Appeal against Royal Court Judgment regarding sanctions imposed by GFSC on directors/managers of fiduciary services company, asserting error of law, unreasonableness, and disproportion.

[2024]GCA003

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION

CASE NO. 569

ON APPEAL FROM THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

18 January 2024

Before: Jonathan Crow CVO, KC

David Perry, KC

Sir Adrian Fulford, PC

Between: **THE GUERNSEY FINANCIAL SERVICES COMMISSION**

Appellant

-and-

(1) IAN CHARLES DOMAILLE

(2) IAN GEOFFREY CLARKE

(3) MARGARET HELEN HANNIS

Respondents

Advocate J. Hill for the Appellant

Advocate A. Williams for the Respondents

Perry JA

This is the judgment of the Court to which we have all contributed.

INTRODUCTION

1. This is an appeal pursued by the Guernsey Financial Services Commission ("**the GFSC**"), pursuant to s. 107(1) of the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law 2020 (the "**EP Law**"). The decision under challenge is the judgment of Her Honour Lieutenant Bailiff Marshall KC, sitting alone in the Royal Court, dated 18 April 2023 ("**the Royal Court Judgment**"). That judgment allowed an appeal, pursued under s. 106 of the EP Law, by the three individual Respondents, respectively Mr Domaille, Mr Clarke and Mrs Hannis ("**the Individuals**"), against the decision of the GFSC acting by Mr John Russell Finch, OBE, as a Senior Decision Maker ("**SDM**"), that is an officer appointed by the GFSC in accordance with its published guidance for the purpose of exercising its discretionary enforcement powers.

2. The SDM's decision, dated 29 July 2022 ("**the Decision**"), imposed sanctions on each of the Individuals using powers vested in the GFSC by the EP Law. These sanctions, principally financial penalties and Prohibition Orders (which we explain below), were imposed upon the Individuals on the basis of findings by the SDM that they had each acted without probity[1] and, separately, that they had failed to meet certain aspects of the Minimum Criteria for Licensing ("**MCL**") (the criteria to determine whether someone is fit and proper to be involved in financial services), as set out in Schedule 1, Article 2 of the Regulation of Fiduciaries Administration Businesses, Company Directors, etc (Bailiwick of Guernsey) Law 2020 (the "**Fiduciaries Law**"). The conduct giving rise to these findings had taken place over a number of years, principally from 2014 to 2021, and at a time when the Individuals had each held senior positions in Artemis Trustees

[1] For the reasons set out in §116 below, although the legislative scheme refers to both "*integrity*" and "*probity*" this judgment generally refers to "*probity*" without adding "*or integrity*" on each occasion.

Limited ("**ATL**"), a Guernsey-based company whose business is the provision of financial and fiduciary services.

3. At the time the matter was considered by the SDM, the three Individuals each accepted, as did ATL, that certain of their conduct had fallen short of the requirements of the MCL. The Individuals also accepted that they should each suffer an appropriate financial penalty (but not a Prohibition Order) with a corresponding public statement to explain the reasons for the penalties. What was in dispute was the seriousness of the failures, whether the Individuals had acted without skill rather than without probity, and their level of fault. It follows that the SDM was involved in a process of evaluation; he was required to assess the degree of the Individuals' fault and determine the appropriate level of penalty.

4. The oral hearing before the SDM took place on 14 and 15 June 2022 and the Decision was reserved. In his Decision, the SDM imposed the following sanctions:

    (i) discretionary financial penalties imposed under s. 39 of the EP Law upon Mr Domaille, Mr Clarke and Mrs Hannis of £280,000, £90,000 and £30,000 respectively;

    (ii) Prohibition Orders made under s. 33 of the EP Law, prohibiting Mr Domaille, Mr Clarke and Mrs Hannis from holding the position of Controller, Director, Partner, Money Laundering Reporting Officer and Money Laundering Compliance Officer in any entity operating in the financial services sector in Guernsey for periods of 8 years, 4 years and 3 years respectively;

    (iii) a disapplication of the exemption under s. 3(1)(g) of the Fiduciaries Law (which prohibits unlicensed individuals from holding more than six separate company directorships simultaneously) for the same periods of the Prohibition Orders, 8 years, 4 years and 3 years respectively;

    (iv) a Public Statement in respect of each of the Individuals issued pursuant to s. 38 of the EP Law.

5. Each of the Individuals appealed to the Royal Court, as they were entitled to do, against all the sanctions imposed by the SDM, save that Mrs Hannis did not appeal against the level of the discretionary financial penalty imposed in her case (£30,000).

6. The appeal was heard by the Royal Court on 25 to 27 October 2022. The Royal Court Judgment allowing the appeals was handed down on 18 April 2023.

7. In an impressively detailed and thorough judgment, which runs to 558 paragraphs, the Lieutenant Bailiff allowed the appeals on the basis of four of the five grounds of appeal advanced by the Individuals. In summary, the Lieutenant Bailiff concluded that:

    (i) The SDM had erred in law in finding that the Individuals had acted "*without probity*". The errors identified by the Lieutenant Bailiff were based on failures correctly to apply the civil burden and standard of proof (when considering a serious allegation involving a lack of probity), or fairly to evaluate each Individuals' explanation for his or her conduct and their particular state of mind.

    (ii) The SDM had failed to conduct a fair and balanced assessment of the facts and this had led the SDM to take an unwarranted view of the seriousness of the Individuals' failings with the result that the sanctions imposed by the Decision (and in particular the Prohibition Orders coupled with the financial penalties in the cases of Mr Domaille and Mr Clarke) were unreasonable and disproportionate.

    (iii) The SDM had erred in law or acted unfairly in imposing financial penalties on Mr Domaille and Mr Clarke calculated under increased fining powers which came into force on 13 November 2017 in circumstances where some of the relevant conduct occurred prior to that date.

    (iv) The SDM had failed to take into account the sanctions previously imposed in similar cases as required by s. 39(6)(f) of the EP Law and that the financial penalties imposed on Mr Domaille and Mr Clarke were inconsistent with

previous decisions and penalties even taking into account the increases in fining powers conferred on the GFSC from November 2017.

8. The Lieutenant Bailiff found it unnecessary to consider a fifth ground of appeal (a challenge to the Prohibition Orders on human rights grounds) in light of the conclusions she had reached on the other grounds. For the avoidance of doubt, it should be made clear that the fifth ground of appeal was not undetermined as such: rather, it was subsumed within the other issues determined by the Royal Court and in particular the reasonableness and proportionality of the penalties.

9. Having allowed the Individuals' appeals, the Lieutenant Bailiff set aside the Prohibition Orders and the concomitant disapplication orders in all three cases, and reduced the financial penalties imposed on Mr Domaille and Mr Clarke to no more than £175,000 (from £280,000), and no more than £60,000 (from £90,000), respectively. The question of the terms of an appropriate Public Statement for each of the Individuals was remitted to the GFSC for reconsideration in light of the judgment with liberty to apply.

THE APPEAL TO THIS COURT

10. The appeal to this Court is pursued under s. 107(1) of the EP Law which so far as material provides:

"*An appeal from a decision of the Royal Court made under the provisions of this law … lies, with leave of the Royal Court or Court of Appeal, to the Court of Appeal on a question of law".*

11. By Notice of Appeal dated 12 May 2023, the GFSC sought leave to appeal on a number of questions of law. These questions concerned the Lieutenant Bailiff's approach to the exercise of her powers in an appeal under s. 106 of the EP Law, the possible misapplication of the Guernsey anti-money laundering ("**AML**") regime and possible errors of law in relation to the findings of probity and the assessment of the penalties.

12. Following an oral hearing on 19 June 2023, the Lieutenant Bailiff refused leave to appeal and later provided to the parties a helpful, brief written note of her reasons.

13. A renewed application for leave to appeal was determined and granted on 28 July 2023, by Helen Mountfield KC, sitting as a single judge of this Court. The four grounds of appeal upon which leave was granted may be summarised in our own words as follows:

    (i) The approach taken by the Lieutenant Bailiff in reviewing the SDM's decision, and the matters covered in her Judgment, exceeded the jurisdiction conferred on the Royal Court by s. 106 of the EP Law.

    (ii) The Lieutenant Bailiff erred in her approach to the application of the Bailiwick's AML regime, which is concerned with identifying and quantifying risk, by considering whether the Individuals' breaches of the requirements of the regime resulted in any actual harm to the public or to the reputation of the Bailiwick as an international finance centre.

    (iii) The Lieutenant Bailiff erred in law in her findings on probity and in relation to the Prohibition Orders, and in particular: (1) misapplied the two stage test in *Ivey v. Genting Casinos UK Ltd (Trading as Crockfords Club)* [2017] UKSC 67 to determine a want of probity; (2) misapplied the civil standard of proof to a finding of want of probity; (3) erred in limiting the basis for imposing a Prohibition Order.

    (iv) The Lieutenant Bailiff erred in law in her approach to the assessment of financial penalties: (1) in her approach to s. 39(1) of the EP Law which is concerned with a present breach of current licensing conditions with no requirement to have regard to historic fining powers and in respect of which no issue of retrospective penalisation arises; and (2) in her approach to the interaction between the penalties imposed on a director and a licensed entity where the individual (in this case Mr Domaille) was also a shareholder of the licensed entity.

14. We should also add that the single judge refused GFSC leave to argue that the Lieutenant Bailiff was not fair and balanced in her approach and had predetermined the issues raised by the appeal to the Royal Court. We respectfully agree with the single judge's decision on this point. The judgment under appeal is obviously the product of

immense industry over a period exceeding five months. Neither the detailed analysis contained in the judgment, nor the transcripts of the proceedings before the Royal Court (which we have read and considered with care), betrays any inclination to prejudge any of the issues that fell to be determined. The judgment stands or falls on its own merits and the sole issue that now arises for consideration is whether the decision of the Royal Court was right as a matter of law. Before turning to address that issue, it is necessary to explain something of the background.

ATL AND THE INDIVIDUALS

15. ATL was incorporated in 2001 and granted a fiduciary licence by the GFSC in August 2002. It was founded by Mr Domaille and Mr Robert Sinclair who were the only shareholders, with Mr Domaille owning 50.73% to Mr Sinclair's 49.27%. ATL's primary business was and is the establishment and administration of trusts and corporate structures.

16. Mr Domaille was a main Board Director of ATL from the time of its incorporation until June 2019 when he became the Managing Director in place of Mr Sinclair.

17. Mr Sinclair was the Managing Director from the time of ATL's incorporation until June 2019. He was also ATL's Money Laundering Reporting Officer from October 2008 until June 2019, and Money Laundering Compliance Officer from March 2019 to May 2019. Mr Sinclair was forced out of ATL by Mr Domaille in mid-2019 at a time when ATL was engaging with the GFSC following a regulatory inspection visit in 2018.

18. Mr Clarke was an Associate Director of ATL from January 2011 to November 2015 when he became a Board Member.

19. Mrs Hannis joined ATL in March 2011 as a Manager. She was promoted to Associate Director in December 2016 and became a full Board Member in June 2019. She resigned as a Director on 8 June 2022.

20. Both the SDM (Decision, §33) and the Lieutenant Bailiff (Royal Court Judgment, §57) make reference to the fact that in September 2019, ATL had 595 clients in total, of whom 192 were rated as 'high risk' and 403 as 'standard risk'. The characterisation of business

as either 'high risk' or 'standard risk' is part of the GFSC's risk-based approach towards the prevention of money laundering and terrorist financing. In broad terms high risk clients are those with links to particular territories or industrial sectors that are commonly associated with an increased risk of corruption (for example mining, construction, public procurement and energy businesses), or those that have political connections or links to a politically exposed person (that is a person who has or has had at any time a public function or who has been elected or appointed to a public function in an overseas territory: see Regulation 5(2)(b) of the Criminal Justice (Proceeds of Crime) (Financial Services Business) (Bailiwick of Guernsey) Regulation 2007). 'High risk' relationships carry a high risk of involvement in money laundering or terrorist financing and for those reasons require enhanced customer due diligence and more frequent and extensive ongoing monitoring of the relationship.

21. ATL's annual turnover for the year 1 May 2019 to 30 April 2020 was approximately £6 million. The Lieutenant Bailiff suggested that it had been at around this level or slightly higher in the period from 2014 to 2021 (§58).

THE ENFORCEMENT PROCESS IN THE INDIVIDUALS' CASES

22. The enforcement process in the Individuals' cases was summarised by the SDM (§§35-37, §39 and §173) and the Lieutenant Bailiff (§§60-88). For present purposes we provide the following chronology:

    (i) In 2014 a full risk assessment of ATL was conducted by the GFSC's Fiduciary supervision and Policy Division. Deficiencies were noted in ATL's own internal corporate governance. A third party review was commissioned, which was critical of Mr Sinclair's "*overload of jobs*". No changes took place in the management structure until June 2019, when Mr Sinclair was removed from ATL by Mr Domaille.

