David John Merrien v Cees Schrauwers (Chairman of the Financial Services Commission)
Royal Court
9th June 2016

JUDGMENT 23/2016

Appeal against a publication by the Guernsey Financial Services Commission and against its making of prohibition orders

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between:

DAVID JOHN MERRIEN **Appellant**

-and-

CEES SCHRAUWERS
(CHAIRMAN OF THE
GUERNSEY FINANCIAL SERVICES COMMISSION)
Respondent

Hearing date: 15th June 2015

Judgment handed down: 25th September 2015

Judgment published: 9th June 2016

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocates for the Appellant: Advocate R Shepherd
Advocate for the Respondent: Crown Advocate J Hill

Cases & legislation referred to:

The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000
The Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002
The Protection of Investors (Bailiwick of Guernsey) Law, 1987
The Banking Supervision (Bailiwick of Guernsey) Law, 1994
The Insurance Business (Bailiwick of Guernsey) Law, 2002
Article 6 of the European Convention on Human Rights
The Human Rights (Bailiwick of Guernsey) Law, 2000
Practice Direction No. 1 of 2006.
The Royal Court Civil Rules, 2007
Walters v States Housing Authority (1997) 24.GLJ.76

Introduction

1. This is an appeal brought by David Merrien, the Appellant, against the Guernsey Financial Services Commission ("the GFSC") acting for these purposes through its Chairman. It

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challenges the decision of the GFSC to publish a short notice on its website on 19 December 2013 stating that the Appellant "*is not licensed to carry out controlled investment business*" and that he "*is also not licensed to carry out long term insurance business*" under the respective Laws mentioned therein. It also challenges the decisions made on 3 December 2014 to make prohibition orders against him under the suite of regulatory Laws, to dis-apply the exemption set out in section 3(1)(g) of the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000 ("the Fiduciaries Law"), and further to impose a financial penalty of £200,000 and to make a public statement under section 11D and section 11C respectively of the Financial Services Commission (Bailiwick of Guernsey) Law, 1987, as amended ("the FSC Law"). The grounds of appeal are those set out in provisions contained in the various Laws, which are in similar terms.

2. Although Advocate Shepherd, who appears on behalf of the Appellant, has sought to argue that the entire process was flawed, with the consequence that the decisions should be set aside and remitted to the GFSC with such directions as the Court thinks fit (under section 11H(5)(a) of the FSC Law), he also made it clear that the principal complaint the Appellant has is about the level of financial penalty imposed. Indeed, he suggested that if the penalty had been £10,000 rather than £200,000 the appeal would most probably not have been instituted.

3. The hearing took place in private. This was because section 11H(7) of the FSC Law provides:

> "*An appeal against a decision to publish a statement in respect of a person shall be held in private unless -*
>
> > *(a) the parties agree that all or part of the hearing should be held in public, or*
> >
> > *(b) the Court so orders.*"

One of the elements of the decision of 3 December 2014 being appealed is the publication of a statement under section 11C and neither party suggested the hearing, or any part of it, might take place in public. Having considered the matter in the light of what actually took place at the hearing, it strikes me that section 11H(7) only really makes sense if the statement is not already public. It is understandable that there would be no sense in making public the very statement that an appellant wishes to avoid being put into the public domain. However, where the statement in question has already been published, as was the case here, it seems to me that it is contrary to principles of open justice, whether those are general principles or as set out in Article 6 of the European Convention on Human Rights, for the Court to convene in private.

4. With the benefit of hindsight, I would have ordered that the hearing take place in public so that justice would also be capable of being seen to be done. Accordingly, although judgment was handed down in private to the parties on 25 September 2015, I indicated that it would in due course be published and without any attempt to anonymise the case. In doing so, I acceded to a request to defer publication until the conclusion of a criminal trial involving the Appellant so as to avoid any risk of prejudice to the fair trial to which he would be entitled. In future, although each case will, of course, be decided on its own facts, I imagine that, where the details of the decision under appeal involve a statement that has already been published, even if the parties do not agree to a public hearing, the Court is more likely than not to order one. In any event, I note that section 11H(8) of the FSC Law provides:

> "*Where an appeal against a decision to publish a statement under section 11C or 11D(3) is upheld the Commission shall, if the appellant so requests, publish a statement of that fact.*"

This provision only makes sense in respect of an appeal hearing convened in private. Where a statement has already been made public, I think it is inevitable that the appellant will wish to have that corrected by a further statement publicised to the same extent. However, if the decision to publish a statement has not become public, the subsection leaves the choice with the successful appellant as to whether there should be publication of his successful challenge.

The fact of the appellant's success means, of course, that the GFSC cannot proceed to publish the statement that it wanted to make pursuant to the decision that has been set aside. However, it may serve the appellant's purposes to request publication so as to dispel any rumours already circulating as to what might or might not have taken place, but equally the appellant may elect, as the subsection permits, to keep everything private. I take the view that subsection (8) supports my conclusion that an appeal against a statement already in the public domain should not be heard in private, unless some other good reason to do so is apparent.

Decisions appealed

5. The decision of 3 December 2014 under appeal is set out in a Final Notice signed by the Senior Decision Maker, Glen Davis QC. It recites that Mr Davis was appointed pursuant to section 11(1) of the FSC Law as an officer and a Senior Decision Maker of the GFSC on 9 June 2014. His appointment was in respect of considering, hearing and determining enforcement proceedings involving the possible imposition of sanctions on Guernsey Insurance Brokers Limited ("GIBL"), Richard Wickins and the Appellant. The conclusion of Mr Davis was that all three of the subjects of this process have contravened in material particulars provisions of or made under the regulatory Laws and does not fulfil any of the minimum criteria for licensing specified in those Laws and applicable to the person in question. The reasons for his decision were set out in a detailed Statement of Reasons dated the same day.

6. This Final Notice recites the matters that the GFSC is required to take into consideration under sections 11C(2) and 11D(2) of the FSC Law (to which I will return) and that Mr Davis took into consideration the extent to which each subject of the Decision:

   "*(a) has dealt with the Commission in an open and cooperative manner in the course of the Commission's investigation into their conduct and in the course of the determination by the Senior Decision Maker;*

   (b) has accepted responsibility for their part in the events which have given rise to the Decision;

   (c) has taken pro-active steps to inform their clients of the situation and where appropriate offered redress to such clients;

   (d) is able to pay the amount of the financial penalty to be imposed, taking account of the evidence of financial circumstances which has been put before him."

   He added that *"The Decision reflects the balance which the Senior Decision Maker considers that it is correct to strike given the conclusion he has reached as to the respective responsibility of Mr Merrien and Mr Wickins for the matters described in the Statement of Reasons.*"

7. As a result of this Decision, the GFSC imposed the following sanctions on the Appellant:

   "*3.1 Mr Merrien is prohibited:*

   (a) pursuant to section 34E of the POI Law from performing any function in relation to controlled investment business carried on by an entity licensed under the POI Law;

   (b) pursuant to section 17A of the Banking Supervision Law from performing any function in relation to deposit-taking business carried on by an institution licensed under the Banking Supervision Law;

   (c) pursuant to section 17A of the Fiduciaries Law from performing any function in relation to a regulated activity carried on by a fiduciary licensed

under the Fiduciaries Law;

(d) pursuant to section 28A of the Insurance Business Law from performing any function in relation to an insurance business on behalf of an entity licensed under the Insurance Business Law;

(e) pursuant to section 18A of the IMII Law from performing any function in relation to the business of an insurance manager or an insurance intermediary as or on behalf of a person or entity licensed under the IMII Law;

and the functions which Mr Merrien is to be prohibited from performing under sub-paragraphs (a)-(e) above include the functions of acting as controller, partner, director, or manager of a relevant entity, institution, fiduciary, insurance business, insurance manager or insurance intermediary, whether employed directly or indirectly under a contract of service (without this in any way limiting the generality of the order).

3.2 The exemption in section 3(1)(g) of the Fiduciaries Law (which would otherwise permit Mr Merrien to act as a director of not more than six companies (being directorships which are not the subject of an exemption contained in any other paragraph of subsection 3(1) of the Fiduciaries Law), where the activity of acting as a director would be considered a regulated activity under the Fiduciaries Law without requiring a personal fiduciary licence) is disapplied.

