its course in the e-filing system of the Court;

(c) by taking as proven, based on the mere *ipse dixit* of the E notices, that Y Limited suffered loss and that such loss had allegedly been caused tortiously by the Applicant, the Respondent was pre-judging highly contentious issues that would be the very subject matter of the Supreme Court Case and which could only be determined at a full trial after exchanges of pleadings and documents, the testimony of witnesses and submissions;

(d) it was within the province of the Court, and the Court alone, to pronounce itself on the veracity or not of the contents of the Eversheds notices - the Respondent, being a Co- Defendant in the Supreme Court Case, would be fully aware of the evidence to be presented to the Court and the judgment would have *autorité de la chose jugée*;

(e) it was not established that the breaches, being technical and regulatory, had caused the alleged loss to Y Limited;

(f) the Respondent made an incorrect conflation of the breaches (which the Applicant admitted and remedied and which did not cause prejudice to anyone) with the question of whether, as between the Applicant and Y Limited, the investments were agreed to be made - the issue of agreement and authorisation of the investments was one to be considered and determined in the Supreme Court Case; and

(g) if the Respondent and the EC, without waiting for the outcome of the Supreme Court Case, had already made up their minds that the Applicant

acted tortiously and thereby caused loss to Y Limited, there was a real risk that this would prejudice the Applicant's right to a fair trial in the Supreme Court Case if the Plaintiffs were to rely on the public censure to support their case.

The Applicant's comments on the materials from other jurisdictions referred to in the Respondent's written submissions

29. In relation to the DEPP Manual of the FCA - Chapter 6, those rules, according to the Applicant, only give the choice between financial penalty and public censure. There is no provision for a private warning, unlike Mauritian Law. Therefore this was not a proper benchmark for the EC. For the same reason, the case law referred to by the Respondent ought not to have been of assistance to the EC. In addition, in the present matter, there was as yet no proven loss suffered by Y Limited, and no proven causation between the breaches of the Applicant and the alleged loss suffered by Y Limited. All those matters were issues that would have to be determined in the Supreme Court Case.

30. The decision from Dubai referred to by the Respondent concerns a case where misleading statements had been made to the DFSA. It had never been suggested in the present case by either the Respondent or the EC that the Applicant had made misleading statements in any way. The DFSA Decision was therefore not an appropriate one to be considered by the EC in its benchmarking exercise. The Dubai legislation cited merely sets out the powers of the DFSA to publish censures where it considered appropriate but no example of public censure from the DFSA in cases involving breaches similar to the ones concerned in the present application has been provided in the written submissions.

31. The Applicant found it unusual that the Respondent's submissions (Annex 14 thereof) contained extracts from legislation concerning public censure of (1) market abuse (i.e. insider dealing, unlawful disclosure and market manipulation) and (2) failure to comply with breaches of obligations by persons issuing transferable securities, persons offering transferable securities to the public and persons requesting the admission of transferable securities on a regulated market, which are a far cry from the nature of the technical and regulatory breaches which are the subject matter of the present application.
32. According to the Applicant, a public censure was a disproportionate sanction and a private warning would be appropriate in the circumstances.

Respondent's rejoinder

33. The relevant breaches were clearly mentioned in the letter dated 28 September 2017. Hence these breaches represented reasons for imposing the sanctions. The Respondent further submitted that public bodies giving administrative decisions, are not required to give detailed reasons and quoted a number of cases in support.
34. According to the Respondent, financial prejudice was caused as a result of the breaches committed by the Applicant. The latter did not deny this fact in its written representations. In fact, the Applicant admitted that there were shortcomings in the way that the file of Y Limited was maintained and the remedial actions were only taken by the Applicant afterwards.
35. The EC considered all these facts and imposed an appropriate sanction commensurate with the seriousness and severity of the breaches. In this respect, the public censure was imposed following consideration of all circumstances of the case including the remedial measures taken thereafter.