    (ii) In 2016, a Fiduciary Engagement Visit was undertaken by the GFSC's Fiduciary Supervision Policy and Innovation Division, which noted a large number of outstanding action points in ATL's record. The GFSC required ATL to initiate a risk management programme to reduce the number of action points.

(iii) In 2018 to 2019, a full risk assessment was conducted by the GFSC's Financial Crime Division, which assessed the governance and operational risk levels within ATL as "*disproportionately high*" and noted the unacceptable risk this posed to the Bailiwick's reputation. In light of the seriousness, it was proposed to refer ATL to the GFSC's Enforcement Division ("**ED**"). A Risk Mitigation Programme was put into effect by GFSC and a third party was appointed to conduct a review of ATL's policies, procedures and controls.

(iv) The matter was passed by GFSC to its ED on 30 August 2019. The ED's investigation continued into 2021, including voluntary interviews with the Individuals conducted in late 2020.

(v) A Draft Enforcement Notice was issued on 26 July 2021, noting 13 breaches of various Regulations, Rules, Codes, Instructions or principles applicable to finance businesses largely in the period between 2014 and July 2021. The breaches were alleged against ATL, Mr Sinclair and the Individuals. The Draft Enforcement Notice recommended the sanctions which were ultimately imposed by the SDM against Mr Domaille and Mr Clarke, and a discretionary financial penalty of £45,000 in the case of Mrs Hannis. The Draft Enforcement Notice did not contain any allegation of lack of probity against the Individuals.

(vi) ATL and the Individuals submitted a response to the Draft Enforcement Notice to the GFSC, dated 15 October 2021. The response admitted many allegations, contested others, suggested that the seriousness of the conduct was overstated and contended that the proposed sanctions were disproportionate, having regard to the remedial action taken at ATL since 2019 and the level of penalty in previous cases. It was also contended that the proposed Prohibition Orders were unwarranted.

(vii) The Final Enforcement Notice was issued by the GFSC on 20 December 2021. The Final Enforcement Notice also contained criticism of a self-reported breach by ATL in relation to a Guernsey company ("**O Co**"), described in more detail below. The proposed penalties within the Final Enforcement Notice

remained the same as those set out in the Draft Enforcement Notice and it included allegations of want of probity against each of the Individuals. The GFSC made clear that any credit for remediation measures taken by ATL since June 2019 was viewed as being offset by the seriousness of the matters which had come to light in respect of the dealings with O Co.

(viii) Following receipt of the Final Enforcement Notice Mr Sinclair agreed not to contest the sanctions proposed against him, thereby obtaining a 30% settlement discount with the result that this financial penalty was reduced to £196,000 and the Prohibition Order was reduced to "5.6" years.

(ix) Mr Finch OBE was appointed as the SDM on 27 January 2022.

(x) The SDM issued his Minded to Notice ("**MTN**") on 7 April 2022, setting out his provisional views to endorse the penalties proposed by the GFSC in the Final Enforcement Notice.

(xi) On 24 May 2022, ATL and the Individuals provided to the SDM their written responses.

(xii) An oral hearing took place before the SDM on 14 and 15 June 2022, and the Decision was reserved. Following the hearing and in advance of the Decision being announced, ATL settled with the GFSC and accepted the proposed financial penalty, and obtained a 10% reduction in the penalty (to £450,000) in recognition of the settlement. ATL also agreed to the public statement which the GFSC proposed.

(xiii) The SDM's Decision was issued on 29 July 2022 and the SDM imposed sanctions previously proposed, save that in the case of Mrs Hannis the financial penalty was reduced to £30,000 and the Prohibition Order to 3 years.

THE REGULATORY BREACHES

23. The GFSC's Final Enforcement Notice identified eight ATL files which gave rise to its allegations of serious regulatory breaches. It is sufficient for present purposes to provide

a brief outline of the matters which feature in both the Decision and the Royal Court Judgment. The SDM's findings in relation to each matter is also briefly described.

O Co

24. O Co was a Guernsey company with an associated Trust, both of which were administered by ATL. In 2006 to 2007 substantial sums had been paid into the trust by a Lichtenstein Anstalt. ATL failed to establish either the ultimate beneficial owner of the Anstalt or the legitimacy of the source of the funds. In 2014, at a time when its due diligence enquiries were outstanding, the ATL files were signed off as complete. In 2018 ATL noticed the incomplete due diligence and made enquiries of the Anstalt which was uncooperative. An internal suspicious activity report was raised within ATL but not submitted to the Guernsey Financial Intelligence Unit. Later, further investigations within ATL were inconclusive despite the engagement of forensic accountants, and the possibility existed that the funds paid into the trust were derived from a tainted source.

25. In July 2021, ATL self-reported a regulatory breach in relation to O Co. The SDM noted the admitted breaches and the fact that ATL had been potentially in receipt of criminal property. The SDM attached little weight to the mitigation based on the attempts to establish the source of the funds and noted that there were inconsistencies in the explanations advanced to support the assertion that the funds were not likely to have originated from a criminal source (Decision, §123).

X Trust

26. The X Trust concerned Mr A, a wealthy Libyan businessman involved in construction and engineering projects in Libya. Mr A had been a client of ATL since 2002 and was the settlor of the A Family Trust, of which his wife and son were beneficiaries. The Trust owned a British Virgin Islands ("**BVI**") company known as L Holdings. Mr A's affairs were designated as 'high risk'.

27. In short, the breaches arose from the following events:

(i) Between 2002 and 2010, ATL failed properly to verify the source of approximately £10 million transferred into the A Family Trust through money exchange companies.

(ii) The "*change of name incident*" (§182), in which Mr Domaille agreed to change the name of the A Family Trust in late 2011, following Mr A's concerns about the connection to his name after Colonel Gaddafi's government was overthrown. The X Trust was created in January 2012, with Mrs A and her children named as beneficiaries. In March 2013, a sub-trust of the X Trust was established, the X No. 2 Trust, which listed Mr A as a beneficiary.

(iii) Mr A's connection to his brother, AA, who had previously held a senior position in the Gaddafi government and in an authority responsible for awarding construction contracts ("**ODAC**") and who was under investigation by the Maltese authorities accused of misappropriating funds from the Libyan government. In June 2014, Mr A requested the transfer of large sums of money from the X Trust into bank accounts in Turkey, in the names of Mr A and his son, for an investment with a Turkish business partner. The GFSC later discovered that the business partner had previously worked in Libya with ODAC.

(iv) In September 2014, Mr A requested further distributions from the X Trust to himself and his son, including giving instructions for certain fixed term deposits to be broken (thus incurring penalty charges). When asked by Mrs Hannis for the economic justification for doing so, Mr A claimed that it was to get a better return on the funds and that in Turkey it was necessary to be fast and ready with money in order not to miss opportunities. The transfers to Mr A (a non-beneficiary) were recorded within ATL as transfers to Mrs A. It was not until 2 October 2014 that Mrs A provided ATL with a letter confirming that Mr A had made the requests for payment from the X Trust to himself for her benefit and with her authority.

(v) On 29 September 2014, Mrs Hannis became aware that Mr A's brother had been arrested in the United Arab Emirates, and that he was the subject of an Interpol Red Notice based on allegations of financial wrongdoing committed at a time when he was a public official in Libya. On 2 October 2014 Mrs Hannis made a suspicious activity report to the Guernsey Financial Intelligence Unit. This stated that until that time ATL had been comfortable with the position, but now in light of the adverse media reports, there was a concern that ATL may "inadvertently" have been assisting in the movement of criminal property.

(vi) ATL continued with Mr A as a client until June 2017. The end of the relationship came about after the Trust's bankers withdrew banking facilities from the X Trust, because of the links between Mr A and his brother.

(vii) The X Trust was wound up, Mr A was added as a named beneficiary, and distributions totalling £9.6m were remitted to Mr A's account in Lichtenstein.

28. The GFSC relied on the facts of the X Trust matter in support of its case that Mr Domaille and Mrs Hannis had acted with a lack of probity. The SDM agreed with the GFSC. In particular, in relation to the change of name incident the SDM found that Mr A was trying to camouflage his connection with large sums of money that had been transferred out of Libya including £10 million from unverified sources and that Mr Domaille would have appreciated that he was assisting Mr A to distance himself from the Trust. Mr Domaille's conduct in this regard, together with his general failure to provide the necessary oversight or scrutiny of Mr A's actions and consider their legitimacy, formed the basis of the SDM's finding that Mr Domaille had acted without probity and failed to meet the MCL. The SDM was also critical of the fact that Mr Domaille had allowed the relationship with the A family to continue for as long as it did, including for almost three years after the suspicious activity report in October 2014 (Decision, §81 and §177).

29. In relation to Mrs Hannis, the SDM was critical of her failure to act in circumstances which gave rise to a heightened risk of money laundering, of the belated suspicious

activity report, and of the failure to obtain Mrs A's confirmation before making the payments (Decision, §84 and §188).

The Y Trust

30. The Y Trust is a Guernsey charitable trust established in 2004 by Mr B, a client of ATL whose family had a long-standing relationship with Mr Sinclair. Mr Clarke was the ATL manager with oversight of the Y Trust. Mr B was a mining engineer and entrepreneur with business in sub-Saharan Africa. His affairs were accordingly categorised as "high risk". The object of the charitable trust included promoting education of communities and individuals worldwide. The breaches arose from the following events.

    (i) In November 2017 a payment was made from the Y Trust at the request of Mr B to a "*lifestyle guru*" in India as a personal birthday gift. Mr Clarke accepted ultimate supervising responsibility for this payment made in breach of trust, but by way of explanation attributed it to the misjudgement of a junior employee.

    (ii) In July 2019, Mr B requested a payment from the Y Trust for one year's university tuition for the daughter of General T, who was employed by one of Mr B's companies (also administered by ATL and operating in Guinea). Owing to Mr Clarke's concerns about the payment being disguised remuneration, he advised that it would be preferable for Mr B to pay the fees personally, and Mr B did so.

31. In the GFSC's investigation, when interviewed, Mr Clarke erroneously "confirmed" that General T had been Minister of Mining in Guinea in the 1970s. Mr Clarke also stated that he did not regard the university fees payment as improper and the overall risk (of the payment being disguised remuneration) was not sufficient to take the matter further.

32. The GFSC relied on the facts of the Y Trust matter in support of its case that Mr Clarke had acted with a lack of probity. The SDM agreed with the GFSC, noting that the payment to the "*lifestyle guru*" was an admitted breach and the payment of £10,000

went ahead despite Mr Clarke identifying the risk that it might amount to disguised remuneration (Decision, §189).

F Co

33. F Co was a BVI company incorporated in 2006. Its affairs were administered by ATL. The ultimate beneficial owner of F Co was Mr D, a wealthy Russian businessman and politically exposed person, given his links to the Russian government. Mr Domaille was responsible for the client relationship and Mrs Hannis for day-to-day oversight. F Co had been established because while Mr D wanted to own real property in Switzerland he was not qualified to do so. F Co entered into an arrangement with a person who was qualified to own property and held it as a nominee for the company. The expenses of the Swiss property were paid for by F Co using loans from one of D's companies, TI Co.

34. The breaches arose from the following events:

    (i) Despite the fact that ATL's relationship with F Co fell into the high risk category, ATL failed to verify the source of funds going to TI Co and on to F Co. When ATL later sought to verify the source of funds and in particular the source of a loan on non-commercial terms made in 2008 by a BVI company owned by a cousin of Mr D, enquiries revealed that the loan had been waived in 2017 and there was no copy of the original loan agreement.

    (ii) In 2013 ATL was informed that TI Co was no longer owned by Mr D. It was instead owned by a corporation (B Co) owned by Mr D's mother (Mrs D), a politically exposed person because of her obvious connection to Mr D. This change of ownership was not explained and nor was it investigated by ATL.

    (iii) In July 2014, ATL recorded that Mr D had been barred from the United States of America because of his possible links to organised crime. Also in 2014 shares in B Co were divided among a group of eleven individuals. This was unknown to ATL at the time.

    (iv) In 2016, the F Co files were incorrectly downgraded to standard risk.

(v) In 2018, Mr D was sanctioned by the United States Treasury. The sanctions did not apply to Guernsey. ATL continued the business relationship with Mr D.

(vi) ATL terminated its business relationship with F Co in late 2019.

35. The SDM found that ATL did not properly monitor a high risk relationship and had no clear understanding of the client from 2006 to 2013 (Decision, §89).

