BEFORE THE FINANCIAL SERVICES REVIEW PANEL

2018 FSRP 3

In the matter of –

1. **Mr AB**
2. **Ms ZS**

Applicants

v

The Financial Services Commission

Respondent

DETERMINATION

1. The present applications have been consolidated with the agreement of all parties.

2. Applicant No. 1 was a director of the following companies duly licensed by the Respondent:
   (i) XYZ
   (ii) FGH and
   (iii) ABC.

3. Applicant No. 1 was also the compliance officer of XYZ.

4. Applicant No. 2 was a director of ABC.

Notice of the Enforcement Committee to Applicant No. 1

5. By way of notice dated 01 April 2016, Applicant No. 1 was informed that after due consideration of his written representation, the Enforcement Committee ("EC") concluded that:

5.1 XYZ

(i) breached section 18 of the Financial Services Act ("FSA") in that it did not satisfy the criteria and standards, including prudential standards, applicable to its business activity;

(ii) failed to comply with section 24 of the FSA in that it failed to seek the approval of the Respondent for the appointment of Mr CP as Company Secretary and Compliance Officer;

(iii) failed to keep records in accordance with section 29 of the FSA;

(iv) infringed section 30 of the FSA in that it failed to file its audited financial statements for the years 30 June 2012, 30 June 2013 and 30 June 2014;

(v) breached paragraph 4.2 of the Code on the Prevention of Money Laundering and Terrorist Financing (the "Code") in that it failed to identify and verify the identity of clients; and

(vi) failed to comply with paragraph 7.7 of the Code in that it failed to adopt a compliance culture.

5.2 FGH

(i) breached section 30 of the FSA in that it failed to file its audited financial statements for the years 30 June 2012, 30 June 2013 and 30 June 2014; and

(ii) acted in breach of section 44(2) of the FSA in that it failed to provide documentation and information requested during an investigation.

5.3 ABC

(i) breached section 71(4)(b)(i) of the FSA in that it had only one resident director, namely Ms ZS;

(ii) acted in breach of section 24(6) of the FSA in that it failed to notify the Respondent of the resignation of previous directors;

(iii) failed to keep records in accordance with section 29 of the FSA;

(iv) contravened section 30(3)(a) of the FSA in that it failed to file its audited financial statements for the year ending 30 June 2014 within 6 months of its balance sheet date;

(v) breached condition 4(a) of its Category 1 Global Business Licence in that it failed to appoint fit and proper persons, inasmuch as one of its directors failed to attend to queries from the Investigators;

(vi) infringed condition 12(b) of its Category 1 Global Business Licence in that it failed to file interim reports with the Respondent; and

(vii) failed to comply with paragraph 3.2 of the Code in that it failed to appoint an MLRO; and

(viii) contravened Chapter 4 and paragraph 8.1.2 of the Code in that it failed to maintain updated CDD documents on Directors, Shareholders and Investors.

6. Given that the above breaches had been committed during Applicant No. 1's tenure in office as director and MLRO, the EC concluded that his written representations did not excuse and/or justify his acts and doings/omissions. He was therefore informed that the EC came to the conclusion that he was not fit and proper to hold position as officer in a licensee of the Respondent and disqualified him from holding position as officer in any licensee of the Respondent for a period of 4 years, pursuant to sections 7(1) (c) (iv) and 52(3) of the FSA.

Notice of the Enforcement Committee to Applicant No. 2

7. By letter dated 01 April 2016, Applicant No 2 was informed that: After due consideration of her written representations, the EC had concluded that ABC:
   (i) breached section 71(4)(b)(i) of the FSA in that ABC had only one resident director;
   (ii) acted in breach of section 24(6) of the FSA, in that it failed to notify the Respondent of the resignation of previous directors;
   (iii) failed to keep records in accordance with section 29 of the FSA;
   (iv) contravened section 30(3)(a) of the FSA insofar in that it failed to file its audited financial statements for the year ending 30 June 2014 within 6 months of its balance sheet date;
   (v) breached condition 4(a) of its Category 1 Global Business Licence since it failed to appoint fit and proper persons, inasmuch as a director of ABC failed to attend to queries from the investigators;
   (vi) infringed condition 12(b) of its Category 1 Global Business Licence since it failed to file interim reports with the Respondent as required by the conditions attached to its licence;
   (vii) failed to comply with paragraph 3.2 of the Code on in that it failed to appoint a Money Laundering Reporting Officer; and
   (viii) contravened Chapter 4 and paragraph 8.1.2 of the Code in that it did not maintain updated CDD documents on directors, shareholders and investors.

8. Given that the breaches were committed during Applicant No 2's tenure in office as director, the EC concluded that her written representations did not excuse and / or justify her acts and doings / omissions.

9. Applicant No 2 was informed that the EC came to the conclusion that she was not fit and proper to hold position as officer in a licensee of the

Respondent and disqualified her from holding position as officer in any licensee of the Respondent for a period of two years, pursuant to sections 7(1)(c) (iv) and 52(3) of the FSA.

10. Aggrieved by the decisions of the EC, the Applicants are seeking a review of the decisions.

11. **The grounds for review of Applicant No. 1 are:**

11.1 In respect of XYZ:

(i) Breached section 18

Sec. 18 of the FSA pertains to an incorporated and/or to be incorporated company. XYZ had surrendered its Respondent Management Licence on the 28/03/2015 and was no more in operation. The Respondent caused the publication of the Notice of Termination of license as per section 28(9) of the FSA. XYZ as such could not have acted in breach of this section.

(ii) Failed to comply with Section 24

The approval of the Respondent was sought but Respondent did not respond. Pursuant to section 24(3) (c), the application was deemed to have been approved.

The Respondent was then copied the appointment pack which was sent to the Registrar of Companies. A copy of the extract of the dispatch book where the application was sent to the Respondent, was provided to the investigation team.

(iii) Failed to keep records in accordance with section 29 of the FSA:

All the documents were produced to the Respondent as requested on the 18 February 2015. Indeed as per the Comment Sheet, on the 18 February 2015, Applicant No. 1 produced all documents and information requested. The Respondent did not have any Comment Sheets stating that he had failed and/or refused to submit the documents and information requested on the day of the investigation.

(iv) Infringed section 30 of the FSA – failed to file its audited financial statements for the years 30 June 2012, 30 June 2013 and 30 June 2014.

These duly filed accounts were produced to the investigators and recorded on the Comments Sheets that Applicant No. 1 signed.

(v) Acted in breach of section 44(2) of the FSA - the directors failed to provide documentation and information requested during an investigation of the Respondent.

Applicant No. 1 averred that he fully cooperated with the request of the Respondent and all requested documents were produced to the best of his capacities during the investigation on 18 February 2015. He signed all the Comments Sheets and at no point in time he was informed that he had not communicated any documentation or information.

(vi) Failed to comply with paragraph 3.4 of the Code on the Prevention of Money Laundering and Terrorist Financing (the "Code") - reports of the MLRO for the years 30 June 2011, 30 June 2012, 30 June 2013 and 30 June 2014 were not available on the files of XYZ provided to the Investigators.

Applicant No. 1 did provide the MLRO reports to the investigators of the Respondent. He even signed a Comment Sheet attesting same.

(vii) Breached paragraph 4.2 of the Code

Following the suspension of its Management Licence XYZ lost all its clients save for 3 active companies. Mr N, whose KYC was known to the Respondent, was the only shareholder of all remaining companies which were dormant and inactive.

(viii) Failed to comply with paragraph 7.7 of the Code - failed to adopt a compliance culture.

One of the foremost conditions, when Respondent reinstated C licenses, was that everything should be in good standing. It is to be noted that almost 2 months out of the 3 months of the suspension period of the Management Licence, the investigators reviewed all the

files of XYZ. They did not find any issues with its compliance culture. Consequently its management licence was reinstated. As such the finding that XYZ allegedly failed to adopt a compliance culture was unwarranted.

