# THE FAIR TRADING COMMISSION

## BEFORE THE BOARD OF COMMISSIONERS

**IN THE MATTER of the Fair Competition Act, 2009;**

**THE FAIR TRADING COMMISSION**
**VS.**
**i. EDEN ISLAND RETAIL CENTRE (SEYCHELLES) LTD**
(Rep herein by Mrs. Aarti Kerai)
**ii. MASON'S XCHANGE**
(Rep herein by its directors Mr. Raymond Mason & Mrs. Kathleen Mason)

FCA32

**Complainant**: JPL Exchange (Seychelles) Co. Ltd

**1st Respondent**: Eden Island Retail Centre
(Rep herein by Mrs. Aarti Kerai)
**2nd Respondent**: Mason's Xchange
(Rep by Mr. Raymond Mason & Mrs. Kathleen Mason)

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**QUORUM:**
Mr. Colin Jean-Louis – Chairperson
Mr. Philippe Chong-Seng - Commissioner
Mrs. Jenna Thelermont – Commissioner
Mr. Michael Nalletamby – Commissioner

**For the Complainant**
Ms. Chantale Barallon – Director for Legal Affairs (FTC)
Mr. Francis Lebon – Director for Competition (FTC)

**For the 1st Respondent**
Mr. Bernard Georges – Attorney-At-Law
Mrs. Aarti Kerai
Mr. Nilesh Kerai

**For the 2nd Respondent**
Mr. Frank Ally – Attorney-At-Law
Ms. Alexandra Benoiton – Attorney-At-Law
Mr. Rohit Khanna

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## RULING

[1]The Fair Trading Commission, on the 12th of June, 2013, recorded a complaint from one Mr. Jean-Pierre Latour of JPL Exchange (Seychelles) Co Ltd (See Exhibit 1), now the

complainant, against two registered companies namely Eden Island Retail Centre (Seychelles) Ltd, now the 1st respondent, and Mason's Xchange, now the 2nd respondent (See Exhibits 4, 5 and 6). The complainant alleged that Eden Island Retail Centre (Seychelles) Ltd was in breach of the Fair Competition Act, 2009 by virtue of entering into an exclusivity agreement with Mason's Xchange which gave the latter exclusivity rights to trade as Bureau de Change. He had been directed to cease the operations of his Bureau de Change as of 14th of June, 2013 due to the exclusivity agreement between the 1st and 2nd respondent unless he can come to a consensus with the 2nd respondent (See Exhibit 3(b)).

[2]Following an interim injunction being granted by the Board of Commissioners on 13th of June, 2013 the Fair Trading Commission was allowed six weeks to conduct its investigation into the complaint (See Exhibit 8). Officers of the Commission made several findings. That Mr. Peirre Latour is the owner of JPL Exchange (Seychelles) Co. Ltd situated at Eden Island Plaza and rents a section of these premises from Eden Island Retail Centre (Seychelles) Ltd who is the owner of the entire Eden Plaza building. On the 6th of June, 2013 Mrs. Aarti Kerai, the representative of, Eden Island Retail Centre (Seychelles) Ltd sent an email to Mr. Xavier Heinen, the business partner of Mr. Latour, stating that JPL Exchange (Seychelles) Co. Ltd has to come to an agreement with the owners of Mason's Xchange by the 14th of June, 2013 as Mason's Xchange had been given exclusivity to trade as a Bureau de Change and Mason's Xchange wishes to begin operations at the plaza the following week. Failure of Mr. Latour to agree would lead to cessation of trade. The Commission determined that this was a breach of the Fair Competition Act, 2009 and deemed it necessary for the case to be forwarded to the Board of Commissioner for determination.

[3]The matter appeared before the Board of Commissioners on Wednesday 2nd October, 2013 for hearing. The complainant was being represented by Mr. Francis Lebon, the Director for Competition (FTC) and Ms. Chantale Barallon, the Director for Legal Affairs (FTC). Ms. Barallon presented the evidence of the Commission gathered in support of the allegations against the respondents which were to the effect of a breach of Section 11 (1) and Section 11(2)(b) and (c) of the Fair Competition Act, 2009. The same are reproduced below:

> **"11.(1)** *Subject to this section, agreements between enterprises, trade practices or decisions of enterprises, or undertakings or concerted practices of enterprises that have or are likely to have as their object or effect the prevention, restriction or distortion of competition within Seychelles, are prohibited unless they are excluded in accordance with the provisions of this Sub-Part."*

