

TRIBUNAL GHAL SERVIZZI FINANZJARJI

Pierre Lofaro LL.D. — Chairman
Joseph Kenely M.S.C., A.C.M.A., F.I.A., C.P.A.A. — Membru
Maggur Francis X. Naudi F.I.A., C.P.A.A., - Membru

Illum, 16 t'Ottubru, 2002.

**Id-decizjoni tat-tribunal wara
1-appelli intavolati minn
Fenici Insurance Agency Ltd.
(FIAL) permezz ta' ittra
datata 25 ta' Lulju 2001.**

Fil-21 t'Awissu 2001 it-tribunal ircieva s-segwenti ittra datata 25 ta' Lulju 2001 minghand FIAL, soejeta' li fid-19 t'Awissu 1998 inghatat licenzja sabiex tkun tista' tagixxi bhala "*an insurance agent in-non-life business on behalf of certain underwriters at Lloyd's*¹":

We refer to the following administrative penalties imposed on our company by the Malta Financial Services Centre (the Centre) namely:

1. 9th March 2001 – Lm1,640

Failure of a company acting as an insurance agent to either keep monies held in a fiduciary capacity in a separate account or effect a fidelity bond in accordance with requirements as may be determined by an Insurance Directive made for the purpose of section 13.

2. 2nd February 2001 – Lm505

Failure of an authorised company to enrol in the Sub-Agents List a person registered by the company as an insurance subagent in the Sub-agents Company Register of the company.

¹Ara, inter alia, l-affidavit ta' John Bonett – Director of Insurance, Malta Financial Services Centre – a fol 37 tal-process.

3. 16th May 2001 – Lm260

Failure of company to comply with any condition authorisation.

In connection with the above we would like to formally register our recourse to the Financial Services Tribunal in terms of Article 58 of Act XVII of 1998 (Cap. 403 of the Laws of Malta). The Company feels that the Centre has wrongly applied the provisions of Act XVII of 1998 in its justification of the imposition of the above penalties.

We furthermore refer to the letter received by the Centre dated 23rd January 2001 a copy of which is attached for ease of reference calling upon our company to provide for a contingent liability towards the Centre of Lm9,890 in connection with fees paid to PricewaterhouseCoopers by the Centre who were appointed by the Centre to carry out a non-statutory audit exercise imposed upon the company by the Centre. In this respect the company is claiming protection under Article (2)(b) of Article 58 of Act XVII of 1998.

It would be appreciated if you would indicate what procedure, from this stage onwards, is to be followed by the Company for the submission of in-depth reasons and relative documentation for the hearing of these appeals.

Illi in segwitu ghal din l-ittra it-tribunal ghadha sabiex jisma dawn l-erba' l-appelli u cioe:

(a) Appell minn decizjoni tal-MFSC tad-9 ta' Marzu 2001 li permezz taghha l-MFSC imponiet fuq FIAL penali amministrattiva ta' Lm1,640.

(b) Appell minn decizjoni tal-MFSC tad-2 ta' Frar 2001 li permezz taghha l-MFSC imponiet fuq FIAL penali amministrattiva ta' Lm505.

(c) Appell minn decizjoni tal-MFSC tad-16 ta' Meju 2001 li permezz taghha l-MFSC imponiet fuq FIAL penali amministrattiva ta' Lm260.

(d) Appell minn decizjoni tal-MFSC li permezz taghha l-MFSC talbet lil FIAL sabiex tipprova *for a contingent liability towards the Centre of Lm9,890 in connection with fees paid to PricewaterhouseCoopers by the Centre who were appointed by the Centre to carry out a non-statutory audit exercise imposed upon the company by the centre*

L-avvenimenti saljenti fit-trattazzjoni ta' dawn l-appelli kienu, kronologikament, is-segwenti:

(a) Fl-ewwel seduta, mizmuma fl-4 ta' Dicembru 2001:

- (i) FIAL iddikjarat illi hija qeghda tappella a bazi ta' l-artikolu 58(1)(f) tal-Kap. 403;
 - (ii) It-tribunal ordna lil FIAL sabiex permezz ta' ittra ticcara l-erba' appelli minnha imsemmija fl-ittra taghha tal-25 ta' Lulju 2001 u dan b'tali mod illi t-tribunal ikun f'posizzjoni illi jifhem it-talbiet taghha u l-Malta Financial Services Centre (MFSC) tkun f'posizzjoni li tiddefendi ruhha.
- (b) Fit- 18 ta' Dicembru 2001 it-tribunal ircieva l-ittra spjegattiva ta' FIAL, b'numru ta' dokumenti annessi maghha.
- (c) Fis-seduta ta' 1-20 ta' Dicembru 2001:
- (i) Dr. David Fabri ghal MFSC iddikjara "illi jzomm ferm il-posizzjoni ta' l-MFSC s'issa fis-sens illi l-penali/mizuri nflitti/mehuda huma gusti kemm fis-sustanza u kemm fil-forma".
 - (ii) Il-partijiet qablu illi l-erba' appelli ghandhom jigu ttrattati separatament; b'dan illi, billi hemm konnessjoni bejn l-ewwel u t-tielet appell u jista' jkun hemm xhieda komuni fir-rigward taghhom, l-partijiet qablu illi l-ewwel jittrattaw dawn iz-zewg appelli. Il-proceduri gew differiti ghas- 16 ta' Jannar 2002 sabiex FIAL ggib il-provi taghha fuq l-imsemmija iz-zewg appelli.
- (d) Fis-seduta tas-16 ta' Jannar 2002 FIAL ippresentat affidavit ta' Joseph Perici Calascione rigwardanti l-ewwel u t-tielet appell.
- (e) L-MFSC ipprezentat zewg affidavits (mahlufa fit-30 ta' Jannar 2002) ta' John Bonett, id-Direttur ta' l-Insurance taghha, rigwardanti rispettivament l-ewwel u t-tielet appell.
- (f) Fis-seduta tas-6 ta' Marzu 2002:
- (i) FIAL ippresentat affidavit ta' Carmel Damato.
 - (ii) Xehed Joseph Perici Calascione in kontroezami.