3.3 Mr Merrien is to pay a financial penalty of ***£200,000****, to be paid within seven days of the date of this Final Notice (save that, if Mr Merrien pays £16,666.74 within seven days of the date of this Final Notice, he may then pay the balance of the financial penalty by 11 instalments thereafter of £16,666.66 to be paid monthly on the 3rd day of each calendar month until the penalty has been paid in full).*"

8. The Final Notice also indicated that the GFSC would publish a public statement in the form annexed to it. The position was summarised in the first paragraph commenting on the Decision taken:

> "*The Commission considered it reasonable, necessary and proportionate to make this decision and impose these sanctions and penalties having concluded that Mr Merrien is not a fit and proper person to perform any function in relation to regulated business in the Bailiwick of Guernsey. The Commission's independent Senior Decision Maker found that Mr Merrien had failed to appreciate or properly to advise clients of GIBL of risks in connection with an investment into which they were persuaded to switch part of their pension funds, that he had recklessly promoted a high-risk investment which was unsuitable for retail investors, and that he had dishonestly diverted payments into his personal bank account. The contraventions by Mr Merrien as an Authorised Insurance Representative were at the highest level of seriousness, and were exacerbated by his failures to deal openly and cooperatively with the Commission in the course of its investigation or to accept responsibility for what he has done.*"

The public statement then explains the background to the decision, the findings of Mr Davis, and his conclusions by reference to the legislative requirements. At the very end of the public statement, the mitigating factors are listed:

> "*GIBL suspended Mr Merrien from his position as a director of GIBL when it became aware of the issues relating to the advice provided by Mr Merrien.*
>
> *GIBL has surrendered its licences for conducting controlled investment business and long-term insurance business and arranged for the transfer of the clients to another*

insurance and investment intermediary.

Mr Wickins and GIBL have, at all material times, co-operated and assisted fully with the Commission's enquiries."

9. The other element of the appeal relates to the publication on the GFSC's website on 19 December 2013 of a short article about the Appellant:

"*The Guernsey Financial Services Commission (the "Commission") issues this notice pursuant to its powers under section 2(2)(e) of the Financial Services Commission Law, Section 57(e) of the Insurance Managers and Intermediaries Law, and Section 34B(e) of the Protection of Investors Law.*

The Commission wishes to make it known that as of the 19 December 2013, David John Merrien, is not licensed to carry out controlled investment business under the Protection of Investors Law. He is also not licensed to carry out long term insurance business under the Insurance Managers and Intermediaries Law."

Background

10. GIBL was incorporated on 8 July 2010. Later that month it was licensed by the GFSC under the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002 ("the IMII Law") to operate as an insurance intermediary for personal lines and commercial insurance. Mr Wickins was involved from the outset and was the managing director and the major shareholder. One year later, GIBL's licence was extended to long term life insurance products and the following month it became licensed under the Protection of Investors (Bailiwick of Guernsey) Law, 1987 ("the POI Law") to carry out the restricted activities of Advising and Promotion in connection with category 1 controlled investment business.

11. The Appellant has worked in the insurance sector in Guernsey since 1993. He has not held any personal licence but has operated under the various licences of those employing him. He commenced his employment with GIBL in August 2011 (at around the time it became licensed under the POI Law). He became a director and a shareholder of GIBL in January 2012. His shareholding in GIBL was 7%. Under his contract of employment, the Appellant was only required to be at GIBL's offices for 15 hours each week. He was responsible for the day-to-day management of GIBL's long-term insurance and controlled investment business. His contract refers to a bank account to be styled "*Guernsey Insurance Brokers Limited – DM Account*" into which it was apparently expected that the Appellant's commission and fees would be paid. There was a formula set out for how to calculate his remuneration. The Appellant described himself as "*self-employed with Guernsey Insurance Brokers*". Mr Davis regarded him as capable of operating without any real reference to, or oversight by, Mr Wickins. Mr Wickins concentrated on the general insurance side of GIBL's business and left the Appellant to deal with the other aspects. Mr Davis found that "*In effect, the two directors operated as though they were in silos, and Mr Merrien was able to carry on as though he was self-employed*" (para. 73). By way of example, there was apparently no board meeting of GIBL between those held on 5 August 2011 (ie, before the Appellant became a director) and 30 August 2012 (or at least no minutes of any such meeting existed).

12. The GFSC undertook an audit visit to GIBL on 8 October 2013. Advance notice of the site visit had been given and a pre-visit questionnaire had to be completed by GIBL. This was done by the Appellant. It appears that the GFSC had been made aware that the Appellant may have been engaging in restricted activities without being adequately licensed to do so. This was the wording used in notices under section 27 of the POI Law served on others both before and after the site visit. The visit was conducted by Ms Rosemary Stevens, an officer at the GFSC, and Bruce Fayle of RWA Compliance Services Limited, acting on behalf of the GFSC. They produced a report dated the same day, which highlighted serious concerns with regard to regulatory compliance. Record-keeping was perceived to be weak. It appeared that a significant number of GIBL's clients had been receiving unsuitable investment advice from

the Appellant and that this advice was not truly independent.

13. The GFSC served a notice on GIBL under section 27 of the POI Law on 10 October 2013. It requested further information and documentation. The GFSC also wrote the same day seeking GIBL's agreement to the imposition of conditions on its licence. Initially, GIBL did not accept the concerns of the GFSC. Interviews took place with Mr Wickins on 16 December 2013 and with the Appellant on 19 December 2013. At that time, the Appellant was being assisted by Advocate Langlois.

14. It was at the conclusion of the interview with the Appellant on 19 December 2013 that the Director of Enforcement at the GFSC, Simon Gaudion, produced the draft of the notice to be posted on the GFSC's website about which the Appellant now complains. Advocate Langlois particularly objected to the inclusion of the word "*warning*", which it was agreed could be removed. Advocate Langlois wrote to Mr Gaudion the same day apologising for the way he had reacted and stating: "*I confirm that the revised wording of your proposed notice on your website regarding my client no longer being licensed is perfectly acceptable to both my client and me.*"

15. The Appellant was also suspended from his employment on 19 December 2013. The e-mail exchange that day shows that Mr Wickins had requested answers from the Appellant about removal of data from GIBL's offices and, when he did not receive them, effected the suspension of the Appellant, referring only secondly to the ongoing GFSC investigation. The first mitigating factor in the public statement made by the GFSC dated 3 December 2014 is not, therefore, entirely accurate. The suspension of the Appellant did not arise "*when [GIBL] became aware of the issues relating to the advice provided by Mr Merrien*" because that had occurred some months earlier. In any event, the Appellant had tendered his resignation from GIBL in early December 2013, prior to GIBL notifying the GFSC of that fact by way of letter dated 3 December 2013, with the resignation taking effect from 31 December 2013.

16. The GFSC investigation continued into 2014. The information gathered is set out in considerable detail in the Statement of Reasons prepared by Mr Davis and I do not need to rehearse it to any great extent here. Witness statements were obtained from a number of GIBL's clients and third parties. In summary, the Statement of Reasons describes a number of previous relationships of the Appellant, such as those with St James's Place International plc and MVP Asset Management (USA) LLC, and how they impacted on the Retirement Annuity Trust Scheme set up and promoted by GIBL. One area of particular concern was the promotion to GIBL's clients of the MVP Trade Finance Fund, which was understood to be a feeder fund into the IIG Trade Opportunities Fund NV. Specific examples of clients who invested in these funds were set out. Mr Davis found (at para. 198) that *"the risks of the Trade Finance Fund rendered it unsuitable for recommendation to GIBL's clients, particularly as an investment to be held as part of a RATS pension fund*". He further found (at para. 268) that the Appellant "*did not himself appreciate the risks of investing in the trade Finance Fund, did not properly evaluate the suitability of such investment for the particular client, and did not provide to those clients the documentation which ought to have been provided*" and (at para. 269) that "*he still does not appreciate or accept the extent to which his conduct as GIBL's AIR fell short of the standards required of the AIR of an entity licensed by the Commission*".

17. Another issue addressed briefly is about a complaint that was made to the GFSC by Advocate Langlois on behalf of the Appellant about the involvement of Mr Gaudion, who knew the Appellant socially beforehand. This was dealt with in the Director-General's letter dated 3 March 2014. This complaint was considered to be unfounded and Advocate Langlois later sought to dissociate himself from the content of the Appellant's complaint. Advocate Shepherd has suggested that the GFSC's entire course of action was fuelled by some desire to pursue the Appellant. Underlying that suggestion is the renewed complaint that Mr Gaudion should not have been playing the role he did in the investigation up to and including attending at the oral hearing before Mr Davis.

18. At the conclusion of the GFSC's investigation, a draft of its Enforcement Report was sent out on 2 May 2014. Comments were requested within one month. Mr Wickins provided his comments within that timeframe. The copy for the Appellant was sent to Advocate Langlois, who provided it to the Appellant shortly thereafter. However, the Appellant left the package unopened and did not respond within the requested timeframe. The Appellant was arrested on 2 June 2014. The Police took possession of various papers and the Appellant's laptop computer. Advocate Langlois informed the GFSC on 3 June 2014 that he had ceased to act for the Appellant.

