

UPDATE

GFSC: Third Public Statement of 2018 – The Disappearing Statement

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The Commission has issued its third Public Statement of 2018. This Public Statement was then withdrawn within a matter of days. What can we take from the brief glimpse of this Public Statement and what are we to read into its prompt disappearance?

Following the Public Statement in respect of Blenheim Fiduciary Group Ltd in August 2017 no further Public Statements were issued for over seven months. However since the Richmond Fiduciary Group Ltd decision in April¹ this year we are now seeing Public Statements published at the rate of one a month.

The appearance of Public Statements is always useful for industry as, while tricky to decipher, they have an educational role to play. The latest Public Statement is noteworthy both for its appearance on 8th June, and for its prompt disappearance on 13th June.

This update considers both what industry may take from the content of the Public Statement and what might be read into its disappearance.

The Public Statement

While the 8th June Public Statement has been published, as a courtesy given its withdrawal, we are not naming the entities involved.

The Public Statement was accompanied by

- a Financial Penalty of £13,000;
- a four year order preventing the Respondent from performing the functions of director, controller, partner or manager; and
- the disapplication of exemptions under the Fiduciaries Law which would otherwise have allowed the Respondent to hold up to six directorships without that counting as regulated activity.

The above penalties are some of the sanctions available to the Commission to punish breaches of the regulatory laws and/ or non-fulfilment the minimum criteria for licencing.

The Respondent was employed by a Licensee from 2000 to 2016. Initially he was a non-executive director of the Licensee, but he became an executive director from 2010, and in later years became a controlling shareholder and Money Laundering Reporting Officer. The Respondent's employment contract was explicit that he not take on other work without the Licensee's permission.

Nevertheless, in 2010 the Respondent established a Service Provider. That Service Provider was not licensed.

¹ See our earlier publication <https://www.mourant.com/news-and-views/updates/updates2018/gfsc--first-public-statement-of-2018.aspx>

From May 2012 to February 2016, the Respondent incorporated 12 Guernsey companies through the Service Provider. In each instance, the Respondent completed the formations from the Licensee's office, using the Licensee's computers and using the Licensee's log-in details for the Guernsey Registry.

In 2016 the Licensee began an employee investigation against the Respondent. The grounds included breaching his contract by engaging in his private business interests at the Service Provider without the Licensee's consent. The Respondent resigned from the Licensee in April 2016.

In March 2016, while the employee investigation was ongoing, the Respondent contacted the Commission indicating that he may be in breach of the Prescribed Business Regulations. The Commission passed the matter to its Enforcement Division.

The Commission found that registering companies was licensed business for which the Service Provider did not have the required fiduciary licence. The Respondent contended that the activity was done under the Licensee's licence. The Commission disagreed and found that, even had that been the case, the Respondent was still in difficulties as the activity was not known to the Licensee and the way it had been conducted placed the Licensee in breach of its licence. In particular this was due to the Licensee not holding the required documentation, which was held by the Service Provider at the Respondent's home.

Additionally, it was found that the Respondent had not been acting in the best interests of the Licensee. Since the Service Provider's formation the Respondent had been concerned with that business as its principal without the Licensee's permission. The Respondent used his position in the Licensee to incorporate companies for the Service Provider, a task which he would not have been able to do without access to the Licensee's systems. The Respondent undertook the incorporations for the benefit of the Service Provider, to his ultimate personal benefit as principal of the Service Provider. Conducting the incorporations brought no benefits to the Licensee.

Inferences

This matter did not settle. As discussed further below, it is assumed to be subject to an appeal. It is therefore to be remembered that the Public Statement reflects the Commission's view only. It is not a statement of facts to which the Respondent has agreed.

Nevertheless, in making its findings against the Respondent, mitigating factors to which the Commission had regard included:

- Absence of financial loss.
- Partial co-operation with the Commission.
- Making changes to the way in which the services of the Service Provider were described on its website.

Aggravating factors included:

- The non-fulfilment having been deliberate.
- The Respondent's lack of familiarity with his regulatory obligations.
- Not acting in the best interests of the Licensee, including potentially causing it to breach its licence.
- Not accepting the seriousness of the contravention.
- Not being fully candid with the Commission.
- Only telling the Commission once the employee investigation was known. The inference is that the Respondent only came clean to the Commission when it was inevitable the Commission would find out from a disclosure from the Licensee. The Commission was not prepared to credit the Respondent with self-reporting in such circumstances.