> **"11.(2)** *Subsection (1) applies to agreements, practices, undertakings or decisions that –*
> *(b) limit or control production, markets, technical development or investment;*
> *(c) provide for the artificial dividing up of markets or sources of supply;"*

[4]The Commission presented evidence of the existence of an oral agreement between the 1st respondent and 2nd respondent whereby they had agreed that exclusivity would be given to the 2nd respondent in relation to the service of Bureau de Change as a condition to leasing the premises belonging to 1st respondent. This is clearly depicted in an email sent on the 17th of April, 2013 by the 1st respondent to Mr. Xavier Heinen. The same states *"It has been made clear from the beginning that Mason's has exclusivity for an exchange bureau."*(See Exhibit 3(a)). Further on the 6th of June, 2013 Mr. Heinen again received an email from the 1st respondent directing him to cease operations trading as a Bureau de Change unless he can come to an agreement with Masons (See Exhibit 3(b)). Neither respondents rebutted this allegation but rather admitted that such an oral agreement existed prior to the Plaza being completed.

[5]Ms. Barallon also submitted that the Eden Island Retail Centre (Seychelles) Ltd and Mason's Xchange were in contravention of Section 12(1) of the Fair Competition Act, 2009 which provides that "*An enterprise shall not give effect to an exclusionary provision in an agreement where the agreement is entered into or arrived at between enterprises any two or more of which are in competition with each other, if the effect of the provision is to prevent, restrict or limit- (a) the supply of goods or services to; or (b) the acquisition of goods or services from, any particular enterprise or class of enterprise either generally or in particular circumstances or conditions, by all or any of the parties to the agreement.*" Ms. Barallon stated that the provision of the agreement gives rise and effect to an exclusive territory in that Mason's Xchange initiated the exclusivity provision with the intention of being the sole Bureau de Change operator at Eden Plaza and Eden Island Retail Centre (Seychelles) Ltd gave effect to that exclusivity provision, which provision would have had the effect of restricting and preventing competition from other service providers by foreclosing market access.

[6]Ms. Barallon concluded by stating that an exclusivity provision restricts potential competition by raising the entry barrier and awards a particular market to one enterprise only. Furthermore, that an enterprise protected by exclusivity provision will have the ability to exercise a greater degree of market power without any competitive constraints working against the process of healthy competition. Thus the Board should impose a direction under Section 42(1)(a)(aa) of the Fair Competition Act, 2009 directing the respondents to amend the agreement in view of the illegality of the exclusivity provision

and to apply an appropriate financial penalty as stipulated under Section 46 of the same Act.

[7]Mr. Bernard Georges, Counsel for the 1st respondent argued that the complainant had given an undertaking that JPL Exchange (Seychelles) Co. Ltd would not be operating as a classic Bureau de Change but rather offering mainly international consultancy and services which needs to include some domestic exchange transaction according to the Central Bank of Seychelles' prescription and also international money transfer (See Respondent Exhibit 1). This meant that the two enterprises were to provide different services but then JPL Exchange (Seychelles) Co. Ltd went back on the undertaking it had given to the 1st respondent regarding its operations. Counsel added that nonetheless the exclusivity agreement had since the filing of the complaint been dissolved, therefore, the issue no longer existed hence Section 11 no longer applies. Mr. Georges concluded by stating that Section 12 was not relevant as it refers to an agreement between two or more enterprises that are in competition with each other as opposed to the situation of the current case.

[8]Counsel for the 2nd respondent jointly pointed out that there was no real issue of exclusivity in that the only mention of exclusivity was prior to the signing of the lease agreement therefore had there been real intention of the 1st respondent to give effect to an exclusivity clause to the 2nd respondent it would have included in the lease agreement. That at no point did Mason's Xchange believe that it would be the sole provider of a Bureau de Change given the existence of the Mauritius Commercial Bank and Nouvobanq, also providing a similar service, in the close vicinity of the premises to be occupied by Mason's Xchange. Consequently, Section 11 of the Fair Competition Act, 2009 does not apply. Furthermore, adopting the argument of Mr. Georges, counsel for the 2nd respondent argued that Section 12 also does not apply to the circumstances of this case in that Section 12 refer to two or more enterprises who are in competition with each entering into an agreement and at no point in time was Eden Island Retail Centre (Seychelles) Ltd, who is simply a landlord, in competition with Mason's Xchange, who was at time a potential tenant. With regards to the prayer of an imposition of a fine, counsel stated that Section 46 mentions a financial penalty not exceeding 10 percent of the turnover of the enterprise up to a maximum period of five years during the period of the breach. Given that Mason's Xchange was not in operation during the duration of the alleged breach no financial penalty can be imposed. Counsel moved for a dismissal of the entire complaint.