19. A draft form of notice indicating the sanctions which might be imposed, which included an early draft of what eventually became the Statement of Reasons, was hand-delivered to the Appellant, Mr Wickins and GIBL on 1 August 2014. The opportunity to comment on these documents by 12 September 2014 was offered. Although Mr Wickins made written submissions, there was no response received from the Appellant.

20. On 19 September 2014, the GFSC was notified that Mourant Ozannes were now acting for the Appellant. Additional material offered to the Appellant was collected and an extension of time for comments from him given. Comments from Advocate Shepherd were forwarded on behalf of the Appellant on 10 October 2014. Having considered the comments received from everyone, a Formal Notice pursuant to section 11E of the FSC Law (and equivalent provisions in the other regulatory Laws) (termed the "Minded To Notice") setting out the decisions the GFSC was proposing to make and its grounds for doing so was sent out on 17 October 2014. Because the section provides a 28-day period during which written or oral representations can be made, the GFSC identified 12 November 2014 as a suitable date for any oral representations. However, on behalf of himself and GIBL, in a letter dated 20 October 2014, Mr Wickins accepted the imposition of the sanctions set out in the Minded To Notice.

21. Mourant Ozannes informed the GFSC on 3 November 2014 that the firm was no longer representing the Appellant. Mr Davis records that he understands the firm gave the Appellant an hour of free advice to assist him in what he might say in his oral representations. On 7 November 2014, the Appellant e-mailed various documents to the GFSC on which he intended to rely at the hearing on 12 November 2014. This included a letter from Advocate Fooks, who had been instructed in relation to the Police investigation, in which she raised her concerns that the Appellant would be unrepresented at the hearing. Because of the statutory framework, there was no power to extend the time during which representations could be made. The only option would, it seems, have been to withdraw the Minded To Notice and to re-issue it, thereby starting afresh the 28-day period for representations. Mr Davis decided that it would not be appropriate to do that and the hearing proceeded, as planned, on 12 November 2014.

22. A full transcript of the hearing before Mr Davis on 12 November 2014 has been provided. The list of those also present shows that the Secretary to the Commission, the Assistant to the Commission Secretary, the Director-General, the Director of Enforcement, an Advocate from the Enforcement Division, the Director of the Investment Division and Advocate Hill were in attendance. Mr Davis gave the Appellant the opportunity to provide additional written representations after the conclusion of the hearing. This was done by way of the Appellant's letter dated 14 November 2014. Having considered everything provided by the Appellant, Mr Davis exercised the powers delegated to him and issued his decision on 3 December 2014.

The appeal provisions

23. Because the full suite of regulatory Laws (and for ease of reference I am using, and will continue to use, that general term to cover all of the various Laws such as the POI Law and the IMII Law to which reference has been and will be made) has been relied on for the making of the prohibition orders against the Appellant, Advocate Shepherd has had to invoke the appeal provisions in each, as well as the provisions in the FSC Law.

24. Section 11H of the FSC Law provides:

"*(1) A person aggrieved by a decision of the Commission –*

(a) to make or vary a disqualification order against him under section 11B,

(b) to refuse or vary or revoke a disqualification order made against him under section 11B,

(c) to publish a statement relating to him under section 11C,

(d) to impose a financial penalty on him under section 11D,

(e) to publish his name under section 11D(3) as a person on whom such a penalty has been imposed, or

(f) to omit, pursuant to section 11G(2), any matter from a statement of reasons given to him,

may appeal to the Court against the decision.

(2) The grounds of appeal under this section are that –

(a) the decision was ultra vires or there was some other error of law,

(b) the decision was unreasonable,

(c) the decision was made in bad faith,

(d) there was a lack of proportionality, or

(e) there was a material error as to the facts or as to the procedure."

The grounds of appeal listed in subsection (2) are what might be regarded as the standard, modern grounds included in provisions creating statutory appeals. Subsection (10) provides that the Court is constituted by the presiding judge sitting unaccompanied by Jurats, although the Court is permitted to appoint one or more assessors to assist it in the determination of any matter before it.

25. Section 19 of the Fiduciaries Law confers a right of appeal on a person aggrieved by a decision of the GFSC *inter alia* "*to serve a notice on him under paragraph (g) of section 3(1) disapplying the exemption contained in that paragraph in respect of him*" (para. (d)) and "*to make a prohibition order under section 17A prohibiting him from performing any function, any specified function or any specified description of function*" (para. (k)). The grounds of appeal in subsection (4) are the same as those in section 11H(2) of the FSC Law.

26. Section 36 of the POI Law contains a similar right of appeal, with identical grounds, against a prohibition order made under section 34E. The decisions susceptible to appeal are those listed in section 35. Section 43(1)(j) of the IMII Law also contains a similar right of appeal, with identical grounds, against a prohibition order made under section 18A of that Law. What are effectively identical appeal regimes are provided by section 18 of the Banking Supervision (Bailiwick of Guernsey) Law, 1994 and section 63 of the Insurance Business (Bailiwick of Guernsey) Law, 2002. When I come to deal with the appeals against the making of a prohibition order against the Appellant under each of these regulatory Laws, I will do so generally rather than referring each time to all of the Laws involved.

27. As can be seen from the form of section 11H(1) of the FSC Law, the right of appeal is conferred on a person aggrieved by one or more of the decisions specified therein. As the subject of the matters he now seeks to challenge, the Appellant is clearly a person aggrieved,

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but what he is able to appeal is the specific decision in each case and he can do so on all or any of the grounds set out in subsection (2). I will return to the actual grounds pursued in more detail when I deal with each of the decisions being challenged.

Discussion

2013 website notice

28. Having regard to the Laws recited in the website notice first published on 19 December 2013, it is apparent that none of them creates a right of appeal from the act, or more precisely the decision leading to the act, of publishing this notice. The GFSC has invoked its powers under section 2(2)(e) of the FSC Law, section 57(e) of the IMII Law and section 34B(e) of the POI Law. Advocate Shepherd is highly critical of the GFSC for doing so, pointing out that none of these provisions actually confers on the GFSC any power as such. Further, he submits that the publication of this notice is evidence that the Director of Enforcement was acting in bad faith. The wording might have been chosen better so as not to create the impression that this amounted to a censure of the Appellant.

29. Starting with the first of the provisions invoked, section 2(2)(e) of the FSC Law provides:

> "*The general functions of the Commission are … to take such steps as the Commission considers necessary or expedient for –*
>
> *(i) maintaining confidence in the Bailiwick's financial services sector, and*
>
> *(ii) the safety, soundness and integrity of that part of the Bailiwick's financial services sector for which it has supervisory responsibility …*".

It is apparent that this paragraph in isolation does not confer any power on the GFSC. However, section 8(1) of the FSC Law provides that "*The Commission may do anything which appears to it to be conducive to the carrying out of its functions or to be incidental to their proper discharge*". Subsection (2)(c) provides further that:

> "*Without prejudice to the generality of subsection (1) the Commission may, in connection with the carrying out of its general functions – …*
>
> *(c) publish, in such manner as it considers appropriate, such information relating to its functions as it thinks fit …*".

Accordingly, there is no doubt that the GFSC was empowered to put this notice on its website as a means of providing information to those who might look for and at it that the Appellant was not licensed to act as described. In doing so, it is clear that the GFSC had in mind its functions under section 2(2)(e) relating to the safety, soundness and integrity of these parts of the financial services sector. Whilst it may have been preferable to refer also to section 8, or to omit any reference to the statutory underpinning of what it was publishing, I reject Advocate Shepherd's basic criticism that the GFSC lacked power to act as it did. I am satisfied that the GFSC's functions and powers clearly cover what it has done.

30. Section 57(e) of the IMII Law is a provision dealing with disclosure of information. It has to be read in the context of section 56(1) of the Law, which restricts the disclosure of information:

> "*Subject to the provisions of section 57 –*
>
> *(a) no person who under or for the purposes of this Law receives information relating to the business or other affairs of any person,*
>
> *(b) no person who obtains any such information directly or indirectly from a*

person who has so received it,

shall disclose the information without the consent of the person to whom it relates and (if different) the person from whom it was so obtained."

One of the exceptions to that general restriction on disclosure is "*the disclosure by the Commission of information in the interests of clients or policyholders or in the public interest*". But for an exception such as this, disclosing information would be an offence contrary to section 56(2). Section 34B(e) of the POI Law is in similar terms, save that it refers to "*investors*" in place of "*policyholders*" and operates as an exception to the general restriction on disclosing information contained in section 34A of that Law, which replicates section 56 of the IMII Law.

