

UPDATE

The GFSC enforcement process: To the Senior Decision Maker – and Beyond

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The Royal Court has again held that the Guernsey Financial Services Commission's enforcement process is compliant with licensees' right to a fair trial under The Human Rights (Bailiwick of Guernsey) Law 2006.

The Royal Court has struck out a claim against the Guernsey Financial Services Commission (the **Commission**) alleging that the enforcement process adopted by the Commission was contrary to human rights, primarily the right to a fair trial guaranteed by article 6 of the European Convention on Human Rights (the **Convention**), which is incorporated into Guernsey Law by the Human Rights (Bailiwick of Guernsey) Law, 2000 (the **Human Rights Law**).

The Plaintiff was a shareholder and director of a licensed entity. In November 2014 he became the subject of an investigation by Commission's Enforcement Division of the Commission. The Commission then instigated the decision making process set out in its published decision making process guidance note. Draft reports were provided to the Plaintiff for comment, before a Senior Decision Maker (**SDM**) was appointed in December 2017. SDMs are tasked with determining whether the licensee's conduct falls short of the standards set out in the Regulatory Laws and if so, what the regulatory response should be. Currently all but one of the SDMs on the Commission's Panel are Queens Counsel retained by the GFSC for this specific purpose. The SDM issued his 'Minded To' Notice and the Plaintiff was given the opportunity to make representations thereafter. The final decision, when issued, held that the Plaintiff did not satisfy the minimum standards required by those carrying out regulated activities within the Island's fiduciary sector and imposed a financial penalty of £50,000 together with a prohibition order for 5 years.

The Plaintiff received notice of the foregoing on 31st May 2018. Although he was advised of his statutory right to appeal within 28 days of the decision, he chose not to bring an appeal within the statutory timeframe and paid the fine imposed. However, a year later he brought a claim in the Royal Court seeking damages in the sum of £7,430,326.83 plus further damages including punitive or exemplary damages as compensation for alleged breaches the Convention. The allegations were numerous however the thrust of them was that the Enforcement Division's investigation and decision making process was flawed, and in breach of his right to a fair trial (article 6), the prohibition against the retrospective imposition of criminal offences (Article 7) and the protection against discrimination when applying the rights granted by the Convention (Article 14). The latter claim was founded on the basis that the Plaintiff was subject to sanction but another director was not.

Mourant Ozannes, who acted for the Commission in these proceedings, argued that Article 6 (the right to a fair trial) is satisfied either if the enforcement process followed by the Commission is fair or if there is a right to challenge the enforcement process before the Royal Court. It is sufficient if one or the other of those limbs exist. Without accepting that the exercise of the process itself was in any way unfair, it was a sufficient answer that the Plaintiff had an adequate right of appeal to the Royal Court which he failed to exercise. In relation to Articles 6.2, 6.3 and 7, it was argued they were not engaged because the Commission's enforcement process is not criminal in nature but regulatory. Article 14 was said not to be engaged for two reasons. First, by its nature it is parasitic on other Articles, so if there is no breach of another Article of the Convention, there can be no breach of Article 14. Secondly, even if there has been a breach of another

Article of the Convention (which was not accepted), the Plaintiff had failed to allege discrimination of any of the characteristics set out in Article 14.

The Bailiff accepted all of these arguments and struck out the claim against the Commission. In doing so, he relied upon the decision of the then Deputy Bailiff, Sir Richard McMahon, in Y v the Chairman of the Guernsey Financial Services Commission and Her Majesty's Procureur¹, which said that any defect in the process that exists at the Commission level is cured by the independent and impartial right of appeal to the Royal Court and thus this affords licensees the fairness guaranteed under Article 6.

However, he went beyond what the Deputy Bailiff was called upon to decide in that case, and also concluded that the procedures adopted by the Commission were not criminal or quasi-criminal in nature. The Bailiff held that sanctions that were imposed were in the nature of classic disciplinary sanctions liable to be imposed on professional people and included a deterrent and punitive element. Importantly, there was no risk of non-payment being enforced by a committal to prison through the criminal courts. This was significant because it meant that the additional protections afforded to criminal processes as set out in Articles 6.2, 6.3 and 7 – such as the right to examine witnesses – were not engaged in the enforcement process.

So what are licensees to make of this?

The decision is a useful reminder that licensees need to engage with the allegations against them in the enforcement process, and, if that fails, exercise their statutory right of appeal – there is no 'work around' or second chance through a standalone claim under the Human Rights Law. The statutory grounds of appeal are wide, such that the Licensee can effectively ask the Royal Court to look at any aspect of the SDM's decision. The role that the right of appeal plays in ensuring that the enforcement process is consistent with the right to a fair trial also suggests that the SDM's decision (and how that decision was reached) will be subject to a high level of intensity when reviewed by the Royal Court.

Licensees therefore would be well advised to instruct Advocates who are familiar with the Commission's enforcement process and (as ever) the earlier they are engaged, the better they will be able to navigate the Commission's decision making process – and, if need be, beyond.²

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¹ (Guernsey Judgment 47/2018)

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