

UPDATE

Guernsey Financial Services Commission's decisions upheld on appeal

Update prepared by Christopher Edwards, Iona Mitchell and Charlotte Ward (Guernsey)

The Guernsey Royal Court has published a decision in the latest in a spate of judgments concerning appeals against decisions of the Guernsey Financial Services Commission (the **Commission**). In *X, Y & Z v Chairman of the Guernsey Financial Services Commission* [2023] GRC032, the appeals against the Commission's decisions were largely dismissed.

Introduction

Action was taken by the Commission in relation to Firm A, which held a full fiduciary licence. The appellants were at various times the controllers and / or executive directors of Firm A and its purchaser, Firm C, as well as its joint licensee, Firm D. X was at times also Firm A's MLRO.

Firm A's primary activities were the management and administration of trusts and companies, provision of directors, secretaries, registered office services and nominee services. It had £154 million assets under management and operated a system whereby each director was considered a relationship manager for certain clients, and, in addition, each director would sit on a board of client entities, either in a personal capacity or as director of Firm D.

Findings

The Commission's Senior Decision Maker (**SDM**) found that each of the appellants had failed to meet the 'fit and proper' requirements and the 'minimum criteria for licensing' under the relevant regulatory provisions.

The sanctions imposed by the Commission were:

- discretionary financial penalties of £100,000, £40,000 and £15,000 for Y, Z and X respectively
- prohibition orders of 10 years and six years for Y and Z and two years in respect of X had he not already been prohibited
- disapplication of the exemption from needing a personal fiduciary licence to act as a director of fewer than six companies for the same periods of time as above in respect of Y and Z, and
- the issuance of a public statement relating to the individuals' conduct.

Action was also taken by the Commission against another director, V, who was not the subject of the appeal.

Although the judgment was handed down to the parties on 5 October 2022, the anonymised version was only published in August 2023.

Appeal

Although the three appellants commenced individual appeals, they were joined and heard together. Their grounds of appeal largely related to the specific allegations against them, but they also made certain challenges to the process which may be of wider interest.

Independence of the SDM

It was alleged that the SDM acted in breach of natural justice by hearing the case when the SDM was not independent of the Commission. This argument, of a type which has been raised in other appeals, was based on the premise that the process was fundamentally flawed because it breached the principle that a person may not be a judge in their own cause.

Deputy Bailiff Roland rejected this argument on the basis that the SDM was appointed from a panel of King's Counsel – barristers qualified in England & Wales – who had no interest in the outcome of the decision-making process. The SDM's independence was built into the Commission's Guidance Note on the decision-making process (the **Guidance Note**).

Burden of proof

Secondly, Deputy Bailiff Roland found that in reaching a decision the SDM was not limited to considering allegations advanced by the Commission's Enforcement Division but instead could consider all the evidence before him, including the enforcement report, evidential documents presented to the SDM and any further information that the SDM might request. 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.

Disclosure of documents by the Commission

The appellants challenged the documentation disclosed by the Commission and its investigation, including to suggest that the Commission should have obtained additional documents, particularly when the appellants had difficulty in accessing documentation or records after their departure from the firm by which they were employed. The Deputy Bailiff ultimately found 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 appellants should see all the documents that the SDM had seen in coming to his decision (and they had).

In particular, the disclosure process did not require the Commission to use its powers under the supervisory laws to compel production of documents from Firm A and Firm C if it did not consider the circumstances met the criteria. There was also no duty to conduct a search for documents in the way that there was in civil adversarial proceedings.

However, the Deputy Bailiff did make comments about how the Guidance Note and the language around disclosure in general could be improved.

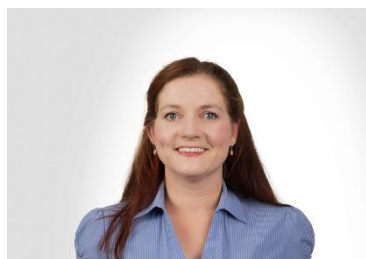
Outcome

The Deputy Bailiff found largely in favour the Commission, dismissing the appeal, save that two challenges by X to the wording of the public statement were successful.

Contacts



Christopher Edwards
Partner I Advocate
Mourant Ozannes (Guernsey) LLP
+44 1481 739 320
christopher.edwards@mourant.com



Charlotte Ward
Associate I Advocate
Mourant Ozannes (Guernsey) LLP
+44 1481 739 132
charlotte.ward@mourant.com



Iona Mitchell
Knowledge Lawyer I Advocate
Mourant Ozannes (Guernsey) LLP
+44 1481 731 406
iona.mitchell@mourant.com

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