31. In relation to the information in the website notice, I have noted that Advocate Langlois wrote to the Director of Enforcement on 19 December 2013 confirming that the wording was "*perfectly acceptable*". To that extent, it appears to me that the Appellant, as the person to whom the information related, consented to its disclosure. Had he not consented, those responsible for the disclosure would, in my view, have been able to rely on the respective paragraph (e) terms because it clarified that the Appellant did not have the authority of the GFSC by virtue of any licence to carry on the types of business described. In that regard, the content of the website notice was advisory and was accepted as being factually accurate. Whilst it may not have been entirely correct to say that the notice was issued "*pursuant to its powers under [the three provisions cited]*", there is no harm done to the Appellant through the GFSC identifying the relevant provisions leading it to act in the way it did. More importantly, what it does was something that the various Laws permit the GFSC to do.

32. The Appellant's appeal seeks an order requiring the permanent removal of this notice on the basis that its publication contravenes all of the statutory grounds of appeal to which reference has already been made and/or on the basis that its publication is a breach of Article 6 of the European Convention on Human Rights. In order to institute an appeal on any of the grounds, Advocate Shepherd would need to identify that a right to appeal such a decision has been conferred by the legislature. He has been unable to do so. Section 43 of the IMII Law exhaustively lists the decisions under that Law that can be the subject of an appeal. There is no reference in it to sections 56 and 57. There is no reference in it to challenging any form of publication. Similarly, section 35 of the POI Law lists the decisions of the GFSC that can be appealed, and again is silent on publications and makes no reference to section 34A or 34B. The decisions listed in section 11H(1) of the FSC Law do not refer to section 2(2)(e) or even section 8. It does, however, refer to publication, but only in specific contexts.

33. Advocate Shepherd has not suggested, however, that section 11C of the FSC Law is engaged in respect of the website notice published in 2013. At that stage, there was no finding in respect of the Appellant, as is required by subsection (1) before a public statement can be contemplated. The investigation into GIBL was still ongoing. Further, there is a requirement to undertake the procedure in section 11E unless the GFSC considers that the urgency entitles it to dispense with the procedure altogether. This was not done because no one involved regarded what was happening as being pursuant to section 11C. Similarly, the other reference to publication in section 11H(1) is when a financial penalty has been imposed, which was not the case at that time.

34. In summary, therefore, there is no right of appeal available to the Appellant in respect of the decision to publish the notice on 19 December 2013 or the ongoing decision to leave it there.

35. Although paragraphs 52 and 53 of the Appellant's Cause claim that there has been a breach of Article 6 of the Convention because the GFSC has made a determination without notifying the Appellant of the allegations made and without providing him with the opportunity to respond to those allegations, this bare assertion has not been developed in Advocate Shepherd's Skeleton Argument, save to add that the publication was highly prejudicial to the Appellant's ability to participate in the enforcement proceedings that followed. In my view,

Article 6 cannot be relied on in relation to the publication on the GFSC's website of information that has been acknowledged to be factually accurate and which I am satisfied falls squarely within the functions and powers of the GFSC. As I have just noted, there was no determination of anything in December 2013 because the GFSC investigation was ongoing and did not reach a conclusion until almost one year later. There is, in my opinion, no merit at all in the addition of a purported challenge based on the Human Rights (Bailiwick of Guernsey) Law, 2000, particularly where it has not been articulated as expected pursuant to Practice Direction No. 1 of 2006.

36. For these reasons, I am satisfied that the Appellant's attempt to require the permanent removal of the notice on the website must fail and that part of his appeal falls to be dismissed. That said, I do wonder why the GFSC feels it necessary or even desirable to continue to have this item on its website when events have progressed to a final determination in the way they have. I would have thought that the publication of the statement under section 11C of the FSC Law might be regarded as having superseded the earlier advisory publication in 2013. However, whether it wishes to remove the December 2013 notice is entirely a matter for the GFSC and not something on which this Court can rule as a result of this appeal.

Prohibition orders

37. Advocate Shepherd clarified that the basis of the appeals against the prohibition orders made against the Appellant under the various regulatory Laws is that he contends that there has been a material error as to the procedure followed. In doing so, he has placed significant weight on the alleged non-compliance by the GFSC with its own published Guidance Note on the Decision Making Process. I have seen the version dated March 2014 and also the version dated September 2014. Both state on their cover sheet that "*It does not hold force of law and is not prescriptive of a process that will always be followed: each case will be considered on its own merits and, as it deems appropriate, the Commission may depart for the process described here.*" (For ease of reference, when I refer to paragraph numbers, I will refer to them as they appear in the September 2014 version.) When considering this ground of the appeals, I accept and bear in mind Advocate Hill's submission that the burden of articulating and proving any alleged material error as to procedure rests on the Appellant.

38. Paragraph 9.6 of the Guidance Note states:

> "*The decision-maker to whom a recommendation has been made will, if he is minded to exercise one or more of his powers, via the Secretary: …*
>
> *9.6.5 ensure that the party is aware of and has access to this Guidance Note …*".

Advocate Hill, on behalf of the GFSC, acknowledged that he was unable to point to anything showing compliance with this requirement.

39. Advocate Shepherd invites me to infer from the absence of any reference to the Guidance Note in the Statement of Reasons of Mr Davis that the Guidance Note was not considered by Mr Davis. In my opinion, this is asking the Court to make an inference that is not warranted. There is no obligation on the part of a decision-maker to refer slavishly to every source available for what he or she is doing. Ultimately, it is a matter of personal choice. What matters is whether or not there has been broad compliance with a fair procedure. It is possible to go through the stages referred to in the Guidance Note and compare what happened with what it says should happen. If the stages have been followed and the overall impression is that the Appellant was dealt with fairly, rather than there being evidence of procedural impropriety vitiating the decision, then this ground of appeal falls away.

40. Paragraph 2 of the Guidance Note sets out the overriding objective, which is "*to deal with matters in a reasonable manner*". This has clearly been drawn from rule 1 of the Royal Court Civil Rules, 2007, because the particular examples of how to deal with matters in a reasonable manner (rather than "*justly*") contains the same basic matters as are referred to in rule 1(2).

The first is to ensure that the parties are on an equal footing. Advocate Shepherd has been critical of Mr Davis for not referring to this principle when deciding that it was appropriate for him to continue with the hearing of the Appellant's oral representations even though the Appellant was at that time unrepresented. It is quite clear from reviewing the Statement of Reasons that Mr Davis was alive to the need to balance the reasonableness of proceeding with the possibility of delaying matters. However, the Appellant had indicated that he was unable to afford legal representation. In those circumstances, delay would not necessarily have led to the Appellant being in any better position as regards legal representation. There was, in my view, no need for Mr Davis to spell out through cross-referencing the Guidance Note how he had approached this element of his decision.

41. Section 2 of the Guidance Note describes the decision-making process. The first stage described is the convening of an appropriate ad hoc case review panel. If this panel decides that the matter should proceed, there is the possibility that the Commission Secretary will need to consider appointing a decision-maker. The second stage is the provision of case material, during which the subject of the investigation is given an opportunity to comment on the material on which the relevant member of the GFSC's Executive will rely in asking the decision-maker to act. At the conclusion of that exercise, the matter is re-presented to the case review panel. The third stage involves the first consideration of the decision-maker. The decision-maker appointed by the Commission Secretary is presented with a package of documents provided to him or her. At that stage, the decision-maker can request further information, decide to take the action recommended, decide to take some other action, decide to take no action, or refer it to a person with authority to take the appropriate action. It is at this stage that the Minded To Notice process arises (and this is where paragraph 9.6.5 is placed). The fourth stage is the second consideration of the decision-maker and involves the hearing or oral representations if the subject of the process chooses to make any. This stage is set out in some detail in paragraph 10.