[9]The Board of Commissioners has taken into account all the evidence adduced before it. Based on the various exchanges of emails and oral evidence given to the Commission and the Board of Commissioners during the hearing it is clear and undisputed that there was indeed the existence of an exclusivity agreement between Eden Island Retail Centre (Seychelles) Ltd and Mason's Xchange initiated by Mason's Xchange as a condition for a

lease. It is similarly clear that Eden Island Retail Centre (Seychelles) Limited was in effect enforcing the said exclusivity clause and had the complainant not sought assistance and thereafter obtained an intervention from the Fair Trading Commission the respondents would have successfully displaced JPL Exchange (Seychelles) Co Ltd from the market of trading in foreign currency. The Board does not agree with this interpretation of the email dated 1st February, 2012 from Mr. Heinen to Mrs. Aarti Kerai (RE1) by counsel for the 1st respondent. Although Mr. Heinen says in the email that they "would not be operating as a classic Bureau de Change" he also states clearly "...which needs to include some domestic exchange transaction according to the Central Bank of Seychelles' prescription..." hence it cannot be said that JPL Exchange (Seychelles) Co. Ltd was not expected to be conducting similar operations as any Bureau de Change. The Board also cannot agree with the arguments of Counsel for the 2nd respondent by stating that Mason's Xchange did not in fact expect exclusivity due to the presence of bank yet the 1st respondent was still making reference to the exclusivity agreement in an email dated 6th June, 2013 whereby JPL Exchange (Seychelles) Co. Ltd was being directed to cease operations as a Bureau de Change due to the existence of this agreement. The Board is of the opinion that the acts of the respondents would most likely have restricted, prevented or distorted fair competition and consequently finds both the 1st respondent, Eden Island Retail Centre (Seychelles) Ltd for having executed the exclusivity agreement and the 2nd respondent, Mason's Xchange for having initiated the same agreement, which would have had as its effect the restriction, prevention and/or distortion of fair competition as well as the elimination of a possible competitor, to be in breach of Section 11(1) and Section 11(2)(b)(c) of the Fair Competition Act, 2009.

[10]With regards to count 2 referring to the breach of Section 12(1) of the Fair Competition Act, 2009, the Board of Commissioners has found no evidence from the complainant to support this allegation given that the exclusivity agreement was not made between two enterprises which are in competition with each other. Therefore, the Board agrees with the arguments of the respondents. Subsequently, this limb of the complaint cannot be allowed. It is hereby dismissed.

[11]Both respondents gave an undertaking before the Board of Commissioners that the since the filing of the complaint the original position has been rescinded in that there is no longer an exclusivity agreement. The Board shall accept this undertaking and thus no further direction is necessary with regards to this issue. Be that as it may the intention remains illegal. Consequently, pursuant to Section 46(1) of the Fair Competition Act, 2009 which provides that *"The Commission may, in relation to a determination made under this Part, in addition to, or instead of, giving a direction, make an order imposing a financial penalty on an enterprise"* **the Board shall impose a fine of SR. 10, 000/- on the 1st respondent and a fine of SR. 10, 000/- on the 2nd respondent** as penalty for the contravention of Section 11(1) and Section 11(2)(b)(c) of the Fair Competition Act,

2009. **Payments are to be made to the Fair Trading Commission not later than thirty (30) days from the dates of this ruling.**

[12]The parties are free to appeal against this decision (*See Section 50 of the Fair Competition Act, 2009*).

[13]We so order.

Ruling pronounced by us on this 27th day of November, 2013.

**Mr. Colin Jean-Louis**
**Chairperson**

**Mr. Philippe Chong-Seng**
**Commissioner**

**Mrs. Jenna Thelermont**
**Commissioner**

**Mr. Michael Nalletamby**
**Commissioner**