11.2 In respect of ABC:

"Regarding ABC at the outset it is noteworthy that no investigation was carried out on ABC. The authorisation letter dated 13th February 2015 did not mention any investigation on ABC. Nevertheless Applicant No. 1 raised the following grounds":

(i) Breached section 71(4)(b)(i) of the FSA - the Company had only one resident director.

Applicant No 1 was not a director of ABC since 18th February 2015 and he was informed that ABC had already surrendered its GBL 1 Licence on 25 March 2015. As such he was not answerable for ABC as from 18th February 2015.

(ii) Acted in breach of section 24(6) of the FSA - failed to notify the Respondent of the resignation of previous directors.

The finding was baseless. The Respondent was notified of the resignation of the former directors.

(iii) Failed to keep records in accordance with section 29 of the FSA.

Applicant No 1 was appointed non executive independent director of ABC. The Company had no employees. All documents received by him during his tenure in office were provided to the Respondent. At the time of the investigation, the Applicant had already resigned as director and was no more in possession of other documents

During his tenure in office as non executive director of ABC there were no operations and as such did not warrant the keeping of any new record.

(iv) Contravened section 30(3)(a) of the FSA - failed to file its audited financial statements for the year ending 30 June 2014 within 6 months of the balance sheet of the company.

Applicant No 1 informed the investigators that the audited accounts were under preparation and therefore not ready for filing.

(v) Breached condition 4(a) of its Category 1 Global Business licence - failed to appoint fit and proper persons, inasmuch as a director of the Company failed to attend to queries from the investigators

Ever since Applicant No 1 assumed office as director of ABC and until his resignation on the 18th February 2015 he had attended to all queries of the Respondent. The Respondent duly approved his appointment as a fit and proper person to act as director.

(vi) Infringed condition 12(b) of its Category 1 Global Business Licence - failed to file interim reports with the Respondent as required by the conditions attached to its licence

When Applicant No 1 took office as director, ABC had not filed interim reports for two years, he was therefore unable to prepare interim reports as he had no comparable figures and he duly informed the Respondent.

(vii) Failed to comply with paragraph 3.2 of the Code – failed to appoint a MLRO

Applicant No 1 was MLRO from 16th March 2011 to 20th June 2012.

(viii) Contravened Chapter 4 and paragraph 8.1.2 of the Code - failed to maintain updated CDD documents on directors, shareholders and investors as required by the Code.

This contention of the EC is objectionable to the extent that during the whole of Applicant No 1's tenure in office as director of ABC, there was no other new director, shareholder or investor.

11.3 In respect of FGH:

(i) Breached section 30 of the FSA – failed to file its audited financial statements for the years 30 June 2012, 30 June 2013 and 30 June 2014.

When Applicant No 1 took office as Managing Director of FGH in March 2013 accounts for the financial year ending June 2012 was due. He retained the services of an audit firm to prepare the outstanding accounts and also the

account for the current year. At the time he left office in June 2014 the said accounts were still under preparation.

(ii) Acted in breach of section 44(2) of the FSA - failed to provide documentation and information requested during an investigation

At the time of the investigation Applicant No 1 was not a director of FGH and was therefore unable to communicate the documentation requested.

He further stated that he had been working in the global business sector since 2010 and he had never been involved in any fraud or Ponzi and Ponzi like related matters. The sanction of the EC was to all intents and purposes disproportionate, unfair and unwarranted. He had always acted in good faith and worked in full transparency and compliance of the law.

Grounds for Review of Applicant No. 2:

12. Applicant No 2 contended at the outset that no duly authorised investigation was carried out on ABC. The Letter dated 13th February 2015 did not mention any investigation on ABC but all the same Applicant No. 2 raised the following grounds:

(i) Breach of section 71(4)(b)(i) of the FSA, since the Company only had one resident director

She was the last director of ABC and pursuant to Section 140(2), she was locked as the last director of ABC and she had already resigned from ABC.
ABC had surrendered its GBL 1 Licence on 25 March 2015. As such ABC could not have been in breach of Section 71(4)(b)(i).

(ii) acted in breach of section 24(6) of the FSA - failed to notify the Respondent of the resignation of previous directors

The finding is baseless inasmuch the Respondent was duly notified of the resignation of the former directors as per the hereto Annexes.

(iii) Failed to keep records in accordance with Section 29 of the FSA

All documents she received during her tenure in office were submitted to the Respondent.

Given that the company was not in operations and that there were no employees, the keeping of any record was not warranted.

(iv) Contravened section 30(3) (a) of the FSA - failed to file its audited financial statements for the year ending 30 June 2014 within 6 months of the balance sheet date of the company.

She informed the investigators that the audited accounts were under preparation and therefore not ready for filing.

(v) Breached condition 4(a) of its Category 1 Global Business Licence - failed to appoint fit and proper persons, inasmuch as a director of the Company failed to attend to queries from the investigators.

The Respondent duly approved her appointment as a fit and proper person to act as director. Ever since the Applicant assumed office as director of ABC, she had attended to all queries of the Respondent.

(vi) Infringed condition 12(b) of its Category 1 Global Business Licence - failed to file interim reports with the Respondent

When she took office as director, ABC had not filed interim reports for nearly two years. She was therefore unable to prepare interim reports as she had no comparable figures and duly informed the Respondent.

(vii) Failed to comply with paragraph 3.2 of the Code - failed to appoint a MLRO.

Mr AB was MLRO from 16 March 2011 to 20 June 2012. Following his resignation, it was not possible to employ an MLRO since the financial position of ABC was and is still in a financial draught situation.

(viii) Contravened Chapter 4 and paragraph 8.1.2 of the Code – failed to maintain updated CDD documents on directors, shareholders and investors.

This contention of the EC is objectionable to the extent that during the whole of her tenure in office as director of ABC, there was no other new director, shareholder or investor.

13. In conclusion, Applicant No. 2 stated that she has been working in the global business sector since 2010 and has never been involved in any fraud or Ponzi and Ponzi like related matters. The sanction of the EC was, according to her, disproportionate, unfair and unwarranted. She had always acted in good faith and worked in full transparency and in compliance of the law.

Additional ground raised:

14. On 4th November 2016, Learned Counsel for the Applicants moved to raise an additional ground for a review of the decision of the EC which reads as follows:
The decision of the EC taken on the 1st April 2016 should be quashed since the Appellant has been denied the right to a fair hearing and the right to the tried by an independent and impartial body in breach of Section 10(8) of the Constitution inasmuch as:

(a) The EC, which took the sanction against the Appellant, was comprised of at least two members of the Board which had set up the EC.

(b) The EC was already in presence of the report of the investigation together with the observations, comments and recommendations of the Chief Executive of the Respondent according to section 44(5) of the FSA when determining the case against the Appellant.

15. The Respondent did not object.

16. The Review Panel accordingly granted leave and invited written submissions on the additional ground raised.

17. We went through the written submissions and were of the view that the point raised could be considered with the merits of the application and requested the parties to submit their respective statement of case.

18. In view of the serious allegations made against the investigators, the Review Panel called the investigators and one Mr CP to whom one investigator allegedly made an unpleasant remark.