42. In terms of who may be in attendance at the meeting, paragraph 10.2 states that "*The decision-maker may also invite anyone else that he considers will assist it in his deliberations, such as the decision-maker's legal adviser.*" Paragraph 10.3 simply advises that procedural matters will be addressed at the start of any hearing and recorded. Oral submissions are then dealt with as follows:

> "*10.4 The decision-maker will be responsible for determining the procedure that will be followed where oral submissions are made, but in general, the following guidelines will apply:*
>
> *10.4.1 The oral submission by, or on behalf of, the party should explain why the proposed decision is inappropriate or not justified.*
>
> *10.4.2 Following the oral submission, the party may be required to answer questions from the decision-maker and clarify issues that may arise.*
>
> *10.4.3 Members of the Executive may be invited to comment on any matter raised by the party, to answer questions posed by the decision-maker or clarify issues.*
>
> *10.4.4 In exceptional circumstances, if information is introduced by the party during the oral submission that has not previously been made available to the Commission, the decision-maker may decide to defer taking a decision to allow more time for the relevant member of the Executive to comment on the information and to disclose any such comments to the party.*
>
> *10.4.5 The process is intended to be interactive rather than adversarial in nature. For the avoidance of doubt, court rules, process and procedures do not apply. All decision-maker meetings will be conducted in private.*
>
> *10.4.6 Whilst the decision-maker will attempt to arrange a meeting date convenient to*

the parties, this may not always be possible, for example, because of the urgency of the matter or because the party appears to be attempting to delay a decision by not making reasonable efforts to attend a meeting. Where strict statutory provisions exist the decision-maker is unable to adjourn a meeting scheduled to hear oral representations beyond the Representation Period.

10.4.7 *If the party fails to attend the meeting, the decision-maker may proceed in its absence, provided that the decision-maker is satisfied that the party has been given sufficient notice of the meeting. If the decision-maker receives no response or representations from the party, the decision-maker may regard as undisputed the allegations or matters outlined in the Commission's submissions.*

10.4.8 *The meeting will be recorded through the use of audio equipment: one of the audio copies made at the meeting will be provided to the party.*"

I will return to some of these matters when addressing Advocate Shepherd's submissions.

43. The following sub-paragraphs appear under the heading "*Deliberations of the decision-maker*", although they do not all seem to relate to that part of the process but touch instead on the procedure at a hearing of oral representations:

"*10.5* *The giving of oral evidence and cross-examination are not usually necessary but the decision-maker may permit both where the interests of justice so require. Cross examination will only be permitted, at the decision-maker's sole discretion, where there is disagreement over the significant facts regarding the alleged regulatory breaches. The decision-maker may, at any time, limit or halt any cross examination he has permitted. The decision-maker may ask a witness questions either himself or through a legal representative acting on the decision-maker's behalf.*

10.6 *Both the relevant member of the Executive and the party may call witnesses, provided that a request is submitted to the decision-maker in writing, identifying the name of the witness(es) and a summary of the evidence to be adduced. This request may be made at least 7 days prior to the holding of the meeting. Requests must be copied to the other participant. The decision-maker will decide in the first instance whether to permit the witness(es) to give evidence in person. Witnesses proposed to be called during a meeting must be available on the scheduled meeting date. The unavailability of a witness on the scheduled meeting date may not constitute sufficient grounds upon which to adjourn the meeting.*

10.7 *The decision-maker, at his sole discretion, may adjourn the hearing. This may occur where the decision-maker requests that the relevant member of the Executive or the party provide further material or attend a subsequent meeting, or to assist him in obtaining the information he requires so that he may make a final decision in relation to the matter before him.*

10.8 *When the decision-maker is satisfied that he has received complete representations, the relevant member of the Executive and the party (other than the members of the decision-maker, his legal advisor and the Secretary) will leave the meeting.*

10.9 *If any new information or matters emerge during the decision-maker's deliberations, including any legal advice given by his legal advisor, the party and the relevant member of the Executive will be given an opportunity to comment thereon. In such a case, the decision-maker will delay taking his final decision for a reasonable period to allow the person(s) concerned to make*

comments."

44. Advocate Shepherd has highlighted that there was no reference to this Guidance Note in the Statement of Reasons and that it was mentioned only once on 12 November 2014, towards the beginning of the meeting, when Mr Davis referred to its publication in its original and updated forms in March and September 2014. Further, in the context of having attended unrepresented, the Appellant himself commented very near the end of the meeting:

   > "*I feel I am severely outnumbered and I feel pressured into saying certain things that I perhaps don't want to say*".

   At first sight, the fact of the Appellant being outnumbered is quite apparent. As the Guidance Note clarifies, Mr Davis, as the GFSC's Senior Decision Maker, was free to admit anyone he wished to be in attendance if it would assist him. Certain persons needed to be present. For example, the Secretary to the Commission (or his nominee) needed to be present to operate the recording device and perform any other necessary administrative tasks and the Director of Enforcement as the relevant member of the Executive and Advocate Hill as legal adviser also needed to be present. However, with an unrepresented party, quite why so many people were considered as being needed to attend to assist is questionable and the Senior Decision Maker might look back at his decision to permit so many fellow officers of the GFSC to be there without having any formal role to play.

45. In that regard, in relation to the Director-General, Mr Davis introduced him at the outset of the meeting and stated that he was "*content for him to be here to uh observe proceedings*". However, Mr Mason subsequently took a more active role in the proceedings. Advocate Hill prefaced the Director-General's contribution by saying "*I think Mr Mason is anxious to say something*" and Mr Mason then proceeded to explain for the benefit of Mr Davis how he and Mr Gaudion had approached certain cases that had settled rather than being determined by a Senior Decision Maker or by the GFSC's own Decision Committee. In doing so, he highlighted the criticisms that have been made of the statutory cap for financial penalties by external bodies such as the IMF. I will return to what he had to say in more detail when I consider the Appellant's challenge to the financial penalty imposed but, for the time being, I will simply comment that I am surprised at the intervention of Mr Mason having been permitted when Mr Davis had allowed him to attend with observer status only. I am conscious that section 11(1) of the FSC Law provides that "*the most senior officer of the Commission shall have the title Director-General*". Accordingly, within the GFSC hierarchy, Mr Mason is a more senior officer than Mr Davis. Although this is something that was not developed on behalf of the Appellant by Advocate Shepherd, and it is not in any event a reason for allowing the appeal against the entirety of what took place leading to the Final Notice, I take the view that it was something that might have been confusing to the Appellant. It is possible that the Appellant would have perceived this intervention as the Director-General giving instructions to the Senior Decision Maker. In any event, the Appellant was not invited to comment on whether Mr Davis should hear from Mr Mason. In saying that, I recognise that paragraph 10.4.3 of the Guidance Note enables members of the Executive, of which the Director-General is clearly one, to be invited to comment so as to "*clarify issues*" and that the process is intended to be interactive (para. 10.4.5). However, whilst not regarding this aspect of the meeting as something that vitiates any of the process, because it cannot, in my view, be said to amount to a material error as to the procedure, I consider the Director-General's intervention in the way it was handled as an unfortunate turn of events.

46. Advocate Shepherd conducted a close analysis of the transcript of the meeting on 12 November 2014 and was critical of the Senior Decision Maker's conduct of certain aspects of it. Perhaps the most serious complaint raised was that Mr Davis had descended into cross-examining the Appellant. About three-quarters of the way through the transcript (at the beginning of disc 4, which marked the resumption of the meeting after a break for lunch), Mr Davis sought to clarify a couple of points because he wished to understand whether the Appellant's position had changed from what had been said on his behalf previously. On six occasions in fairly quick succession, Mr Davis asked questions of the Appellant starting with

"*Do you accept …?*". Although Advocate Shepherd submits that this amounts to cross-examination and so breaches the Guidance Note, I disagree. The Appellant was not being called as a witness. He was not giving any evidence and so was not liable to be cross-examined in any event. Accordingly, I do not regard paragraph 10.5 of the Guidance Note as applicable. In any event, a decision-maker does not cross-examine. That is something permitted to another party. In the context of a meeting such as this, it means the member of the Executive making the recommendation being able to cross-examine any witness being called by the person who is the subject of the recommendation or that person being permitted to cross-examine any witness called on behalf of the Executive. The role of the Senior Decision Maker is explained in paragraph 10.4.2. At the conclusion of the oral submission made by, or on behalf of, the party explaining why the proposed decision is inappropriate or not justified, questions can be posed by the decision-maker and clarification sought. I am satisfied, therefore, that it was entirely appropriate for Mr Davis to seek the clarification he wanted to obtain as a result of the submissions made by the Appellant. If the complaint is about the form of words used, I reject that. In my view, it was quite permissible for Mr Davis to put to the Appellant the series of propositions he did enquiring of him whether he accepted them. He was testing with the Appellant how much agreement there was from him in relation to the particular factors the GFSC was required to take into account. In my judgment, there is no merit in this aspect of the Appellant's case.

