



**GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

FSD CAUSE NO. 15 OF 2024 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION) AND THE BENEFICIAL OWNERSHIP (COMPANIES) REGULATIONS (2022 REVISION)

BETWEEN

PAGET-BROWN FINANCIAL SERVICES LIMITED

APPLICANTS

AND

THE REGISTRAR OF COMPANIES CINDY JEFFERSON-BULGIN

AND

THE COMPETENT AUTHORITY IN RELATION TO APPEALS DAX BASDEO PH.D. JP, CHIEF OFFICER, MINISTRY OF FINANCIAL SERVICES AND COMMERCE

RESPONDENTS

NOTICE OF ORIGINATING MOTION

TAKE NOTICE that the Court will be moved on the ____ day of _____ 202__ at _____am/pm on behalf of the Applicants (“PBFS”) and following the grant by this Court on 24 January 2024 of leave to bring a judicial review in respect of (i) a decision made by the First Respondent, the Registrar of Companies (the “ROC” or “Registrar”) and contained in a Fine Notice dated 9 November 2023 to issue the Applicants PBFS with a fine in the sum of \$100,000 for alleged breach of the obligation under section 261(2) of the Companies Act (2023 Revision) to file beneficial ownership information in relation to companies for which it provided services (the “Fine Notice”); and (ii) a decision of the Second Respondent, the Competent Authority for Appeals contained in a letter dated 19 December 2023 rejecting PBFS’s appeal in relation to the Fine Notice (the “Appeal Rejection”) (together the “Decisions”)

AND FURTHER TAKE NOTICE that the Applicants seek the following Relief against the Respondents, namely:

1. A declaration that the Fine Notice was *ultra vires* of the powers granted to the Respondents by the Companies Act (2023).
2. An Order for certiorari that the Decisions are quashed.
3. Declarations pursuant to the Constitution that the Decisions are incompatible with Article 19 of the Bill of Rights.
4. Such further and other relief as this Honourable Court may deem just; and
5. Costs.

GROUND ON WHICH RELIEF IS SOUGHT

AND TAKE NOTICE THAT the grounds of this Notice of Motion are as follows:

EXECUTIVE SUMMARY

1. The ROC did not have the power to and/or should not have fined PBFS \$100,000. Part XVIIIA of the Companies Act (2023 Revision) (the “Act”) entitled “Beneficial Ownership Registers” requires, inter alia, corporate services providers such as PBFS to file “beneficial ownership information” that Part XVIIIA requires their client companies to provide to them into a centralised government database/search platform so that it is available to specified law enforcement and regulatory authorities.
2. PBFS had at all material times been in compliance with its obligation under section. 261(2) of the Act to disclose beneficial ownership information, namely particulars of the beneficial owners of the companies for which it has been fined. No particulars of beneficial owners were ever withheld from the register and thus no disability or detriment was caused to the availability of such information to law enforcement, or regulatory authorities satisfying the

purpose of the legislation. There was accordingly no basis on which the ROC could or should fine PBFS for failing to file beneficial ownership information, having regard both to the wording of the Act and the stated purpose of Part XVIII A.

3. PBFS did inadvertently fail to file a pro forma monthly confirmation there had been no change in beneficial owners but will submit this does not amount to a failure to file beneficial ownership information for the purposes of section 261(2) and which might attract a fine. The requirement to file pro forma monthly 'no change' confirmations derives from secondary legislation which does not carry with it an administrative fine or any financial penalties for non-compliance.
4. Alternatively, even if PBFS could be lawfully found to have breached section 261(2), PBFS point to the fact that the statute itself prescribes a maximum fine of \$500 for such a breach. A fine of \$100,000 is thus unlawful, egregious and out of all proportion to the alleged omission. The ROC has purported to impose a fine that amounts to twenty times the maximum conceivable penalty such as would be reserved to a most serious and deliberate breach.
5. Further, there has been no engagement by the ROC or the Competent Authority for Appeals with the challenges put forward by PBFS by way of facts and points of law. Instead, both have done no more than repeat the meaningless double negative that PBFS have "failed to provide evidence they have not breached the Act". Due process does not appear to have been followed. Further, PBFS say that there has been a comprehensive failure by the ROC to properly interpret and apply the relevant provision of the Act, leading to an ultra vires exercise of its administrative fining powers, the Competent Authority compounding the error by upholding the ROC Fine Notice, and both in the process falling woefully short of the standards for decision-making required by section 19 of the Bill of Rights.