D Co

36. D Co was incorporated in 2017. It was a company connected to Mr B (of the Y Trust) and ATL provided corporate services. In January 2018 it was rated as 'high risk' as a result of a proposed joint venture involving cryptocurrency.

37. Approximately $300,000 worth of Bitcoin was invested into D Co by a Mr BS and paid into the company's wallet. Between February and March 2019, $216,434.33 was paid into D Co's bank account with Barclays Bank. These funds were derived from the sale of Bitcoin. This payment took place despite the risks, known to ATL, of dealing in cryptocurrencies, and despite the fact that Barclays' policy was not to accept funds generated from the disposal of crypto currencies.

38. On 8 March 2019, ATL filed a suspicious activity report with the Guernsey Financial Intelligence Unit. In April 2019 an ATL internal compliance report noted concerns about not identifying or verifying the source of Mr BS's wealth. On 3 May 2019, ATL decided to terminate the relationship with D Co and the relationship ended on 12 June 2019.

39. The SDM found that Mr Clarke failed to scrutinise the transactions to ensure that the Bitcoin did not originate from criminal activity, but accepted that there was some mitigation as Mr Clarke had admitted his failures in interview.

K Co

40. The K Co matter arose as a result of a proposed purchase of a helicopter. K Co was part of Mr C's business empire and was administered by ATL with Mr Domaille as the Director with responsibility for the client. Mr C was a politically exposed person.

41. In September 2011 the proposal was for K Co to buy a helicopter for €3 million from OT Co, a company owned by AW. This was to be achieved through an option to buy with payments by instalment. Due diligence was carried out on the proposal only after the first payment had been made. Later, OT Co sought a change in the option structure and the payments were converted into loans. OT Co claimed that it would otherwise incur a VAT liability. ATL took no steps to verify this explanation. K Co made the payments totalling €3 million with no security over or rights in the helicopter and it was not delivered. In 2021 ATL instituted legal proceedings in Guernsey on behalf of K Co in an attempt to recover its loss.

42. The SDM noted that the helicopter transaction occurred in a high risk relationship and had all the hallmarks of a very artificial situation. The SDM rejected ATL's submission that the breaches were the result of "inadvertent collective failing" and proceeded on the basis that responsibility lay not with subordinate employees but with those at the top (Decision, §130 and §132).

R Co

43. R Co was incorporated in Guernsey in 2011. It was a company connected to Mr B and was intended to be a special purpose vehicle for a rare earth extraction project.

44. In December 2016 Mr B gave shares in R Co to Mr Clarke and Mr Sinclair. At that time the shares had no value, but R Co was later floated on the London Stock Exchange and the shares became worth £25,000 (in the case of Mr Clarke) and £150,000 (in the case of Mr Sinclair).

45. ATL's internal risk management procedures required gifts of this magnitude to be signed off by the Managing Director (Mr Sinclair). They were also subject to management under ATL's policy in relation to conflicts of interests which required prior approval of gifts by the Board. While Mr Sinclair signed off the gifts, there was no Board approval. It is also the case that the ATL gift register recorded Mr B as "gifting a number of shares to family and friends" which was not accurate in the case of Mr Clarke.

46. In January 2017 Mr Domaille and Mr Sinclair accepted 50% of a further quantity of R Co shares in lieu of payment of £500,000 of outstanding fees owed to ATL by Mr B. While ATL's conflict of interest register recorded the receipt of these shares, it also stated that neither Mr Domaille nor Mr Sinclair was engaged in administration of any relevant Mr B company which was factually inaccurate.

47. Mr Clarke returned his shares in 2019. Mr Sinclair declined to do so. Mr Domaille had sold his shares by the time he came to be interviewed in 2020.

48. The SDM noted ATL's admitted breaches in relation to R Co, but rejected mitigation based on collective, inadvertent failings and found there was a failure to maintain a sound internal control system against the background of a recurring theme: the reliance on others and "*favouring of commercial considerations above basic regulatory requirements*" (Decision, §150(v)).

Z Trust/W Co

49. The Z Trust was a discretionary trust established in 2007. ATL became administrator and trustees in 2003. It was a Trust established by Mr B who settled assets into the Trust in 2011. ATL did not formally record Mr B as the economic settlor. Mr B and his wife were named as beneficiaries of the Trust. W Co was BVI company within the Z Trust structure.

50. Between December 2015 and September 2018 £1.2m was paid to Mr B from the Z Trust for personal living and lifestyle matters. These were treated as loans to Mr B and ATL allowed W Co to be treated as a wallet to fund Mr B's lifestyle. No formal loan agreement was put in place until January 2019. ATL's description of W Co as a holding company and the risks attached to the business were inaccurately stated within ATL.

51. ATL ended its relationship with Mr B's entities following Mr Sinclair's departure in June 2019.

52. The SDM noted that ATL made a number of significant admissions in relation to Z Co, but queried whether the trustees had ever actively exercised their discretion as opposed to acceding without question to Mr B's requests (Decision, §154).

THE DECISION OF THE SDM

53. The Decision of the SDM is also impressively detailed. It is summarised in the Royal Court Judgment (§§112 – 125), and for present purposes it is only necessary to make reference to certain aspects of the SDM's reasoning and factual conclusions.

54. On his general approach to finding facts, the SDM adopted the civil standard of proof, the balance of probabilities. He noted that neither the seriousness of the offence nor the seriousness of the consequences should make any difference to that standard, although he acknowledged, citing *Re Doherty* [2008] UKHL 33, that while the standard itself is finite and unvarying, in some cases a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied that a fact in issue is more probable than not. The SDM said that this was a matter of common sense and logic.

55. In relation to the issue of want of probity the SDM accepted the GFSC's submission that the test is objective and that there is no requirement to make any findings in respect of any individual's state of mind.

56. In his approach to the evidence, the SDM (Decision, §24) adopted the approach commended by Leggat J in *Gestmin SGPS SA v. Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) (at §22):

"*the best approach for a judge to adopt in the trial of a commercial case is in my view to place little, if any, reliance at all on witnesses' recollections of what was said in meetings and conversations and to base factual finding on inferences drawn from the documentary evidence and the known or probable facts".*

57. The SDM declined to give any weight to the witness statement of Ms Deborah Guillou who had been Chief Executive Officer of ATL since September 2019. The statement contained an account of the remedial steps taken by ATL in response to the enforcement process and was intended to demonstrate the extent to which there had been improvements in ATL's governance and compliance principally following the departure of Mr Sinclair.

58. The SDM also rejected the Individuals' mitigation to the extent that it placed reliance on what were claimed to be inadvertent actions of other more junior employees in the compliance and administration teams, and he concluded that the Individuals had sought to minimise their culpability, most notably in the case of Mr Domaille who had been a Board Member of ATL throughout the entirety of its existence.

59. The SDM also rejected the Individuals' arguments that it was necessary to be mindful of the date on which the different instances of misconduct occurred and to calibrate the calculation of the level of the appropriate financial penalties according to the different levels of maximum penalty that applied at that date. Instead, the SDM agreed with the GFSC's submission that the penalties were to be imposed for current failures to satisfy the MCL and that this was permitted by s. 39 of the EP Law.

60. The SDM went on to consider the client files which had formed the basis of criticisms contained in the Final Report, and a summary of the findings in relation to each breach is given above.

61. The SDM also addressed the factors which he was required to consider when: (i) deciding whether to make a public statement and if so in what terms (s. 38(2) of the EP Law); and (ii) when deciding whether to impose a financial penalty and if so in what amount (s. 39(6) of the EP Law). Having considered these matters the SDM imposed the penalties which the GFSC had recommended in the Final Enforcement Notice save in the case of Mrs Hannis where he found "*effective and substantial*" mitigation (§255).

THE ROYAL COURT JUDGMENT

62. As we have explained, the Lieutenant Bailiff allowed the appeal, after conducting a detailed re-evaluation of the SDM's Decision. She considered several thousand pages of material and made her own findings of fact concerning the conduct of the Individuals, and was critical of the approach adopted by both the GFSC and the SDM. We address certain aspects of the Royal Court Judgment in our consideration of the individual grounds of appeal.

GROUND 1: *ULTRA VIRES*

Introduction

63. GFSC's first ground of appeal is that the approach taken by the Lieutenant Bailiff in reviewing the SDM's Decision, and the matters covered in her Judgment, exceeded the jurisdiction conferred on the Royal Court by s. 106 of the EP Law.

64. In our judgment, this ground of appeal succeeds. There are two distinct respects in which the Lieutenant Bailiff exceeded the jurisdiction conferred by s. 106: the first is in respect of the nature of the review that the Royal Court undertook; the second is in respect of the subject matter of the review that was conducted. We will address each in turn, after first setting out a brief summary of the relevant legal context.

The legal context

65. The appellate jurisdiction of the Royal Court under s. 106 can only properly be understood in the wider context of the regulatory regime under The Financial Services Commission (Bailiwick of Guernsey) Law 1987 (the "**1987 FSC Law**"), the Fiduciaries Law, the EP Law and the "*supervisory Laws*" as defined in s. 2 of the EP Law.

66. For the purpose of this appeal, it is unnecessary to set out a comprehensive summary of that regime, but the following elements are important:

    (i) The general functions of the GFSC are (among other things): "*to take such steps as [it] considers necessary or expedient for the … effective supervision of finance business in the Bailiwick*" (s. 2(2)(a) of the 1987 FSC Law); "*the countering of financial crime*" where 'financial crime' includes "*fraud or dishonesty*" and "*handling the proceeds of crime*" (s. 2(2)(d) of the 1987 FSC Law); and "*to take such steps as the [GFSC] considers necessary or expedient for (i) maintaining confidence in the Bailiwick's financial services sector*" (s. 2(2)(e) of the 1987 FSC Law).

    (ii) In the exercise of its functions, the GFSC may take into account "*any matter which it considers appropriate*" but it "*shall*" in particular have regard to "*(a) the protection of the public interest against financial loss due to dishonesty,*

incompetence or malpractice by persons carrying on finance business" and "*(b) the protection and enhancement of the reputation of the Bailiwick as a financial centre*" (s. 2(4) of the 1987 FSC Law).

(iii) The members of the GFSC are elected by the States "*from persons nominated by the [States Policy & Resources] Committee and appearing to the Committee to be persons having knowledge, qualifications or experience appropriate to the … supervision of finance business in the Bailiwick*" (§1(2) of Schedule 1 to the 1987 FSC Law).

(iv) The GFSC has power under s. 33(1) of the EP Law to make a 'Prohibition Order' where in its opinion "*having regard to the applicable minimum criteria for licensing, an individual is not or is no longer a fit and proper person to perform functions as or on behalf of (a) a licensee in relation to a regulated business … or (c) the holder of a supervised role in respect of, or an officer or employee of, a licensee*".

(v) Under s. 39(1) of the EP Law, the GFSC also has power to impose a financial penalty on a licensee, former licensee, relevant office or other person where, in its opinion, that person (a) has contravened in a material particular (i) a provision of various specified Laws, or (ii) any prohibition, restriction, condition, obligation, enforcement requirement, other requirement, duty, direction or arrangement imposed, issued or arising under any such provision, or "*(b) does not fulfil any of the applicable minimum criteria for licensing*".

(vi) The minimum criteria for licensing, as set out in Schedule 1 to the Fiduciaries Law, include a requirement for any regulated activity to be carried on "*with prudence and integrity*" (§1(1)(a)) and "*in a manner which will not tend to bring the Bailiwick into disrepute as an international finance centre*" (§1(1)(c)). In determining whether a person is 'fit and proper' regard shall be had to their "*probity, competence, experience and soundness of judgement*" (§1(2)(a)), the diligence with which they fulfil or are likely to fulfil their responsibilities (§1(2)(b)) and other matters.

67. The four features of this regime that deserve particular emphasis are that: (i) the GFSC is a specialist body composed of suitably qualified individuals; (ii) it is performing a regulatory function which is of the highest public importance; (iii) in performing that function, it is required to form evaluative judgments in relation to matters (such as 'fit and proper') to which there are seldom any objectively right or wrong answers, and (iv) it is the GFSC, not any other person, which is the designated decision-maker under the legislation in respect of the power to make Prohibition Orders under s. 33 and to impose financial penalties under s. 39.

68. Under s. 106(1), a person aggrieved by a decision of the GFSC to make a Prohibition Order and/or to impose a financial penalty (among other things) "*may appeal to the Royal Court against the decision*". The Royal Court's function in dealing with any such appeal needs to be understood against the background of the regulatory regime which has been outlined above, but also in light of the requirements of natural justice, and the rights conferred under the European Convention on Human Rights (the "**ECHR**").