Hearing and Submissions

19. The hearing was completed on 19 January 2018, we set out below the written submissions of the Respondent.

The written submission of the Respondent:

1. *"It is very telling that, instead of addressing the technical issues which the Respondent raised against him, the Applicants merely raised other irrelevant procedural issues which they could not prove. The Applicants were afforded with numerous opportunities to remedy the breaches and to cooperate with the Respondent but failed to do both.*

2. *As far as the allegations of unfairness and coercion raised against the Respondent are concerned, the evidence of witnesses (D and S) remained unrebutted.*

3. *Mr CP made serious allegations against Mr S. However, under cross examination, he was found to be inconsistent. His version was also very clearly rebutted by Mr S who explained the circumstances. In this respect, the Respondent was requested to provide further evidence, as set out in the ensuing paragraphs.*

4. *The public notice containing Mr CP's name was published on the Respondent's website on 1st April 2016 (Annex A). As Mr CP stated, he made a request to the Respondent to have his name removed from the public notice some 2 to 3 months after. The Respondent duly considered his request and the then Ag Chief Executive approved the removal of the name of Mr CP from the public notice. Despite several searches, no written request from Mr CP could be retrieved.*

5. *The emails from Annex B show that the changes were duly effected and a new public notice was published without the name of Mr CPon 22 June 2016.*

6. *On 24 June 2016, Mr CP sent an email to the Respondent, asking for compensation for the publication of his name (Annex C). On 28 June 2016 at 14.30 (Annex D), the Ag Chief Executive decided that following the threat of legal action from Mr CP, the initial public notice containing the name of Mr CP be published (Annex E).*

7. *On 29 June 2016, the Respondent replied to the email of Mr CP. On the same date, the latter replied to the Respondent with further threats of legal action (Annex F). The Respondent did not reply further.*

8. *This chain of emails confirm the version of Mr S. It is submitted that the evidence of Mr CP has been challenged by the evidence of Mr S inasmuch as the latter's evidence is supported by documentary evidence as per the above-referred emails. It is therefore completely false to suggest that the Respondent attempted to put pressure on Mr CP in retaliation to his links with Mr AB.*

9. *The FSRP also requested for submissions on the EC's letter dated 22 September 2015 (invitation for representations). It was alleged, on behalf of the Applicants, that the letter gave the impression that a decision was already taken at that time. The Respondent denies same and refers to section 53 (2) of the FSA*
10. *which provides:*
    (2) Where a matter is referred under subsection (1) or under a relevant Act and the EC intends to impose an administrative sanction under section (7)(1)(c) against a licensee, it shall issue a notice to the licensee stating —
    (a) the intention of the EC to impose an administrative sanction;
    (b) the type and terms of the administrative sanction; and
    (c) the right of the licensee to make written representations to the EC within such time as the EC deems appropriate in the circumstances, but not exceeding 21 days from the date of the notice.

11. *If the EC is satisfied that the breaches are found, it reiterates the breaches in its final decision notice. It is further submitted that the breaches are breaches of the law which are reflected in the formulations in the final decision notices.*

12. *The Respondent will further draw an analogy with the Information, which is lodged in relation to a criminal offence. The Information contains all alleged breaches and details so that the accused knows the case he has to meet. One cannot argue that the fact that an Information has been lodged automatically entails that the Court has already acted upon it to find that all the facts mentioned therein have been proved. In the present case, the Respondent has put the Applicants on notice that a number of breaches have been committed and as they were the persons in charge, they are accountable for them and they were expected to furnish plausible explanations to explain these breaches. Having failed to do so when given all the latitude to do it — (instead Mr AB sent letters that he should not be written to!)- the Applicants left the Respondent with no other option than to apply the sanctions set out in the law."*

20.**The Applicants offered the following submissions**:

1. *"It will be submitted there is no evidence that Applicant was given numerous opportunities to remedy the breaches. At any rate it the contention of the Applicant that the whole investigation exercise was flawed and biased against him. This is evidenced by the deposition of Mr CP before the Review Panel and the notices filed by the Applicant.*

2. *No explanation was given by the Respondent as to why the notice dated 01/04/2016 was amended on the 22nd June 2016, without the name of Mr CP and another notice dated 1st April 2016 had his name inserted anew.*

Decision of EC

3. *It will be submitted that it is clear from the letter sent by the EC that the decision was already taken and a notice was sent to the Applicant to impose the penalty only. One would have expected the EC to call the parties or to give them an oral hearing especially in the light of the allegations made by the Applicant in his letter to the EC but the EC failed to do so, thus showing that it had already taken its decision..*

4. *The analogy drawn with an information before the Court is wrong. At any rate witnesses are heard by the Court before any decision is taken.*

5. *In the present case given the heavy sanction taken by the Respondent, one would have expected in all fairness that the Applicant be heard, so that justice be seen to be done.*

6. *Furthermore (a) no reasons were been put forward by the EC to justify the imposition of the sanction meted out to both Applicants (b) No reason was given to explain in what circumstances the alleged breaches were found, proved in clear breach of the principle of fairness enshrined in S 10 (8) of the constitution. Reliance will be placed on the case of* ***Quality Soap Ltd. and Another v M.C.C.B. Ltd (1999) SCJ 221.***

Comment Sheets

7. *The Applicant will also submit that several comments sheets which were produced before the Review Panel were unsigned by the investigators and some of them were not even signed by the Applicant. Some comment sheets which were filed before the Panel bore the comments of the Respondent officers only without the signature of the Applicant. Furthermore various documents which were not communicated to the Applicant were produced before the Review Panel. As such as at today the Applicant*

does not know what documents were placed before the EC to enable the latter to take an informed decision.

8. *Finally when the notice was issued against the Applicant, there was no mention of the fact that an appeal was under consideration.*

9. *The same submissions apply in the case of Mrs ZS."*

21. The issues raised at paragraph 3, 4 and 5 of the Applicants' submissions are indeed devoid of merits.

22. Under section 53(2) of the FSA, *where a matter is referred under subsection (1) or under a relevant Act and the EC intends to impose an administrative sanction under section (7)(1)(c) against a licensee, it shall issue a notice to the licensee stating –*

(a) the intention of the EC to impose an administrative sanction;

(b) the type and terms of the administrative sanction; and

(c) the right of the licensee to make written representations to the EC within such time as the EC deems appropriate in the circumstances, but not exceeding 21 days from the date of the notice.

23. And under section 53(3), where, after considering the written representations under subsection (2)(c) or where no written representations are received within the time specified in the notice under subsection (2) and the EC decides to impose an administrative sanction, it shall issue a written notification to the person stating the type and the terms of the administrative sanction (Emphasis added).

24. The EC is only required to inform the licensee of his right to make written representation. Hence the EC is not required to hold a hearing like a court of law.

25. Paragraph 2 of the Applicants' submissions can also be disposed of.

26. We have the evidence of Mr S who explained the circumstances which led to the removal of the name of Mr CP from the Notice and why his

name was inserted anew. He also explained the procedure followed by the Request For Information (RFI) Committee chaired by the Chief Executive who ultimately took the decision to reinsert the name of Mr CP in the Notice. Mr CP was called as a witness by the Review Panel regarding the allegations that he was coerced by the investigators. We have given due consideration to the evidence of the witnesses. The investigators vehemently denied having coerced Mr CP in any way whatsoever. They were very straightforward and not in the least perturbed. Whereas Mr CP's demeanour gave him away. We unhesitatingly accept the evidence of the investigators that at no time they coerced Mr CP.

27. Paragraphs 4 to 8 of the Respondent's submissions addressed the issue raised by the Applicant at paragraph 2.

28. We find that the removal of the name of Mr CP from the Notice and the re insertion do not affect the Applicant's case. Furthermore, this is not an issue before us.

29. The contention of the Applicants under paragraph 8 is also devoid of merit. The Respondent is not required under the FSA to state in the notice that the Applicant has applied for a review of the decision which was under consideration.

30. Under section 53(6) of the FSA, notwithstanding an application under subsection (4)(a) but subject to subsection (7), the decision of the EC under subsection (3) shall be given effect immediately after the period of 21 days from the date of the decision.

31. Therefore, notwithstanding the application for review, the decision shall take effect immediately, unless there has been an order for a stay of the decision.

32. The other issues raised in the submissions will be considered when we deal with the respective ground for review.

33. We now turn to the additional ground for review raised:

"Was the Appellant denied the right to a fair hearing and the right to be tried by an independent and impartial body in breach of Section 10(8) of the Constitution in so far as:

(a) the EC, which took the sanction against the Appellant, was comprised of at least two members of the Board which had set up the EC.

(b) the EC was already in presence of the report of the investigation together with the observations, comments and recommendations of the Chief Executive of the Respondent according to Section 44(5) of the FSA when determining the case against the Appellant."

34. In a letter dated 13 February 2015, the Chief Executive of the Respondent pursuant to section 44(1) of the FSA authorised Mr AS and Mr SD to carry out an investigation into two companies namely XYZ and FGH.

