

BEFORE THE FINANCIAL SERVICES REVIEW PANEL

2018 FSRP 6

In the matter of –

- 1. BRT Ltd**
- 2. PH**
- 3. MC**
- 4. DG**

Applicants

v

The Financial Services Commission

Respondent

DETERMINATION

(Published by the Financial Services Review Panel under section 66(7) of the Financial Services Act)

1. This is an application for a review of the decisions of the Enforcement Committee:
 - (a) revoking the management licence of Applicant No.1; and
 - (b) disqualifying Applicants Nos. 2, 3 and 4 from holding positions as officers in any licensees of the Respondent for a period of 5 years.
2. After hearing preliminary objections, the Review Panel directed, on 6 April 2018, that this matter proceed on its merits – vide Review Panel Decision 2018 FSRP 4.
3. Before delving into the merits of these applications, it is appropriate to consider two issues raised by the Applicants –
 - (a) whether on the face of the letters dated 11 September 2017, the Enforcement Committee has been properly constituted in that all decisions therein are being taken by Mr. M. N; and
 - (b) whether on the face of the letters dated 11 September 2017, the Enforcement Committee has fettered its powers by delegating the same to Mr. M. N.
4. The letters dated 11 September 2017¹ are individually addressed to the Applicants. They are titled “Re: Notice under section 53(3) of the Financial Services Act 2007”.

¹ Editorial Note: The signed version reads “11 September 2018”. This is a typographical error and the correct date should read “11 September 2017”, as currently published.

They are signed by “M. N, Secretary of the EC”, “EC” being the abbreviation used in the letters for the Enforcement Committee.

5. We find it appropriate here to reproduce the following provisions of the Financial Services Act –

3. *Establishment of Commission*

(1) *The Financial Services Commission established under the repealed Financial Services Development Act 2001 shall be deemed to have been established under this Act.*

(2) *The Commission shall be a body corporate.*

(3) ...

4. *The Board*

(1) *The Commission shall be administered and managed by a Board.*

(2) ...

(3) ...

(4) ...

7. *Powers of Commission*

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

(a) ...

(b) ...

(c) *with respect to a present or past licensee or any person who is a present or past officer, partner, shareholder, or controller of a licensee—*

(i) *issue a private warning;*

(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;*

(d) ...

(e) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

52. *Enforcement Committee*

(1) *The Board shall set up an internal committee which shall be known as the Enforcement Committee.*

(2) *The Enforcement Committee shall consist of—*

(a) *2 members to be 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 Enforcement Committee.*

(3) *The Enforcement Committee may exercise the disciplinary powers of the Commission under section 7 (1) (c) to impose an administrative sanction on a licensee.*

(4) *The Enforcement Committee shall have such other functions as may be conferred upon it under the relevant Acts.*

(5) *The members of the Enforcement Committee shall be appointed on such terms and conditions as the Board may determine.*

6. The Financial Services Act does not provide for the office of Secretary of the Enforcement Committee. Yet, it can be seen from the above provisions that the Enforcement Committee is an internal committee of the Board. There is nothing under the Act that precludes the Enforcement Committee from having a Secretary to assist in administrative tasks. A close look at the letters dated 11 September 2017 reveal that whenever referring to an action or a decision of the Enforcement Committee, Mr. N expressly refers to the “EC” having performed the action or taken the decision. Nowhere does Mr. N use the personal pronoun “I” and it cannot be said by any stretch of the imagination that the decisions contained in the letters of 11 September 2017 are those of Mr. N and not those of the Enforcement Committee.

7. We therefore hold that the issues set out at paragraph 3 above are devoid of merits.

8. In the light of the above, we shall proceed to consider the merits of the present applications.

Applicant No. 3 (MC)

9. The case of this Applicant differs from that of the other Applicants in that the Enforcement Committee considered that he had failed to submit written representations within the required 21 days and disqualified him from holding position as officer in any licensees of the Respondent for a period of 5 years. The reasons for holding that Applicant No. 3 had failed to submit representations within 21 days are to be found at paragraph 2 of the letter from the Enforcement Committee dated 11 September 2017, which we have found fit to reproduce *in extenso* together with paragraph 1 of the said letter –

“1. We refer to the notice from the Enforcement Committee (the “EC”) dated 03 August 2017 bearing reference [...] (the “Notice”).