69. As to the requirements of natural justice, it is axiomatic that a person must be tried by a process that is fair. As to the ECHR, Article 6 requires that a person's civil rights and obligations can only be determined by an 'independent' tribunal. That requirement is given force in domestic law by s. 6 of the Human Rights (Bailiwick of Guernsey) Law 2000 (the "**Human Rights Law**"), which makes it unlawful for a public authority to act in a way that is incompatible with a Convention right.

70. The making of a Prohibition Order and the imposition of a financial penalty are both capable of engaging a person's rights under Article 6, ECHR. The GFSC is not an 'independent' tribunal within the meaning of Article 6, because it functions as investigator, 'prosecutor' and decision-maker. As a result, a question also arises as to whether its enforcement decisions violate the rules of natural justice.

71. In order to meet these concerns, various control mechanisms have been put in place, principally under ss. 103 – 105 of the EP Law and in the procedures laid down in the Explanatory Note on the Commission's General Approach to Enforcement & Enforcement Measures (the "**Enforcement Explanatory Note**"). Again, it is unnecessary

for the purpose of this appeal to record every element in detail. Each control mechanism and procedure was followed in this case, as set out in the chronology at §22, above.

72. The grounds on which an appeal may be brought under s. 106 of the EP Law are listed under s. 106(3):

> *"(a) the decision was ultra vires or there was some other error of law,*
>
> *(b) the decision was unreasonable,*
>
> *(c) the decision was made in bad faith,*
>
> *(d) there was a lack of proportionality, or*
>
> *(e) there was a material error as to the facts or as to the procedure.*"

73. The powers of the Royal Court hearing such an appeal are set out in s. 106(6). It may:

> *"(a) set the decision of the [GFSC] aside and, if the Royal Court considers it appropriate to do so, remit the matter to the [GFSC] with such directions as the Royal Court thinks fit, or*
>
> *(b) confirm the decision, in whole or in part."*

74. Ground 1 requires careful consideration to be given to the true scope of the Royal Court's function under s. 106. In this connection, the parties drew our attention to the relevant case-law discussing the extent to which s. 106, together with the rules of natural justice, s. 3 of the Human Rights Law, and Article 6 of the ECHR allow or require the Royal Court to conduct a full merits rehearing of any decision by the SDM. In that context, we have had our attention drawn to the following decisions: *Bordeaux Services (Guernsey) Ltd v. GFSC* (Judgment 18/2016); *Y v. GFSC* (Judgment 47/2018); *Chick v. GFSC* [2020] GRC035; *Chick v. GFSC* [2020] GCA078; *Kelham v. The Chairman of the GFSC* [2023] GRC021; *Robilliard v. The Chairman of the GFSC* [2023] GCA035; *X, Y & Z v. The Chairman of the GFSC* [2023] GRC032. We have also been referred to the Strasbourg decision in *Kingsley v. UK* (2001) 33 EHRR 13, and the English House of Lords decision in *Porter v. Magill* [2002] 2 AC 357.

75. In assessing correctly the true scope of the Royal Court's function under s. 106, it is convenient to start by identifying the framework within which the analysis needs to be conducted:

(i) The Royal Court's jurisdiction in this context is entirely statutory.

(ii) The requirements of fairness are always fact specific.

(iii) Similarly, the question whether a person's rights under Article 6, ECHR, have been violated in any given case is again fact specific. It is often said that, where an administrative decision is made which engages Article 6, the review court must have 'full jurisdiction' – but that is a protean concept which does not necessarily demand that a single procedural model must be followed in all cases and in all circumstances.

76. With these points in mind, two interim propositions can be advanced: (i) it cannot be suggested that the Royal Court is positively required (either by the rules of natural justice or by s. 6 of the Human Rights Law) to conduct a full, merits-based trial *de novo* under s. 106; (ii) the ultimate answer to the question whether the Royal Court is either required or entitled to conduct a full, merits-based trial *de novo* under s. 106 is to be found in a correct interpretation of the EP Law.

77. Against that framework, and having considered the case-law in light of the relevant legislation, we consider that the following considerations must be kept clearly in mind:

(i) Under the express statutory wording of s. 106(1), the Royal Court is exercising an appellate function. It is hearing an "*appeal*". It is not conducting a trial *de novo*.

(ii) The Royal Court is hearing an appeal "*against the decision*" of the GFSC. It is not conducting an inquiry into the performance by the GFSC of its investigative function.

(iii) The true scope and limits of the Royal Court's role under s. 106 must be identified in light of the other procedural safeguards which are laid down by the EP Law and in the Enforcement Explanatory Note.

(iv) It is important to recognise the significance of the limited remedies available to the Royal Court pursuant to s. 106(6). The Royal Court has a finite range of options:

it can set aside the GFSC's decision, or remit the matter to the GFSC with such directions as it thinks fit, or it can confirm the decision in whole or in part.

78. Taking these considerations into account, it is important not to be misled by the apparent breadth of the issues by reference to which an appeal can be brought under s. 106(3). Whilst the question whether a decision by the GFSC was *ultra vires* or was made in bad faith admits of only one correct answer, the question whether a decision was reasonable, or proportionate, or involved an error of fact is a matter of judgment on which different, but equally rational opinions could be formed by different decision-makers on the basis of exactly the same material.

79. The function of an appellate court on these issues begins and ends with a determination of whether the GFSC's decision was reasonable or proportionate: if it was, then the GFSC's decision stands; if it was not, the Royal Court can only exercise the limited functions conferred on it under s. 106(6); but it cannot usurp the primary decision-making function of the GFSC. Similarly, the fact that a successful appeal can be brought on the basis that there was a material error as to the facts does not mean that the Royal Court is to undertake its own primary, evidential decision-making function. Rather, its appellate mandate is to consider the evidence and to determine whether the GFSC's decision on the facts is materially 'wrong' in the usual appellate sense – *i.e.* that it is unsupported by any evidence or is perverse in the face of the overall weight of the evidence. If the GFSC's decision was not wrong, in this sense, then it stands; if it was wrong, then the GFSC's decision cannot stand; but in that situation, the Royal Court is again limited to the exercise of the powers under s. 106(6), and it cannot arrogate to itself a primary fact-finding function.

80. The conclusion is that the Royal Court's function under s. 106(1) is to hear an appeal by reference to all or any of the grounds listed in s. 106(3), and to exercise the powers conferred by s. 106(6) – no more, no less. It is not the Royal Court's function to conduct a full, merits-based trial *de novo*, or to assume the primary fact-finding function or the expert, evaluative, regulatory decision-making function of the GFSC.

The general approach of the Lieutenant Bailiff

81. Several features of the Lieutenant Bailiff's approach bear noting.

82. First, the Lieutenant Bailiff considered that the powers vested in the Royal Court by section 106 of the EP Law included "*not only a power to correct mistakes of law or of a procedural nature … but also an element of original and independent authority to appraise and evaluate the materials in the case, in particular, in considering whether the outcome may be flawed as unreasonable or on the basis of a lack of proportionality"* [33]. This assertion of jurisdiction led the Lieutenant Bailiff to conduct her own evaluation of the case materials and reach her own conclusions on what she considered to be the overall merits of the case. It is apparent from what followed in the body of the Royal Court Judgment that the Lieutenant Bailiff's understanding of the Royal Court's "*original and independent authority*" involved a misprision of its function on an appeal under s. 106.

83. Second, in §128 of the Royal Court Judgment, the Lieutenant Bailiff said that her pre-reading of the Decision, the Notices of Appeal, the Defences and the Skeleton Arguments led her to form "*an initial general impression that the sanctions appeared to be harsh*" and as a result she considered that she "*needed to consider very carefully and rigorously the materials and arguments which had been thought to justify such severe sanctions, not just by the SDM, but by those persons who had carried out the investigation*". This suggests that the Royal Court did not regard itself as hearing an appeal, in which the onus was on the Individuals to make out their challenge to the Decision by reference to one or more of the grounds under s. 106(3), but rather that the Royal Court was conducting an inquiry to determine whether the GFSC could justify its Decision. It also suggests that the Royal Court was entitled to review the conduct of the investigation.

84. Third, the Lieutenant Bailiff proceeded to consider the imposition of sanctions on the basis that the primary objective of a Prohibition Order is public protection, and it followed from this that a finding of conduct lacking probity by an individual must be "*the key justification*" for imposing a Prohibition Order so as to remove the relevant untrustworthy individual from operating in the field of financial services (§137). The correctness of this approach is examined in §144-154 below.

85. Fourth, in §136 of the Royal Court Judgment, the Lieutenant Bailiff expressed certain opinions about the utility of a prohibition order as a deterrent, compared with the imposition of a financial penalty or a public statement. In particular, the Lieutenant Bailiff described a prohibition order as a "*draconian penalty*" and a "*blunt instrument*" which has an "*especially punitive effect*", whereas she considered that fines and public censure were "*very much more appropriately and proportionately suited to doing the job of deterrence*". In our judgment it is impossible to reconcile these statements with the function of the Royal Court under s. 106. As the Lieutenant Bailiff rightly recognised elsewhere (in §130), judges are "*not immersed in practical experience of the practices and processes of either working in the financial services industry itself, or of the [GFSC] as its regulator*". For exactly that reason, the GFSC has been specifically established, staffed and empowered to perform a specialist role that the courts are ill-suited to perform. That being so, neither in hearing an appeal under s. 106 nor otherwise is it appropriate for the court to express its own opinions as to the suitability or efficacy of particular forms of enforcement in the generality of cases.

86. Having made these general observations about the Royal Court's overall approach to its role in this case, we will now address the errors of law in the Royal Court Judgment. As noted above, the first specific respect in which the Lieutenant Bailiff fell into error was in relation to the nature of the Royal Court's review.

The nature of the Royal Court's review

87. There are broadly three respects in which the Royal Court's review departed from the power conferred by s. 106. The first is in respect of its approach to questions of primary fact; the second is in respect of its approach to matters of evaluation; and the third is in respect of its approach to the exercise of regulatory judgment.

88. Starting first with the Royal Court's approach to evidence of primary fact, it is apparent, (for example §§166 – 196 and §§219 – 220 dealing with the X Trust) that the Lieutenant Bailiff conducted a comprehensive exercise of original fact-finding. Instead of considering whether the SDM's findings of fact were wrong, in the relevant appellate

sense, the Lieutenant Bailiff made her own independent findings of fact, following a detailed review of the evidential material.

89. Merely by way of example, the Lieutenant Bailiff formed her own view (§176) that confirmation as to the legitimacy of using money exchange companies to transfer significant sums from Libya into the X Trust was obtained from a person "*who was, on the face of it, a member of a recognised and respectable firm of lawyers*" and (in §177) that the correspondence "*looks efficient, responsible and businesslike*". Similar observations can be made with regard to §§247 – 261 of the Royal Court Judgment, in particular §§252 – 253, where the Lieutenant Bailiff clearly developed her own independent interpretation of the documentary evidence regarding the Y Trust.

90. It is neither necessary nor possible for this court to pass judgment on whether the Lieutenant Bailiff's assessment of the evidence was objectively reasonable. For the purpose of this appeal, what matters is that the Lieutenant Bailiff's approach to the evidence was erroneous in that it displayed a disregard for true nature of the Royal Court's appellate function under s. 106.

91. Second, turning from questions of primary evidence to matters of evaluation, it is apparent that the Royal Court again formed its own opinions, instead of conducting an appellate review of the SDM's Decision. For example, in §177 of the Decision, the SDM had concluded that "*no real justification*" for the "*change of name incident*" had been given by Mr Domaille in the course of his interview with the ED. That was a matter of evaluation. The Lieutenant Bailiff reached a different conclusion by reference to her own evaluation of matters such as whether it is "*commonplace*" for trusts to be restructured and renamed, and the "*many reasons which perfectly normal and respectable … individuals may have*" for not wishing to "*draw easy or obvious attention to their assets*" (§§203 – 207). In other words, the Lieutenant Bailiff was not exercising an appellate jurisdiction by assessing whether the SDM's Decision was wrong, in the relevant appellate sense; rather, the Lieutenant Bailiff was conducting an independent, evaluative exercise of her own.

92. Turning finally to matters of regulatory judgment, we consider that the Royal Court again erred in substituting its own opinion for that of the SDM, instead of asking whether the Decision could properly be challenged by reference to the grounds listed under s. 106(3). This is most apparent in the section dealing with the findings other than want of probity (§§279 – 374). In this connection, it is particularly striking that the Individuals "*acknowledged and accepted the fact and the factual descriptions of the very many failings*" which the GFSC had identified (§280). As such, the appeal against this part of the Decision avowedly involved a challenge to the SDM's assessment of "*the true seriousness … and the weight to be attached*" to the admitted failings. That is clearly a matter of regulatory judgment. With that in mind, and taking the Lieutenant Bailiff's findings in relation to F Co by way of example (§§285 – 302), it is apparent that this part of the Judgment comprises a review by the Lieutenant Bailiff of the evidential material, and concludes with the words: "*I find it understandable that the low, routine and apparently innocuous activities of F Co lulled Mr Domaille and Mrs Hannis into possibly unwarranted complacency at the relevant time, but that was all it was*". It is apparent from the terms in which this conclusion is expressed, and from the preceding review of the evidence, that the Royal Court was forming its own, original view of the seriousness of the Individuals' conduct: it was not conducting an appellate review of the SDM's Decision on this issue by reference to the test under s. 106.