47. Advocate Shepherd also criticised the way in which Emma Bailey, the Director of the Investment Division, was brought into the meeting towards the end. In this case, I take the view that her attendance was indeed as a witness. Advocate Hill asked her questions. She had previously provided a witness statement. When she had finished answering the questions put to her, which included some questions of clarification from Mr Davis, Mr Davis quite properly turned to the Appellant and asked him whether he had any questions for Mrs Bailey, to which he responded that he did not. I have had regard to paragraph 10.6 of the Guidance Note relating to the calling of witnesses. It provides that advanced notice of the intention to call a witness should be given to the other party. This was not done here because the idea of asking Mrs Bailey to attend only arose during the course of the meeting. However, I do not regard paragraph 10.6 as being prescriptive in this regard. Although the structure of paragraph 10 is a little odd, I note that paragraph 10.4 confers on the decision-maker the responsibility for determining the procedure and that what follows are guidelines. If the paragraph dealt with matters in a chronological manner, paragraph 10.6 would precede paragraph 10.4. It is a step prior to the actual conduct of the meeting. However, what is apparent is that the terms of the Guidance Note do not set out a procedure that must be followed but offer guidance to all those concerned as to the most likely manner in which a meeting, and the steps prior to it, will be conducted. If something arises during the course of a meeting, the decision-maker has to manage that as best he can. In relation to Mrs Bailey's input, it is apparent that Advocate Hill sought to call her to explain a little more about the Collective Investment Class B Rules and the GFSC's expectations in relation to how they would be operated. This was a form of clarification sought by Mr Davis. Rather than attempt to provide the clarification sought through explanation on instructions Advocate Hill preferred to seek permission to call Mrs Bailey into the meeting to assist so that Mr Davis could "*have it straight from the horse's mouth*". Although I think it would have been preferable had Mr Davis asked the Appellant to comment on whether he agreed with that course of action before allowing Mrs Bailey to join the meeting, I do not consider that there was a material error as to the procedure in proceeding in the way the meeting did. In particular, Mr Davis invited the Appellant to ask Mrs Bailey any questions he wished to put to her. As such, in my view, the Appellant was given a fair opportunity to deal with the information placed before the Senior Decision Maker by Mrs Bailey.

48. The principal general complaint of the Appellant is that the process from start to finish was tainted by bias against him. I am satisfied that the ongoing involvement of Mr Gaudion was not a problem. The complaint about him had been addressed in the Director-General's letter of 3 March 2014. Mr Davis mentioned this in the Statement of Reasons, thereby acknowledging that he had addressed his mind to this aspect of the process. There is nothing in this element of the complaint and I do not find that the process followed was in any way

vitiated because of Mr Gaudion being the relevant member of the Executive making the recommendation to the Senior Decision Maker as a result of his overall investigation. The reason why the focus of the investigation was on the Appellant more than on Mr Wickins was because it focused on the part of GIBL's business for which the Appellant was primarily responsible. The Appellant has acknowledged that he made statements that would come across as misleading. The serious nature of what was discovered during the course of the investigation is why the Appellant has been placed at the centre of these proceedings. It has not, on my assessment, arisen because of any inherent bias against him.

49. Having conducted a careful and thorough review of the material generated prior to the meeting on 12 November 2014 and the transcript, I am not persuaded that there is any evidence of bias. The way the meeting was conducted did take into account that the Appellant did not have legal representation. Mr Davis addressed his mind to this question and considered whether it was appropriate to adjourn or to proceed. Looking at the transcript, after the preliminaries, it seems that Mr Davis offered the Appellant a fair opportunity to make his submissions in the form he wished to make them. There were some interventions from Mr Davis for clarification but, by and large, the Appellant addressed the meeting without any other interruption. Those submissions may not have been as focused as a lawyer's presentation may have been and did not always explain directly why the proposed decision set out in the Minded To Notice was inappropriate or not justified, however I believe that the Appellant was able to put forward everything he wanted to say. I have already commented that I feel that Mr Davis probably allowed more people from the GFSC to be present than was desirable and that the more active part played by the Director-General, when he was present as an observer and so really should have remained silent, should have been dealt with differently. However, despite these matters, the overall impression I have formed is that the Appellant was given a fair opportunity to comment on matters that eventually found their way into the Final Notice and the accompanying Statement of Reasons. Because the procedure taken as a whole was fair, anything that might have been done better (and I am aware that it is often the position following most hearings that one thinks of how a hearing might have been improved) does not, in my judgment, constitute a material error as to the procedure.

50. On the basis that I have concluded that there has been no material error as to the procedure, it follows that I will similarly conclude that the Appellant was afforded a fair hearing. This means that the very barest of challenges based on the Appellant's Convention rights being violated, which were not articulated in any detail, nor were they developed during oral submissions, is also without foundation. It is incumbent on an Appellant wishing to raise matters under the Human Rights (Bailiwick of Guernsey) Law, 2000 to do so in a structured manner. It is unhelpful to make a bare assertion that a person has been deprived of a fair hearing without identifying the basis for such an allegation. In any event, I suspect that there is nothing further to be gained by mentioning the right in Article 6 of the European Convention on Human Rights when the statutory grounds of appeal already encompass such matters.

51. In relation to the appeals made against the imposition of the prohibition orders, I reject the arguments made on behalf of the Appellant by Advocate Shepherd about alleged procedural errors. In particular, the Appellant has failed to discharge his burden to show that any errors that occurred were material to the ultimate decisions to impose prohibition orders under the regulatory Laws. The appeals against the prohibition orders are, therefore, dismissed.

Disapplication of exemption relating to directorships

52. The appeal pursuant to section 19(1)(d) of the Fiduciaries Law against the decision to serve a notice on the Appellant under section 3(1)(g) of that Law disapplying the exemption contained in that paragraph in respect of him has proceeded on the same basis as the appeals against the prohibition notices. Although the Cause does not address this element of the Decision in any detail, I have approached it on the basis that the principal complaint of the Appellant is that the flawed procedure adopted vitiates the entire process, with the consequence that everything contained in the Decision should be set aside. However, for the

reasons I have rehearsed in respect of the prohibition orders, I have concluded that there has been no material error as to the procedure followed and that applies equally to the decision reached under section 3(1)(g) of the Fiduciaries Law.

53. Because Advocate Shepherd did not clarify that he was only advancing procedural error in relation to this matter, I have briefly considered whether there are any grounds to find that this particular decision was unreasonable or lacking in proportionality. The disapplication of the exemption relating to directorships requires a finding by the GFSC that it is not satisfied, having regard to the criteria of Schedule 1 to the Fiduciaries Law, that the person if a fit and proper person to be or to become a director of a company. Paragraph 3(2) of that Schedule provides that the GFSC shall have regard to certain matters, including the person's probity and soundness of judgment. The findings of the Senior Decision Maker, as summarised in the Final Notice, were that the Appellant "*had recklessly promoted a high-risk investment which was unsuitable for retail investors, and that he had dishonestly diverted payments into his personal bank account.*" At the time of doing so, he was a director of a regulated entity. He was also the Authorised Insurance Representative of GIBL. Although Advocate Shepherd sought to minimise the level of culpability of the Appellant for what happened and suggested that this was not a sophisticated methodology to divert funds away from where they were meant to be received, none of this deflects from the fact that the allegation against the Appellant was one of active mis-selling and that he has acknowledged that there were grounds for making such a finding. Being a director of GIBL and not keeping his fellow director informed supports the finding that the Appellant is not a fit and proper person to be a director. I do not accept that what happened should be categorised as an error rather than dishonesty, as I understood Advocate Shepherd to have attempted to portray, although he also acknowledged the problems he faced in arguing that there was no dishonesty. In reality, his submissions went more towards making the actions of the Appellant less culpable and placing them more into the context of the degree of oversight or supervision that Mr Wickins might have been expected to exercise. In those circumstances, and where the decisions to impose prohibition orders under the regulatory Laws have been upheld, I do not find that the decision to disapply the exemption was in any manner disproportionate or unreasonable. It flowed naturally from the findings made and the other sanctions imposed on the Appellant.

54. The appeal pursuant to section 19(1)(d) of the Fiduciaries Law, is, therefore, dismissed.

Financial penalty

55. The appeal that has been pressed most strenuously by Advocate Shepherd relates to the imposition of a financial penalty on the Appellant of £200,000. This appeal is brought pursuant to section 11H(1)(d) of the FSC Law. The financial penalty was imposed under section 11D of that Law, which provides:

"*(1) Where the Commission is satisfied that a licensee, former licensee or relevant officer –*

(a) has contravened in a material particular a provision of, or made under, the prescribed Laws, or

(b) does not fulfil any of the minimum criteria for licensing specified in the regulatory Laws and applicable to him,

it may, subject to the provisions of section 11E, impose a penalty in respect of the contravention or non-fulfilment of such an amount not exceeding £200,000 as it considers appropriate.