- (g) Permezz ta' ittra datata 13 ta' Marzu 2002, illi t-tribunal irceiva fl-20 ta' Marzu 2002, FIAL ipprezentat affidavit konguntiv ta' Joseph Perici Calascione, Carmel Damato u Silvan Said ma liema affidavit huma annettew dokument rigwardanti l-ewwel u t-tielet appell.
- (h) L-MFSC ipprezentat zewg affidavits ohra (mahlufa fit-22 ta' Mejju 2002) ta' John Bonett rigwardanti l-ewwel u tielet appell.
- (i) Fis-seduta tat-8 ta' Mejju 2002 FIAL ipprezentaw affidavit ta' Joseph Perici Calascione, liema affidavit jirrigwarda t-tieni appell. Ma dan l-affidavit hemm dokument anness.
- (j) Fl-20 ta' Mejju 2002 FIAL ipprezentaw affidavit ta' Ronald Said, b'numru ta' dokumenti, dan riferibbilment ghat-tieni appell tagghom.
- (k) Fis-seduta tak-22 ta' Mejju 2002:
 - (i) l-MFSC ipprezentat affidavit ta' John Bonett, b'numru ta' dokumenti mieghu, u dan rigwardanti t-tieni appell ta' FIAL.
 - (ii) l-MFSC ipproduciet bhala xhud lil Kevin Vella, Manager fl-Insurance Division taghha, u dan ghar-rigward it-tieni appell ta' FIAL.
- (l) Fis-seduta tat-3 ta' Gunju 2002 l-MFSC ipprezentat nota ta' l-osservazzjonijiet rigwardanti t-tieni appell.
- (m) Fil-21 ta' Gunju 2002 l-MFSC ipprezentat nota ta' l-osservazzjonijiet ghar-rigward l-ewwel u t-tielet appell.
- (n) Fl-24 ta' Gunju 2002 FIAL ipprezentat nota ta' l-osservazzjonijiet responsiva ghar-rigward it-tieni appell.
- (o) Fis-seduta tas-27 ta' Gunju 2002:
 - (i) L-MFSC ipprezentat risposta ghan-nota responsiva ta' FIAL rigwardanti t-tieni appell.
 - (ii) Dwar ir-raba' appell l-partijet qablu illi stante li l-MFSC ghada ma mponitx il-hlas u kull ma ghamlet s'issa kien li hija rriservat id-dritt li timponi tali hlas, kull appell rigwardanti l-istess hlas ghandu jsir biss jekk u meta l-MFSC titlob l-istess hlas. Fid-dawl ta' din id-dikjarazzjoni FIAL irtiraw ir-raba' appell.

- (p) Fl-11 ta' Lulju 2002 FIAL ipprezentat noti ta' l-osservazzjonijiet rigwardanti t-tlett appelli taghha.
- (q) Fid-29 ta' Lulju 2002 l-MFSC ipprezentat nota ta' osservazzjonijiet fir-rigward tat-tlett appelli u dan minflok it-trattazzjoni finali prevista ghas-seduta tas-6 t'Awissu 2002.
- (r) Fis-seduta tas-6 t'Awissu 2002:
 - (i) FIAL inghatat l-opportunita' sabiex tirrispondi bil-miktub in-nota ta' l-MFSC tad-29 ta' Lulju 2002 u dan sal-21 ta' Awissu 2002.
 - (ii) Il-kaz gie differit ghas-sentenza ghall-Ottubru 2002.
- (s) Fid-19 t'Awissu 2002 FIAL ipprezentat in-nota responsiva taghha.

Illi qabel ma jghaddi sabiex jezamina t-tlett appelli ta' FIAL (stante li r-raba' appell gie rtirat fis-seduta tas-27 ta' Gunju 2002), t-tribunal jidhirli li jkun opportun illi jaghmel issegwenti osservazzjonijiet: -

- (a) L-Att dwar il-Kummerc ta' Assigurazzjoni (Kap 403) u l-Att dwar Brokers fl-Assigurazzjoni u Intermedjari Ohra (Kap 404) dahlu fis-sehh fl-i ta' Ottubru 1998 u dan permezz ta' l-Avvizi Legali 188 u 189 ta' l-1998.
- (b) A tenur ta' l-Artikolu 2 (3) tal-Kap 403:

In this Act and in any rules or regulations made thereunder, if there is any conflict between the English and the Maltese texts, the English text shall prevail.
- (c) L-artikolu 2 (3) tal-Kap 404 jghid l-istess haga.
- (d) Ghal din ir-raguni f din id-decizjoni id-dispozizzjonijiet ta' dawn iz-zewg Atti se jigu kkwotati bil-lingwa ingliza.
- (e) Permezz ta' l-Avviz Legali 190 ta' l-1998 il-Ministru tal-Finanzi u l-Kummerc innomina lill-Malta Financial Services Centre bhala l-Awtorita Kompetenti ghall-finijiet ikkontemplati fl-imsemmija zewg Atti.

(f) Illi a tenur ta' l-Artikolu 4 (1) tal-Kap 403:

It shall be the duty of the Competent Authority to carry out the functions assigned to it by or under this Act and to ensure that persons authorised to carry on the business of insurance in or from Malta comply with the provisions of this Act and of any rules or regulations made thereunder, with any Insurance Directive made by the Competent Authority in virtue of this Act and of any rules or regulations made thereunder and with the conditions specified in their respective authorisation.

(g) Illi testisti disposizzjoni simili fil-Kap 404.²

(h) illi l-Artikolu 58 tal-Kap jipprovdi s-segwenti:

(1) Subject to the provisions of this section, any person who is aggrieved by a decision of the Competent Authority –

OMMISSIS

(f) to impose an administrative penalty in respect of infringements as may be prescribed under section 67 of this Act.