93. In seeking to uphold the Royal Court Judgment, Advocate Williams urged on us that the court in *X, Y & Z* (*supra*) undertook a similarly detailed review of the evidence in much the same way as the Lieutenant Bailiff in this case. He submitted that the only difference between the two cases is that, in *X, Y & Z* the GFSC won in the Royal Court, whereas in this case it lost.

94. We do not accept that submission. The true difference between what the Lieutenant Bailiff did in this case and what the Deputy Bailiff did in *X, Y & Z* is most clearly demonstrated by a comparison between the passages in the Royal Court Judgment discussed above, and passages such as those in §§120 – 122 of the Deputy Bailiff's judgment in *X, Y & Z*. In the former, the Lieutenant Bailiff examined the evidence in detail, and reached her own independent findings of fact. In the latter, the Deputy Bailiff examined the evidence in as much detail, but reached a conclusion as to whether the

SDM was entitled to make the findings of fact that he did. The difference between the two approaches is not in the intensity with which the evidence is scrutinised, but in the actual nature of the assessment that is undertaken. One was an illegitimate exercise of autonomous decision-making, while the other was a legitimate process of appellate review. In our judgment, the latter is authorised and mandated by the terms of the EP Law, whereas the former is not.

The subject-matter of the Royal Court's review

95. The second respect in which the Royal Court Judgment exceeded the jurisdiction conferred by s. 106 was in relation to the subject-matter of the court's review.

96. As noted above, the allegation of a want probity was only made at an advanced stage of the process. This prompted three overlapping findings.

97. First, the Lieutenant Bailiff expressed the view that a person under investigation by the ED is entitled to "*a natural and reasonable expectation*" that "*the charges in a Draft Notice might be reduced before the Final Notice is issued, <u>but they will not be increased</u> – at any rate absent the emergence of some further, new, evidence or matter in the meantime, which <u>radically changes</u> the complexion of the case*" (§270, emphasis added). The Lieutenant Bailiff's second finding was that, when the GFSC first formulated the Draft Enforcement Notice, it applied its mind to the question of probity and reached the conclusion that a case based on a want of probity could not be made against the Individuals (§275), and that the GFSC subsequently changed its mind not because of any objective reassessment of the gravity of the Individuals' conduct but "*rather more to bolster support for the [GFSC's] decision as to penalties*" (§273). This inference was repeated in strong terms in §§478 – 479 and §482 of the Royal Court Judgment. The third finding was that this change of mind by the GFSC, and in particular the Lieutenant Bailiff's understanding of the reason for the change of mind, was "*rather compelling evidence*" (§277) which carried "*quite significant weight*" (§278) in assessing whether the Individuals truly lacked probity.

98. The first finding suggests that the Royal Court had lost focus on the nature of the proceedings before it. The court was not hearing a judicial review challenge to the

fairness of the investigative process: rather, it was hearing an appeal against the SDM's Decision. Furthermore, leaving the relevance of the finding to one side, we are not persuaded that it was correct on its own terms. Decision-making in an organisation such as the GFSC will inevitably be a collective and iterative process. Different individuals reviewing the same material may reach different assessments, and there can be no "*expectation"* that the allegations made in a draft notice will only ever be adjusted downwards, absent "*radical changes*" in the evidence. Needless to say, if a finding is made in an SDM's decision on which the 'accused' has had no opportunity to respond, then that would be likely to give rise to an appeal against that decision under s. 106(3): but that is an entirely different matter.

99. The Lieutenant Bailiff's second finding is also a cause of concern, because it essentially involves an adverse interpretation of the ED's reasons for making an allegation based on want of probity in circumstances where the individuals involved in the decision-making were not before the court.

100. As to the third finding on relevance, we are not persuaded that, in hearing an appeal under s. 106, the Royal Court is entitled to take into account, let alone attribute "*significant weight*", to its own understanding of the thought processes of the ED in developing the allegations made in the course of any enforcement proceedings. The Lieutenant Bailiff appears to have treated as "*compelling evidence*" her own inference as to the ED's own decision-making process. That was then listed in §467 of the Royal Court Judgment as the first of three factors on which the Lieutenant Bailiff relied as being particularly significant in supporting her impression that the penalties were unjustified. We consider that approach to be wrong.

Conclusion on Ground 1

101. For the reasons given in this part of the judgment, we therefore conclude that Ground 1 is well founded. In reaching this conclusion, we should emphasise that we have necessarily focused exclusively on the nature of the review undertaken by the Royal Court in this case – *i.e.* the lawfulness (under s. 106) of the approach taken by the Lieutenant Bailiff. Nothing we have said should be taken as holding that the SDM's

findings could not properly have been overturned on appeal under s. 106. Indeed, we have ourselves concluded that the Decision is flawed and cannot stand. We address this issue and explain our reasons at §§181 – 186.

GROUND 2: THE ABSENCE OF ACTUAL HARM

Introduction

102. Ground 2 of the appeal alleges that the Lieutenant Bailiff erred in law in (i) "*failing properly to reflect the seriousness of anti-money laundering breaches which were concerned with failures of process*", and (ii) "*assessing seriousness by reference solely to outcome (i.e., the harm caused by the anti-money laundering breaches)*".

103. The GFSC's argument under this heading is premised on the assertion that Guernsey has a comprehensive regime for AML and countering the financing of terrorism ("**CFT**") which, as the GFSC submits, is "*focused on process rather than outcome*". On that basis, whilst the GFSC recognises that "*outcome*" (in the sense of actual money laundering, or other tangible harm) may be relevant in assessing the seriousness of a breach for the purposes of s. 39(6)(c) of the EP Law, the converse is not necessarily true: "*An absence of harm does not mean the failure to adhere to rules and regulations on AML and CFT lacks seriousness*" (§33 of the GFSC Skeleton). The essence of the GFSC's submission is that any evidence of actual money laundering, financing terrorism or other harm would constitute an aggravating factor, but the absence of any such evidence should not be regarded as a mitigating factor.

104. In our judgment, both the premise of the GFSC's argument and its essence are correct. Reading the Royal Court Judgment as a whole, it is impossible to escape the inference that the Lieutenant Bailiff treated the absence of any direct evidence of actual money laundering or other harm as a mitigating factor. For the reasons explained in more detail below, this Ground of appeal accordingly succeeds.

The legal context

105. Under s. 2(2) of the 1987 FSC Law, one of the GFSC's general functions is the "*countering of financial crime and of the financing of terrorism*". In the discharge of that function,

the GFSC has publicly endorsed the International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation issued by the Financial Action Task Force (the "**FATF Recommendations**").

106. In particular, the GFSC has produced The Handbook for Financial Services Businesses on Countering Financial Crime and Terrorist Financing, dated 15 December 2007 (the "**2007 Handbook**") which expressly states the GFSC's adherence to the FATF Recommendations (Part 1.1, §2) and specifically underlines the importance of the risk-based approach (Part 1.4, §20 & §23).

107. The FATF Recommendations have in turn been reflected in the applicable legislation. The relevant legislative regime that applied at the time of the conduct in this case was The Criminal Justice (Proceeds of Crime) (Financial Services Businesses) (Bailiwick of Guernsey) Regulations 2007 (the "**Proceeds of Crime Regulations**"). The Proceeds of Crime Regulations (specifically, regulation 3) required financial services businesses to take a risk-based approach to AML and CFT issues, and (under regulation 15) to establish effective policies and controls to address AML and CFT. Obligations with regard to customer due diligence were imposed by regulations 4 and 5. Other relevant obligations related to monitoring transactions (regulation 11) and record keeping (regulation 14).

108. Under regulation 17, it was an offence to contravene "*<u>any</u> requirement of these Regulations*" (emphasis added). Furthermore, the 2007 Handbook made clear (in Section 1.2, §9) that the GFSC was entitled to take any failure to meet the standards required by the Proceeds of Crime Regulations into consideration "*in the exercise of its judgment as to whether the financial service business and its directors and managers have satisfied the minimum criteria for licensing*". In particular, the 2007 Handbook (*ibid*) stated that the GFSC "*must have regard to compliance*" with the Proceeds of Crime Regulations, related rules in the Handbook and the 'relevant enactments' when determining whether a firm is carrying on its business with integrity and skill and "*whether a person is fit and proper*". The same consideration is now reflected in Schedule 1 of the Fiduciaries Law.

109. In light of the various provisions outlined above, and also as a matter of common sense, it is important to recognise that the question whether any particular breach of the applicable regime does or does not result in tangible harm is (absent deliberate facilitation) likely to be outside the knowledge and control of the relevant individuals who are carrying on the regulated business. Moreover, even in a case where tangible harm has in fact been caused, the question whether any direct evidence of such harm is available to the GFSC may be a matter of happenstance. The GFSC is, in our judgment correct in saying that, although evidence of actual harm could rightly be regarded as an aggravating factor, the absence of any such evidence cannot properly be regarded as a mitigating factor. What matters most in each case is the gravity of the breach in its own terms.

The GFSC's challenge to the approach taken in the Royal Court Judgment

110. To be clear, the specific ground of appeal with which we are dealing is that identified in §13(ii) above – namely, the legal significance (or otherwise) of the presence or absence of actual harm. Although a number of tangential issues arose in the GFSC's argument, this judgment is concerned only with the issue of whether the Royal Court Judgment treats the absence of any tangible harm as a relevant mitigating factor. In our judgment, it is clear that it does. There are numerous examples in the judgment.

    (i) In §302, having described one of the breaches in relation to F Co, the Lieutenant Bailiff then said this: "*it is notable that there appear to have been no unlawful, or even questionable, consequences*". In the same paragraph, having described another matter as involving an "*outright serious breach*", the Lieutenant Bailiff then added "*it does not appear that there was anything actually nefarious which would have been uncovered*" but for the breach.

    (ii) In §316, having noted certain breaches, or belated observance of the regulatory regime in relation to D Co, the Lieutenant Bailiff said: "*it is not suggested that any actual unlawful activity was facilitated as a result*".

    (iii) In §353, having identified certain specific failings in relation to R Co, the Lieutenant Bailiff concluded by saying this: "*I observe once again, though, that there is no*

evidence put forward that anything untoward actually happened as a result of these failings, in practice".

(iv) Again, in §373, having described the ED's case in relation to the payment made from the Z Trust, the Lieutenant Bailiff observed that: "*the ED's assessment and censure stops there and gives no consideration to whether there were any adverse consequences in practice*". In the following paragraph, the Lieutenant Bailiff said this: "*yet again, the underlying essence of the charges is that of not meeting regulations of form and process, rather than matters which actually caused, or which, in the circumstances of the case were ever actually likely to cause, genuine practical damage or detriment to anyone*".

111. All of these examples are quoted from the concluding paragraphs of the various sections in Part (2) of the Royal Court Judgment which deal essentially with the seriousness of the several breaches (see in particular §280). Part (3) of the Royal Court Judgment, which is expressly headed "*Seriousness*", then draws together the Lieutenant Bailiff's conclusions on the reasonableness and proportionality of the penalties imposed by the Decision. Under that heading, the Lieutenant Bailiff made two observations. The first (in §398) is immaterial for present purposes. The second (in §399) was that "*despite all the charges which have been laid (and mostly admitted) there appears to be absolutely no evidence that any of the matters has in fact caused any damage to the public interest at all … There are no complaints of anyone losing money through defaults by ATL or the [Individuals] … Neither is there any suggestion that ATL's defaults have caused any damage to the reputation of the Bailiwick*". The Lieutenant Bailiff concluded (in §401) by saying that "*if one is to penalise persons or entities on the grounds that their conduct "risked jeopardising the good name of the Bailiwick" it is material that this actually did not happen … That must surely, reasonably, affect the penalties which it might be proportionate and reasonable to impose*".

112. There is, in our judgment, a clear and principled distinction between (on the one hand) noting the absence of an aggravating factor and (on the other) treating something as a relevant factor which has a positively mitigating effect when assessing seriousness. It is clear from the passages quoted above that the Royal Court Judgment proceeded on the

basis that the absence of any evidence of actual harm is a mitigating factor – indeed, a significant mitigating factor (being one of only two points made in the section headed "*Seriousness*"). That, in our judgment, is the wrong approach, not least because it significantly underestimates the importance of taking a risk-based approach.