FACTUAL BACKGROUND

6. PBFS provides company management solutions to Cayman Islands structures for a wide variety of clients and have done so since 1984. Part XVIII A of the Companies Act (2023 Revision) (the "Act") requires PBFS to maintain and disclose particulars of companies'

beneficial owners to the ROC. The ROC in turn makes the particulars available to inspection for law enforcement and regulatory purposes. In its Notice of Investigation letter to PBFS dated 29 August 2023 (“NOI”), the ROC described the Part XVIIIA regime as satisfying the following purpose:

“In an effort to prevent the misuse of legal persons for money laundering or terrorist financing, the overarching objective of the beneficial ownership regime is to achieve transparency of the beneficial owners of legal persons, registered or incorporated within the Cayman Islands. Non-compliance with the legal requirements hinders the attainment of this objective and poses various risks to the financial services industry and the Cayman Islands economy as a whole.”

7. PBFS has established a bespoke technology platform in accordance with section 261(1) of the Act through which it maintains and then discloses to the ROC the prescribed information as to the beneficial owners of companies for which it provides services. The system also generates an internal monthly beneficial ownership register update report, based upon which PBFS makes its filings to the ROC. During a full routine reconciliation of the reporting system in August 2023 a programming issue was identified. This inadvertently caused 20 companies to fall off the monthly updates for a period of three months. The issue was swiftly resolved and the missing filings – being 19 ‘no change’ filings and one ‘no registrable person’ filing -- were uploaded to the ROC on 2 August and 10 August 2023.
8. The missing updates did not deprive the ROC of any actual beneficial ownership information. As the ROC could have easily ascertained from the “analysis” stated in the NOI to have been undertaken, 19 of the companies had (and continued to have over the three-month ‘missing update’ period) no beneficial owner/registrable person at all. The only missing information from the updates was a pro forma confirmation that there had been no changes for the period in question. In respect of the remaining one company, there was a beneficial owner/registrable person showing in its beneficial ownership register. However, that beneficial owner had been redeemed out, leaving no beneficial owner and accordingly the missed update in respect of that company was an update to ‘no registrable person.’ To be clear, the status in respect of all 20 companies over the

three-month period of missing updates was that there were no beneficial owners/registrable persons on whom to file beneficial ownership information.

9. On the 29th of August 2023, almost three weeks after the PBFS rectification referred to in paragraph 10 above, PBFS received an NoI letter from the ROC advising that a potential breach of section 261(2) had been identified from ROC data analysis and inviting PBFS to provide any evidence it wished to rely on to refute the breach in reply and further that should ROC not find the PBFS reply compelling, a fine of \$5,000 per entity “for which [PBFS] failed to deposit beneficial ownership information or other related information” would be imposed, under section 281B. PBFS responded, pointing out amongst other things the fact that no actual beneficial ownership information was ever withheld and provided evidence of the rectification made (being the filing of 19 ‘no change’ notices and one ‘no registrable person’ filing). Despite this, on 9th November 2023 the ROC issued a Fine Notice in the sum of \$100,000, \$5,000 per company, ignoring PBFS’ arguments and reached the baffling conclusion that PBFS “did not provide any supporting evidence to refute that breaches of section 261(2) of the Act occurred”. The ROC failed to recognise that the rectification evidence provided by PBFS was inherently evidence that no breach of section 261(2) was (or could be) involved.
10. On 29th November 2023, PBFS issued an appeal to the Competent Authority under Regulation 9C of the Beneficial Ownership (Companies) Regulations (2022 Revision) (the “Regulations”). The appeal relied on both the fact that there had been no failure to file beneficial ownership information i.e. no breach of section 261(2) of the Act as well as the fact that the ROC had failed to have any regard to the prescribed maximum fine under the Act of \$500, amongst other things.
11. PBFS received a decision on its appeal to the Competent Authority on 19th December 2023. The decision contained nothing of substance. It did not address any of PBFS’ arguments and instead simply repeated the conclusion to be found in the 9th November Fine Notice that PBFS had not provided evidence to support a finding that the breaches had not occurred.

THE LEGISLATION

12. Part XVIIIA of the Companies Act (2023 Revision) contains a detailed regime whose purpose is to facilitate the disclosure to specified law enforcement and regulatory agencies of the beneficial owners of Cayman Islands companies. The key section for present purpose is S261 which reads as follows:

“Duty of Registrar and corporate services providers

261. (1) A corporate services provider engaged by a company pursuant to section 252, or the Registrar if so engaged, shall provide an information technology solution, either directly or through another corporate services provider, that enables the corporate services provider or Registrar, as the case may be — (a) to establish and maintain the company’s beneficial ownership register on its behalf; and (b) to provide the information on the beneficial ownership register to the competent authority by way of the search platform established pursuant to section 260”.

(2) The corporate services provider shall regularly deposit beneficial ownership information received from the companies that have engaged the provider, in such place, in such manner and at such intervals as may be prescribed.