May appeal against the decision to the Financial Services Tribunal which shall have exclusive competence to hear appeals on the matters listed in this subsection.

(2) An appeal under this section shall lie only on any of the following grounds –

(a) that the Competent Authority has wrongly applied any of the provisions of this Act or

(b) that the decision of the Competent Authority constitutes an abuse of discretion or is manifestly unfair, provided that the discretion of the Competent Authority may not, so long as it has been exercised properly, be queried by the Tribunal.

(i) il-Kap 404 ghandu disposizzjoni simili.³

² Artikolu 4(1)

³ Artikolu 45

L Ewwel Appell

Id-decizjoni tal-MFSC

Dan jirrigwarda penali amministrattiva illi l-MFSC imponiet fuq FIAL permezz ta' ittra datata 9 ta' Marzu 2001 u li tinsab esibita bhala appendix H ma l-affidavit ta' John Bonett rigwardanti dan -l-appell, liema affidavit sar fit-30 ta' Jannar 2002.

Fi kliem John Bonett – ara l-imsemmi affidavit tieghu:

Following submissions of the audited accounts for the year ended 31 December 2000 and the management accounts for the month of January 2001, it transpired that from at least 31 December 2000 to 31 January 2001 the company had a deficiency of the Business of Insurance Account. At 31 December 2000 the deficiency amounted to Lm3,355 and at 31 January 2001 the deficiency amounted to Lm2,306. An administrative penalty was imposed in this respect on 9 March 2001. The penalty amounted to Lm1640 and was computed as the minimum amount stipulated for such infringement by the Insurance Business (Penalties for offences and Infringements) Regulations, 2000 (Legal Notice 100 to 2000).

Skond l-MFSC din ma kinitx l-ewwel darba li FIALkellha deficjenza fil-*Business of Insurance Account* taghha.

Id-disposizzjonijiet rilevanti tad-dritt in materja

1. illi a tenu ta' l-artikolu 13(5) tal-Kap 403 agent ta' l-assigurazzjoni ta' kumpanija awtorizzata (bhalma hija FIAL) 'is also subject to the requirements set out in Part III of the Fourth Schedule to this Act'.

2. is-subartikolu (6) tal-imsemmi artikolu 13 jghid:-

the Competent Authority shall, by an Insurance Directive made for the purposes of this section, determine matters required to be determined under any provision contained in the Fourth Schedule to this Act.

3. il-paragrafu 5 tat-Taqsima III tar-Raba' Skema tal-Kap 403 jaqra hekk:-

Every authorised insurance agent or insurance manager shall keep moneys held by it in a fiduciary capacity separate from its own moneys and shall, in respect of those moneys, maintain separate accounts in accordance with requirements determined by the Insurance Directive made for the purposes of section 13.

4. Din id-Direttiva dwar l-Assigurazzjoni saret ggib in-numru 11 ta' l-1999, bl-isem "monies Held in Fiduciary Capacity". Din dahlet fis-sehh fir-rigward ta' agenti ta' l-assigurazzjoni gia licenzjata fl-1 ta' Ottubru 1999.

5. kif spjega tajjeb John Bonett fl-imsemmi affidavit tieghu;-

The Directive refers to the two methods for the protection of monies held in a fiduciary capacity outlined by the Act itself and allows for the company to choose between:-

- (a) operating a Business of Insurance Account, i.e. effectively separating client's monies from the company's own monies; or
- (b) effecting and holding a fidelity bond as respect the company's business of insurance.

FIAL opted for the first method of protection of monies held in a fiduciary capacity.

6. Il-Paragrafu 8 ta' l-Ewwel Skenda tad-Direttiva jghid:-

Every company concerned shall ensure that at all times value of the insurance transactions assets of its business is not less than the amount of the insurance⁴ transactions liabilities of that business.

7. "*Insurance transactions assets*" huma definiti bhala:

the aggregate of balances on banking accounts designated "Business of Insurance Accounts", approved short term assets designated "Business of Insurance Accounts" or held for the Business of Insurance Account of the company at an approved bank at which such Business of Insurance Account is held and debtors in respect of insurance transactions.

8. Il-Frazi "*insurance transaction liabilities*" hija definita bhala:

The aggregate of creditors in respect of insurance transactions.

9. Il-Paragrafu 3 ta' l-imsemmija l-Ewwel Skeda tad-direttiva jghid:-

Every company concerned shall without delay and, in any event, not later than the next two business days after the day the money is paid to or received by the company, pay or cause to be paid into a Business of Insurance Account and into no other account,

- (a) all monies which are paid to or received by it from any source and which relate to insurance transactions of any kind connected with its business of insurance including commission and duty payable on policies and endorsement thereon;
- (b) all monies which are paid to or received by it in respect of the disposal of, or otherwise in connection with, approval short terms assets.

10. Filwaqt illi l-paragrafu 9 jiddisponi kif gej:

Every company concerned shall ensure that its accounting records are kept in such a way as to enable compliance with the requirements of this schedule to be demonstrated at any time.

11. il-Kap, 403 u r-regolamenti li saru jaghtu s-setgha lill-MFSC li timponi penali amministrattiva f'kaz li ma jkunx hemm fondi sufficjenti fil-*Business of Insurance Account* ta' agent ta' assigurazzjoni ta' kumpanija awtorizzata.

Is-sottomissjonijiet ta' FIAL

Il-posizzjoni ta' FIAL fuq din il-materja hija imfissra tajjeb fl-ittra spejgattiva taghha tat-18 ta' Dicembru 2001 fejn gie sottomess;-

The Company did not have in actual fact a deficiency in the Business of Insurance Account as maintained by the Centre in support of the imposition by it of this penalty. This alleged shortfall stems from the fact that the Centre, in its consideration of the relative facts and figures, did not take into consideration a sum of money which was due to be paid by third parties to the Company, into the account of the company which is taken and considered for the calculation of the Business of Insurance Account.