113. The passages quoted above from §399 and §401 also raise a related but separate issue. The Lieutenant Bailiff proceeded on the basis that the impact of any breaches on the Bailiwick's reputation could readily be demonstrated by adducing empirical evidence. In some cases (probably rare and exceptional ones) that might be true: but, in the generality of cases, the question whether any particular breaches actually harm, or risk causing harm to the reputation of the Bailiwick is a matter of judgment on which the court should be slow to substitute its own judgment for that of the GFSC, for the reasons discussed above in relation to Ground 1.

Conclusion on Ground 2

114. For the reasons and to the extent discussed above, Ground 2 of the appeal succeeds: evidence of actual harm can amount to an aggravating factor, but the absence of any such evidence should not be regarded as a mitigating factor when assessing seriousness.

GROUND 3, PART 1: TEST FOR LACK OF PROBITY

Introduction

115. The first part of GFSC's third ground of appeal is that the Lieutenant Bailiff erred in her approach to the test for lack of probity. The Lieutenant Bailiff purported to apply the two-stage test in *Ivey* *supra*, the case in which the Supreme Court restated the two-stage test for dishonesty in criminal proceedings. In fact, she introduced an additional component that involved carrying out an assessment of the individual's state of mind and evaluating their own sense of culpability. This is contrary to what was said by the Supreme Court in *Ivey*. It is also contrary to other established authority and involved a clear error of law. In our judgment this limb of Ground 2 succeeds.

116. As set out in §67(vi) above, Schedule 1 to the Fiduciaries Law uses both the word "*integrity*" (Article 1) and "*probity*" (Article 2). The Lieutenant Bailiff (§142) treated the

two terms as interchangeable. In the course of oral argument, Advocate Hill (for the GFSC) suggested that there is a difference between them. In response, Advocate Williams (for the Individuals) objected that this was the first time such a distinction had been dawn. In the event, Advocate Hill did not develop the argument, and we consider he was right not to do so. For the purpose of this judgment, we will proceed on the basis that "*integrity*" and "*probity*" are interchangeable.

The Legal Context

117. The relationship between dishonesty and integrity has been the subject of detailed consideration in a number of cases. The first point to note is that there is a clear distinction between the two concepts. While honesty has at its heart a basic moral quality, integrity generally connotes adherence to the ethical standards of a profession. As a result, it is possible for a person to lack integrity without being dishonest. In *Wingate v. Solicitors Regulation Authority* [2018] EWCA Civ 336, Jackson LJ (with whom Sharp and Singh LJJ agreed) said this (at §97):

"*In professional codes of conduct, the term "integrity" is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members … The underlying rationale is that the professions have a privileged and trusted role in society. In return they are required to live up to their own professional standards."*

118. Although the substantive content of the two concepts is distinct, the correct legal approach in determining whether in any given case there has been dishonesty or a want of integrity is essentially the same. Until the recent decision in *Ivey*, the test for establishing dishonesty in the criminal law was partly objective and partly subjective. It was objective in the sense that it was the ordinary standards of reasonable and honest people that fell to be applied, but it was subjective in the sense that the relevant conduct must not only have been dishonest according to those standards, but it was also necessary to show that the defendant appreciated that it was dishonest. This was established in the well-known case of *R v. Ghosh* [1982] QB 1053, in which Lord Land CJ explained the test in the following way:

"*In determining whether the prosecution has proved that the defendant was acting dishonestly a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts of genuinely believes that he is morally justified in acting as he did.*"

119. The decision in ***Ghosh*** was peculiar to the criminal law. In the civil law, it had long been settled that the test of dishonesty is objective: ***Royal Brunei Airlines sdn Bhd v. Tan*** [1995] 2 AC 378; ***Barlow Clowes International Ltd v. Eurotrust International Ltd*** [2005] UKPC 37; [2006] 1 WLR 1476. In ***Barlow Clowes***, Lord Hoffman said (at 1479 – 1480): "*The standard by which the law determines … [dishonesty] is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards.*"

120. In ***Ivey***, the Supreme Court brought the criminal law test for dishonesty into line with the civil test, and simplified the law (as well as the task of fact-finding tribunal) by removing the subjective limb of the ***Ghosh*** test. The test is now solely objective. This was made clear by Lord Hughes (at §74) who explained the position in the following way:

"*When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief of the facts … When once his actual state of mind as to knowledge or belief as to the facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.*"

121. In our judgment, there is nothing technical about this. Lord Hughes is describing the conventional exercise of deciding whether certain conduct is dishonest by reference to the nature of the conduct and what the individual knew or believed the circumstances to be as a matter of fact (as opposed to their knowledge or belief as to the honesty or ethical standards of ordinary decent behaviour). As such, it is perhaps unhelpful to speak of a person's "*state of mind*" in this context, and more accurate to focus instead on the person's knowledge or belief as to the existence or absence of facts. What is important is the actual state of the Individuals' knowledge or belief in that regard, not their particular state of mind based on their system of values. Once their knowledge or belief as to the facts has been established, the question can then be answered as to whether their conduct (or inaction) involved dishonesty, judged objectively.

122. As a matter of principle, we see no real difference between the *Ivey* approach in determining dishonesty and the correct approach to assessing probity. We agree with the decision in *Newell-Austin v. Solicitors Regulation Authority* [2017] EWHC 411 (Admin), where Morris J held that integrity connotes moral soundness, rectitude and steady adherence to an ethical code (at §47) and went on to explain (at §§48 – 50) that, while the test for lack of integrity was objective, the state of a person's knowledge was nevertheless relevant to determining whether they had acted without integrity. The importance of the state of the individual person's knowledge or belief of the facts can be seen in the different outcomes in the decision in *Wingate*, *supra*. A solicitor who signed a sham contract (knowing its terms did not reflect the true nature of the agreement) objectively lacked integrity, whereas his partner who had left the detail of the transaction to him after making adequate, if not full, inquiries, did not (see Jackson LJ, at §§117 – 128).

123. In their submission to us, the GFSC argued that the applicable test for determining whether there has been a lack of integrity was set out in the recent decision of this Court in *John Adam Robilliard v. The Chairman of the Guernsey Financial Services Commission* [2023] GCA 035 where it was stated that "*the two-stage test for dishonesty or want of probity in Ivey is not required when considering the lesser allegation of want of integrity*." We wish to make clear that, in *Robilliard*, the Court of Appeal was emphasising that the test for want of probity was objective and that it was not necessary

for the Royal Court to make express findings of fact as to the individual's state of mind (in the sense of assessing whether the individual recognised that they were doing anything wrong). The court was not intending to cast doubt on what had been said by Morris J in *Newell-Austin*, *supra*, later approved by Jackson LJ in *Wingate*, *supra*, namely, that the state of a person's knowledge is relevant to determining whether they had acted without integrity. In fact, the court in *Robilliard* cited both *Newell-Austin* and *Wingate* in support of its reasoning.

124. The question of want of probity may also turn on whether the facts known to the particular individuals, viewed objectively, should have given rise to a suspicion and whether the failure to suspect is itself a sign of a lack of integrity. As Jackson LJ noted in *Wingate* (at §100):

"*Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or an arbitrator will take particular care not to mislead. Such a person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse."*

125. In *Seiler and Others v. The Financial Conduct Authority* [2023] UKUT 133 (TCC) The Upper Tribunal accurately stated that the test of what constitutes a lack of integrity is essentially objective, but nevertheless involves having regard to the facts in which the person concerned knew or believed. In relation to "turning a blind eye" the Upper Tribunal said this (at §48):

"*A person who turns a blind eye to a risk can also be said to be acting without integrity … that is because they have chosen not to think about the risk that a particular activity might be occurring or they have chosen not to ask questions for fear of what they may discover. Such a person knows or suspects facts which cause them to conclude that they would be better off not knowing more: not asking questions in that situation shows a lack of integrity because the person acts notwithstanding a suspicion of impropriety. A person who has no suspicion in their mind at all, however, does not turn a blind eye. A person who does not ask questions because it does not occur to them that there is risk*

of wrongdoing (whether or not they would recognise it as such) does not turn a blind eye."

126. While we do not disagree with these observations, they do serve to emphasise the danger of using the concept of 'turning a blind eye'. A person may act without integrity or probity where objectively viewed their conduct, on the facts as they were known to them, demonstrates a willingness to run a risk that they would be acting contrary to the standards of the profession in question. This is all the more so in the financial services industry where there is a significant danger of dealing in tainted funds and facilitating criminal enterprises. We would also add that, while a person who has no suspicion in their mind at all does not turn a blind eye, the failure to hold a suspicion may, in appropriate circumstances, amount to a want of probity. We also address this issue at §184 below.

The Royal Court Judgment

127. As noted above, the Lieutenant Bailiff purported to apply what she described as the two-stage test in ***Ivey***. Having quoted what was said by Lord Hughes (which we have set out above), she then (at §158) went on to give what was in effect a ***Ghosh*** direction. The first stage of her test involved deciding whether the state of mind of the relevant actor was "*culpable in the sense that he or she knew that what they were doing (or not doing) was ethically "wrong" – whether as a matter of conscious participation or facilitation, or as a matter of consciously closing his or her eyes to that possibility, or consciously not caring about it, rationalising it anyway*". This is not a reflection of what Lord Hughes intended and nor does it reflect the objective test.

128. Although Lieutenant Bailiff went on to deal with the second stage of what she regarded to be the test (whether a right-thinking person in that situation could have believed that their conduct is proper), she concluded her consideration of the test with these words:

"*It can be seen, though that, even in that case (viz. under the second stage of the test), there is still an underlying finding as to the individual's subjective state of mind, and that that state was culpable. It is just that the relevant state of mind there is not that held*

with regard to the actual doing of the act, but as to the erroneous belief that what was being done was not improper."

129. We are in no doubt that this is not an accurate description of the objective test and amounts to an error of law. It infected the Lieutenant Bailiff's analysis when she later considered the findings of want of probity in the case of Mr Domaille (§§200 – 209), Mrs Hannis (§§217 – 223), and Mr Clarke (§§257 – 261). For this reason, her findings cannot stand.

130. For these reasons, the first limb of Ground 3 succeeds, and this provides an additional basis for our conclusion that the Royal Court Judgment cannot stand.

GROUND 3, PART 2: APPLICATION OF CIVIL STANDARD OF PROOF

Introduction

131. The second part of GFSC's third ground of appeal is that the Lieutenant Bailiff was wrong in law in her application of the civil standard of proof. The Lieutenant Bailiff purported to apply the single and uniform standard, expressed as proof on the balance of probabilities, but made clear that where a finding concerns a matter such as dishonesty or want of professional probity, the strength of the evidence which is properly required to make out such a finding may well need to be more compelling than for findings of fact which are morally neutral.

132. In our judgment, the Lieutenant Bailiff's approach amounts to a clear error of law and the second limb of Ground 3 succeeds.

The Legal Context

133. The law on the civil standard of proof on the balance of probabilities has recently been explained by the Supreme Court in *Birmingham City Council v. Jones* [2023] UKSC 27; [2023] 3 WLR 343, which concerned the standard of proof for proving the threshold conditions for applications by local authorities for injunctions to restrain drug-related violence and drug dealing. The Supreme Court (Lord Reed PSC, Lord Hodge DPSC, Lord Lloyd-Jones, Lord Sales, Lord Stephens, Lady Rose, Lord Richards JJCS) held that there is

only one standard of proof at common law, and that is proof on the balance of probabilities, and there is no general rule that the seriousness of an allegation or of the consequences of upholding an allegation justifies a requirement of more cogent evidence where the civil standard is applied.

134. In the course of his judgment (with which the other members of the Supreme Court agreed) Lord Lloyd-Jones traced the development of the law, and made reference to three cases in which the notion of a "*flexible*" or "*heightened civil standard of proof*" had been rejected.

135. In *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, Lord Nicholls had stated (at 586g):

"this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred."

136. In *Secretary of State for the Home Department v. Rehman* [2003] 1 AC 153, Lord Hoffman stated (at §55):

"*The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in In Re H … some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian."*

137. In *In Re B (Children) (Care Proceedings: Standards of Proof)* [2009] 1 AC 11, Lord Hoffman repeated his earlier observations and said (at §13):

"*I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not."*

138. Returning to the decision in ***Jones***, Lord Lloyd-Jones summarised the position in the following way (at §51):

"*(1) It is now established that there is only one standard of proof at common law and that is proof on the balance of probabilities.*

(2) Nevertheless, the inherent improbability of an event having occurred will, as a matter of common sense, be a relevant factor when deciding whether it did in fact occur. As a result, proof of an improbable event may require more cogent evidence that might otherwise be required.