(3) If default is made in complying with subsection (2), the corporate services provider and any officer of the corporate services provider who is in default — (a) shall incur a penalty of five hundred dollars; and

(b) if the competent authority is satisfied that the default was knowingly or wilfully authorised or permitted, shall incur an additional penalty of one thousand dollars and a further penalty of one hundred dollars for every day during which the default continues” (emphasis added)

13. PBFS will say that there is a distinction between beneficial ownership information required by the Act and a further document required by Regulation 7C of the Beneficial Ownership (Companies) Regulations (2022 Revision) (the “Regulations”) known as a “no change” notice. Failure to file the former attracts a fine. Failure to file the latter does not. Similarly, failure to make a ‘no registrable person’ filing in accordance with Regulation 4 of the Regulations does not attract a fine.

14. The Regulations are secondary legislation which support the regime in Part XVIIA of the Act. They clearly confirm the distinction between beneficial ownership information and no change notices.

“7C Deposit of beneficial ownership information

(1) Corporate services providers shall deposit with the competent authority not less than once in each month —

(a) the beneficial ownership information required to be deposited under section 261(2) of the Law and the relevant information required under regulation 7A(1) respecting a confirmation of exemption; or

(b) if the beneficial ownership information and relevant information referred to in subparagraph (a) has not changed since the prior deposit of such information, a notice that there has been no change to the information since that time.

(2) The beneficial ownership information and notice referred to in paragraph (1) shall be deposited in the manner specified by the competent authority as being compatible with its search platform.

(3) Notwithstanding paragraph (1), the period for deposit of the beneficial ownership information and notice referred to in that paragraph is —

(a) every ninety days for a company that is in liquidation; and

(b) every three hundred and sixty-five days for an ordinary resident company.”
(emphasis added)

15. The above section very clearly distinguishes between the beneficial ownership information required to be deposited by S. 261 (see 7.C.1(a)) and a no change notice which is required to be filed by S.7.C.1(b)) of the Regulations. They are two separate things. Only failure to file the former can lead to a breach of S 261 and therefore a fine.

PRIMARY ARGUMENT

16. PBFS' primary argument is that only a breach of S. 261(2) attracts a fine. PBFS have not breached S. 261 because at no time did they fail to file beneficial ownership information on the 20 companies concerned.
17. PBFS may have temporarily been out of compliance with the requirement under 7.C.1(b) of the Regulations to file a no change notice and (in one instance) the requirement under Regulation 4 to file 'no registrable person' but nowhere in the Act or the Regulations does it say that failure to file a no change notice or make a 'no registrable person' filing attracts a fine.
18. The purpose of Part XVIIIA and its subordinate legislation is to ensure the identification of the beneficial owners of companies (if there are any) to aid law enforcement. The power to fine must have been intended to encourage compliance with the purpose of the legislation, to identify beneficial owners and to ensure that beneficial ownership information gets fed into the government centralized search platform¹.
19. The ROC appears to have misunderstood the distinction between beneficial ownership information and other filings as well as the focus of section 261 (2) and thus inherently the whole focus of the beneficial ownership regime in Part XVIIIA which she is tasked to administer and enforce (fairly). Consequently, she is seeking to fine PBFS for a breach it did not commit. All that PBFS had done was failed to make certain filings in respect of 20 companies for which no obligation to file beneficial ownership information arose, because none of them have beneficial owners/registrable persons. It identified the omission via its own internal controls processes and rectified it immediately. Yet, the ROC has taken the absurd and unlawful position in respect of that minor failure and rectification that PBFS should be hit with the maximum penalty that could possibly be conceived in respect of an actual depriving of the government centralized search platform of beneficial ownership information.

¹ Note S. 253 (3) which reiterates there is no obligation to disclose any particulars in relation to non-registerable persons.