Through a failing of such third party, the monies were sent by it to the account of Fenici Insurance Brokers Limited, an associated company of the Company with which such third parties had in previous years had business dealings with. This was money destined for the account of the Company.

It is to be noted that even in spite of this state of affairs, for the sake of prudence and clarity, and since debts from a related company would not in this case be taken into consideration for the calculation of the Business of Insurance Account, the Company proceeded to rectify this error – albeit made by third parties independently of any involvement of the Company - by depositing an equivalent sum in the relative Business of Insurance Account. This is without prejudice to the fact that the directives do not per se exclude associated companies as insurance debtors if the amounts in questions are actually premia due to the Company.

This notwithstanding, the Centre deemed this as a failing on the part of the Company and proceeded to impose the penalty.

This penalty therefore was imposed on the Company as a result of a fact, which the Company itself had no involvement in and was not in any way part of. No act or omission of the Company brought about this particular state of affairs and the imposition of the relative penalty was therefore improper and inapplicable.

Is-sottomissjonijiet ta' l-MFSC

Dawn huma spjegati b'mod car minn John Bonett fl-affidavit tieghu tat-30 ta' Jannar 2002 b'dan il-mod:-

FIAL's basis of contention in the above mentioned affidavit is that an amount of Lm3,531 paid by FIAL clients to FIBL bank accounts was in respect of insurance transactions and therefore should have been considered to form part of the Business of Insurance Account of FIAL.

The amount in question cannot be considered to form part of the Business of Insurance Account for the following reasons:-

- (a) Upon receipt of the amounts in question from debtors of FIAL into the bank account of FIBL, the directors of FIAL had only two options to rectify the situation and bring the company in line with paragraph 8 of the First Schedule to the Directive 11:
- (i) either transfer an equivalent amount to the amount deposited in the bank account of FIBL from the administration account of FIBL from the administration account of FIAL into the Business of Insurance Account, or
 - (ii) remit payment, in cash, from FIBL into the Business of Insurance Account of FIAL of the amount deposited in the bank account of FIBL.

In terms of paragraph 3 of the First Schedule to the Directive any of the above mentioned measures had to be carried out within two business days from receipt of the funds.

- (b) Rather than opting for any of the above, the directors themselves, in preparing the financial statements for the year ended 31 December 2000, utilised the amounts in question (totaling Lm3,531) to set-off an amount due to FIBL by FIAL (for the amounts unrelated with insurance transactions).

The same audit report documented by FIAL in the above mentioned affidavit confirms the position of the Centre that there was a deficiency in the Business of Insurance Account at 31 December 2000 (Appendix 1). Therefore, the amount of Lm3,355 mentioned in FIAL's letter of 1 March 2001 could not be considered to form part of the Business of Insurance Account. The difference between the amount of Lm3,355 (being the shortfall outlined above) and the Lm2,950 outlined in the report in Appendix H is the amount of Lm405 representing returned cheques as per computation attached to Appendix H.

Furthermore, another emphasis of matter note in the same audit report states that the company's internal control and procedures were madequate for the auditors to form an opinion as to whether inter-bank transfers from bank accounts designated "Business of Insurance Account" to all other bank accounts have been correctly carried out in accordance with Insurance Directive 11 (Appendix 1).

The January 2001 management accounts again indicated that there was a shortfall in the Business of Insurance Account, as outlined above in paragraph 4.3 (appendix J).

II-konsiderazzjonijiet u l-Konkluzzjonijiet ta' dan it-tribunal

Illi d-disposizzjonijiet tal-ligi in materja huma internzjonati sabiex jassiguraw illi l-flejjes li agent ta' l-assigurazzjoni awtorizzat jkollu f'idejh f'kapacita' fiducjarja jinzammu separati mill-flejjes tieghu stess u dan naturalment biex ma jkunx hemm konfuzjoni b'detriment ghal min ikun wera fiducja fl-istess agent ta' l-assigurazzjoni.

Fil-kaz in kwistjoni jirrizulta illi FIAL naqset minn dan l-obbligu billi mhux biss ma zammitx tali flejjes separati mill-fondi taghha talli ppermettiet li tali flejjes jinzammu minn terza persuna (Fenici Insurance Brokers Lts) meta hija kellha fir-rejalta is-setgha li ma thallix lit-tali terza persuna (li hija socjeta' assocjata) li zzomm l-istess flejjes.

Minn agent ta' l-assigurazzjoni awtorizzat wiehed jistenna serjeta. FIAL mess immedjatament hadet il-passi necessari sabiex il-fondi li kienu gew erronjament iddepositati fil-kontijiet ta' Fenici Insurance Brokers Limited jigu ttrasferiti *fil-Business of Insurance Account* taghha.

L-ahjar ipotesi ghal FIAL hija illi hi ma ndunatx li il-flus gew depositati ma FIBL. Is-serjeta' fil-kamp tas-servizzi finanzjarji pero' tirrekjedi li FIAL messa ndunat mall-ewwel u rremedjat is-sitwazzjoni immedjatament.

Il-penali amministrattiva imposta fuq FIAL mill-MFSC kienet ghalhekk f' waqtha.

It-Tieni Appell

Id-decizjoni tal-MFSC

Dan l-appell jirrigwarda penali amministrattiva illi l-MFSC imponiet fuq FIAL permezz ta' ittra datata 2 ta' Frar 2001 u li tinsab esibita bhala Appendix 1 ma l-affidavit tat-22 ta' Mejju 2002 ta' John Bonett rigwardanti dan l-appell.

L-imsemmija ittra indirizzata lil FIAL mill-MFSC taqra hekk:-

We refer to your applications for Messrs. Ronald Said, Stephen Galea and Mario Calleja to act as insurance sub-agents for Fenici Insurance Agency Limited ("FIAL).