(2) In deciding whether or not to impose a penalty under this section and, if so, the amount thereof, the Commission must take into consideration the following factors –

(a) *whether the contravention or non-fulfilment was brought to the attention of the Commission by the person concerned,*

(b) *the seriousness of the contravention or non-fulfilment,*

(c) *whether or not the contravention or non-fulfilment was inadvertent,*

(d) *what efforts, if any, have been made to rectify the contravention or non-fulfilment and to prevent a recurrence,*

(e) *the potential financial consequences to the person concerned, and to third parties including customers and creditors of that person, of imposing a penalty, and*

(f) *the penalties imposed by the Commission in other cases.*

(3) *Where a penalty is imposed on a person under this section, the Commission may publish his name and the amount of the penalty.*"

56. It is immediately apparent that the financial penalty imposed on the Appellant was the maximum permitted under this section. Accordingly, the grounds of appeal advanced in respect of the financial penalty go beyond the alleged errors as to procedure and also encompass reasonableness and proportionality. I do not need to repeat what I have already stated about the procedure followed. The same reasoning applies and, in my judgment, that ground of appeal does not assist the Appellant. Once the general complaint about the overall procedure being tainted in such a way that the entire Decision should be set aside disappears, I understood there to be no challenge as such to the principle of imposing a financial penalty, but rather that the appeal concentrates on the amount of the penalty. In any event, the seriousness of the findings against the Appellant is sufficient to show that there were clear grounds on which to impose a financial penalty rather than not to do so.

57. The Appellant questions a number of the findings made by Mr Davis alleging that it was unreasonable for him to have made those findings, particularly as they relate to dishonesty and acting for personal gain. Those findings are summarised in paragraph 348.1 of the Statement of Reasons, which deals with whether the contravention or non-fulfilment was inadvertent (ie, section 11D(2)(c)):

> "*Mr Merrien deliberately promoted investment into the Trade Finance Fund by misrepresentation and misleading information for his own personal gain, deliberately concealed his activity from Mr Wickins, and deliberately procured that payments of commission were to be made to his personal bank account.*"

58. As Advocate Shepherd submits, the finding of dishonesty made by the Senior Decision Maker on the facts as he found them is a serious one and has a significant impact on the Appellant. In paragraph 123 of the Statement of Reasons, Mr Davis deals with a payment of £63,504.86 that the Appellant received on 26 April 2013:

> "*Mr Merrien has accepted in the Merrien Submissions: "I have already agreed that I should never have issued the invoice for the payment on 26th April 2013 and received the payment into my personal account. This was an error on my part." The Commission considers that this was more than an "error" on the part of Mr Merrien; it was deliberate and it was dishonest.*"

On the basis that the Appellant accepted that a special account was to be opened under the terms of his employment with GIBL to receive this type of commission payment and admitted that the invoice relating to this payment had used his personal bank account for the receipt of the payment, I am satisfied that it was open to Mr Davis, having regard to all the circumstances of the case against the Appellant, to reject his claim that he had made an error

and for him to treat this as being deliberate, ie, not inadvertent. As soon as the Appellant's explanation that it was simply an error was rejected, Mr Davis was entitled to conclude that it followed from the finding that it was deliberate that it was also indicative of the Appellant acting dishonestly. Again, once that finding was made, Mr Davis was entitled to conclude from the fact that the Appellant took no steps to move the payment received from his personal account into an account of GIBL that it was done for his personal gain. None of the Senior Decision Maker's findings in this respect can, in my view, be said to amount to unreasonable findings. They are not, therefore, findings with which this Court can interfere on this appeal.

59. Advocate Shepherd has also criticised Mr Davis making a finding that there was deliberate concealment of what was happening from Mr Wickins. However, on closer analysis, what Advocate Shepherd seemed to be suggesting was more directed towards Mr Wickins' failure to exercise a level of scrutiny over what was happening in such a way that, if Mr Wickins had done what he should have done in reviewing the material available within GIBL's records, the payments to the Appellant would have been spotted and something done about them. I regard this suggestion as subtly different from an assertion that there was no concealment from Mr Wickins. Insofar as the Appellant did not act in a transparent manner and deal with this type of payment in a way that had been agreed is, in my view, material from which it was open to Mr Davis to reach the reasonable conclusion that there had been deliberate concealment of what the Appellant was doing from Mr Wickins. The allegation that Mr Wickins should have shouldered his fair share of the blame for not exercising the degree of supervision over all GIBL's affairs is more directed towards the issues of proportionality and consistency of approach.

60. The final matter pleaded in respect of reasonableness relates to the finding that there had been misrepresentation on the part of the Appellant. There were two specific findings of misrepresentation set out in the Statement of Reasons. Paragraph 118 deals with the information provided to a couple that "*several of my clients have already taken advantage of*" the investment opportunity being recommended to them:

> "*The Commission accepts that the dictionary definition of the word 'several' is 'more than two but not many' and that the distinction to be drawn between the roles of Liberation as trustee for Mr and Mrs Randall's separate QROPS and the role of Guardian Trust as trustee for the Randall Trust means that the statement that 'several' of Mr Merrien's clients had invested as at 12 March 2013 was not technically inaccurate. The Commission does however consider that the statement gave a misleading and exaggerated impression of the extent to which clients of Mr Merrien had committed to invest in the IIG TOF. Moreover, there was no reasonable basis for Mr Merrien to describe the IIG TOF as "a suitable and safe way of getting growth" or suggest that it offered "a solid, low risk recovery". These statements were negligent and misrepresented the risk of investing in the IIG TOF.*"

Paragraph 131 deals with what the Appellant wrote to Mr Robert indicating that "*the Manager has a block of USD 500k he has purchased for me which I'll try to get you into but I have been inundated*":

> "*The statement that a block of US$500k had been "purchased for" Mr Merrien appears unlikely to be true. In the Mourant Submissions, it is said that Mr Merrien maintains that a block had been acquired for him, to be available to him to sell to interested customers, but n evidence in support of this assertion has been adduced. The Mourant Submissions accept that it was not the case that Mr Merrien had been "inundated" by demand for the Trade Finance Fund in the sense of being "literally overwhelmed by the interest"; the statement that Mr Merrien had been "inundated" was a misrepresentation. The Mourant Submissions suggest that "interest had been high" but put forward no detail in support of that proposition. In the Merrien Submission, Mr Merrien refers to the interest of Mr Carre and Mr and Mrs Cooke (who did not have immediately available funds) and of Miss Barsby (his personal partner) and Mr Merrien (his brother). This would be evidence of some interest, but*

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not sufficient to justify the statement that Mr Merrien had been "inundated". This was an exaggeration by Mr Merrien which misrepresented the position."

61. Because there were these two passages referring to misrepresentation, the pleaded case, in referring solely to the misuse of the single word "*inundated*", gives a misleading impression. Even if there had only been the finding at paragraph 131, it would still have been a reasonable conclusion for Mr Davis to reach because it had been accepted by the Appellant in the Submissions lodged on his behalf that the word had been used inappropriately. As Advocate Shepherd put it, this was the "puff" of a salesperson. As Mr Davis found, it was an exaggeration. Being admitted, it could properly be characterised as a misrepresentation. It has, in my view, been placed properly into context in paragraph 131.

62. I further find that there is nothing unreasonable about the way in which the finding in paragraph 118 has been made. The reference to misrepresentation is explicitly combined with negligence, thereby making it a less serious form of misrepresentation than if it had been deliberate. Although this distinction is not made in paragraph 348.1, when the Statement of Reasons is read as a whole, it is apparent that there had been deliberate promotion of the Trade Finance Fund by the Appellant to GIBL's clients and that this had involved the instances of deliberately giving misleading information and making statements that were not accurate, ie, misrepresentations. Moreover, the Appellant has accepted that he made mistakes.

63. In these circumstances, I do not find that the Appellant has identified anything in the approach taken by Mr Davis that brings him within the ground in section 11H(2)(b) of the FSC Law. In my judgment, the decision to impose a finance penalty of £200,000 does not fall to be set aside because it was unreasonable.

64. Advocate Shepherd submits that the decision to impose the maximum fine permissible under section 11D of the FSC Law is not a fair, proportionate or consistent use of the GFSC's enforcement powers. Particular regard should have been had to the fact that the Appellant is an individual and not a corporate entity. The disparity in penalties as between the Appellant and GIBL and Mr Wickins shows that the approach taken was flawed. Referring to and relying on penalties imposed in the United Kingdom, where there is no statutory cap, was wrong. In short, Mr Davis erred in his approach because he did not comply with section 11D(2).

