In the name of His Highness Sheikh Hamad bin Khalifa Al-Thani, Emir of the State of Qatar

IN THE REGULATORY TRIBUNAL
OF THE QATAR FINANCIAL CENTRE

7 May 2012

CASE NO: 01/2011

KASHIF CHAUDHRY **Appellant**

v

QFC REGULATORY AUTHORITY **Respondent**

DECISION OF THE REGULATORY TRIBUNAL

Members of the Regulatory Tribunal:

Chairman, Michael Thomas CMG, QC

Francois Gianviti

Laurence Li

DECISION

Introduction

1. On 23 May 2011, Kashif Mehmood Chaudhry ('Mr. Chaudhry') appealed to the QFC Regulatory Tribunal against a Decision Notice dated 28 March 2011 addressed to him by the Qatar Financial Centre Regulatory Authority ('the Authority'). The Authority decided to impose upon Mr. Chaudhry a financial penalty of US$20,000 and to prohibit him from performing the Compliance Oversight Function for any Authorised Firm in the Qatar Financial Centre ('QFC') for a period of 12 months. They cited contraventions of Principles 2 and 4 of its Individuals Rule book ('INDI'), and of Article 84(2)(a) of the QFC Financial Services Regulations ('FSR').

2. The QFC Regulatory Tribunal is established by Article 8(2)(a) of Law No. (7) of 2005 as amended, and is empowered to hear and determine appeals against decisions of the Authority as in this case. By consent, the Authority's decision was stayed from taking effect until 14 days after the determination of this appeal. Because of the time required to prepare for the just resolution of this and other related appeals, it proved impracticable to proceed to an adjudication within 90 days of the receipt of Mr. Chaudhry's notice of appeal. As a result of directions made by the Chairman of the Tribunal on 20 October 2011 and 25 January 2012, the hearing of this appeal took place by agreement in Doha on 5, 6 and 7 February 2012 before the Chairman and two other duly appointed judges of the Tribunal, namely Professor Francois Gianviti and Mr. Laurence Li.

3. The hearing of this appeal was held in public and without dispute took the form of a *de novo* hearing of the Authority's allegations. It was conducted in accordance with the Tribunal's Regulations and Procedural Rules. The Authority, by counsel, adduced written evidence and documents, and made submissions to prove and justify the findings and conclusions set out in its Decision Notice. In support of his appeal, Mr. Chaudhry gave oral evidence, called one witness, Mr. Khan, and by counsel submitted that the contraventions alleged by the Authority had not been proved on the evidence before the Tribunal and that, in any event, the financial penalty and prohibition order proposed by the Authority were unjustly harsh.

4. This unanimous decision upon the issues raised in the appeal is now rendered pursuant to Schedule No. 5 of the Law No. (7) of 2005 as amended, and Article 23 of the Regulations and Procedural Rules. It is given after due and careful consideration of the evidence, the relevant documentation, and the representations and submissions made to us by the parties.

The regulatory scheme

5. At all material times, business activities within the QFC were governed, in the case of corporations by the QFC Companies Regulations, and more generally by the FSR whose requirements for authorising firms and individuals to undertake regulated business activities are amplified and explained in published 'rule-books' that guide the Authority when exercising its powers of approval and supervision.

6. According to the register kept by the Companies Registration Office ('CRO'), Al Mal Bank LLC ('Al Mal') was incorporated on 3 December 2008 at the QFC to undertake regulated business activities. Its authorised share capital was shown as QR218,400,000 (the equivalent of US$60-m.), and eight directors and a secretary were named.

7. The same day, the Authority formally authorised Al Mal to undertake a range of financial banking services on the mutual understanding (though without any formal undertaking from Al Mal) that it must not perform those services until the Authority had first assessed, and then approved its systems and controls. The events that concern this appeal occurred shortly before 16 August 2009, the date when Al Mal was finally approved and authorised to commence its regulated business activities. During that period, although Al Mal was only preparing to do business, the Authority's staff were also concerned to ensure that Al Mal possessed sufficient capital to support its proposed banking activities.

8. The QFC regulatory scheme required Al Mal to appoint individuals to key positions of responsibility whom the Authority could trust to operate Al Mal professionally and in accordance with its obligations to the Authority, and to report any shortcomings or matters of significance to the Authority. Those individuals required prior approval by the Authority. On 3 December 2008, after interview and reviewing his previous experience at banks in Pakistan, Mr. Chaudhry was formally approved to perform the Compliance Oversight Function and Money Laundering Function of Al Mal.

9. The functions of Compliance Oversight are defined in INDI by reference to the Controls Rule book ('CTRL'). These involve consideration at two levels. Al Mal was itself required 'to establish an effective and independent compliance function including systems controls and written policies and procedures that ensure compliance with applicable requirements and standards under the regulatory system', and to reduce the risk of it being used for furthering financial crime.

10. To fulfil that obligation, Al Mal appointed Mr. Chaudhry as its 'First Vice President, Compliance' as from 1 March 2009. He was to be supervised by the approved Chief Executive Officer ('CEO'), Mr. Nazim Omara.