You may be aware that we have held a meeting with Mr. Said at the Centre on 29 January 2001, in which Mr. Said confirmed that he was carrying on sub-agency activities for FIAL during the year 2000. You would also recall your declaration that the last transaction date in respect of policies introduced to the company by Mr. Said was 30 November 2000.

The Centre is also seriously concerned to note that in your application for Mr. Said, you had declared that Mr. Said was given adequate instructions in business of insurance to carry out insurance sub-agency activities relevant to the application. In fact, Mr. Said expressed himself that he was for Policyholders and Insurance Intermediaries Directive 7 – Code of Insurance Selling Practice, and that these were never made available to him.

This is yet another in this long serious of episodes which reflect adversely on the competence of the directors of the company to manage its affairs in a sound and prudent manner.

Please be informed that the Centre has taken regulatory action against Mr. Said. The Centre has also asked for meetings with Messrs. Galea and Calleja.

Without prejudice to any regulatory action which the Centre may deem fit to take following our meetings with Messrs. Galea and Calleja, this matter leaves the Centre with no option but to impose an administrative penalty, in terms of the Insurance Intermediaries (Penalties for Offences and Infringements) Regulations, 2000 (Legal Notice 101 of 2000), as follows:-

<i>Infringement</i>	No.of days	Fixed Penalty	Daily Penalty at Lm5
Failure of authorised company to enrol in the Sub-agents List a person registered by the Company as an insurance sub-agent in the Sub-Agents Company Register of the company	91	LM50(A)	Lm455 (from 01/09/2000 to 30/11/2000) (B)
Total Amount Due			Lm505 (A) + (B)

The Centre expects immediate settlement of such fine. Meanwhile, we are enclosing cheque for Lm80, being refund of acceptance fee paid in advance in respect of Messrs. Said and Calleja.

Please be guided accordingly.

Id-disposizzjonijiet rilevanti tad-dritt in materia

1. L-artikolu 32 tal-Kap.404 (Insurance Brokers and other Intermediaries Act) jghid:

No person shall act as an insurance sub-agent and carry out, or attempt to carry out in Malta insurance sub-agency activities unless such person is appointed, registered and enrolled in accordance with the provisions of this Act.

2. L-artikolu 33(1) izidjghid:

Subject to the provisions of this Act, every authorised company desirous of appointing a person to act on its behalf as an insurance sub-agent shall, under this section, appoint and register in the sub-agents company register of the company and enrol with the competent authority in the subagents list, any one or more persons to act on its behalf as insurance sub-agents.....

3. Is-Sub-artikolu 7 ta' l-artikolu 33 jipprovdi ghas-segwenti ezenzjoni:-

No person who is an employee of an authorised company shall, solely by virtue of his employment by the company, require registration in the sub-agents company register of the company under this section except where such person carries out insurance sub-agency activities on behalf of the company in a place of places, other than the company's place, or places of business.

4. L-Iskeda tal-Kap. 404 tiddefinixxi l-attivitajiet ta' *insurance sub-agent* bhala:

Activities of persons..... who acting on behalf of authorised companies,

among other things carry out introductory works, introduce contracts of insurance or collect premiums, provided that no insurance commitments towards or on the part of the public are given as part of these activities.

5. L-MFSC hi awtorizzata li timponi penali amministrattiva f'kaz ta' ksur tal-probizzjonijiet ikontemplati fl-artikoli 32 u 33 fuq citati.

Is-sottomissjonijiet ta' FIAL

1. FIAL qeghda tinvoka l-ezenzjoni maghtija mill-artikolu 33(7) tal-Kap 404. Ara, inter alia, in-nota ta' l-osservazzjonijiet taghha tas-27 t'Awissu 2002.

Fl-ewwel lok jigi rilevat li Fenici qatt ma cahdet li Ronald Said ma kienx qed jizvolgi xi attivitajiet li per se, mehudin biss in vacuo, jaqghu that id-definizzjoni ta' l-attivitajiet ta' sub-agent.

L-argument ta' Fenici mill-bidu nett kien li Roanld Said kien impjegat tal-kumpanija... u li kien effettivament, qed jaqdi l-manzjonijiet tieghu esklussivament min post tax-xoghol li kien dak tal-principal tieghu... ghajr li ex edmissis, kien gieli jmur ghal il-klijenti bhala parti mill-manzjonijiet ta' impjegat assenjat fid-dipartiment tas-sales and customer care ta' Fenici.

2. FIAL qeghda wkoll tissottometti illi d-disposizzjonijiet tal-ligi in materja m'ghandhomx jigu interpretati b'mod litterali ghaliex altrimenti min "jissuggerixxi li min jiltaqa' mieghu socjalment biex jassigura r-riskji mas-socjeta' li maghha jkun impjegat" ikun qighed jikkommetti attivita' ta' *insurance sub-agent* kif definita fl-Iskeda tal-Kap 404.

Is-sottomissjonijiet ta' l-MFSC

Da parti taghha l-MFSC issottomettiet illi l-artikolu 33(7) tal-Kap. 404 mhuwiex applikabbli ghall-kaz de quo.

Inter alia l-MFSC

- tghid illi f'numru ta' okkazzjonijiet FIAL ammettiet illi Ronald Said kien iwettaq ix-xoghol tieghu ghand il-klijenti taghha.
- tissottometti illi l-artikolu 33(7) hu kategoriku fis-sens illi l-ezenzjoni imsemmija fl-istess artikolu tapplika biss sakemm l-impjegat iwettaq ix-xoghol fil-"*comapnys place, or places of business*".
- taghmel riferenza ghal-ittra datata l-1 ta' Marzu 2001 fejn FIAL tiddekrivi certi attivitajiet li kien iwettaq Ronald Said, liema attivitajiet jaqghu that l-umbrella ta' l-attivitajiet ta' *Insurance sub-agent* li tinsab fl-iskeda tal-Kap. 404.
- taghmel riferenza ghal fatt illi FIAL hallset *commissions* u *disbursements* lil Ronald Said fis-sena 2000 ammontanti ghal Lm2105.14.