36. Section 7(1)(c) of the FSA provides for harsher sanctions but the public censure was considered as more appropriate having regard to all the circumstances of this matter.
37. Though the Applicant qualified the breaches as “unfortunate circumstances” and its duty to apply remedial actions as “cooperation” with the Respondent, breaches had been committed and admitted. The Respondent is a regulator and has to carry out its statutory functions by, inter alia, supervising the conduct of business, preserving the good repute of Mauritius, taking measures to suppress improper practices, taking measures to protect consumers of financial services.
38. We find it appropriate to set out *in extenso* the submissions of the Respondent where it referred to the “*losses suffered by Y Limited and submits that in a letter dated 19 July 2016 from the Applicant, the latter conceded that the investment incurred losses and that Mr G started to question the whole investment made on behalf of the K Trust and Y Limited. It is therefore wrong to impute that the Respondent relied solely on the legal notice from E. (2) As regards the Supreme Court case, the Respondent acted on the admission of the Applicant in relation to the loss suffered by Y Limited and on other breaches which are not before the Supreme Court, but which come directly under the regulatory purview of the Respondent. (3) The framework for the public censure is based on an international benchmarking exercise of the best practices followed by the Respondent’s foreign counterparts*”.

Further reply from Applicant dated 19 February 2018

39. While reiterating and maintaining the contents of its letters dated 5 October 2017, 22 November 2017 and 15 January 2018, the Applicant recalled inter alia that (i) there was no causal link between the breaches and the alleged

financial prejudice of the Applicant's client, and (ii) this issue lies at the core of the Supreme Court Case.

40. In its submissions, the Respondent did not establish the causal link between the breaches (being technical in nature) and the alleged loss/ financial prejudice. The real issue was whether the investments were made with the consent and authorisation of Mr G, the ultimate beneficial owner of Y Limited. In any event, this critical issue would have to be thrashed out and decided in the Supreme Court Case.
41. In deciding on the appropriate sanction to be meted out against the Applicant, the right of the Applicant to have a fair trial in the Supreme Court Case ought to be paramount and the Applicant feared that a public censure would also indicate to the Court that the Respondent had pre-judged the issue of authorisation (or lack thereof) of the investments when the Respondent ought instead to have taken a balanced view after taking cognizance of pleadings and documentary evidence.
42. We have given due consideration to the submissions of both parties.

Did the Respondent have to give reasons regarding the sanctions imposed?

43. Whilst we agree with the Respondent that an Administrative Body is not required to give elaborate reasons for its decisions, it is indeed very bold of Learned Counsel for the Respondent to have carried out a mind reading exercise to submit that the EC took into consideration a number of factors:
- (a) the benchmarking in UK and Dubai;
 - (b) the degree of seriousness of the breaches committed; and
 - (c) the financial loss allegedly suffered by the client company as a result of the breaches committed.

There is not the slightest hint to suggest what was on the mind of the EC regarding the submission of the Respondent.

44. In any event the cases from UK and Dubai do not lend support to the decision of the EC.

45. As rightly submitted by the Applicant, the rules provided in chapter 6 of the DEPP manual of the UK FSA only give the choice between financial penalty and public censure, unlike Mauritian law. Consequently the UK provision is not a proper benchmark.

46. We would like to refer to chapter 6 - paragraph 6.4.2:

Some particular considerations that may be relevant when the FCA determines whether to issue a public censure rather than impose a financial penalty are:

- (1) whether or not deterrence may be effectively achieved by issuing a public censure,*
- (2) if the person has made a profit or avoided a loss as a result of the breach, this may be a factor in favour of a financial penalty, on the basis that a person should not be permitted to benefit from its breach;*
- (3) if the breach is more serious in nature or degree, this may be a factor in favour of a financial penalty, on the basis that the sanction should reflect the seriousness of the breach; other things being equal, the more serious the breach, the more likely the FCA is to impose a financial penalty;*
- (4) if the person has brought the breach to the attention of the FCA, this may be a factor in favour of a public censure, depending upon the nature and seriousness of the breach;*
- (5) if the person has admitted the breach and provides full and immediate co-operation to the FCA, and takes steps to ensure that those who have suffered loss due to the breach are fully compensated for those losses, this may be a factor in favour of a public censure, rather than a financial penalty, depending upon the nature and seriousness of the breach;*