11. Mr. Chaudhry's roles and responsibilities in that post are set out in a document approved by the Authority. Mr. Chaudhry's was to oversee 'all compliance and anti-money laundering issues in relation to operations conducted in or from the QFC' and two deputies in a wide range of activities. No deputies were in fact appointed to assist him. Nor was any person appointed to act as company secretary or to be secretary to the board of directors until 31 July 2009. Mr. Pillai named in the CRO register did not show up.

12. Mr. Chaudhry, as a person approved by the Authority to fulfil the Compliance Function, was required by the FSR to adhere to the principles and requirements set out in INDI. These specifically included: Principle Two – 'to act with due skill, care and diligence in carrying out' the compliance function, and Principle Four – 'to deal with the Authority in an open and co-operative manner and disclose appropriately to the Authority any information of which the Authority would reasonably require notice'.

13. Mr. Chaudhry accepted before us that he was the 'Head of Compliance' at Al Mal and as such was responsible (among other things) for advising and assisting its board of directors and senior management in the design and implementation of compliance policies, procedures, and systems controls to comply with the applicable legislation in the QFC. He accepted that this included a responsibility to ensure compliance with the Companies Regulations, which he had read, and to ensure it had a share register. He was, however, not appointed to perform the duties of company secretary, nor to carry out such duties. It appears that Al Mal also employed as from May 2009 an experienced corporate lawyer as 'First Vice President – Head of Legal'.

Misconduct alleged against Mr. Chaudhry

14. The factual allegations of misconduct against Mr. Chaudhry referred to in the Decision Notice, and maintained before us by the Authority, were that he prepared minutes of a meeting of Al Mal's board of directors (purportedly held on 30 July 2009) which he ought to have known were false and misleading, and that he submitted those false minutes to the Authority and to the CRO on 5 August 2009. Upon those facts, it is contended that he contravened Article (2)(a) of the FSR (in that he 'recklessly provided false minutes to and misled the Authority'), and that he breached both Principle 2 (in that he failed to act with due skill, care and diligence) and Principle 4 (in that he failed to deal with the Authority in an open manner).

15. Although the disputed facts focus upon Mr. Chaudhry's acts, omissions and his state of mind over a few days at the end of July 2009 and the days following, they should be viewed against the background of an earlier period.

Common ground

16. The relevant events leading up to late July 2009 are either agreed or not materially in dispute. Al Mal was authorised as an Islamic Financial Institution (Category 5). This obliged it to hold at any time a minimum of US$10-m. of capital resources. Since it was not yet carrying on business except to set up its operation, this was then expected to consist of its ordinary paid up share capital less expenditure.

17. It was known by all concerned that Al Mal was intended to be a wholly owned subsidiary of a company incorporated in Bahrain called Al Sadd Holdings BSC ('Al Sadd') with no other shareholder. Following pressure applied by the Authority, Al Mal received US$15-m. from Al Sadd on 11 February 2009. This was treated in its books as its initial share capital.

18. On 19 February 2009, the CRO (and in effect the Authority) received notification in Form Q07 signed by Mr. Omara of a board resolution to increase initial paid up capital to US$15-m. and to increase authorised share capital to US$150-m., to amend the Articles of Association accordingly, and for the allotment of 15,000 shares of US$1000 each to Al Sadd for cash of US$15-m., and significantly, to increase the paid up capital to at least US$60-m. before commencement of business. The CRO subsequently amended the public register to show these changes. The evidence before

us however shows that there was no valid board meeting held to pass those resolutions, and that the directors' signatures on the attached board minute were forged. All this occurred before 1 March 2009 when Mr. Chaudhry began his employment.

19. The Authority subsequently asked representatives of Al Mal at various informal meetings when further share capital was expected to be 'put in place'. It received verbal assurances, principally from Mr. Omara, that it was Al Mal's intention to commence business with US$60-m. paid up capital. Further discrete payments of some US$6-m. were paid into Al Mal's account. Those came from investors in Al Sadd who were treated as 'indirect' investors in Al Mal contributing to its share capital.

20. No other sums were ever received by Al Mal attributable to share capital. Furthermore, although required by the QFC Companies Regulations (Article 25) and by Al Mal's Articles of Association (Article 4), no share certificates were ever issued by Al Mal to anyone, or paid for by Al Sadd (or anyone else). Nor apparently did Al Mal keep a share register to record the issue of shares; *ibid.* (Article 44). Mr. Chaudhry said he at sometime asked Mr. Omara if he could see Al Mal's share register, but was denied access. Nor, apart from briefing the bank early on in general terms, did the Authority ever direct its own attention or inquiries to these important legal formalities in its consideration of Al Mal's issued share capital.

21. The Authority took comfort from Al Mal's first Quarterly PIIB return received on 26 April 2009 recording US$15-m. as issued share capital. On 29 June 2009 a second Q07 Form of notification was received by the CRO (and made available to the Authority) attaching a minute of an Al Mal board resolution dated 21 June 2009 to increase paid up capital to US$35-m. and reporting a corresponding allotment of shares and cash received. It is now known that no such meeting had been held and that the directors' signatures were forged. Nor did any further matching payment reach Al Mal's account or show up in its books.