(3) However, the seriousness of an allegation, or of the consequences which would follow for a defendant if an allegation is proved does not necessarily affect the likelihood of its being true. As a result there cannot be a general rule that the seriousness of an allegation or of the consequences of upholding an allegation justifies a requirement of more cogent evidence where the civil standard is applied."

139. Later in his judgment (at [66]), Lord Lloyd-Jones emphasised: *"there is no such thing as a heightened civil standard."*

The Royal Court Judgment

140. It is apparent from her judgment that the Lieutenant Bailiff applied legal rules to her approach to the evidence which are inconsistent with the authorities noted above. In particular, she proceeded on the basis of two erroneous propositions (§146):

"The first is the general one that, because the norm of ordinary decent behaviour is honesty and propriety, it requires stronger and more cogent evidence to justify displacing this starting point, so as to tip the balance of probability. The second is that, certainly as regards professional persons, a finding of dishonesty would have such serious personal consequences for the individual that this fact is, in itself, evidence tending to suggest that it would be unlikely that such an offence would be committed – certainly committed lightly – consequentially requiring a countervailing strength of evidence to upset this."

141. The Lieutenant Bailiff's approach was influential in her findings on the want of probity issue and formed the basis of her criticism that the SDM had been insufficiently rigorous in his evaluation of the evidence. It also provided the basis for the conclusion that his findings were unfair and unreasonable. This is apparent from her analysis of Mr Domaille's case, the "*standard of proof to be applied*" and the requirement for "*strong evidence*" (at §201 and §210). The analysis of Ms Hannis' case (at §237]), (finding of lack of integrity is only reasonably done in "*clear and obvious cases*") and the analysis of Mr Clarke's case generally (at §§247 – 261).

142. This reasoning cannot stand with the decision in *Jones* (which was decided after the Lieutenant Bailiff's judgment) and nor can it stand with what Lord Hoffman said in *Re B*, *supra*, (at §15):

"There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate to inherent probabilities … it would be absurd to suggest that the tribunal must in all cases assume that serious conduct in unlikely to have occurred. In many cases, the other evidence will show that it was all too likely."

143. For these reasons, the second limb of Ground 3 succeeds and this provides an additional basis for our conclusion that the Royal Court Judgment cannot stand.

GROUND 3, PART 3: THE BASIS FOR IMPOSING PROHIBITION ORDERS

Introduction

144. The third part of the GFSC's third ground of appeal is that the Lieutenant Bailiff significantly and unlawfully limited the circumstances in which a Prohibition Order might properly be imposed so that only findings of lack of probity or incompetence to an egregious degree would justify the conclusion that such a penalty is reasonable and proportionate.

145. In our judgment this third limb of Ground 3 succeeds. The Lieutenant Bailiff's approach is unduly restrictive and does not properly reflect the flexible nature of the Prohibition

Order and the importance of their availability in furtherance of the regulatory objective of bringing about and maintaining high standards of conduct of persons involved in the Bailiwick's financial services sector.

The Legal Context

146. As we have noted, a Prohibition Order is an enforcement sanction that prohibits an individual from acting in certain roles, or performing certain functions within the Bailiwick's regulated financial services industry. The power to make a Prohibition Order is contained in s. 33(1) of the EP Law and described at §66(iv) above.

147. As s. 33(1) makes clear, a Prohibition Order can only be applied to an individual and such an order can be imposed where it appears to the GFSC that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by a licensee. The question of whether a person is fit and proper is determined by reference to the MCL.

148. Section 33(1) replaced s. 34E(1) of the Protection of Investors (Bailiwick of Guernsey) Law 1987 which contained similar wording. This earlier provision was considered by the then Deputy Bailiff in ***Bordeaux***, *supra*. In that case, the Deputy Bailiff noted (at §31) that:

"a person who fails to meet any of those minimum criteria [for licensing] is capable in law of being made the subject of a prohibition order. In other words, the basic vires for such an order exists, but whether it is appropriate for GFSC to exercise the discretion available to it will depend on the degree of non-fulfilment of these criteria as part of a review of all the circumstances of the case."

149. Later in his judgment, the Deputy Bailiff said this (at §79):

"The Senior Decision Maker properly recorded that a prohibition order is generally reserved for cases where there has been proof of some lack of integrity. However, if the basis for making a prohibition order were to be limited to such cases, the legislature would not have referred to having regard to the minimum licensing criteria. Moreover, as the final words of section 34E ["prohibiting that individual from performing any

function, any specified description of function"] … demonstrate the GFSC can choose to make a tailored prohibition order on an individual: it does not have to be an all-encompassing prohibition order. Accordingly, the legislative scheme must be approached on the basis of asking whether a prohibition order of some sort is appropriate and then to consider its extent."

150. Also in ***Bordeaux*** (at §§59 – 61), the Deputy Bailiff approved of the range of factors relevant to the imposition of a Prohibition Order that the GFSC had set out in its published guidance. A revised version of that published guidance applied in the present case in the form of the Enforcement Explanatory Note, which provided (at §§2.6.3):

"(3) … the Enforcement Powers Law does not set out any criteria for determining whether to impose a Prohibition Order, the Order's scope or its duration. The Commission must consider in each case whether, in line with the Enforcement Policy, the imposition, variation or revocation is appropriate.

(4) In considering whether to make a prohibition order … the Commission will consider the seriousness of the contravention or misconduct and all relevant circumstances.

(5) The Commission will generally consider imposing a Prohibition Order where the contravention or misconduct is by a board member or an individual with greater responsibility, or who undertakes a more senior role; or where the behaviour of an individual, irrespective of their level is such that the contravention has caused or is likely to cause damage to the reputation of the Bailiwick; or the individual poses a risk to the customers or the public."

The Royal Court Judgment

151. The Lieutenant Bailiff's erroneous approach to the test for imposing a Prohibition Order has already been foreshadowed in §84 above, quoting from §137 of the Royal Court Judgment. The Lieutenant Bailiff further explained her general approach first in the case of Mrs Hannis (§488):

"As a general point the justification for putting the relevant person effectively out of action as regards operating in the financial services sector in Guernsey is the protection

of the public (clients) or the protection of the reputation of the Bailiwick. It can therefore be very reasonably justified where its subject has shown a lack of probity. To be justified on the grounds of "incompetence", (a term which I will use to encompass all the general characteristics indicated by the MCL) there must be sufficient reason to believe that the subjects' potential [for] such incompetence poses a danger to the public or to the reputation of the Bailiwick. The further arguable purpose of deterrence to third parties in respect of similar conduct to that sanctioned, can only be a limited operation because it runs the significant risk of imposing a penalty which is unreasonable or disproportionate as regards the individual subject. I have to consider, therefore, whether or not I regard it as reasonable and proportionate, against that background and in the circumstances of the case to impose such an order on Mrs Hannis."

152. The Lieutenant Bailiff adopted the same general approach in the case of Mr Domaille (§§518 – 523) and Mr Clarke (§548).

153. In our judgment, the Lieutenant Bailiff's assessment of the reasonableness of the sanctions in this case was substantially (and wrongly) influenced by the overall approach taken in relation to the Royal Court's function, which has already been addressed in §85 above. More specifically, the Lieutenant Bailiff's view that the justification for a Prohibition Order is public protection by the incapacitation of those who have demonstrated a lack of probity or extreme incompetence is contrary to the general wording of the EP Law and the specific ruling of the Deputy Bailiff in ***Bordeaux***. We agree that a Prohibition Order is more likely to be made in a case where there is some lack of integrity, but it is not limited to such cases, nor is it limited to cases of incompetence to an egregious degree. The GFSC is to approach each case on the basis of asking whether a Prohibition Order of some sort is appropriate, and then to consider its extent. We also consider that the Lieutenant Bailiff took an unduly restrictive view of the public ("*clients*") in her analysis of the justification for imposing a Prohibition Order.

154. It follows that the third limb of Ground 3 succeeds, and this provides an additional basis for our conclusion that the Royal Court Judgment cannot stand.

Conclusion on Ground 3

155. For the reasons and to the extent discussed above, the appeal succeeds on Ground 3.

GROUND 4, PART 1: HISTORIC FINING POWERS

156. The first limb of Ground 4 is that the Royal Court erred in concluding that financial penalties had to be assessed by reference to fining powers applicable to legislation no longer in force. As we have explained, the Lieutenant Bailiff held that it was necessary to distinguish between wrongdoing before and after November 2017 when greater fining powers came into effect, and to calibrate any financial penalty by reference to those earlier powers. In our judgment, this was an error of law and this part of Ground 4 succeeds.

The Legal Context

157. Until November 2017, the GFSC's powers to impose financial penalties were limited by statute to a maximum of £200,000 in respect of both licensed entities and individuals. Since that date, in law now incorporated in s. 39 of the EP Law, the GFSC's powers to impose financial penalties increased (namely, up to £4 million for a licensee and £400,000 for an individual).

158. Initially, in a public statement made in November 2017, the GFSC announced that it would apply the increased penalties in enforcement cases which commenced after 13 November 2017 and where the breaches took place after that date. However, on 21 July 2021, prior to the issue of Draft Enforcement Report, the GFSC announced it would use the new financial penalty limits in all cases, regardless of when the relevant conduct occurred. In the case of the three Individuals, the failings spanned the date upon which the financial penalty limits increased.

159. The financial penalties were imposed by the SDM using powers available in s. 39(1) of the EP Law. By reason of s. 39(1), the power to impose a discretionary financial penalty is engaged:

"where in the opinion of the Commission a Licensee, former Licensee, relevant officer or other person

(a) Has contravened in a material particular

i. A provision of this Law, the Financial Services Commission Law or the prescribed laws, or

ii. Any prohibition, restriction, condition, obligation, enforcement requirement, other requirement, duty direction or arrangement imposed, issued or arising under any such provision, or

(b) Does not fulfil any of the applicable Minimum Criteria for Licensing,

It may impose on that person a penalty in respect of the contravention or non-fulfilment of such amount not exceeding the relevant sum calculated in accordance with subsections (2) and (3)."

160. As we have noted, the MCL are those listed in Schedule 1 of the EP Law and, as the language of the statute makes clear, these criteria require a current assessment of a variety of factors (as set out in Schedule 1 (2)(2) and (3)) so as to determine whether a person is "*fit and proper*".

161. Among the several factors the GFSC is required to have regard in determining whether a person is fit and proper is "*the previous conduct and activities of the person in question and, in particular, to any evidence that that person has*: …

(b) contravened any of the provisions of

(i) this law

(ii) the regulatory laws

(iii) the repealed regulatory legislation (within the meaning of the Enforcement Powers Law) …

(c) Engaged in any business practices (whether unlawful or not)

(i) Appearing to the Commission to be deceitful or oppressive or otherwise improper, or

(ii) Which otherwise reflect discredit or that person's method of conducting business or that person's suitability to carry on regulated activities, or

(d) Engaged in or been associated with any other business practices or other conduct or behaviour in such a way as to cast doubt on that person's competence and soundness of judgment."

162. The meaning of the "*repealed regulatory legislation*" is explained in Schedule 1 of the EP Law and includes, among other things, The Protection of Investors (Bailiwick of Guernsey) Law 1987. It follows from this that breaches of the 1987 Law (and other repealed legislation) may be taken into account in determining whether there is a present non-fulfilment of MCL, and the extent of it, so as to justify the imposition of a sanction.

The Royal Court Judgment

163. The Royal Court accepted the Individuals' submissions that the decision to apply the new financial penalty limits amounted to breaches of the principle precluding retrospective penalisation, and basic fairness. The Lieutenant Bailiff stated (at §436):

"it is incumbent on the Commission to have regard to the time of offences upon which it relies in support of the charges which it brings and which give rise to its "opinion" in respect of imposing financial penalties (and I note that it is this form of sanction with which section 39 is concerned) and to calibrate this into its calculation of any appropriate fine."

164. In our judgment, this was an error of law. The GFSC approach to the imposition of the financial penalties was based on a correct analysis of the legislative scheme. The assessment of whether a licensed entity or individual fulfils the MCL is, on the plain wording of the statute, a current assessment. This is consistent with the purpose of enforcement proceedings, namely to assess whether a person currently fails to meet the MCL rather than to hold them to account for specific historic regulatory breaches. It is the current failure to meet MCL, taking into consideration any relevant past conduct,

which provides the power for the GFSC to exercise its powers to impose financial penalties.

165. We also consider that the Royal Court fell into error in its suggestion that financial penalties are necessarily imposed in respect of particular incidents of alleged misconduct (at §141). Discretionary financial penalties are available where an entity or individual is found not to meet the MCL. The financial penalty arises following an assessment of whether the MCL have been met and the extent to which there has been a departure from those criteria.