(6) if the person has a poor disciplinary record or compliance history (for example, where the FSA or FCA has previously brought disciplinary action resulting in adverse findings in relation to the same or similar behaviour), this may be a factor in favour of a financial penalty, on the basis that it may be particularly important to deter future cases; (...)

47. Section 7(1)(c)(v) of the FSA provides for an administrative penalty.

Rule 3 of the Financial Services (Administrative Penalties) Rules 2013 provides the following:

3. Administrative penalties

(1) Where a licensee fails to comply with a legal obligation specified in the first column of the Schedule, the licensee shall be liable to pay to the Commission the corresponding administrative penalty specified in the second column of the Schedule for each business day of non-compliance.

48. Rule 4 of the Financial Services (Administrative Penalties) Rules 2013 reads as follows:

4. Effect on other sanctions

The imposition of an administrative penalty under these Rules shall be without prejudice to any other power, penalty, sanction or remedy provided under the relevant Acts.

49. The administrative penalty provided under Mauritian law is not an alternative to the other sanctions provided but may be imposed in addition to any other sanction imposed, whilst under the UK legislation, the financial penalty is an alternative to a public censure and is imposed in cases considered more serious.

50. The decision from Dubai also cannot be considered as a benchmark. As rightly submitted by the Applicant, it has never been suggested in the present case by either the Respondent or the EC that the Applicant had made misleading statements in any way.

Was the financial loss allegedly suffered by the client company ever an issue?

51. Neither in the show cause letter dated 24 August 2016 nor in the referral letter dated 19 January 2016 (this must be a typing error and ought to read 19 January 2017) was mention made of financial loss suffered. The Respondent placed reliance on the letter dated 19 July 2016 in which the Applicant pointed out that the client company incurred financial losses and explained that *“it is only after the investment incurred losses that Mr G started to question the whole investments made on behalf of the Y Trust and Y Limited”*.
52. The statement was in response to the allegation that the funds of the entities were invested without prior knowledge from the beneficial owner. We are of the view that the statement of the Applicant is not an admission to an allegation of financial loss. It was in response to the letter from the Respondent dated 16 June 2016 which made no reference to alleged financial loss by the client company. The Applicant stated in his explanation dated 20 June 2016 that *“Mr G was very happy when the investments made on verbal instructions were fruitful and it is only after the worldwide slump in the stock market following the Asian crisis which occurred in September 2015 that Mr G is making those allegations against them”*.
53. Even on the assumption that the Respondent did not give any reason as to why it decided to impose a public censure, given the jurisdiction of the Review Panel to review the whole matter in order to determine whether the decision of the EC should be maintained, amended or cancelled, we consider that this is not fatal.
54. Taking into consideration (i) that the Applicant cooperated and explained the circumstances in which the regulatory breaches occurred, (ii) that the Applicant made a clean breast of everything and did not keep anything up its sleeves, (iii) the prompt remedial actions taken, (iv) that the beneficial owner did sometimes give verbal instructions to the Applicant, (v) that at this stage it would appear that the Applicant did not derive any benefit from the transaction

and (vi) lastly that the Applicant has not been previously sanctioned by the Respondent, we find that a private warning would be appropriate in the circumstances.

55. We accordingly amend the decision of the EC, and substitute a private warning therefor.

Mrs. R. N. Narayen

(Chairperson)

Mr. Y. Jean-Louis

(Vice – Chairperson)

Mr. S. Lalmahomed

(Member)

Date:

23.03.2018