

UPDATE

Guernsey Court of Appeal considers regulatory enforcement

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In *A Robilliard v The Chairman of the Guernsey Financial Services Commission* [2023] GCA035, the Guernsey Court of Appeal rejected an appeal against a decision of the Guernsey Financial Services Commission (the **Commission**). This is an important judgment as it is believed to be the first time that the Guernsey Court of Appeal has considered certain issues relating to regulatory enforcement, including the test for lack of integrity.

Introduction

The Commission's Senior Decision Maker (**SDM**) found that certain individuals failed to meet the 'fit and proper' requirements and the 'minimum criteria for licensing' under the relevant regulatory provisions. Three of the individuals appealed this decision to the Guernsey Royal Court, which largely rejected their appeals.

One of the appellants – Mr Robilliard – then appealed the Royal Court's decision to the Court of Appeal.

The SDM's decision

In summary, the SDM found that Mr Robilliard had failed to act with probity, integrity, competence and soundness of judgment. The SDM had found that the sanctions that should be imposed on Mr Robilliard were a £40,000 discretionary financial penalty, a six-year prohibition order and the issuance of a public statement.

The appeal

The Royal Court dismissed the appeal against the SDM's decision and the Court of Appeal also dismissed Mr Robilliard's appeal. His three grounds of appeal before the Court of Appeal raised points which may be of wider interest and are dealt with in turn below.

Burden of proof

The SDM found that the concept of the 'burden of proof' used in adversarial proceedings, which determined which party had the burden of proving or disproving the allegations, was not relevant here and in the Royal Court decision the Deputy Bailiff agreed with this approach.

The Court of Appeal agreed. Nonetheless, the SDM could not make a finding adverse to the appellant without having satisfied himself that there was a proper factual basis for reaching such a finding, applying the balance of probabilities measure. He would reach that conclusion having regard to what was provided by the Commission's Enforcement Division, taken with anything else submitted to him and also making such further investigations as he might consider appropriate.

The Court of Appeal pointed out that it was not for the appellant to prove or demonstrate or adduce anything, and certainly not for him to show that he was a fit and proper person or otherwise met the minimum licensing requirement: it was for the SDM to be satisfied of the contrary if, but only if, the SDM could properly do so on the basis of the materials before him.

Disclosure of documents by the Commission

The second ground of appeal was around the documentation that Mr Robilliard said should have been disclosed by the Commission and its investigation, including the suggestion that the Commission should have obtained additional documents.

The Court of Appeal found no fault with the Deputy Bailiff's decision that the Commission had adhered to the required disclosure process and the procedure met the standard of fairness in this case so that the appellants all knew what the Commission was relying on, in coming to the decision that it did.

The Deputy Bailiff was also correct to find that there was no duty to conduct a search for documents in the way that there was in civil adversarial proceedings. She was also right to reject the suggestion that the Commission should have used its powers under the supervisory laws to compel production of documents from the licensed entity and its joint licensee.

Dishonesty / lack of probity and lack of integrity

The Court of Appeal considered the test for lack of integrity and in particular the relevance of the state of a person's knowledge. The Court noted that there was no requirement that the person must 'subjectively' realise that the conduct lacked integrity. This test was different to the test for dishonesty / lack of probity, which had a higher threshold.

Accordingly, a fact finder (such as the SDM) did not need to make express findings as to the person's state of knowledge when considering an allegation of lack of integrity made against them.

This is believed to be first time that the Guernsey Court of Appeal has considered the test for lack of integrity in the context of regulatory enforcement.

Mourant acted for the Commission.

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