ALTERNATIVE ARGUMENTS

20. In the alternative, even if a breach of section 261(2) could be lawfully made out, PBFS respectfully submit the following:
- a. In imposing a fine of \$100,000 the Registrar failed to comply with s. 261(3)(a) of the Act which mandates a fine of up to \$500 for a breach of s. 261(2), instead purporting to rely on the fining provision in s. 281B and Schedule 7 of the Act. The latter empowers the ROC to issue administrative fines of up to \$5,000 for breaches of several sections listed in the Schedule. Section 261(2) is listed in the Schedule, creating a conflict between the \$500 fine prescribed in section 261 itself and the \$5,000 prescribed in Schedule 7. That conflict must be resolved by operating established rules of statutory interpretation, in particular the rule that a general provision (here, s. 281) should not be interpreted as derogating from a specific one (here, s. 261). Further, a statute must be construed in accordance with the reasonable expectations of the persons affected by it. PBFS or any service provider in its position reading s. 261 could only ever reasonably be expected to be fined up to \$500 for a breach of s. 261. Put simply, that is because the statute itself says so.
 - b. It was only open to the ROC to impose a fine of up to \$500. This is because of the clear wording of s.261(3)(a) of the Act. Under the rules, any penalty provisions must be construed strictly to avoid uncertainty and injustice. Further, s. 43 Interpretation Act 1995 requires the amount of any fine appearing in a statute to be construed as the maximum fine that may be imposed. As such there should be some rational basis for imposing the maximum applicable fine. There was none.
 - c. The ROC, acting reasonably and in accordance with paragraph 4.1 of her own Enforcement Manual (which states that she will take into account mitigating factors) should have reduced the \$500 maximum in order to take into account factors such as the historic, temporary and inadvertent nature of the alleged breach, the fact that PBFS corrected the error on its own initiative well before

deliberately withheld beneficial ownership information. Secondly, it is clear from s.281B that the aggravating factor to be considered is the length of time for which the breach continues -- and for which (subject to the overall cap of \$25,000) the Registrar can levy an additional penalty of \$1,000 per month -- not the number of companies affected.

- iii. The Registrar's application of the s.281B fine appears to ignore the fact that, by virtue of the Interpretation Act, the \$5,000 penalty is a maximum penalty (see above) and has gone straight to that amount (exponentially compounding the error by applying it per company), without due consideration of significant mitigating factors in the PBFS case, as set out in 20 c above.

In sum:

- g. Paragraph 19 of the Bill of Rights entitles PBFS to expect the Registrar to act in a lawful, rational, proportionate and procedurally fair manner when exercising her fining powers . The decision to fine PBFS \$100,000 was none of these. In particular:
 - i. The Fine Notice is unlawful in that no breach of s.261(2) arose in the first place. PBFS' only failure was a failure to file a 'no change notice' pursuant to regulation 7C(1)(b) of the Regulations and in one instance, a failure to file 'no registrable person' pursuant to Regulation 4 . Neither Regulation 7C (1)(b) nor Regulation 4 is listed in the Schedule 7 list of prescribed breaches.
 - ii. In the alternative, the Fine Notice is unlawful in that it did not comply with the statutory maximum fine for a breach of s.261(2) as clearly set out in in s.261(3)(a) (and having regard to the maximum fine of \$1,000 prescribed in s.261(3)(b) for deliberate breaches of s.261, which this was not), s.281B being of no application. Even were i above or this ii to

be disregarded, the amount of the fine purported to be levied pursuant to s.281B was set in an unlawful, irrational and disproportionate manner, producing an exorbitant and wholly unjustifiable penalty of \$100,000. Indeed, this \$100,000 fine imposed by the Fine Notice has the dubious distinction of exceeding by 400% the maximum for initial fine plus continuing fines combined of \$25,000 set by s.281B(c).

- iii. In an industry which provides services to large numbers of companies, it is likely that a systems error such as the one which caused the issue here could affect many companies at one time. A systems error which causes say 1500 companies to miss a monthly update but not withhold beneficial ownership information, applying the approach taken by the ROC towards PBFS, would result in a fine of \$7.5 million. This is a fantastical amount. It makes a mockery of the intended penalty cap and offends the presumption in legislative construction that an 'absurd' result is not intended. The same flawed logic has been applied to PBFS, with the same resultant unfairness and absurdity.

THE APPEAL TO THE COMPETENT AUTHORITY

21. On 29 November 2023 PBFS exercised its right to appeal the Fine Notice to the Competent Authority under Regulation 9C of the Regulations. The appeal relied on substantially the same arguments set out above.
22. Regulation 9D required the establishment of an independent review committee comprised of two persons with knowledge and experience in accounting, financial services, banking or compliance and an attorney-at-law. It further required that the committee prepare a report on its findings and recommendations for consideration by the Competent Authority.
23. PBFS have not seen any evidence that a committee was formed and reported as required. The only information provided by the Competent Authority rejecting the appeal was in the form of a very short decision letter received on 19th December 2023 and which said nothing substantive at all. The letter merely repeated the ROC's earlier meaningless conclusion

that PBFS had “not provided evidence to support a finding that the breaches had not occurred”.

24. To repeat, at no stage in the entire process do any of the points and evidence submitted by PBFS above appear to have been given proper consideration. PBFS have accordingly not been afforded a fair hearing and their constitutional rights have been infringed.

DATED the 26th day of January 2024



**TRAVERS THORP ALBERGA
ATTORNEYS-AT-LAW
FOR THE APPLICANTS**