35. On 18th February 2015 the investigators carried out the investigation and thereby submitted their report to the Chief Executive. As required by section 44(5) of the FSA, the Chief Executive transmitted the said report to the Board.

36. Two members of the Board of the Respondent were also members of the EC, which took the ultimate sanction of disqualifying the Applicants from holding position as officer in any licensee of the Respondent for a period of four years.

37. Learned Counsel for the Applicants submitted as follows:

(i) The Applicants had not been afforded the right to a fair hearing and the right to be tried by an independent and impartial body in line with section 10(8) of the Constitution which provides:

"(8) Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial, and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

(ii) The word authority should be interpreted to include the EC.

(iii) As far as the right to be tried by an independent and impartial body, Learned Counsel referred to the following cases:

- Victoire v. The King (1950) MR 23
- R v Bow Street Metropolitan Stipendiary Magistrate (ex parte Pinochet) (2000) 1 AC 119
- Poonoosamy & ors v. State (1996) MR 1
- Francois v. State (1993) SCJ 140

(iv) Justice was not done in this case and could not have been seen to be done at least in the eyes of the Applicants, knowing that at least two persons who had taken cognizance of the report of the investigators together with the observations, comments and recommendations of the Chief Executive, and had decided to set up the EC after having taken cognizance of those facts behind his back, were the very ones who had finally taken the drastic sanction against him.

(v) The possibility of 'subconscious bias' cannot be discarded, given that at least two members of the EC were already aware of the report of the investigators together with the observations,

comments and recommendations of the Chief Executive at the time the matter were referred to them.

(vi) The same body which was previously aware of the reports, observations of the Chief Executive, amongst others, adjudicated upon the breaches committed and took the ultimate sanction of disqualifying the Applicant from holding position as officer in any licensee of the Respondent for a period of 4 years.

(vii) The doctrine of 'automatic disqualification' should have been applied in this case.

(viii) Any fair-minded and informed observer, having considered the facts of this case, would conclude that there was a possibility that the authority could be 'biased'.

(ix) The EC being a Committee set up by the Board and consisting of at least two members of the Board could be seen as being judge and party in the same case in clear breach of the principle of natural justice.

38. Accordingly to Learned Counsel for the Applicant, the decision taken by the EC was taken in clear breach of section 10(8) of the Constitution and should consequently be quashed. Indeed section 66(1) (a) of the FSA confers on the Review Panel the power to confirm, amend or cancel a decision made by the EC.

39. Learned Counsel for the Respondent is resisting the point of law raised and submits:

(i) Section 66(1) of the FSA sets down the jurisdiction of the Panel which is to review a decision of the EC. The Applicants are asking the Panel to act 'ultra vires' its mandate when they challenge the composition of the EC, which is beyond the powers of the FSRP. The Panel can only 'review' the decision on the merits but it cannot discard its powers of review on the ground that the legislator has failed the Applicant when the law itself provides for members of the Board to be part of the EC.

(ii) In accordance with section 44(5), the Chief Executive transmitted the investigator's report to the Board.

(iii) Under section 53(1) where the Chief Executive has reasonable cause to believe that a licensee:

(a) has contravened any relevant Act, any direction or order issued under a relevant Act or any condition of the licence;
(b) is carrying out his business in a manner which threatens the integrity of the financial system of Mauritius or is contrary or detrimental to the interest of the public;
(c) has committed a financial crime;
(d) no longer fulfils any condition or criteria specified under the relevant Act for the grant of a licence;
(e) no longer carries out the business activity for which it is licensed;
(f) has failed to commence business within 6 months from the date on which it is licensed;
(g) is not a fit and proper person,

he may refer the matter to the EC for such action as the EC may deem appropriate.

(iv) Under section 52, the Board has a statutory mandate to set up the EC comprising of:

(a) 2 members appointed every year by the Board;

(b) not more than 2 employees being of a grade not lower than Executive and not involved in investigations of the licensee under section 44, designated by the Board;

(c) such other person having the necessary expertise as may be co-opted by the EC.

(v) Member as defined under section 2 of the FSA means a member of the Board and includes the Chairperson and the Vice-Chairperson.

(vi) The Applicants, against whom, an administrative sanction was taken following an investigation under the authority of the Chief Executive and a sanction by the EC, in which the Chief Executive has no say, cannot complain that he was denied a fair hearing because the body which sanctioned him was not independent and impartial. The transmission of the investigation report to the Board cannot be considered as poisoning the mind of the EC inasmuch as any decision taken by the EC following further representations made by the Applicant as provided for under sections 53(2) and 53(3) of the Act which reads as follows:

53. Disciplinary Proceedings

(1)…

(2) Where a matter is referred under subsection (1) or under a relevant Act and the EC intends to impose an administrative sanction under

section (7)(1)(c) against a licensee, it shall issue a notice to the licensee stating –

(a) the intention of the EC to impose an administrative sanction;

(b) the type and terms of the administrative sanction; and

(3) Where, after considering the written representations under subsection (2)(c) or where no written representations are received within the time specified in the notice under subsection (2) and the EC decides to impose an administrative sanction, it shall issue a written notification to the person stating the type and the terms of the administrative sanction.

(vii) The Respondent submitted that the case law referred to by Learned Counsel for the Applicants is irrelevant in the present matter. The sanction imposed is a mere administrative step that has been taken by a public body in the exercise of its functions under the law. The principles governing a criminal offence are of no relevance to the present matter. The Respondent drew an analogy whereby a Magistrate who signs a provisional charge in Mauritius, is not barred from hearing the case.

(viii) The Applicants submitted their written representations as requested by the EC. The EC took the decision only after having considered the case for both the Applicants and the Respondent.

(ix) The decisions taken by the EC were taken by the whole committee, which consisted of members other than the 2 Board members. It is important to highlight that the members of the EC were not involved at the level of investigations and therefore the question of bias did not arise.

40. We have given due consideration to the submissions of Counsel for both parties. Section 10(8) of the Constitution provides:

"(8) Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial, and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

The case of Victoire

41. In the case of Victoire vs the King (1950) MR 23, the Supreme Court held that "…..it is not merely of some importance but is of fundamental importance, that justice should not only be done but should manifestly and undoubtedly be seen to be done"

42. In that case, the Learned Magistrate at the outset of the case, observed that *"he was satisfied that the appellant, whose defence was an alibi, had been in the declarant's house on the night in question at the time when the offence was alleged to have been committed"* although the Prosecutor had made a motion to withdraw the case of larceny against the Accused. After that statement, the Prosecutor decided to proceed with the hearing of the case which culminated in the Accused being found guilty by the same Magistrate.

43. On appeal, the Supreme Court held that:

"In view of that statement, it is difficult to come to any conclusion but that this important issue between the Crown and the accused had been decided by the Magistrate adversely to the appellant before the defence had been heard. Furthermore, the impression might reasonably have been caused on

the mind of the appellant, on hearing that statement, that he was not having a fair trial and that justice was not being done."

44. The presiding magistrate had already made a decision which was adverse to the accused party before he presented his defence of alibi.

45. In the present matter, by virtue of section 44(5)of FSA, the investigators' report was transmitted to the Board. No decision as such was taken on the report by the Board. We are accordingly of the view that the decision in the case of Victoire vs the King is to no avail in the present matter.

The case of Poonoosamy

46. In the case of Poonoosamy & Ors v. State (1996) MR 1, the Appellants appealed on the ground that the Appellants did not have a fair trial in that the presiding magistrate who heard the case, had previously heard a civil case wherein the same issues were raised. In allowing the appeal and quashing the convictions, the Supreme Court held that ' *we have perused the record of the civil case which Mr Magistrate Domah heard. The Court there had to determine issues similar to those arising in the criminal proceedings. No one would dare suggest that subjectively Mr Magistrate Domah did not act impartially together with his colleague. But this is not sufficient to remove from the mind of a litigant or an accused person the uneasiness which he may feel at such an occurrence and this is the objective approach on the basis of which courts have time and again quashed decisions where the impartiality of a tribunal has been impugned. In the circumstances and in view of the juridical thinking on the subject as adumbrated above, we hold that the appellants did not benefit from a fair trial for lack of objective impartiality.'*

47. This decision is also no authority for the determination of the present matter. The magistrate had already heard a civil case wherein the same issues were raised. The magistrate had already decided the very issues which were also the subject matter of the criminal case.