- taghmel riferenza ghalinkontru li hija kellha ma Ronald Said fid-29 ta' Jannar 2001 f'liema inkontru – skond John Bonett – *“Mr. Ronald Said Confirmed that in February 2000, he had asked the directors of FIAL, to allow him to start selling insurance policies, outside office premises, on behalf of FIAL. For this purpose, Mr. Said confirmed that he was granted full use of a company car, thus confirming that such activities were carried outside the premises of FIAL”*.

II-Konsiderazzjonijiet u l-Konkluzzjonijiet tat-Tribunal

Illi fil-fehma ta' dan it-tribunal l-artikolu 33(7) hu car fis-sens illi jekk impjegat ta' kumpannija awtorizzata jwettaq attivita' imsemmija fil-paragrafu 2 tat-Tieni Kolonna ta' l-Iskeda li hemm mal-Kap. 404 f'post *“other than the company's place, or places of business”* l-ezenzjoni kkontemplata fl-istess subartikolu ma tkoprihx.

Illi mill-provi prodotti jirrisulta illi l-MFSC kienet gustifikata timponi fuq FIAL l-penali amministrattiva de quo. FIAL kisret b'mod mill-aktar lampanti l-artikolu 33(1) tal-Kap. 404 u fil-fatt l-appell taghha hu wiehed frivolu ghall-ahhar, multo magis meta wiehed iqis li l-penali inflitta hija l-minimu stabbilita mill-ligi.

Bizzejjed wiehed jaqra l-ittra ta' FIAL lil MFSC datata l-1 ta' Marzu 2001 – liema ittra giet esebita bhala Appendix A ma' l-affidavit ta' John Bonett tat-22 ta' Mejju 2002. Din l-ittra taqra hekk:-

We refer to your letter of the 23 February 2001 in connection with the management letter issued by Deloitte & Touche.

We wish to inform you of the following facts regarding the case of the employee who was not always passing on to the company the amounts collected from debtors in a timely manner.

The employee concerned was Mr. Ronald Said who was employed with the company since 1st December 1994. Mr. Said was originally employed by Fenici Insurance Brokers and a broker and for a while he was appointed claims assistant manager with Fenici Insurance Agency Ltd. With effect from 1st March 2000 Mr. Said was assigned duties as a sales representative of the company. He remained in full time employment and worked from the company's office on sales.

One of Mr. Ronald Said's duties was to follow up on renewals and service clients of the company which included the collection of premium due by customers. The company's system of control provides for a manual receipt to be issued by the person collecting the premium to the client. When the cash is passed on to the company's cashier a system generated receipt would be issued

and given to the person collecting the cash. In this way cash traced from the client up to the time it is deposited in the company's bank account.

When the statements for the end of the year were issued in January certain customers informed the company's management that they had paid Mr. Ronald Said the amount being claimed by the company. On verification it transpired that, in fact the customers were correct and Mr. Ronald Said was still in possession of receipts which he had not yet passed on to the company's cashier. These cases spanned over the last quarter of 2000 until end of January.

Mr. Ronald Said confirmed that he had not yet passed on the receipts in question which amounted to Lm7,169.89. he was informed by the management that this was not acceptable especially in view of Insurance Directive 10 regarding the business of Insurance Account regulations as he should have been aware from his training sessions.

Consequently and in order to impress upon him the gravity of the manner, he was immediately suspended by the management from his duties until the board could decide what disciplinary action to take on his case and was asked to hand over the money concerned immediately.

Mr. Ronald Said has in fact paid the amount in question and no amounts are outstanding.

In its deliberations the board of directors considered Mr. Said's long service and loyalty to the company and his co-operation in verifying the case which clearly indicated no fraudulent intent. It therefore decided to issue a formal warning to him on a probationary period of six months on condition that should there be a re-occurrence of this matter he will be immediately discharged without references. He was also informed that he is to comply strictly with the company's rules on cash receipts and is to ensure that any money received must be handed over to the company's cashier without fail. Any breach of this rule will result in instant dismissal in which case the company will be duty bound to inform the regulator accordingly.

Furthermore in the light of this situation the board of directors have decided that his current application for sub-agent cannot be supported by the company at least until his probationary period is satisfactorily completed. Consequently we are hereby withdrawing his application dated 7th December 2000.

The company has also taken measures to ensure that manual receipts issued by staff collecting or receiving premiums are checked daily by the supervisor of the underwriting department to the company who is designated as the company's cashier. A memorandum to this effect was issued to all staff.

Huwa veru li din l-ittra intgaghtet xahar wara li l_MFSC impniet il-penali amministrattiva in kwistjoni, pero' il-kontenut taghha jirrefer ghall-attivitajiet imwettqa u i ghalihom giet inflitta l-istess multa mill-MFSC fuq provi ohra li kellha f'idejha: liema provi rrizultaw ukoll waqt it-trattazzjoni ta' dan l-appell – bhal per ezempju l-inkontru li MFSC kellha ma Ronald Said fid-29 ta Jannar 2001 fejn hu ammetta li kien mar kontra dak li jiddisponu l-artikoli 32 u 33 (1) tal-Kap 404. Fil-fatt irrisulta ukoll mill-provi illi l-MFSC kienet imponiet penali amministrattiva anki fuq Said minhabba dan l-agir tieghu u l-istess Said kien hallas din il-penali.

Fl-ahharnett it-tribunal ihoss illi ghandu jikkumenta dwar is-sottomissjoni ta' FIAL illi interpretazzjoni stretta tad-disposizzjonijiet tal-ligi in materja jwasslu ghal sitwazzjoni li impjegat ta' kumpanija awtorizzata ma jkunx jista' f'okkazzjoni socjali jirrikomanda lil min ikun qed ikellem biex dan jassigura r-riskji tieghu mas-socjeta' li maghha jkun impjegat.