22. Mr Chaudhry was involved in that Q07 notification to this extent. He was sent the day before on 28 June 2009 by Mr. Omara a letter dated 2 April 2009 signed on behalf of the Doha Islamic Bank ('DIB') certifying that Al Mal had US$61,312,150 in a numbered bank account. This letter would have appeared genuine to Mr. Chaudhry,

but is now known to have been a forgery. Mr. Omara also told him "we are only using $35-m. this time.....I don't want the QFCRA to get too excited about the $60-m. I wanted to show them just enough". On the day of that notification, Mr. Chaudhry at a meeting informed the Authority that an additional US$20-m. capital was being put into place taking the total to US$35-m. and that paperwork would be provided shortly. We do not think that Mr. Chaudhry had any duty to inform the Authority of the greater sum of US$60-m. that he then thought was already with the DIB. The Authority well knew that Al Mal's stated intention was to have US$60-m. of issued share capital before commencing business.

23. Finally, we approach the crucial event a month later when Mr. Chaudhry submitted under a signed covering letter dated 5 August 2009, a further Form Q07 that he had prepared for Mr. Omara to sign, notifying the CRO that Al Mal had increased its paid up capital to US$60-m. and recording the issue of shares of a matching number and cash of US$60-m. received. The Form recorded 'a special board resolution dated 30 July 2009' authorising that increase, and a certified copy of a minute of the board meeting was attached. It is now known that no such board meeting had taken place, and that the directors' signatures had been forged.

24. There was also attached a letter from the DIB dated 4 August 2009 certifying that US$61,312, 150 was held in an Al Mal bank account. This was for exactly the same sum as had been 'certified' on 4 April 2009 but showed a different Al Mal account number and stated that this sum had been allocated to capital. It is now known that this letter too was a forgery.

The case against Mr. Chaudhry

25. The allegations made against Mr Chaudhry turn on the question whether, exercising the skill and care of a diligent professional compliance officer, he ought to have known or suspected that the board meeting of 30 July 2009 had not taken place, or had probably not taken place, and upon what his true state of mind and belief was when he submitted it to the CRO as part of the Form Q07 notification. The Authority accepts that he did not know that the signatures on the original minute he saw and copied were forged, or that the DIB certificate of 4 August 2009 was forged. Nor does it challenge his fundamental honesty, although it does not accept that he has given a true

explanation of what he did and knew at the time, either in response to investigations or in his evidence to this Tribunal.

26. The Authority maintains that any competent compliance officer placed in his position, especially given the part he played in drafting the minute, would at least have been highly suspicious that the minuted board meeting had not in fact taken place, and would have made further inquiries, such as checking with a director to see whether the meeting had in fact been held. It was submitted that, without some confirmation of that fact, he ought to have reported his doubts or reservations to the Authority.

27. To prove that Mr Chaudhry recklessly submitted that false board minute to the CRO (and in effect to the Authority) on 5 August 2009, the Authority rely particularly on five matters. First, that the meeting (like others that had earlier been minuted) could not have taken place on the 14th floor of the Gloria Hotel as stated since that floor has no meeting rooms, only a swimming pool. There is, however, no evidence that Mr. Chaudhry knew that. Secondly, it points to the several inconsistencies in the accounts given by Mr. Chaudhry of how that minute came to be drafted by him in successive emails between 30 July 2009 and 4 August 2009, and the way in which listing out the working policies and procedures needing board approval was internally compiled and finalised only after the date on which the board were supposed to have approved them. Thirdly, it points to Mr. Chaudhry's own draft minute of an Al Mal audit and compliance committee meeting at which Mr. Omara is recorded as present and causing the meeting to adjourn at 11:25 on 30 July, whereas the board meeting was eventually minuted as taking place with Mr. Omara present that morning between 11:00 and 11:30 in a hotel eight kilometres away.

28. Fourthly, it was put to Mr Chaudhry that alterations made subsequently to an email in his computer inbox on 18 November 2009 soon after the Authority started investigations could only have been made by him to ease a guilty mind and to support his pretence of innocence. Lastly, it was suggested that Mr. Omara's promise, as soon as the Authority's approvals had been secured, to grant him a bank loan on easy terms to replace more onerous house purchase financing made him the more anxious to assist Al Mal obtain approval to commence banking business, tempting him to be unduly cooperative and to neglect his professional responsibilities.

Mr. Chaudhry's case

29. Throughout the earlier investigations, and before us in giving evidence, Mr. Chaudhry maintained that he genuinely believed that a board meeting had taken place as minuted. He could not know for certain about the meeting since he was not present. He had first been shown some notes by Mr. Omara about the board meeting. He was later told of the resolutions that had been passed by the board. Having drafted them appropriately in accordance with what he had been shown or told, he later saw and copied the written minute apparently signed by five directors, including Mr. Omara, before submitting it to the CRO as part of the Form Q07 notification that he prepared and which Mr. Omara signed. All this contributed to a firm belief that the meeting had truly taken place.