The case of Francois

48. In the case of Francois v. State (1993) SCJ 140, the court held that the question arose as to whether an accused had been deprived of the right to a fair hearing by an independent and impartial court since one of the Magistrates who had heard the trial proper, had previously heard the bail application.

49. The Court took the view that, in those circumstances the likelihood of a doubt in the public mind as to the fairness of the trial could not be discarded

50. The Court stated that:

"The basic principle with which we are concerned is of course that, according to section 10(1) of the Constitution, a person charged is entitled to be tried by an impartial tribunal. In England, the particular point we have to consider is dealt with as follows in section 42 of the Magistrates' Courts Act 1980: "A justice of the peace, shall not take part in trying the issue of an accused's guilt on the summary trial of an information if in the course of the same proceedings the justice has been informed, for the purpose of determining whether the accused shall be granted bail, that he has one or more previous convictions.

In France it is article 253 of the Code de Procedure Penale which takes care of the situation. The Court de Cassation has had occasion to hold,

by reference to that provision and to article 6 of the European Convention on Human Rights (which is the equivalent of section 10 of our Constitution), in the following terms:

"toute personne a droit à ce que sa cause soit entendue par un tribunal impartial, c"est à dire des magistrats n"abordant pas les débats au fond,avec une idée toute faite. Ceux qui ont participé à l"instruction préparatoire de type inquisitorial, ne peuvent en conséquence siéger lors de l"instruction définitive de caractère accusatoire (Cass. Crim. 28.1.86, GP 1987 Somm. 1)";

"... étendre la règle de l"incompatibilité au magistrat qui a participé à une précédente décision statuant sur la détention provisoire de la personne en cause car à cette occasion il a nécessairement du procéder à un examen préalable au fond (Cass. Crim. 23.1.85, GP 1985 2 Somm. 217)."

51. The appeal was allowed and the conviction quashed.
52. The decision in the case of Francois v. State is also of no help to the Applicants in that the magistrate who heard the criminal matter was aware that the accused had a previous conviction when he dealt with the application for bail.

The case of Pinochet

53. The case of Pinochet is indeed irrelevant here. In that case the doctrine of automatic disqualification was applied on the basis that no one should be a judge in his own cause. The question of "Judge in his own cause" has no relevance in the present matter inasmuch as the Board did not give any decision on the report transmitted by the Chief Executive.

54. That the investigator's report was transmitted to the Board as required under section 44 (5) of the FSA does not make the EC, which includes

two Board members, a judge in its own cause. The FSA confers a duty on the Chief Executive to transmit a report, submitted to him by an investigator duly authorised to carry out an investigation, to the Board.

55. The Board has a duty to set up an internal committee, the EC which consists of 2 Board members and not more than 2 employees being of a grade not lower than Executive and not involved in investigations of the licensee under section 44, designated by the Board.

56. The Chief Executive referred the matter to the EC pursuant to S53 of the FSA. The EC invited the Applicants to submit their respective representations as required under S 53(3) of the FSA. The EC decided the matter after having considered the Respondent's case and the written representations of the Applicants.

57. Against this background can it be said that the Applicants have not been afforded the right to a fair hearing within the spirit of section 10(8) of the Constitution.

58. When we look at the stages a case goes through until the EC reaches its decision, it is our considered view that the objective of the provisions of the law, regarding the procedure to be followed, is precisely to afford a fair hearing to a party before the Commission. Hence we find that the provisions of section 52 of the FSA is very much in line with the provisions of section 10(8) of the Constitution. The two members of the Board who were also members of the EC, albeit aware of the investigation report, did not make any pronouncement or any comment or any observation on the report. Indeed the EC took its decision in the light of the Respondent's case and the written representations of the Applicant.

59. In any event, Learned Counsel for the Applicants is in effect challenging the legality of section 52 of the FSA which provides for the appointment and composition of the EC. As rightly submitted by Learned Counsel for the Respondent, the Applicants are asking the Review Panel to act 'ultra vires' its mandate when they challenge the composition of the EC, which is indeed beyond the powers of the Review Panel.

We accordingly set aside the additional ground raised.

60. We shall now consider whether the investigators were duly authorised by the Chief Executive to conduct an investigation into the affairs of ABC.

61. It is the contention of the Applicants that:

(i) the investigators acted ultra vires their powers in conducting an investigation into the affairs of ABC;

(ii) the letter dated 13th February 2015 authorised an investigation into the affairs of XYZ and FGH only;

(iii) hence the investigation itself was *ab initio* flawed;

(iv) consequently the EC could not have relied on the investigations in order to find the alleged breaches proved.

62. The Respondent submitted the following on this issue:

63. ABC was a Global Business company administered by XYZ, a Management Company, as such it administers the business of its clients and it stands to reason that an investigation into XYZ, a Management Company, includes investigations into companies under its administration. As per the letter dated 13 February 2015 an investigation was authorised "in relation to the business activities of the Management

Company". The business activities of a Management Company is the administration of its client companies, a fact which the Applicants should have been well versed in as an "Officer" under the FSA. The Respondent, whilst investigating into the business of XYZ, was bound to review its clients' files in order to make a proper assessment of the business conduct of the Management Company. Thus, the Respondent did not need any further authorisation in accordance with the FSA to review client's files. (Emphasis added) The files of the following companies were reviewed / queried by the investigation team:

- J Inc.
- SFSI
- T
- CIC
- ABC
- E Ltd
- SCV

64. It is admitted that:

a) the Management Licences of XYZ and FGH were suspended on 30 October 2013;
b) by letter dated 22 January 2014, the suspension was cancelled;
c) by letter dated 13 February 2015, the Chief Executive authorised an investigation into the business affairs of XYZ and FGH (Learned Counsel for the Respondent conceded that the authorisation was in respect of these two companies);
d) an investigation was conducted into the business activities of ABC;
e) the investigators reviewed the files of 20 client companies.
f) The file of ABC was not reviewed

65. We agree with the Respondent that while investigating into the affairs of XYZ and FGH, investigators would invariably review the files of their clients'

companies in order to make a proper assessment of the business conduct of the Management Company. However, there is a difference between reviewing files of clients' companies in the course of an authorised investigation into the activities of a Management Company and carrying out an actual investigation into the business activities of a client company.

66. Section 44 of the FSA reads as follows:

where the Chief Executive has reasonable cause to believe that a licensee –

(a) has committed, is committing or is likely to commit, a breach of –

(i) any of the relevant Acts;

(ii) any condition of his licence, authorisation or registration; or

(iii) any direction issued by the Commission under a relevant Act;

(b) has carried out, is carrying or is likely to carry out, any activity which may cause prejudice to the soundness and stability of the financial system of Mauritius or to the reputation of Mauritius or which may threaten the integrity of the system;

(c) has failed or is failing to take such measures as are required pursuant to the Financial Intelligence and Anti-Money Laundering Act 2002,

the Chief Executive may order that an investigation be conducted into the business or any part of the business of the licensee or its associate.

(2) For the purposes of this section, a person duly authorised in writing by the Chief Executive as an investigator shall have all the powers of the Chief Executive under section 43 and may direct the licensee, or any of its officers, its employees, and its associates or any witness:

(a) to produce to the investigator, at a reasonable time and place specified in the direction, any specified document or other thing that may afford such evidence and that is in his possession or under his control;

(b) to give explanations or further information about any documents or things produced; or

(c) to attend before the investigator at a reasonable time and place and answer under oath questions relating to the investigation.

(3) For the purposes of an investigation, the investigator may –

(a) enter any premises used or apparently used by the licensee for business purposes at any reasonable time;

67. With all due respect to the view of the Respondent, we cannot espouse the reasoning that an investigation into the activity of a Management Company includes investigations into companies under its administration.