It-tribunal jispera li qatt ma jkollu quddiemu kaz frivolu bhal jew simili ta' dan u f'kaz li jkollu jittama li min ikun qieghed jippresedih ikun dotat b'dehen sufficjenti li japplika l-ligi tenut kont ic-cirkostanzi (frivoli) ta' l-istess kaz.

It-Tielet Appell

Id-decizioni tal-MFSC

Dan l-appell jirrigwarda penali amministrattiva illi l-MFSC imponiet fuq FIAL permezz ta' ittra datata 16 ta' Mejju 2001 u li tinsab esibita bhala Dok FIA 7 ma' l-ittra spiegattiva ta' FIAL tat- 18 ta' Dicembru 2001.

Fi kijem John Bonett (ara l-affidavit tieghu rigwardanti dan l-appell tat-30 ta' Jannar 2002):

On 14 May 2001 the management accounts of the company for the month of April 2001 were submitted to the Centre (Appendix I). It transpired that there was a shortfall in own funds of Lm1,534 as at 30 April 2001. Therefore, an administrative penalty of Lm260 was imposed on 16 May 2001. This penalty was computed as the minimum amount stipulated for such infringement by the Insurance Business (Penalties for offences and Infringements) Regulations, 2000 (Legal Notice 100 of 2000).

Skond l-MFSC din ma kinitx l-ewwel darba ii FIAL keliha nuqqas fil-fondi taghha stess.

Id-disposizzjonijiet rilevanti tad-dritt in materla

1. l-III l-artikolu 2(1) tal-Kap. 403 ighid ii:

“own funds” shall be construed in accordance with an Insurance Directive made by the Competent Authority for the purposes of this Act to determine the amount of, and the components which make up, the company’s own funds.

2. II-paragrafu 3.5 ta’ Taqsima 1 tar-Raba’ Skeda tal-Kap.403 jghid:

The company’s own funds, whether in Maltese liri or in other currencies acceptable to the Competent Authority and unencumbered at all times, amount where the authorisation sought or held is to act as an insurance agent, to the value of not less than twenty-five thousand Maltese liri or to such other higher value as may be prescribed.

3. Id-Direttiva dwar l-Assigurazzjoni ii ghaliha hemm accenn fid-definizzjoni tajj’ow, ~ funds” saret u ggib in-numru 1 ta’ 1- 1999

bl-isem “Own Funds of Companies Carrying on Business of Insurance or Acting as Insurance Agents or Insurance Managers”. Hija dahlet fis-sehh fit-2 t’Awissu 1999.

4. II-Paragrafu 3 tad-Direttiva de quo jghid:

The scope of this Directive is to determine, unless otherwise specified in the Act, the amounts of, and the components which make up, the own funds of companies concerned.

5. II-Paragrafu 4 ta’ l-istess Direttiva jzid jghid:-

The own funds of a company concerned, whether in Maltese uini or in other currencies acceptable to the Centre and unencumbered at all times, shall amount and be construed in accordance with the provisions set out in the following articles of this Directive.

6. It-Title II tat-Tieni Skeda tad-Direttiva jgib l-isem “Components Making up the Own Funds” u jstabilixxi l-istess *components* hekk:

1. The paid up share capital of the company which, in each case shall be not less than the value appropriate to the kind of appointment under which the company acts specified in the second column of Title 1 of this Schedule or required by the Centre, whichever is the higher.
2. Reserves.

3. Any profits brought forward.
7. Il-Kap. 403 u r-regolamenti maghmula tahtu jaghtu s-setgha lill-MFSC ii timponi penali amministrattiva fuq min ma jkollux bizzzejjed fondi tieghu stess.

Is-sottomissjonijiet ta' FIAL

In succinct FIAL issottomettiet illi hija hadet il-passi kollha necessarji fwaqthom sabiex izid is-share capital taghha u b'hekk ma jkunx hemm nuqqas fil-fondi taghha stess, pero' minhabba diffikultajiet ii inqalu mar-Registatur tal-Kumpanniji tali zieda ma setghetx timmaterjalizza ruhha fiz-zmien opportun.

Fl-affidavit tieghu tas-16 ta' Jannar 2002 Joseph Perici Calascione, direttur ta' FIAL, ighid:-

The MFSC requested that this deposit be reflected in an increase in the share capital of Fenici and the relative resolution was effected on the 1st March 2001. This resolution was formally submitted to the Registry of Companies on the 4th June 2001. A copy of the relative document is attached herewith and marked as Document JPC3. This time-lag was due to the fact that a separate previous increase in share capital, taken by resolution of the 3rd March 2000 and submitted to the Registry of Companies on the 13th March 2000, had not been yet formally registered by the Registry of Companies due to an administrative review of the documentation on their part and this increase (i.e. the one of 3 March, 2000) was effectively resubmitted on the 4th June 2001 as evidenced by a copy of the presented resolution which is attached herewith and marked as Document JPC4. The increase of March 2001 could not be formally registered before that of March 2000.

I would also state that until the registration of this increase in share capital was formally given effect to by the Registry of Companies, the relative funds could not be referred to increase in share capital in the monthly Management Accounts which Fenici submitted to the MFSC.

Carmel Damato, direttur iehor ta' FIAL, jghid hekk fl-affidavit tieghu:-

I would make specific reference to the sum of Lm2,350 which represents an increase in share capital of Fenici and which appears in the management accounts of Fenici for the month of April 2001 under the heading of "shareholders' loans".

It is confirmed that I was fully aware at that time, that this same amount of Lm2,350, deposited in the Company's bank account, represented from the very outset an increase in share capital of the Company. The shareholders of Fenici had in fact, prior to the deposit of this sum in

Fenici's accounts, decided to increase the share capital and this same sum was to represent the paid-up issued increased capital. However due to the fact that the physical deposit in Fenici's bank account and its relative reflection in the Company's management accounts had to be made immediately (for onward transmission to the MFSC) and could not therefore attend the formal registration of the Registrar of Companies, it was decided to temporarily classify such amount as "shareholders' loans" until such time that formal registration was in place.