The sanctions imposed on the Respondent, in particular the Financial Penalty, were relatively low. It appears that while the Commission considered the conduct merited censure, it did not view the conduct to be of the most serious kind.

It is interesting to note that of the aggravating factors, three relate to the Respondent's interaction with the Commission in the conduct of its enforcement action rather than the breaches of law and regulation which led to the investigation.

Removal of the Public Statement

As the Public Statement has mysteriously disappeared, we can reasonably expect that the Commission's Final Decision against the Respondent is being challenged. Once that challenge has concluded, the Public Statement may reappear, it may be amended, or the Final Decision may be overturned such that the Public Statement is never seen again in any form.

However the swiftness of the Commission's publication of the Public Statement is a point for caution. The Commission reached its Final Decision, which included the determination to issue a Public Statement on Friday 8th June 2018. The Decision did not arise from settlement, so the Respondent had not agreed to the Public Statement being published. Nevertheless, the Public Statement appeared on the Commission's website that same day.

There are statutory powers to appeal to the Court against the Commission's decisions. Such appeals are to be instituted within 28 days.² Where the appeal is against a decision to publish a Public Statement the hearing is to be conducted in private, unless the Court orders otherwise or the parties agree to a public hearing.³ The right to a private hearing is rendered pretty useless where that Public Statement has already been published.

In September 2014 the Commission published a Guidance Note regarding its Decision Making Process.⁴ That Guidance Note was in place when the Commission's Enforcement Division's investigation into this matter began in 2016. The 2014 Guidance Note was replaced by a revised Guidance Note in October 2017.⁵ The 2017 Guidance Note specifically warns that there is no requirement for the Commission to stay the exercise of its Final Decision, including publishing Public Statements, until conclusion of the appeal period. The 2014 Guidance Note was silent in this respect.⁶

In spite of the change in the Guidance Notes, the Commission's practice from 2014 to 2017 and to date has been consistent. For matters which have not settled, the Public Statements are published on or about the date on which a Final Decision is reached.

There is legislation pending for the revision of the Commission's enforcement powers in the form of the Draft Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2017 (**Draft Enforcement Law**).⁷ Assuming that the Draft Enforcement Law proceeds in its current form, it does address this apparent gap, but it does so by making it harder to challenge the Commission's decision. Rather than staying the publication of Public Statements pending the outcome of appeals, the Draft Enforcement Law abolishes the expectation that appeals against the publication of Public Statements will be heard in private.⁸

Those facing enforcement actions should therefore expect that the Commission will publish a Public Statement promptly upon a Final Decision being made. If a settlement can be reached with the Commission it may be possible to do some damage limitation with the Commission on the Public Statement's contents prior to it being released. However, the 2017 Guidance Note is explicit that settlement discussions will only be held if the nature and gravity of the misconduct is accepted.⁹ This leaves parties who challenge the Commission's findings in the unenviable position of being unable to influence the Public Statement through settlement, and at risk of a damning Public Statement being made about them before they can conclude their challenged to the Commission. Where the position taken by

² s.11H Financial Services Commission (Bailiwick of Guernsey) Law, 1987; s.36 The Protection of Investors (Bailiwick of Guernsey) Law, 1987; s.18 The Banking Supervision (Bailiwick of Guernsey) Law, 1994; s.19 The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000; s.63 The Insurance Business (Bailiwick of Guernsey) Law, 2002; and s.43 of The Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002

³ S.11H(7) Financial Services Commission (Bailiwick of Guernsey) Law, 1987

⁴ See <https://www.gfsc.gg/sites/default/files/Guidance%20Note%20-%20Decision%20Making%20Process%20-%20September%202014.pdf>

⁵ See <https://www.gfsc.gg/sites/default/files/Enforcement%20Decision%20Making%20Process%20%28Oct%202017%29.pdf>

⁶ See paragraph 16.2 of the 2017 Guidance Note

⁷ For the latest draft see: https://consultationhub.gfsc.gg/revision-of-laws/engagement-on-the-enforcement-law/supporting_documents/The%20Financial%20Services%20Commission%20Enforcement%20Powers%20Bailiwick%20of%20Guernsey%20Law%202017%20Copy.pdf

⁸ See s.106(9) of the Draft Enforcement Law

⁹ See paragraph 9.3 of the 2017 Guidance Note

such parties is vindicated through successful Court challenges, this position appears to be particularly harsh.

We therefore await with interest any published Court decision connecting to the 8th June Public Statement and the reappearance or otherwise of that Public Statement.

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