166. In our judgment, the GFSC had not proceeded on the basis that it was purporting to identify "*offences upon which it relies in support of the charges which it brings*": it was instead assessing whether the Individuals met the MCL, and this assessment involved more than a mere evaluation of past adherence to relevant rules and regulations. The seriousness of the current non-fulfilment is assessed by reference to the factors identified in s. 39(6) of the EP Law.

167. We note also that the Lieutenant Bailiff herself recognised (at §442) that even on her own analysis a process of tabulating "*offences*", assessing their seriousness, and then identifying sanctions according to date was not necessarily required. She also accepted that a simple aggregation of penalties, treating them as separate and cumulative might result in an unduly harsh penalty. Instead, she suggested "*that some level of apportionment of the relevant conduct being penalised by both its time and its extent, and therefore its contribution to the overall appropriate penalty, might be required."* This merely serves to demonstrate the problem created by the Lieutenant Bailiff's interpretation of the legislation. The Lieutenant Bailiff accepted, not only that her interpretation could lead to unduly harsh penalties, but also that the process would be "*somewhat cumbersome*". In our judgment, there is no need to resort to any such technical exercise, cumbersome or otherwise. The short point is that a requirement to have regard to previously limited powers to impose financial penalties relating to the failure to meet the MCL cannot be read into the legislative scheme. Such a requirement would create unnecessary complexity and is contrary to the plain wording of the statute.

168. It follows that the first limb of Ground 4 succeeds.

GROUND 4: PART 2, THE PENALTIES IMPOSED ON ATL/MR DOMAILLE

169. The second part of the fourth ground of appeal is that the Lieutenant Bailiff erred in law by having regard to the interrelationship between the penalties imposed on an individual director and on a licensed entity where the individual (in this case, Mr Domaille) is also a shareholder of the licensed entity (in this case ATL). The Lieutenant Bailiff proceeded on the basis that imposing a financial penalty on ATL would have the effect of imposing a financial penalty on Mr Domaille and should therefore have been taken into account when fixing the level of financial penalty against him.

170. In our judgment, the Lieutenant Bailiff's approach is inconsistent with the recognition of separate corporate personality, and this aspect of Ground 4 of the appeal also succeeds.

The Royal Court Judgment

171. The Royal Court held (at §471) that *"in the case of an entity such as ATL, effectively owned as to 50% by each of two of the three Directors with overall responsibility for the defaults of ATL itself, the interaction of the corporate sanction and the personal one does also need, in my judgment, to be taken into account in assessing the appropriate personal penalty."*

172. The Royal Court proceeded (at §472) on the basis that *"the effect of fining ATL £500,000 would be that Mr Domaille and Mr Sinclair were each effectively fined £250,000 by this route. The combined effect of the additional sanctions proposed to be imposed on each of them was therefore to fine them £530,000 each."*

173. In our judgment, this analysis is flawed in a number of respects. First, the penalty imposed on ATL was imposed on ATL as a separate legal entity and in respect of the systematic governance issues which were properly regarded as the failings of ATL acting as the licensed entity. While it is right to acknowledge that failings of a corporate entity can only occur through the acts of individuals, the penalty is nevertheless imposed on the entity. This is an inevitable incidence of the law's recognition of separate corporate

personality, and the separate regulatory defaults committed by that entity as such. Nor was there any basis for the Lieutenant Bailiff to conclude that the individual fault of Mr Domaille had not been properly separated from the corporate sanction or that the personal sanction had become "*a penalty of strict liability by association*" (at §473).

174. Second, quite apart from the point of legal personality, the practical effect of imposing a penalty on ATL as a separate legal entity was not to double the penalty imposed on Mr Domaille. The potential financial consequences on Mr Domaille of imposing a financial penalty on ATL were largely unknown and certainly remote (as the Lieutenant Bailiff appeared to accept at §472). What was known to the Royal Court was that ATL had settled with the GFSC and that it was still in operation. By implication it had accepted the financial penalty as appropriate and was in a position to satisfy it.

175. In our judgment, it is appropriate to impose financial penalties on entities and individuals which properly represent their respective failings and which properly reflect the concept of separate legal personality. The Lieutenant Bailiff's analysis, if applied generally, would undermine this principle and enable culpable individuals to contend that financial penalties should instead be visited on the corporate entities in which they had an interest with a corresponding detrimental impact on the public interest.

176. We should also make clear that this analysis is consistent with the provisions of s. 39(6)(e) of the EP Law. Section 39(6)(e) provides that, among the matters the GFSC is required to take into account when deciding whether to impose a financial penalty and the amount of any such penalty, is *"the potential financial consequences to the person concerned and to third parties including customers and creditors of that person".* While the definition of "*third parties*" might without more extend to encompass the potential financial consequences to an employee or director, it is apparent that the intention of the subsection is directed at 'innocent' parties. It provides no support for the proposition that where a separate corporate entity is made the subject of a financial penalty, the owner/directors of that entity who are also liable to a financial penalty are entitled to a reduction of their own penalty for their own defaults on that account alone.

177. In addition to these observations and in light of the fact that this case is likely to be reconsidered by the GFSC, we consider it right to express our views on the following additional matters which concern calculation of the financial penalties.

178. First, we do not accept that the Royal Court was correct to criticise the GFSC for failing to take into consideration the penalties imposed by it in other cases as required by s. 39(6)(f) of the EP Law. In our judgment, the GFSC did have regard to sanctions imposed in other cases, but in any event any comparisons with other cases in this context should be approached with a suitable degree of realism and flexibility. As the GFSC noted in its submission to the Royal Court, the previous decisions were made under the previous fining powers and this in itself imposes a limit on the extent to which any useful comparison can be made. Moreover, making "*micro-comparisons*" (which the SDM rejected as the correct approach) is inappropriate in a context where the imposition of appropriate sanctions relies on an overall assessment of the circumstances of the particular case.

179. Second, as the Lieutenant Bailiff noted (at §461), comparisons can never be taken too far and the issue to be decided is the seriousness of the Individuals' failings. The Enforcement Explanatory Note contains guidance on the level of potential fines and the factors to be taken into account in deciding whether a case falls within one of other of the four bands which for individuals are: Band 1 up to £50,000; Band 2 up to £100,000; Band 3 up to £250,000; Band 4 up to £400,000. The factors will have to be considered in light of our decision and the appropriate financial penalty will be for the SDM to determine.

Conclusion on Ground 4

180. For those reasons, Ground 4 of the appeal succeeds.

THE DECISION OF THE SDM

181. As foreshadowed in §101 above, in our judgment the Decision of the SDM was also flawed and we consider it necessary to remit the matter for re-determination by a new SDM. The Decision was flawed for the following reasons.

182. First, the SDM proceeded on the basis that it was not necessary to make findings on any of the Individuals' state of mind (§23 of the Decision). We consider that to have been the correct approach, if (and only if) the SDM meant that it was unnecessary to make any finding as to whether the Individuals realised that their conduct involved a want of probity. Whether they knew or believed they were acting ethically or otherwise was irrelevant. On the other hand, it was necessary for the SDM to consider what each of the Respondents knew or believed of the (objective) facts. It would then have been necessary to consider whether, knowing of or believing in the existence those facts, the Respondents' conduct lacked probity.

183. However, in some parts of the Decision it is not clear if the SDM was proceeding on the basis of what the Individuals actually knew or believed, or what they ought to have known. One possible reading of the SDM's Decision is that he was proceeding on the basis that the facts known to each of the Individuals were such that to continue to act in the particular cases (the X Trust, in the case of Mr Domaille and Mrs Hannis) or to continue with the transaction, (the Y Trust, in the case of Mr Clarke) was unethical and demonstrated a want of probity. This was a finding open to the SDM, but the specific findings of what was known or believed by each of the Individuals is not entirely clear, nor is it clear whether he was proceeding on the basis of the fact known or believed by each of them, or on the basis of what each of the Individuals ought to have known. This lack of clarity, which goes to the heart of the finding of want of probity, is itself sufficient reason for the Decision to merit reconsideration.

184. Our second point is linked to the first. The SDM made findings that two of the Individuals had turned a blind eye to what was obvious (in the case of Mr Domaille at §177 and in the case of Mrs Hannis at §188). This is a potential source of confusion, as it turned out to be in this case where the Lieutenant Bailiff took this to be a positive finding as to a state of mind (at §199). The notion of what is involved in turning a blind eye to suspected facts involves first making a finding of what a person knew or believed. It is not the case that a blind eye can be turned to unsuspected facts, or that negligent ignorance will do. In our judgment, 'turning a blind eye' connotes an element of knowledge, because it only arises where a person is suspicious of the truth, and refrains from making inquiry for fear of what might be discovered for certain.

185. In the case of the Individuals, the question of want of probity will turn on whether the facts known to the particular individual, viewed objectively, gave rise to a suspicion that funds were tainted or that they were to be used for a discreditable purpose. If so, a reasonable director or manager in the financial services sector aware of those facts would not have pressed on with the client relationship or continued with the transaction, at least not without making further enquiries.

186. Third, in reaching his conclusions on the discretionary penalties, the SDM had regard to two sets of client files (K Co and Z Trust/W Co) which had been included in the materials before him as being relevant to ATL. They did not contain any criticisms of the Individuals (see the Decision at §§123 – 132 and §151 – §154). This was the subject of criticism by the Lieutenant Bailiff (§116), who accepted that, while the files might still be material as examples of failures by the three Individuals in their oversight responsibilities as Directors, this was not the basis on which the files were originally singled out for consideration, nor was this stated to be the reason for them being relied on. Once again, we have some sympathy with the views expressed by the Lieutenant Bailiff. This illustrates the care required to ensure that any decision in relation to the Individuals is carefully reasoned and properly explained by reference specifically and only to their personal conduct. A similar point arises from the SDM's consideration of Mrs Hannis' case. He appeared to suggest (at §247) that she had failed to act with probity, competence or soundness of judgment when dealing with issues relating to F Co. This is an error. There was no such finding in relation to F Co in either the MTN or in the Decision itself. Similarly, we agree with the Lieutenant Bailiff that the SDM did not make any finding of want of probity against Mr Domaille or Mr Clarke in relation to the O Co matter or the R Co matter (§§262 – 266), although his judgment was not entirely clear on the point.

ADDITIONAL OBSERVATIONS

187. We make the following additional observations, which we hope to be of assistance to the new SDM.

188. First, we have a good deal of sympathy for the Lieutenant Bailiff's view that the Individuals should have been afforded some credit for the remedial measures which were put in place in ATL in the period after June 2019 and the matters contained in Ms Guillou's witness statement, dated 24 May 2022. The Lieutenant Bailiff's discussion of these matters (at §§406 – 411) seems to us to have some force but the weight to be attached to this mitigation (if it is accepted as such) will be a matter for the decision-maker.

189. Second, we do not agree with the Lieutenant Bailiff's analysis that the self-report of the O Co matter was "*in effect a forced confession*" (at §416). Whether the mitigation based on the major remediation steps which had been taken since June 2019 is 'off-set' by the seriousness of the O Co matter (as the GFSC contended) is a matter for the decision-maker to decide having regard to the individual circumstances of each of the three Individuals.

190. Third, to the extent that the Royal Court Judgment suggests that the GFSC had acted inappropriately as a regulator or that compliance with the regulations, rules and guidance is to be regarded a matter of form and process, we respectfully disagree. As the Lieutenant Bailiff herself noted, the financial services industry is an extremely important part of the economy and culture of Guernsey. It is in Guernsey's interests to be a location which observes the highest ethical standards. In our judgment, this point cannot be overstated and it is legitimate for the GFSC to approach its role as a regulator with this in mind. It has been given wide-ranging powers to enforce and uphold good practice in order to ensure that the Bailiwick's reputation as an international financial centre is enhanced and the public are protected from undesirable practices.

191. In summary we agree with the observations made by the Deputy Bailiff in ***Bordeaux*** supra (at §28)*:*

"The regulatory environment in which businesses and individuals operate must deliver the GFSC's objectives of maintaining financial stability in the regulated sector, managing risk to the financial system and maintaining market confidence; ensuring fair efficient

and transparent markets, protecting financial services' customers and countering financial crime and the financing of terrorism".

192. Finally, we wish to emphasise that any future decision must be based on an entirely fair and individualised assessment of each person's culpability, taking into account the exculpatory and mitigating factors on which they properly rely.

CONCLUSION

193. For the reasons we have given, the appeal is allowed and the decision of the Royal Court cannot stand.

194. The matter should be remitted to the GFSC, for it to appoint a Senior Decision Maker (not Mr Finch OBE) for the decision on sanctions to be retaken in accordance with our judgment.

195. We wish to express our gratitude to Advocate Hill and Advocate Williams and their teams for the assistance they provided to us at the hearing of the appeal and for their written arguments and the efficient compilation of the case materials.