The classification as increased share capital was duly effected once the formalities required by Law for the registration of the increase in share capital with the Registrar of Companies were completed.

Is-sottomissjonijiet ta' 1-MFSC

Il-posizzjoni tal-MFSC hija imfissra fl-affidavit ta' John Bonett tat-3 ta' April 2002, liema affidavit sar b'risposta ghal dak ta' Carmel Damato. Il-parti rilevanti taqra hekk:

.....the amount of Lm2,350, mentioned in Carmel Damato's affidavit, which was appearing as shareholders' loans in the April 2001 management accounts, could not have been considered to form part of own funds of the company for the following reasons:

(i) Shareholders' loans are not included in Insurance Directive 1 of 1999 as one of the components acceptable to the Centre to form part of the own funds of a company. The reason for this is that shareholders' loans may be withdrawn out of the company at any time.

(ii) The Centre requested FIAL on 27 February 2001 to increase the share capital of the company, by at least Lm3,355, to make good for the deficiency in the business of insurance account as at 31st December 2000.

FIAL proceeded to deposit Lm2,350 into the business of insurance account on 1 March 2001, without increasing the share capital of the company.

Meanwhile the March and April 2001 management accounts were submitted to the Centre on 6 April 2001 and 14 May 2001 respectively.

None of these accounts indicated that the increase in share capital had been effected by FIAL.

It results that the statutory documentation related to such increase was only submitted to the Registry of Companies for the first time on 4 June 2001 and was re-submitted (since the documentation was not compiled correctly) on 31 October 2001. Therefore, the increase in share capital was only effected **five and a half months following the imposition of the**

administrative penalty and eight full months following the above mentioned instruction by the Centre.

In view of the fact that the statutory documentation had not yet been presented by 16 May 2001, i.e. the date of the imposition of the administrative penalty, FIAL could not have been considered to satisfy the requirements of the Directive.

Previous increases in share capital, as indicated in the affidavit of FIAL itself were recorded as share capital in the management accounts submitted to the Centre, notwithstanding that such increases were not formally registered at the Registry of Companies, until the date of increase in question.

Il-konsiderazzjonijiet u l-konkluzzjonijiet tat-tribunal

Illi l-iskop tad-disposizzjonijiet tal-ligi in materja hu ii jassigura li agent ta' l-assigurazzjoni ta' kumpannija awtorizzata jkun sufficjentement b'sahhtu finanzjarjament sabiex jkun jista' jwettaq l-obbligi tieghu.

Id-Direttiva dwar l-Assigurazzjoni numru 1 ta' 1-1999 b'mod dettaljat tistabilixxi x'assi ghandhom ikunu ikkunsidrati biex jigu kkalkolti *i-own funds* ta' agent ta' l-assigurazzjoni ta' kumpannija awtorizzata.

Jinkombi fuq l-agent ta' l-assigurazzjoni li jizgura illi f'kull mument ma jkunx hemm nuqqas fil-fondi tieghu stess mill-minimu stabbilit mid-disposizzjonijiet vigenti tal-ligi b'tali mod illi fil-kalkolazzjoni ma jigux inkluzi assi ii mhumiex ikkontemplati mill-imsemmija Direttiva.

Illi fil-kaz de quo FIAL qeghda tissottometti li somma li fl-accounts tidher bhala *shareholders' loan* kienet fil-fatt somma intiza ghal '*incerase in share capital*' u bl-inkluzzjoni ta' tali somma FIAL kellha fondi taghha stess fl-ammont rikjest mill-ligi.

Skond FIAL tali somma kellha tibqa' tidher bhala *shareholders' loan* sakemm id-dokumentazzjonijiet relattivi ghaliha u ghall-hwejjeg anterjuri ghaliha gew debitament irregistrati mir-Registru tal-Kumapnija.

Fil-fehema tat-tribunal is-sottomissjonijiet ta' FIAL f'dan ir-rigward mhumiex accettabbli ghaliex is-serjeta' fil-kamp tas-servizzi finanzjarji tirrekjedi kompartament ta' diligenza ferm aktar supejuri minn dak li bih imxiet FIAL in materja.

L-obbligu li kontinwament jkollha fondi taghha stess fl-ammont u fil-kwalita' li trid kien jinkombi fuq FIAL u hi kellha tassigura ruhha, sa fejn hu amanament pussibbli, li ma jkun hemm ebda ostklu li jtellifha milli tosserva l-imsemmi obbligu. Il-problemi li FIAL tghid li kien hemm mar-Registratur tal-Kumpanniji ma kienux ikunu hemm li kieku din mexxiet l-affarijiet taghha bil-prudenza u s-serjeta minstenni minn agent ta' l-assigurazzjoni ta' kumpannija awtorizzata.

Jirrizulta ghalhekk li anki f'dan il-kaz il-penali amministrattiva imposta mill-MFSC kienet f'waqtha.

DECIZJONI

Ghal dawn il-mottivi – u dan qiegħed jingħad għat-tlett appelli - billi:-

- i. l-Awtorita Kompetenti ma applikatx hazin xi wahda mid-dispozzjonijiet tal-Kap 403 u tal-Kap 404 u tar-regolamenti magħmul taħthom, u
- ii. l-anqas ma d-decizjoni ta' l-istess Awtorita Kompetenti tikkostitwixxi abbuz ta' diskrezzjoni jew hi manifestament ingusta,

it-tlett appelli ta' Fenici Insurance Agency Limited qegħdin jigu respinti u d-decizjonijiet tal-Malta Financial Services Centre li permezz tagħhom imponent l-penali de quo fuq Fenici Insurance Agency Limited qegħdin jigu kkonfermati.