The Tribunal's conclusions of fact

30. The Tribunal has given careful consideration to everything that Mr. Chaudhry has said at different times to support a genuine belief that a board meeting had taken place, at the date and the time minuted, to pass the resolutions recorded over the directors' signatures. We recognise that he was ultimately misled by the forged signatures that appeared on the original minute that he copied before submitting the Form Q07 to the CRO. But he admitted drafting those minutes in that form. We regret to say that none of his various explanations of how and why he came to prepare a template in several forms (one it appears before the 30 July 2009 and others later) and then to adapt them to produce the finally signed minute, can be accepted as reliable or true.

31. We also think it more probable than not that the day after Mr. Omara was removed from office on 17 November 2009, Mr. Chaudhry altered two of his own emails (one dated 29 June 2009, and the other dated 3 August 2009) to include self-serving words, contrary to his denials. It is difficult to see who else could have gained access to those emails, or why anyone else should have sought advantage from locating them in his mail box and making those alterations. We are not here concerned with the significance of the first, although Mr. Chaudhry had also prepared the earlier Form Q07 notification of 29 June 2009 enclosing another board minute with forged signatures. But the second, on which the Authority relied, strongly suggests that Mr. Chaudhry was trying to shift responsibility for the final form of the 30 July 2009

minute to Mr. Omara. We do not think, however, that Mr. Chaudhry's pending request for a home loan is of any relevance.

32. Mr. Chaudhry would have us believe that he was shown some handwritten notes by Mr. Omara on 29 or 30 July 2009 about a meeting, and asked to draft or 'type up' the minutes of a meeting. It was never clear what meagre information he derived from those notes beyond a vague reference to approval of procedure and policies. To say that he may have been shown them before the 30 July 2009 did little to justify reliance upon them as evidence of any meeting. They could not have referred to the resolution to increase capital to US$60-m. Mr. Chaudhry's early drafts make no mention of that, though they do refer to resolutions that did not find their way into the signed minute subsequently submitted. Mr. Chaudhry said he was first told by Mr. Omara of a resolution to increase capital on 4 August 2009, even if (as he later said) he may have been told sometime between 26 July and 2 August 2009 that the board might consider a capital increase. Nor at the outset could Mr. Chaudhry have been informed either by notes or by Mr. Omara of the date of the meeting. His succession of drafts in August variously refer to 29 July 2009, to backdating ('we need to get them signed off at a pre-fact date lets say 26 July' – this on 4 August 2009), then finally to 30 July 2009.

33. The emails exchanged by Mr. Chaudhry with Mr. Stockwell from the afternoon of 30 July onwards sought information about what 'stuff', understood to mean what operating manuals policies and procedures, needed to go through 'BoD approval.' A list ultimately emerged including two manuals in a recently finalised form. The same list was minuted as having been approved on the morning of 30 July. Even if a slightly different list (showing those two manuals in draft or yet to be drafted) was already in existence and might have been available for the board's consideration on 30 July, it was still a different list from the one that Mr. Chaudhry attached to his minute, even if Mr. Chaudhry assumed that the directors would have resolved to pass all the manuals as finalised, and sought to 'rectify' (as he put it) the resolution that was passed.

34. Mr. Chaudhry wholly lacked credibility when attempting to reconcile the blatant inconsistencies between the two minuted meetings held on the morning of 30 July. His own draft minute of the meeting of the audit and compliance committee held at Al Mal and begun at 10:30 recorded that Mr. Omara had adjourned the meeting at 11:25. Those times, he told the investigators, were correct, as we would expect them to be.

That being so, he could not have truly believed that Mr. Omara was at the Gloria Hotel the same morning from 11:00. We did not believe his late self-serving pretence before us that Mr. Omara had, contrary to his own minute, left the audit and compliance meeting early, either 'in the middle of the meeting', or at 'around eleven' or 'ten to fifteen minutes' after it started.

35. We accept that when Mr. Chaudhry submitted the board minute to the Authority on 5 August 2009 as part of the Form Q07 notification, he believed that Mr. Omara had obtained the signatures of four directors and had signed it himself. But we do not accept that he could have honestly believed that those directors had been assembled at a meeting in the Gloria Hotel on 30 July 2009 and had passed the resolutions that he had drafted for the minute. His true state of mind can only be discerned from all the relevant circumstances, the contemporaneous documentation, and the balance of probabilities.

36. We have concluded that it is most probable that Mr. Chaudhry realised that the minute he was being asked to draft, and did ultimately settle, was intended falsely to describe a fictitious meeting, even though it was in the end apparently signed off by directors. The minute was created by him in that form because those resolutions were promised and needed, to secure permission for Al Mal to commence business. Because none of the Al Mal board minutes (Mr. Chaudhry had seen those dated 21 June 2009) included the non-executive directors as attendees, they could not be treated as valid 'circular minutes'. Mr. Chaudhry said he did not view them as 'circular minutes'. So the pretence of a board meeting was necessary.

37. Mr. Chaudhry knew nothing from his own knowledge of the meeting. He was not there. Nor had he seen any notice of a meeting. Without a company secretary present, there could be no authentic record of a genuine meeting. Instead, under the influence of Mr. Omara, Mr. Chaudhry was drawn into the process of constructing minutes purporting to show a board meeting at which the necessary resolutions had been passed. As an intelligent man with an impressive record of experience, let alone as a Compliance Officer concerned with dutiful attention to formalities and scrutiny of due process, we are driven to find that Mr. Chaudhry allowed himself to be complicit in the construction of false minutes, not caring whether the meeting had in fact taken place, and not wishing to seek out the truth.