68. Albeit ABC is a client of the Management Company, ABC is a different legal entity altogether.

69. The Chief Executive, in his letter dated 13 March 2015, authorised investigation into the activities of XYZ and FGH. This is conceded by Learned Counsel for the Respondent. Under section 44(3) (a), for the purposes of investigation, the investigator may enter any premises used or apparently used by the licensee for business purposes at any reasonable time.

70. By any stretch of imagination, the business premises of XYZ and FGH cannot include the business premises of ABC. There is more. It is admitted that in the course of the investigation, the files of ABC were neither reviewed nor queried. We are accordingly of the view that the investigators were not authorised by the Chief Executive to investigate into the affairs of ABC.

71. The case was referred to the EC on the basis of the investigation. Since the very basis of the investigation itself was flawed, the decision of the EC, as submitted by Learned Counsel for the Applicant, cannot stand. As Review Panel, we cannot cure such flaws.

72. There is one more issue we consider relevant and pertinent to address.

73. At this juncture, we consider that we should proprio motu determine whether the EC was mandated to find Applicant No 1 liable for breaches allegedly committed by ABC under his directorship.

74. The Referral letter reads as follows:

"Re: Referral of the following officers of:

(a) XYZ;

(b) FGH; and

(c) ABC.

(Collectively the "Companies")

1. *Mr. AB in his capacity as past (i) Director and Money Laundering Reporting Officer ("MLRO") of XYZ, (ii) Director of FGH and (iii) Director of ABC;*

In accordance with Section 53(1) of the Financial Services Act 2007 (the "Act" or "FSA"), I have reasonable cause to believe that the Officers are not fit and proper. Accordingly, I am referring the matter to the EC (the "Committee") to take such actions as the Committee deems appropriate against the Officers.

During the investigation conducted on the Companies as from 18February 2015, the Investigators noted that the Officers of the Companies failed to act judiciously and in the best interests of the Companies. (Annexure 1 Copy of the Investigation Report)."

And concluded: "*Kindly note that, in this referral letter, the Commission will proceed by delineating separate Parts as follows:*

Part I - Background and Current Issues (Page -3 to 6)

Part II - Referral of Messrs. AV as directors of XYZ and FGH (Page-7 to 16)

Part III - Referral of Ms. ZS as director of ABC (Page-17 to 22)

Part IV - Other Observations (Page-23-24)

75. Part II – Referral of Mr AB as Directors of XYZ and FGH - gives details of the breaches committed by XYZ and FGH.

76. No reference is made of the breaches allegedly committed by ABC under the directorship of Applicant No 1. In his written submissions, Learned Counsel for the Respondent contended that Part III of the Referral Letter gives details of the alleged breaches committed by ABC. Our reading of Part III is that only Applicant No. 2 was referred to the EC for breaches committed by ABC under her directorship. Hence, the finding of the EC that Applicant No 1 was responsible for the breaches committed by ABC was outside its mandate.

77. We accordingly cancel the decision of the EC *quoad* both Applicants in respect of ABC for the reasons given.

78. We are now left to consider the decisions of the EC for breaches found committed by (a) XYZ and (b) FGH.

XYZ - Breach of section 18 of the FSA - it did not satisfy the criteria and standards including prudential applicable to its business activity.

79. In his representation to the September Notice, his grounds for review, and his statement of case, Applicant No. 1 contended that section 18 of the FSA

"*pertains to a vivid entity, a Company, which has just been licensed by the Respondent, or a forthcoming operator, whereas XYZ was licensed in June 2000 and had already surrendered its licence".*

80. Accordingly it would be wrong to say that XYZ had breached section 18 of the FSA. Furthermore the Chief Executive caused the publication of the Notice of Termination of license as per section 28(9) of the FSA on the 17th April 2015.

81. Under section 46(2)(a) of the FSA, the Chief Executive has a discretion to direct a person who has acted in contravention of the FSA to take such measures as may be necessary to ensure that contraventions of the FSA do not recur. Yet the Chief Executive did not deem it fit to do so and found the breaches proved without hearing the version of Applicant No. 1.

82. In its statement of Defence, the Respondent averred that the discrepancies were noted during the investigation which started on 18 February 2015 and XYZ was still holding a management licence. At the time of investigation, it was noted that:

(i) XYZ did not have the appropriate procedures for proper supervision of its business and the business of its clients and did not have adequate staff to ensure proper supervision of its clients in an orderly and judicious manner;

(ii) the directors of XYZ were not knowledgeable on regulatory and supervisory framework pertaining to global business, including the obligations to maintain customer due diligence documents on shareholders /beneficial owners of client companies on an on-going basis and the need to conduct independent checks on the sources of funds/wealth of shareholders.

83. Under section 18(2)(f) of the FSA, Applicant No. 1 once licensed should be able to satisfy criteria or standards, including prudential standards, applicable to its business activity.

84. With regards to section 46 (2) (a) of the FSA, the Respondent submitted that it provided XYZ and FGH with numerous opportunities to remedy the situation before proceeding with formal action. Pursuant to section 27(3) of the FSA, the Management Licenses of XYZ and FGH were suspended on 30 October 2013 on the following grounds:

a) XYZ and FGH breached section 23(1) of the FSA by transferring their shareholding to the Applicant without seeking the prior approval of the Respondent;

b) XYZ and FGH were imposing arbitrary termination fees on clients that proposed to move to another Management Company without being able to demonstrate that those fees had a legitimate basis or have been duly earned by XYZ and FGH; and

c) Applicant No. 1, acted in an improper and unprofessional manner by sending emails to the clients of both XYZ and FGH in a very unprofessional/abusive language.

85. Section 18 of the FSA provides for the conditions that the Respondent must be satisfied before granting a licence.

86. Section 18 (2) reads as follows:

“The Commission shall not grant an application unless it is shown to its satisfaction that –

(f) applicant No 1, once licensed, will be able to satisfy criteria or standards, including prudential standards, applicable to its business activity; and”

87. It therefore stands to reason that there is an ongoing obligation on the part of a licensee to satisfy the criteria set out under section 18(2)(f) of the FSA. The decision of the EC is accordingly maintained.

XYZ - Breach section 24 of the FSA failing to seek prior approval with respect to the appointment of Mr CP as Company Secretary and Compliance Officer

88. It is Applicant No 1's case that the approval of the Respondent was sought but the Respondent never replied to the said letter. Hence pursuant to section 24(3)(c), the application was deemed to be approved where the Respondent did not object within 15 days of receipt of the application. The Respondent was even copied the appointment pack sent to the Registrar of Companies. The Applicant No. 1 pointed out that the same procedures were adopted for the former Compliance Officer. The application was sent to the Respondent, she was called for an interview by Mr D but on the very date itself, Mr D cancelled the interview, no reason was given, and the former Compliance Officer was appointed *de facto*, pursuant to section 24(3)(c).

89. The Respondent submitted that: "According to the Applicant No. 1, XYZ requested the approval of the Respondent, for the appointment of Mr. CP to act as Company Secretary, on 1 June 2014 and 25 June 2014, whilst statutory filings were made with the Registrar of Companies on 23 June 2014 and highlighted that according to the records of the Respondent, the aforesaid letters were not received. Even at the time of investigation, the Applicant No.1 failed to provide copies of the letters dated 1 June and 25 June 2014. The only document which he provided was a copy of a dispatch book with an entry dated 25 June 2014, "Letter to Respondent". There was no signature on the dispatch book.

90. Under section 24 (3)(c), an application for the approval of the Commission in terms of subsection (1) shall 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 (emphasis added).

91. The above provision will operate in favour of a licensee if it is proved that the Respondent has indeed received the application.

92. In the present application, the Respondent contended that it did not receive the letter dated 01 June 2014 and that of 25 June 2014 allegedly sent.

93. According to Applicant No 1, an application was made for the approval of the appointment of Mr. CP to act as Company Secretary on 1 June 2014 and another application was made on 25 June 2014.

94. If Applicant No.1 did indeed consider that the application allegedly made on 01 June 2014 was deemed to be approved after 15 days, the question arises as to why he applied to the Respondent on 25 June 2014 seeking its approval for the appointment.

