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UPDATE

Guernsey Financial Services Commission vindicated

Update prepared by Gordon Dawes (Guernsey)

This Update comments on the recent Guernsey Court of Appeal decision of *The Guernsey Financial Services Commission v Domaille, Clarke & Harris* [2024] GCA 003

Overview

In a much anticipated judgment, *GFSC v Domaille, Clarke & Harris* [2024] GCA 003[1], dated 18 January 2024, the Guernsey Court of Appeal overturned the Royal Court judgment of Lieutenant Bailiff Hazel Marshall and remitted the case to a new Senior Decision Maker. It is fair to say that LB Marshall's judgment had been excoriating in its intensity and the talk of the financial services community. Things look very different now.

LB Marshall's judgment was itself on appeal from a Senior Decision Maker, who happened to have been a former Judge of the Royal Court and still Lieutenant Bailiff. He had upheld the preliminary findings of the Enforcement Division and handed down penalties in the form of prohibition orders and fines. LB Marshall found that the SDM had erred in law in his application of the legal test for want of probity, had failed to conduct a fair and balanced assessment of the facts and had acted unreasonably and disproportionately in imposing prohibition orders and financial penalties of the scale that he had.

The GFSC appealed to the Court of Appeal, with one ground only being refused leave - that LB Marshall had not been fair and balanced in her approach and had predetermined the issues.

The Court of Appeal upheld the four remaining grounds of appeal and, in doing so, has clearly set out the legal framework for the future, at least unless and until the Judicial Committee of the Privy Council or a future Court of Appeal holds otherwise[2].

The Royal Court's jurisdiction

The Court parted company with the Lieutenant Bailiff through a very literal approach to the provisions of the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020 (the **EP Law**). Given her unfavourable initial impression of the findings in the case, the Lieutenant Bailiff had read into the underlying case in considerable detail and, in essence, formed her own evaluation of the evidence and had reached a different conclusion to the SDM. The Court of Appeal held that this was an error of law and exceeded the jurisdiction which the EP Law conferred. The Law was clear, they held. The grounds of appeal were restricted to findings that the decision appealed against was (a) ultra vires or the product of some other error of law, (b) unreasonable, (c) made in bad faith, (d) lacked proportionality or there was (e) a material factual or procedural error. If an appeal was allowed the Royal Court's powers of disposal were

[1] https://www.guernseylegalresources.gg/CHttpHandler.ashx?documentid=85202

[2] The JCPC being the ultimate appellate body for Guernsey and the Guernsey Court of Appeal does not bind itself, unlike the English Court of Appeal.

(strictly) limited to (a) setting aside the decision of the GFSC and, if appropriate, remitting the matter to the GFSC with such directions as the Royal Court thought fit or (b) confirming the decision, in whole or in part[3].

The Court held that the jurisdiction of the Royal Court was clearly (and only) an appellate jurisdiction. Its role was restricted to hearing an appeal by reference to the statutory grounds and to exercise the powers conferred '*... no more, no less*'. It was '*... 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*'.

While this is clearly supportive of the GFSC it does raise the issue of broader compliance with the European Convention on Human Rights and Article 6, which provides that: '*In the determination of his civil rights ... everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law*'. It is not disputed by the GFSC that it is not an independent tribunal. What prevents breach is a right of appeal to a tribunal with '*full jurisdiction*'. By so narrowly defining the role of the Royal Court on appeal, the fullness of its jurisdiction has been brought into issue. Arguably that is the fault of the legislation and whether its provisions are ECHR compliant, which is a separate issue.

The Court likewise paid deference to the experience and expertise of the Guernsey Financial Services Commissioners (which is not in doubt) whilst overlooking the fact that decision making is delegated to SDMs, some of whom have little or no personal experience of the Guernsey financial services industry.

New allegations

The Court of Appeal found that it was open to a Senior Decision Maker to add to the matters faced by those the subject of a draft enforcement notice and to make new and additional adverse findings. This comes as something of a surprise, albeit it is implicit that those being investigated must have the opportunity to respond to any such new allegation. The Court held that decision-making '*... in an organisation such as the GFSC will inevitably be a collective and iterative process*'.