38. Having seen the signed original, he might have thought that the five directors had somewhere gathered to sign the minute, around 4 or 5 August 2009, thereby assenting to its terms. But that they had passed those resolutions at a properly convened board meeting held on 30 July between 11:00 and 11:30 he could not have believed. He admittedly took no steps to verify the truth of what was represented by the minute that he drafted. He could have asked a director about the meeting, or looked for a notice of meeting and agenda sent to all directors. He did not do so. Instead he allowed himself to be party to the pretence that the meeting had taken place, and submitted the minute to the CRO as part of the package attached to the Form Q07 of 5 August 2009.

39. We have already referred to the misconduct alleged against Mr. Chaudhry by the Authority. We note that at no stage did the Authority suggest that the misconduct relied on involved preparing or submitting a Form Q07 that represented that there had been a share allotment shares of 60,000 shares to Al Sadd, and that US$60-m. cash had been received by Al Mal. Though questions were asked of Mr. Chaudhry and others about those matters, and we have referred to facts in evidence, we make it clear that because of the lack of prior notice, we have taken no account of them. It would be unfair to take any account of such matters in judging whether the contraventions formally alleged against Mr. Chaudhry had been proved, or in assessing what penalty he should bear.

The meaning of 'recklessly'

40. Article 84(2) of the QFC Financial Services Regulations (FSR) provides:

> "Without prejudice to the generality of Article 84(1), for the purposes of these Regulations a Person contravenes a Relevant Requirement if he:
> Knowingly or recklessly provides to the Regulatory Authority any information which is false, misleading or deceptive or conceals information where the concealment of such information is likely to mislead or deceive the Regulatory Authority."

41. There was legal argument before us as to what is here meant by 'recklessly', and what proof was required of Mr. Chaudhry's state of mind in providing information to the Authority that was admittedly false and misleading. Two contrasting views were propounded.

42. For the Authority, it was argued that a person acts recklessly with respect to (i) a circumstance when he is aware of a risk that it exists or will exist; or (ii) a result when he is aware of a risk that it will occur; and (iii) it is in the circumstances known to him, unreasonable to take such a risk; R v. G [2004] 1 AC 1034 at 1057G (per Lord Bingham). This test emerges from a series of decisions upon statutory provisions defining the *mens rea* required when acts have caused damage. Previous authority upholding an objective approach to the assessment of risk of damage was overruled. The Tribunal is required to find subjectively what was appreciated about the possibly damaging consequences of what the accused was doing. In the context of this appeal, it was argued, the relevant 'risk' was the risk of the falsity of information, and in the circumstances known to him, Mr. Chaudhry 'unreasonably' took the risk of providing it.

43. For Mr. Chaudhry, it was objected that R. v. G. was a decision explicitly confined to defining the *mens rea* for a specific offence, focussing on how the risk of the damaging consequences had been perceived at the time of the initiating conduct. In the different context of a 'misrepresentation' such as Article 84(2)(a), the reckless provision of false, misleading or deceptive information, it would be more appropriate to look for proof of the kind of 'blind eye knowledge' described in Derry v. Peek (1889) LR 14 App. Cas. 337; that is, a mind not caring whether the statement was true or false, or one indifferent to its truth.

44. In the course of argument, our attention was drawn to Three Rivers DC v. Bank of England [2000] UKHL 33 where it was held that liability for the tort of misfeasance in public office could arise from an act performed with reckless indifference to the outcome, not caring whether the consequences happen or not. This, like R.v. G., addressed liability for consequences not fully or consciously intended by one whose conduct was impugned. On the other hand, the Hong Kong Court of Final Appeal has readily accepted, without legal analysis, a lower court's finding of recklessness applying the R. v. G. test, when upholding a conviction for 'knowingly or recklessly providing false or misleading information to a regulatory authority', a similar offence to Article 84(2)(a); see To Shu Fai v. SFC (2009) 12 HKCFAR 758.

45. The Tribunal is reluctant to decide definitively as between these two approaches. A good and sufficient reason for not doing so is that it is unnecessary for us to do so on this appeal. On either approach, we are satisfied upon the facts that Mr. Chaudhry's state of mind in providing the relevant information to the Authority was proved to have been 'reckless', on both the Derry v. Peek concept of 'blind eye knowledge' and what is said to be the less stringent test of R. v. G..

46. That said, we think it right to be cautious about applying the R. v. G. test, formulated explicitly to deal with an offence of causing damage, to the requisite state of mind of one who provides false information. R. v. G. was clearly not intended to provide a rule applicable in other statutory contexts; see Lord Bingham at 1054D. To read across from that case mechanistically to the different topic of misrepresentation, and to think of a 'risk' of falsity and of 'known circumstances' in the context of the basis of a subjective belief, involves an inelegant use of language and is unattractive.

47. We note that in both Article 84(2)(a) and Article 92(1) 'recklessly' is used only in the context of the provision of false information and the like (though it does not qualify the duties in Article 57 (4) or Article 132 of the Companies Regulations). In both cases, the statutory purpose is, we think, to penalise the provision of information where there is no honest belief in its truth.