95. Applicant No. 1 produced three letters dated 01 June 2014, 23 June 2014 and 25 June 2014.

96. As per letter dated 01 June 2014 addressed to the Respondent – Applicant No. 1 sought the approval for the appointment of Mr CP as Company Secretary. The Respondent denied having received the letter.

97. In the second letter dated 23 June 2014, addressed to the Registrar of Companies with copy to the Respondent, Applicant No. 1 informed the Registrar of Companies that Mr CP had been appointed as Company Secretary.

98. In the letter dated 25 June 2014 addressed to the Respondent –Applicant No. 1 again sought the approval of the Respondent for the appointment of Mr CP as Company Secretary. The Respondent denied having received the letter.

99. The irresistible inference is that Applicant No. 1, as a Director, knew that under section 24(2) of the FSA, any appointment of an officer in contravention of subsection 1 shall be of no effect.

100. A copy of the despatch book (produced by the Respondent) bears the following entry "*25 June 2014 – Letter to Respondent – Post*".

101. The entry in the despatch book does not tilt the balance of probabilities in favour of Applicant No.1, if anything the balance tilts in favour of the Respondent - that the Respondent did not receive the application.

102. The comparison with the procedure adopted in the case of the former compliance officer, where according to Applicant No.1 the same procedure was followed, does not help Applicant No. 1's case. In that case the Respondent did receive the application and the proposed officer was called for interview.

103. We accordingly find that the appointment of Mr CP as Company Secretary was in breach of section 24 of the FSA.

104. We maintain the decision of the EC.

XYZ failing to keep record in accordance with section 29 of the FSA

105. In his representations to the September Notice, Applicant No. 1 stated "*we have indeed produced all the necessary documents to the Respondent as requested by the Respondent Officers on the 18 February 2015. I cannot understand what the Respondent meant by failing to comply with Section 29. As per the Respondent comment sheet, on the 18 February 2015, we have produced all documents and information required. The Respondent does not have any Respondent Comments sheets stating that it did not provide them with requested documents and information on the day of the investigation*."

106. The Respondent contended that XYZ failed to comply with section 29 of the FSA inasmuch as insufficient record keeping was noted. The deficiencies noted were listed in the copies of the Examiners' Comment Sheets produced which consist of 27 pages.

107. The format of the Comment Sheet is as follows:

Examiners Comments	Management Comments
Examiner: Examiner's signature: Team Leader: Team Leader's signature: Date:	Name of authorised officer: Signature: Date:

108. We note that the Comment Sheets produced do not bear the signatures of the examiners or the team leaders nor are their names printed. It is also observed that only two sheets are dated and two sheets bear the purported initial of the Team Leader.

109. When confronted with the unsigned and undated Comment Sheets, Mr Doongoor was taken aback, he collected himself and diffidently stated that this was an oversight.

110. The Examiners' Comments Sheets are the very basis on which the investigators prepare their reports. Accordingly, the Sheets have all their importance and they must be signed. Given that the examiners' Comments Sheets have not been authenticated, they do not have any probative value. Consequently, they cannot be relied upon.

111. We accordingly cancel the decision of the EC.

XYZ infringing section 30 of the Act - failing to file its audited financial statements for the years 30 June 2012, 30 June 2013 and 30 June 2014

112. Applicant No. 1 submitted that, these accounts were indeed produced to the investigators and this was noted on the Comment Sheets. The Applicant annexed a copy of the Comment Sheet. He further averred that at any rate the CE could have exercised her discretion under section 46 of the FSA.

113**.** It is here appropriate to consider the Respondent's submissions.

(i) It maintained that, as required under section 30 of the FSA, XYZ did not file its audited financial statements ("AFS") for the years 30 June 2012, 30 June 2013, 30 June 2014. The AFS for the years ended 30 June 2012 and 2013 were tabled as part of other documents requested in the course of the investigation and same were left at the premises of XYZ.

(ii) The Chief Executive has wide powers under the FSA and may use his discretion in fairness. A breach of section 30 of the FSA is a breach which entitles the Chief Executive to refer the matter to the EC.

(iii) under section 30 of the FSA, the audited financial statements of a licensee must be filed with the Respondent at the end of the financial year; and

(iv) Applicant No. 1 conceded that it was in the course of the investigation when queried that the audited financial statements were produced to the investigators. It follows that the AFS were not filed within the statutory timeframe.

114. At paragraph 1 of the Comment Sheet, the inspector whose name is printed at the bottom of the sheet wrote "*Audited financial statements for the year ended 2012 / and 2013 (received and viewed)"*

115. No mention was made that the Applicant No. 1 was reminded that the AFS should be duly filed with the Respondent within the prescribed timeframe and that viewing the AFS did not amount to filing of AFS with the Respondent. However, this is not material to the Respondent's case given that a director ought to know the timeframe within which to submit the AFS.

116. We accordingly find that Applicant No. 1did not comply with section 30 of the FSA. The decision of the EC is maintained.

XYZ breach of paragraph 4.2 of the Code - failing to identify and verify the identity of clients

117. We hasten to say that the particulars of the alleged breach would, if found established, be a breach of paragraph 4.1 of the Code and not paragraph 4.2 which caters for the verification of source of funds / property. Given that it well established that reference to the wrong section of the law is not fatal, we amend paragraph 4.2 and substitute therefor 4.1.

118. Applicant No. 1 contended that the undue suspension of the licence of XYZ in October 2013 resulted negatively on the Management Company, it suffered severe prejudice and lost most of its clients.

119. In the course of the enquiry in 2013 the very investigators, who conducted the investigations in February 2015, reviewed all the files of XYZ over a period of two months. The investigators were satisfied that XYZ had complied with the conditions imposed and the suspension was cancelled. The Respondent had the KYC of J N who was the sole shareholder of the remaining companies which were dormant and inactive.

120. In its statement of defence, the Respondent averred that "XYZ had failed to comply with Paragraph 4.2 (sic) of the Code insofar as it did not identify and verify the identity of its clients using reliable, independent source documents, data or information. It was noted, with serious concern that XYZ did not establish a system to monitor the source of funds of its clients. The more so, as per the Procedure Manual of XYZ, in order to understand the client's business and to ascertain the source of funds, a Fact Sheet and Source of Fund Declaration form need to be completed by all client companies. However, during the Investigation, no Fact Sheet and/or Source of Fund Declaration Form was seen on any client file. This deficiency was observed in almost all clients' files of XYZ. The above also shows that XYZ did not comply with its own Procedure Manual."

121. The first two lines reproduced the averments in the notice. The remaining part referred to source of funds. As already alluded to, this is a breach of paragraph 4.1 and not 4.2.

122. The alleged breach is based on the investigation. The Examiners' Comment Sheets as mentioned earlier were not authenticated. Consequently, they have no probative value and cannot be acted upon.

123. The decision is accordingly cancelled.

XYZ failing to comply with paragraph 7.7 of the Code and to adopt a compliance culture

124. The alleged breach is based on the Examiners' Comment Sheets produced. As already alluded to, the Sheets bear no authenticity except for a purported initial of the Team Leader.

125. We accordingly cancel the decision of the EC for the reasons given above.

FGH breach of section 30 of the FSA - failing to file its audited financial statements for the years 30 June 2012, 30 June 2013 and 30 June 2014

126. According to Applicant No.1:

(i) It was agreed with the Respondent to produce those accounts at a later stage;

(ii) when he took office as Managing Director of FGH in March 2013 accounts for the financial year ended June 2012 was due. He retained the services of an Audit firm in order to prepare the outstanding accounts and also the account for the current year. At the time he left office in June 2014 the said accounts were still under preparation and;

(iii) With regards to the accounts for the year 2014, the Applicant having already resigned as director of the Company in June 2014, he could not therefore have been held responsible for failing to file AFS for the year ending 30th June 2014.

127. The Respondent submitted that the Applicant clearly admitted that the AFS had not been filed with the Respondent as required by section 30 of the FSA.