2. We also refer to the letter dated 22 August 2017 under the signature of Mr DG purporting to be your written representations regarding the Notice. The EC has however noted that you have failed to provide evidence that you have expressly authorised Mr DG to submit written representations on your behalf. In the absence of such an authorisation, the EC has not considered the content of the letter dated 22 August 2017 and has concluded that you have failed to submit representations within 21 days from the date of the Notice.”

10. We note that there is on record a letter dated 3 July 2017 from Mr. MC, which reads as follows –

“To whom it may concern,

I MC have authorised Messrs DG and PH to act on my behalf in all matters concerning BRT Ltd (formerly known as GBT Ltd) to act on my behalf in all matters pertaining to the Suspension of the Licence of GBT and to me in person as Director of GBT.”

11. There is no evidence on record to show that the Enforcement Committee was in presence of the letter dated 3 July 2017. However the letter dated 22 August 2017 bears the heading “MC” and is signed “PP: MC”, the word “pp” meaning “*per procuracionem*” or “on behalf of”.
12. It is here appropriate to refer to the second rule of natural justice sometimes expressed in Latin as *audi alteram partem* and translated as “he who decides must hear”.

13. In R (on the Application of Hill) v Institute of Chartered Accountants in England and Wales [2013 EWCA Civ 555], at paragraph 47, Lord Justice Beatson held as follows –

“47. More broadly, the requirements of natural justice have often been described as "fair play in action": see, for example, Lord Morris of Borth-y-gest in Wiseman v Borneman [1971] 1 AC 297 at 309. Particularly since the re-invigoration of the principles almost 50 years ago in Ridge v Baldwin [1964] AC 40, the concept of fairness embodied in the different strands of natural justice has been seen as flexible and as not requiring the courts to lay down over rigid rules: see R v Monopolies and Mergers Commission, ex p. Matthew Brown Plc [1987] 1 WLR 1235 and Lloyd v McMahon [1987] 1 AC 625 at 702.”

14. Based on the fact that the letter dated 22 August 2017 bears the heading “MC” and is signed “PP: MC”, we hold that the Enforcement Committee has laid down an over rigid rule in requiring Applicant No. 3 to provide evidence that he had expressly authorised Mr. DG to submit written representations on his behalf. We accordingly cancel the decision of the Enforcement Committee in respect of Applicant No. 3.

Applicants Nos. 1, 2 and 4

15. The decisions of the Enforcement Committee in respect of Applicants Nos. 1, 2 and 4 are premised on breaches described at Annex 1 to notices under section 53(2) of the Financial Services Act dated 3 August 2017 and served individually on these Applicants. The Annex 1 is similar in all 3 notices and is reproduced in the Appendix to this determination.
16. The alleged breaches are set out in detailed and explicit terms as can be seen from the Appendix and concern various breaches of the FSC Code on the Prevention of Money Laundering and Terrorist Financing 2012 by Applicant No. 1 in respect of –
- (a) MF;
 - (b) FL;
 - (c) ABDL; and
 - (d) EALL.
17. We have carefully considered the replies of Applicants Nos. 1, 2 and 4 to the notices from the Enforcement Committee. None of the replies address the specific issues raised in respect of –
- (a) MF;
 - (b) FL;
 - (c) ABDL; and
 - (d) EALL.
18. In fact, to our great astonishment, none of the alleged specific breaches are denied, let alone traversed.

19. In these circumstances, the Review Panel finds it difficult to interfere with the decision of the Enforcement Committee.
20. Our analysis would not be complete if we did not consider the contention of Applicants Nos. 2 and 4 to the effect that breaches by Applicant No. 1 could not be invariably ascribed to them in their capacities as directors of Applicant No. 1.
21. To this contention, our view is that the acts or omissions of a company have necessarily to be attributed to controlling minds, in this case directors, as human agents. Short of Applicants Nos. 2 and 4 having shown that they had no knowledge of or involvement in the breaches said to have been committed by Applicant No. 1, we cannot find fault with the decision of the Enforcement Committee with respect to Applicants Nos. 2 and 4.
22. We accordingly confirm the decisions of the Enforcement Committee in respect of Applicants Nos. 1, 2 and 4.

Y. Jean- Louis

(Vice - Chairperson)

S. Lalmahomed

(Member)

Date: 24 September 2018