48. The analysis by Lord Herschell of the deceitful mind in Derry v. Peek brought out the distinction between the honest belief of one who carelessly, stupidly or through ignorance makes a false statement but in the belief that it is true, and one who lacks that honest belief because of an indifference to the truth or a resolve not to seek the truth despite indications of falsity. The latter describes 'recklessness' in the tort of deceit. It is difficult to see why any different approach should have been intended, or should be adopted in construing the financial services regulations governing the provision of false information. Equally, it may be that the R. v. G. approach would lead to much the same result in most cases if 'unreasonable' were to be equated with the rational working of an honest mind.

49. In any event, given the legal uncertainty here created by the undefined use of the word 'recklessly', we would have been inclined to prefer what was said on Mr. Chaudhry's

behalf as providing the more stringent test. In case of ambiguity, the construction more favourable to those facing the possibility of penalties and professional consequences should ordinarily be preferred.

50. We therefore leave this matter to be explored on a future occasion having offered our tentative thoughts.

Findings on charges

51. In paragraph 6.7 of its Decision Notice dated 28 March 2011, the Authority concluded that Mr. Chaudhry contravened three Relevant Requirements: Principle 2 (Due Skill, Care and Diligence) and Principle 4 (Relations with the Regulator) of the Principles of Conduct for Approved Individuals (the 'AI Principles') that are set out in Part 7 of the INDI, and Article 84(2) (A) of the FSR. It maintained that the same contraventions had been established on this appeal.

Contravention of Article 84(2)(a) of the FSR

52. It follows from our findings of fact set out above as to Mr. Chaudhry's state of mind, that we find this contravention to be proved even on the most stringent meaning of 'recklessly'. Mr. Chaudhry was plainly a 'person' within the meaning of that Article. It has been proved upon a balance of probability, and after taking into account the seriousness of the allegation, that he recklessly provided to the Authority, on 5 August 2009, information that was false or misleading. That false information consisted of the admittedly forged minute of an Al Mal board meeting dated 30 July 2009 that purported to evidence the passing of the board resolutions there set out.

Contravention of AI Principles

53. We now turn to the judgment upon Mr. Chaudhry's conduct that has to be made according to objective standards. Although there was no evidence called to establish what the reasonable standard of skill or care or diligence was of a senior compliance officer of a bank, and what might reasonably have been expected by the Authority of a person exercising that function, there is expertise and experience available to the members of this Tribunal that enables us to form a view upon the extent to which he fell short of the requisite standard. In that connection, we note that Mr. Chaudhry had

many years' experience of compliance work in the employment of two banking institutions in Pakistan.

Contravention of AI Principle 2

54. In INDI, AI Principle 2 is formulated as follows: 'An Approved Individual must act with due skill, care and diligence in the carrying out of Controlled Functions'. It is not disputed that Mr. Chaudhry was an 'Approved Individual', who performed a 'Controlled Function', that is the Compliance Oversight Function. The Compliance Oversight Function is defined in Rule 2.1.5 of INDI as follows: "The Compliance Oversight Function is the function of being responsible for compliance matters of an Authorised Firm as provided in the QFC Regulatory Authority's Controls Rulebook ('CTRL'), section 4.3". Those matters are described in wide and general terms. It is not disputed that Al Mal was an 'Authorised Firm'.

55. In its Decision Notice (para. 6.7 (i)), the Authority found that Mr. Chaudhry contravened Principle 2 in that he failed 'to act with due skill, care and diligence in carrying out the Compliance Oversight Function', thus contravening Principle 2. It was further said that he 'prepared the 30 July Minutes, which were false, in circumstances where .... [he] ought to have been aware that: no meeting of the Directors was held on that date; (b) no notice of the meeting had been given to the Non-Executive Directors; (c) the manuals, policies and procedures recorded as having been approved by the Directors had not in fact been provided to or approved by the Directors; and (d) the resolution to increase the capital of Al Mal to US$60-m. had not been passed at any Directors' meeting.'

56. In his Notice of Appeal, Mr. Chaudhry claimed that because he was not the company secretary (as Mr. Khan confirmed), and his duties did not extend to preparing minutes of meetings of the Board of Directors, there was no reason for him not to act on the instructions of Mr. Omara, Al Mal's CEO, or to question them. He said he had no reason to doubt the passing of resolutions included within the minutes of 30 July 2009, or the approved capital increase to US$60-m., or to question whether a meeting had in fact taken place. He believed what the CEO told him was true. Similarly, he had no duty to investigate whether the non-executive directors not named as attendees, had received notice of the meeting. Calling of Board meetings, setting agendas and distributing minutes of the meeting were all matters beyond the scope of his duties.

57. With respect to the approval by the Board of the manuals, policies and procedures, Mr. Chaudhry knew that they could not all have been laid before Directors at a meeting of 30 July 2009. He claims, however, that he was under the impression that a list had been made available to Directors and that he could honestly believe as stated in the minutes that the manuals, policies and procedures had been approved.