Absence of harm

The Lieutenant Bailiff had attached much importance to the absence of actual harm consequent on the regulatory breaches as powerful mitigation. The Court again disagreed. Whilst absence of actual harm might be a factor which did not aggravate, it could not mitigate. The regulatory breach stood by itself.

Probity/integrity

The question of want of probity or integrity is central to an assessment under the regulatory laws and the minimum criteria for licensing. The Court of Appeal again disagreed with the Lieutenant Bailiff's approach to the question of probity, itself being interchangeable with integrity, but both being assessed objectively rather than requiring any kind of examination of what the individual subjectively believed about the quality of his or her conduct. While the subjective belief of the individual as to the material state of affairs was a correct first step, the question of whether in fact there was want of probity or integrity was purely objective. Again, the Court found that the Judge had fallen into error.

Standard of proof

The question of standard of proof was also addressed and again the Court of Appeal found that the Judge had made an error of law. Citing English authority, the Court found that there is a single civil standard of proof in regulatory matters, the balance of probabilities (as opposed to the criminal standard of beyond reasonable doubt). The mere fact that allegations were serious with serious consequences did not affect the standard of proof, with the only nuance being that if the allegation concerned something inherently implausible then more cogent evidence might be required to establish that it had actually happened.

Penalties

The Court also disagreed with the Lieutenant Bailiff as to the circumstances in which a prohibition order might be imposed, finding that her approach was *'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*

[3] The provision leaves a number of questions begged, e.g., what happens if the Royal Court simply sets aside a decision? Can the GFSC start again? How far can the directions go in terms of telling the GFSC what to do?

objective of bringing about and maintaining high standards of conduct of persons involved in the Bailiwick's financial services sector'. The Court cited a judgment of the then Deputy Bailiff, now Bailiff, in support of the proposition that, while a prohibition order was generally reserved for cases of lack of integrity, it was not limited to such cases.

Finally, the Court also disagreed with the Lieutenant Bailiff as to the GFSC's powers to impose fines at rates introduced by legislation only after the material conduct had already commenced or occurred. This was on the basis that the assessment being made was a '*... current assessment of a variety of factors ... so as to determine whether a person is 'fit and proper'*'. In other words, the financial penalty was in respect of a '*present non-fulfilment of (minimum criterial for licensing)*', which is perhaps difficult to follow – it is more obvious in respect of prohibition orders.

In terms of the penalties themselves, the stand-out point was a strict adherence to the separate legal personality of a financial services business from its shareholders in the context of financial penalty. A large fine imposed upon the business would not assist its shareholders in terms of the financial penalties they could expect.

Conclusion

All of that said, the SDM's decision was itself found to be flawed for a number of reasons and the whole matter remitted to the GFSC with a direction that a new SDM be appointed and '*the decision on sanctions to be retaken in accordance with our judgment*'.

The GFSC was very quick to produce a statement welcoming the judgment, The Guernsey Financial Services Commission and (1) Ian Charles Domaille (2) Ian Geoffrey Clarke (3) Margaret Helen Hannis.

This is the second Guernsey Court of Appeal decision in a GFSC matter in the last five months, the other being Robilliard v GFSC[4]. There is another long awaited Royal Court decision on its way, which again may go to the Court of Appeal. This an area of evolving Guernsey jurisprudence of huge importance to the industry. Certainly the Domaille case will give no comfort at all to those facing the Enforcement Division. No one doubts the absolute imperative of thoroughgoing regulation and the defence of the Bailiwick's reputation, it is essential to the good standing of the financial services industry. There is a balance to be struck between the regulator and the regulated and the balance has now tipped in favour of the regulator.

[4] [2023] GCA 035; where the finest of distinctions was drawn between the absence of a burden of proof on the Commission and what had to be proved (by the Commission).

Contacts

Gordon Dawes
Partner I Advocate
Mourant Ozannes (Guernsey) LLP
+44 1481 731 474
gordon.dawes@mourant.com