128. Applicant No. 1 did not produce any evidence to substantiate his contention at 1 above. Indeed at 2 above, there is a clear admission that the audited financial statements for the year 30 June 2012 was due when he took office in March 2013 and that for the year 30 June 2013 was due at the time of the investigation. Hence, on the Applicant's own admission that the audited financial statements for the year 2012 and 2013 were under preparation, he could not have filed the audited financial statements with the Respondent.

129. As for the filing of the audited financial statements for the financial year ending 30 June 2014, Applicant No. 1 cannot be held responsible given that he resigned as director on 26 June 2014.

130. We cancel the decision of the EC regarding the failure to file the audited financial statements for the year 2014 and maintain the decision with respect to the financial year 2012 and 2013.

FGH breach of section 44(2) of the FSA - failing to provide documentation and information requested during an investigation

131. The following are admitted:

(i) Applicant No. 1 resigned as director of FGH on 26 June 2014;

(ii) FGH surrendered its licence on 25 June 2014;

132. Applicant No. 1's case:

At the time the investigation was conducted, he was neither a director nor an officer of FGH. He had already resigned. He was therefore unable to communicate the requested documentation. He further averred that the allegation was very vague.

133. The Respondent's submission:

(i) Under section 44(7) of the FSA, a licensee includes any person who is a present or past officer, partner, or controller of the licensee. Furthermore, under section 29(2)(c) of the FSA, every record should be kept for a period of at least 7 years after the completion of the transaction to which it relates.

(ii) As per its records, FGH and XYZ had the same registered office at the date the licence was surrendered and the Applicant was still a director of FGH.

(iii) At the time of the 2015 investigation, the investigation team was not provided with client files/ records even though the Applicant was physically present; XYZ and FGH shared the same premises and the same management. The Applicant had full access to records of FGH which were kept together with records of XYZ.

(iv) Furthermore, during the 2015 investigation, the Applicant intimated to the investigators that the trusts previously under FGH's administration had been transferred to CTCL in St. KN and he refused to provide any information on the grounds that FGH had already surrendered its Management Licence. The Respondent requested information from the Financial Services Regulatory Commission, N, W I with respect to CTCL whereby it was informed that the Register of Shareholders and Directors for CTCL filed in October 2014 disclosed that Applicant No. 1 was a shareholder and director of CTCL.

134. The contention of Applicant No. 1, that the allegation is vague, is of substance. But, as will be seen, it is not fatal to the Respondent's case. Considering that the EC was contemplating to impose a very serious sanction on the Applicant, the EC ought at least to have mentioned the documentation and information requested. However, this defect was

cured when the Applicant stated that he was unable to communicate the documentation and information requested. We understand that Applicant No. 1 was aware of the documentation and information sought.

135. FGH had surrendered its licence on 25 June 2014. Applicant No. 1 resigned as director of FGH on 26 June 2014 and the investigation was conducted some 8 months after his resignation.

136. Section 44(2)(a) of the Act provides:

(2) For the purposes of this section, a person duly authorised in writing by the Chief Executive as an investigator shall have all the powers of the Chief Executive under section 43 and may direct the licensee, or any of its officers, its employees, and its associates or any witness –

(a) to produce to the investigator, at a reasonable time and place specified in the direction, any specified document or other thing that may afford such evidence and that is in his possession or under his control;

137. As a past officer of the licensee, Applicant No. 1 would be caught under subsection 2 provided it is shown that the document sought was in his possession or under his control.

138. According to the Respondent, FGH and XYZ shared the same premises and have the same management company. Applicant No. 1 was present on the day of the investigation. Thus, Applicant No. 1 had full access to the records which were kept with the records of XYZ.

139. Applicant No. 1 told the investigators that FGH Trust was transferred to CTCL in St. KN, but he refused to provide any information on the

grounds that FGH had already surrendered its Management Licence. Furthermore, the Respondent requested information from the Financial Services Regulatory Commission, N, WI with respect to CTCL whereby it was informed that the Register of Shareholders and Directors for CTCL filed in October 2014 disclosed that the Applicant was a shareholder and director of CTCL. It follows that Applicant No. 1 had full access to the records of FGH even after the surrender of its licence.

140. The Review Panel requested the Respondent to produce the Comments Sheets in respect of FGH. Learned Counsel stated that:

Since, Mr. AB refused to provide any information, no comment sheet was filled in. The investigators made their notes and drafted the report. All the findings are contained in the referral letter.

141. Assuming that Applicant No. 1 had access to the documents sought, it does not follow that the documents were in his possession or under his control. That he was a shareholder and director of CTCL did not give him the right to produce document pertaining to FGH to the Respondent. Albeit the Applicant No. 1 was a shareholder and director of CTCL it does not mean that the documents sought in respect of FGH was in his possession or under his control.

142. We accordingly cancel the findings of the EC.

143. We have now to determine the appropriate sanction that would meet the ends of justice having regard to the breaches found committed in respect of:

a) XYZ, namely:
   (i) breach of the ongoing obligation to satisfy the criteria set out under section 18(2) (f) of the FSA;
   (ii) appointment of Mr CP as Company Secretary in breach of section 24 of the FSA; and
   (iii) breach of section 30 of the FSA.

b) FGH, namely, breach of section 30 of the FSA.

144. Section 7(1)(c) of the Act 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 –

(i) issue a private warning;

(ii) issue a public censure;

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

(iv) in the case of an officer of a licensee, disqualify the officer from a specified office or position in a licensee for a specified period;

(v) impose an administrative penalty;

(vi) revoke a licence;

145. Section 20 of the FSA provides that

20. Matters related to fit and proper person requirements
(1) In considering whether a person is a fit and proper person the Commission may have regard to –

(a) in relation to the person and, where the person is a corporation, the officers and beneficial owners of the corporation –

(i) financial standing;

(ii) relevant education, qualifications and experience;

(iii)ability to perform the relevant functions properly, efficiently, honestly and fairly; and

(iv) reputation, character, financial integrity and reliability;

(b) any matter relating to –

(i) any person who is or is to be employed by, or associated with, the person;

(ii) any agent or representative of the person;

(iii) where the person is a corporation, the officers and any shareholder of the corporation, the related corporations of the corporation and the officers of those related corporations; and

(c) any matter specified in a relevant Act as relating to the fit and proper person requirement.

(2) For the purposes of this section, the Commission may have regard to any other information in its possession.

146. In the present case, from the breaches committed and the surrounding circumstances, it is clear that Applicant No.1 did not discharge his duty as a director properly and efficiently. However, we find no element of dishonesty.

147. Taking into consideration that:

(a) any appointment in breach of section 24 (1) shall under subsection 2 be of no effect;

(b) there is no evidence of previous sanction for breaches of the FSA against Applicant No. 1;

(c) there is no evidence of dishonesty;

(d) the number of breaches committed; and

(e) the nature of the breaches committed

we take the view that the disqualification for a period of 4 years is disproportionate.

148. We accordingly amend the decision of the EC quoad Applicant No.1 and issue to him the following private warning:

"Following your application for review of the decision of the Enforcement Committee dated 01 April 2016, we take the view that:

(a) XYZ

(i) breached the ongoing obligation to satisfy the criteria set out under section 18(2)(f) of the Financial Services Act;

(ii) appointed Mr CP as Company Secretary in breach of section 24 of the Financial Services Act;

(iii) breached section 30 of the Financial Services Act; and

(b) FGH breached section 30 of the Financial Services Act.

For reasons set out in the determination of the Financial Services Review Panel 2018 FSRP 3, a private warning is accordingly being issued to you as a past director of the above-named companies under section 7(1)(c)(i) of the Financial Services Act."

149. In view of our findings cancelling the decisions of the EC in respect of ABC, the decision of the EC disqualifying Applicant No.2 for a period of 2 years is accordingly cancelled.

Mrs. R. N. Narayen

(Chairperson)

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Mr. Y. Jean- Louis

(Vice - Chairperson)

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Mr. S. Lalmahomed

(Member)

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Date: 30 March 2018