58. It was also submitted by Mr. Chaudhry's counsel during the hearing that his duties as Head of Compliance did not require him to ascertain the truthfulness of the minutes he was asked to draft and, more generally, that as his duties did not extend to witnessing the decisions of the board, he could not question the information he received from Mr. Omara upon decisions taken at board meetings.

59. The Tribunal does not, however, find any support for such a restrictive understanding of the Compliance Oversight Function in Section 4.3.1 of CTRL. As Head of Compliance, Mr. Chaudhry was a senior manager of the company, responsible for ensuring compliance with "applicable requirements and standards under the Regulatory System" (Section 4.3 of CTRL). Regulatory System is defined in the Authority's Interpretation and Application Rulebook as follows: 'The arrangements, in or under regulations or rules, for regulating authorised firms'. This definition is broad enough to encompass all regulated aspects of a company's organs, including its Board of Directors. The responsibilities of a Head of Compliance at Al Mal do not, therefore, end at the door of the Board room, as this would give the most powerful officials of the company free rein to engage in reprehensible activities to the detriment of shareholders and other persons. Nor can a Head of Compliance be justified in taking instructions and information from a CEO at face value as Section 4.3.1 of CTRL requires the compliance function to be 'effective and independent'.

60. On the basis of the evidence presented to the Tribunal, and the admitted lack of any steps taken by Mr. Chaudhry to check upon the truth of the matters set out in that board minute, one that he himself had drafted, the Tribunal concludes that Mr. Chaudhry contravened AI Principle 2.

61. First, given his duties as Head of Compliance, Mr. Chaudhry had a duty to make sure, to the best of his ability, that Al Mal's board meetings and board decisions had been truly and accurately recorded. In the case of the minute of the board meeting of 30 July

2009, he conspicuously failed to do so despite the many facts that should have alerted him to the possibility that the draft minutes of the Board meeting that he himself drafted in stages after the supposed event were neither true nor accurate. We have already referred to the coincidence of two meetings attended by Mr. Omara at the same time in different and distant places, the apparent absence of agenda and notices of the meeting attached to the draft minutes, the late addition by Mr. Omara to the draft minutes of a resolution on the capital increase of Al Mal, and the uncertainties about the date of the meeting and other inconsistencies.

62. Secondly, even if, contrary to our findings, Mr. Chaudhry had sincerely believed that a board meeting had taken place on 30 July 2009, and that the directors had authorised the paid-up share capital of Al Mal to be increased to US$60-m., and that more than US$60-m. had been deposited with DIB as certified in the forged letter he was shown, this would still not have been sufficient for him to conclude that the capital increase had become effective. Until the allotment of shares corresponding to the capital increase had been made, the balance in the DIB account could only be regarded as a repayable deposit, not as an addition to Al Mal's paid-up share capital. In order to determine that a capital increase had become effective, Mr. Chaudhry would have had to make sure that an allotment of shares had taken place, and that he failed to do. He made no inquiries to that end because he said he had previously been denied access to the Al Mal share register. There is no evidence that one ever existed or was used. We do not think that a Head of Compliance can be excused for failing to pay attention to these important formalities which alone determine the measure of Al Mal's issued share capital.

63. For the first of these reasons, the Tribunal finds that Mr. Chaudhry contravened AI Principle 2. For the reasons already given, we exclude consideration of the second which, on our findings, is no more than a hypothetical conclusion.

64. We observe that the evidence might have supported an additional charge, a contravention of AI Principle 5 (Management and Compliance). But as this issue was not raised before or during the appeal, we say no more about it.

Contravention of AI Principle 4

65. AI Principle 4 (Relations with the Regulator) states: 'An Approved Individual must deal with the Regulatory Authority in an open and cooperative manner and disclose appropriately to the Regulatory Authority any information of which the Regulatory Authority would reasonably expect notice'.

66. According to the Decision Notice (para. 6.7(ii)), Mr. Chaudhry failed 'to deal with the Regulatory Authority in an open and cooperative manner by failing to disclose appropriately to the Regulatory Authority information of which the Regulatory Authority would reasonably expect notice. Specifically, [he] submitted the 30 July Minutes to the Regulatory Authority when they were false and misleading and failed to notify the Regulatory Authority of the matters referred to in paragraph 6.7(i) above'.

67. Mr. Chaudhry denies having contravened AI Principle 4 because he claims he genuinely believed that the information he was providing was accurate.

68. On the basis of the evidence presented to the Tribunal and our findings above, we reject that claim. The Tribunal concludes that Mr. Chaudhry contravened AI Principle 4. The true state of the issued share capital was a matter of considerable importance to the Authority if it were to permit Al Mal to commence business as an Islamic Financial Institution. On the true facts, no more than US$23-m. had been received and treated in its books as share capital. On the Form Q07 notification of the 29 June 2009, it had been reported that shares up to US$35-m. had been allotted and paid for, that an additional US$25-m. of share capital had been received. It is true that US$60- m. was not apparently an essential requirement before permitting business to commence, and that sight of the DIB certificate of 4 August 2009 might have affected him. But the fact that the Head of Compliance was not convinced that there had been a true meeting of the board on 30 July 2009 to authorise that further increase of share capital was clearly a fact that ought not to have been withheld from the Authority.

69. For these reasons, the Tribunal finds that Mr. Chaudhry has contravened AI Principle 4.

Mitigating factors

70. Mr. Chaudhry claims that the penalties inflicted upon him by the QFC Regulatory Authority were excessive because they do not take into account certain mitigating factors. These mitigating factors are set out in Mr. Chaudhry's representations to this Tribunal. It said that he had no wilful intent to deceive, he was simply 'too trusting' of Mr. Omara, and that his previous record of service shows that he is reliable, and certainly not 'reckless' by nature.

71. We take into account Mr. Chaudhry's previous good record of service exercising compliance duties in related business activities. We accept his statement of means, brought up to date for us on the last day of his appeal. He is not well off. We recognise that he supports many family dependents, and gained nothing for himself from the contraventions proved against him.

72. The Tribunal has no doubt that the conduct of Mr. Chaudhry was to a large extent the consequence of fraudulent activity to which he was not privy, and of forged documentation brought to him by Mr. Omara, his superior officer and supervisor. He was no doubt strongly influenced by the Bank's CEO whose authority he did not question. He would no doubt have been reluctant to question or check what he had been told by Mr. Omara.

73. Had Mr. Chaudhry not been a member of Al Mal's senior management and, more specifically its Head of Compliance, these considerations would have carried great weight with the Tribunal. But the important nature of the responsibilities he had undertaken, and was required by the Authority to perform with appropriate professional skill, care and diligence, was such that he cannot shirk them by claiming that he was too trusting, or that he did not have the fortitude or resourcefulness to discharge them properly. Nor can he credibly claim that he misunderstood the extent of his authority and believed that he could not question his CEO's assertions and instructions.

74. It should also be noted that the penalties imposed on Mr. Chaudhry by the Authority are not unduly harsh. The Financial Penalty (US$20,000) is equivalent to about two months of his current salary. The Prohibition Order is limited in scope as it prohibits Mr. Chaudhry from performing the Controlled Function of Compliance Oversight, that

is only the most senior compliance oversight function, for any Authorised Firm in the QFC for a period of 12 months.

75. It became clear to us during the hearing that Mr. Chaudhry still believes that a Head of Compliance should not question the information and instructions he receives from a company's CEO, or examine whether a Board of Directors have complied with the requirements of the QFC's Regulatory System and the QFC Companies Regulations. It follows that it would be in the public interest to mark the breaches of duties proved on this occasion with a period of experience in a lesser role, re-learning the role of a Head of Compliance that matches the standards required by the Authority within a regulated firm. It is not unreasonable that he should not be allowed to perform such functions for a one year period, though we would hope that he would be able regain such a position thereafter, with the benefit of all the lessons that a man of his intelligence must have learned from his experience with Al Mal.

Decision on penalties

76. We therefore uphold the decision imposed under Article 62(3) of the FSR to prohibit Mr. Chaudhry from performing the Compliance Oversight Function for any Authorised Firm in the QFC for a period of 12 months beginning from a date 14 days after the publication of this decision. We have carefully considered in all the circumstances whether it would be right to set aside or reduce the fine of US$20,000 that was also imposed by the Authority, but we can find no good reason to do so. We therefore also uphold the financial penalty and order Mr. Chaudhry to pay the fine of US$20,000 to the Authority within three months from the date of this decision. The appeal is therefore dismissed.

Lessons

77. It has not been part of our function to look critically at the conduct of the Authority. Although commercial fraud and forgeries are rarely easy to detect, we would hope and expect the Authority to have learned some lessons from the facts of this case. What follows are thoughts we offer for its consideration.

78. This hearing may have demonstrated the perennial truth that a 'light touch' approach to regulation can bring disadvantages, particularly when a start-up financial institution is involved. We were however struck by the contrast between the very detailed

inquiries and consideration given by the Authority to the approval of Mr. Chaudhry to undertake Compliance Oversight duties, and its much less rigorous testing of what Al Mal had reported at different times about its issued share capital and its shareholding. It became clear during the hearing that too much may have been assumed about the adequacy of Al Mal's understanding of basic legal and accounting principles. Though confusion between the capital and assets of the holding company (Al Sadd) and the capital and assets of its wholly owned subsidiary (Al Mal) was evident and detectable, there was no real attempt to correct this confusion or to make sure that it did not continue.

79. We would end by expressing our gratitude to the parties, their counsel and their legal teams for the co-operation that enabled this hearing to be completed in just over two days. Much credit belongs to those who prepared and maintained the considerable documentation so efficiently. Each counsel presented and conducted his respective case with commendable clarity and realism. Though it was the first appeal to be heard by the Tribunal, the manner in which the parties conducted themselves provides a model of how future appeals should be conducted.

Signed by: Michael Thomas CMG, QC

Chairman of the QFC Regulatory Tribunal on behalf of the Tribunal

Representation:

For the Appellant, Mr. Kashif Chaudhry: Mr. Richard Ritchie (Counsel, XXIV Old Buildings Chambers, UK) and Mr. Paul Sandosham (Wong Partnership, Singapore)

For the Respondent, QFC Regulatory Authority: Mr. Ben Jaffey (Counsel, Blackstone Chambers, UK) and Mr. Shane Sibbel (Counsel, Blackstone Chambers, UK)