65. In this regard, I have compared the content of the Minded To Notice with what has been set out in the Statement of Reasons (ignoring changes to paragraph numbering). The section dealing with aggravating and mitigating factors remains unchanged save for the correction of one typographic error. In respect of the Appellant, the Statement of Reasons states:

"*342.1 Mr Merrien bore day-to-day responsibility for the long-term business of GIBL and it was Mr Merrien who actively mis-sold long term products to GIBL clients as set out above.*

342.2 Mr Merrien's behaviour in respect of recommending investment products which were not suited to the licensee's clients' needs was not isolated to his tenure at GIBL (although the Commission would be minded to reach the decision set out in this Notice even without having regard to this factor).

342.3 After conditions were imposed on GIBL pursuant to the Commission's letter of 10 October 2013 under which GIBL was not to transfer or relocate off its premises any records, including electronic and client records, relating to long-term insurance business without the prior written consent of the Commission, Mr Merrien (without the prior consent of the Commission) transferred confidential client information to his person email address in order to contact clients."

The Statement of Reasons also records (at paragraph 341.1) that "*The Commission considers*

that the primary responsibility and culpability rests with Mr Merrien, and accepts that Mr Merrien did not disclose to Mr Wickins what he was doing or the payments he received."

66. When setting out his conclusions on the factors he was required to take into account pursuant *inter alia* to section 11D(2) of the FSC Law, the first area where changes were made relates to paragraph (e) ("*the potential financial consequences to the person concerned, and to third parties including customers and creditors of that person, of imposing a penalty*"). The changes appear to have arisen following submission of the Appellant's letter dated 14 November 2014 explaining the financial loss he had already experienced. Paragraph 355 in the Statement of Reasons sets out the position as follows:

"*355.1 The financial impact of a penalty on Mr Merrien will be high.*

355.2 Mr Merrien says that he is presently unemployed and has been unable to find any work since December 2013.

355.3 Mr Merrien has submitted a schedule of his assets and liabilities which has been considered and taken into account. He maintains that he would be unable to pay <u>any</u> fine and that the imposition of a financial penalty would bankrupt him.

355.4 However, the level of the financial penalty imposed on Mr Merrien is proportionate to the seriousness of his behaviour, the money he personally received as a result (which as admitted in the Mourant Submissions is not less than £63,500), and the scale of the sums invested by GIBL clients which are likely to be at risk.

355.5 The consequences of the proposed sanctions are extremely serious for Mr Merrien. Mr Merrien would be unable to make a living as a director, controller, partner or manager of a regulated business.

355.6 Mr Merrien has informed the Commission that he has debts in respect of loans. The imposition of a financial penalty would be likely to affect his ability to repay his creditors.

355.7 Mr Merrien does not appear to be in a position to make any significant payment of compensation to GIBL clients (subject to any potential availability of cover under a policy of professional indemnity insurance), whether or not a financial penalty is imposed.

355.8 It is acknowledged that the public statement will have an adverse impact. The publicity is likely to affect his ability to obtain other employment."

Despite the inclusion in this paragraph of reference to what the Appellant had stated in his letter of 14 November 2014, the substance of what became paragraph 355.4, referring to proportionality, remained unchanged.

67. In respect of the factors in paragraphs (a) to (d) of section 11D(2), there were no real changes from the Minded To Notice. The Appellant did not bring matters to the attention of the GFSC (as was also the case with Mr Wickins and GIBL). The assessment made of the seriousness of each drew a distinction between the Appellant, whose contraventions taken as a whole were regarded as "*very serious*", whereas for Mr Wickins the failures taken as a whole were described as "*serious*" and the failure of GIBL was also "*serious*". Similarly, as I have previously mentioned, in relation to inadvertence, the GFSC found that the Appellant had acted deliberately, whereas the failures on the part of others were not deliberate, albeit that reference was made to the position of GIBL as it took responsibility for the acts of the Appellant. In respect of efforts to rectify the position and to prevent a recurrence, paragraph 352 of the Statement of Reasons records:

"*352.1 Mr Merrien has resigned as a director of GIBL and as an employee with effect from 31 December 2013.*

352.2 The Commission is not aware of any efforts by Mr Merrien to rectify the contraventions or prevent a recurrence.

352.3 In the Mourant Submissions it is suggested that Mr Merrien sought to work with GIBL to move the client book to a suitable alternative provider, but no particulars of his efforts in this regard have been provided."

In relation to GIBL and Mr Wickins, the matters recorded include that the Appellant was suspended by GIBL on 19 December 2013 and that GIBL's licences to carry out long-term insurance business and controlled investment were surrendered and cancelled respectively on 26 February 2014. These were all aspects of GIBL ending its relationship with the Appellant, which really started with the Appellant tendering his resignation on or before 3 December 2013. Therefore, perhaps the most significant step taken to prevent any recurrence of what the Appellant, and so GIBL, had done, was this resignation. Because the Appellant has never held any licence personally, his decision to leave GIBL seems to me to be something designed to prevent any recurrence. Because of the ongoing investigation, and the publication of the notice on the GFSC's website from that time relating to him, the Appellant was highly unlikely to have been able to put himself in a position to repeat what he had done. Indeed, as GIBL's letter to Mr Gaudion dated 3 December 2013 informing him of the resignation states, the Appellant "*has decided a change of career is in order and does not plan to seek an AIR position with another company in Guernsey*". I think paragraph 352.2 is, therefore, not entirely accurate.

68. Turning finally to the factor in section 11D(2)(f) of the FSC Law ("*the penalties imposed by the Commission in other cases*"), which has been dealt with in conjunction with section 11C(2)(f), which is in similar terms relating to making a public statement, the Statement of Reasons refers to two additional cases from June and October 2014. Paragraph 357 of the Statement of Reasons refers to a financial penalty of just £400 imposed without publication of any statement, where the breach was regarded as "*of a minor nature*" and where the individual "*had very few assets or available funds and their income was very low*". Paragraph 356 refers to financial penalties imposed on the directors of Kingston Management (Guernsey) Limited, but without stating the amount, a penalty of £10,000 imposed on Christopher Hubbard, which was coupled with a prohibition order, a penalty of £150,000 against Generali Worldwide Insurance Company Limited, a penalty of £30,000 imposed on Willow Trust Limited and a penalty of £70,000 imposed on the Guernsey branch of Ahli United Bank (UK) plc. At paragraph 358, Mr Davis commented that "*Although the Commission has had regard to the action taken in these cases, it is not considered that any of them sets a direct precedent for this case.*"

69. In paragraph 359 of the Statement of Reasons, Mr Davis sets out that the GFSC has also had regard to recent cases of a similar nature in the United Kingdom. In paragraph 360, it is similarly noted that "*None of these cases is a direct precedent for this case.*" The only difference from the Minded To Notice is the inclusion of paragraph 359.5 referring to Final Notices published by the Financial Conduct Authority on 5 November 2014 censuring persons involved with Swinton Insurance and imposing fines. Upon reviewing the transcript of the meeting on 12 November 2014, I did not spot any opportunity being given to the Appellant to make any comment on these particular penalties. The most substantial fines referred to were those imposed on Sesame Limited and UBS AG. The fines imposed on the individuals mentioned, including those at Swinton Insurance, all exceeded £200,000.

70. One major change between the Minded To Notice and the Statement of Reasons, though, is the inclusion of paragraph 361:

"*The maximum penalty which the Commission has power to impose under section*

11D of the Financial Services Commission (Bailiwick of Guernsey) Law, 1987 is £200,000. But for that statutory cap, the Commission considers that the seriousness of Mr Merrien's conduct as recorded above, exacerbated by his failure to take responsibility for exposing clients of GIBL to undue risk in connection with a significant part of their pension portfolios, and by his failure to deal with the Commission in an open and cooperative manner in the course of these Enforcement Proceedings, would have merited a substantially higher financial penalty."

71. In my judgment, this paragraph shows that Mr Davis misdirected himself when considering his approach to the appropriate financial penalty to impose. The matters that section 11D(2) of the FSC Law required him to take into consideration are exhaustively listed. There is no general catch-all at the end permitting the GFSC to take into consideration, eg, any other relevant matter. The scheme of the subsection is to ensure that a consistent approach to financial penalties is developed. However, that approach must recognise and respect that the legislature has seen fit to impose a statutory cap of £200,000. The GFSC is as much bound by that statutory cap as anyone else, including this Court. If the GFSC considers that the continuance of a statutory cap is no longer warranted, or that the cap should be increased, the appropriate course of action is to seek amendment to the legislation through a political process.

72. This aspect was touched on in the intervention made by the Director-General towards the end of the meeting on 12 November 2014. Mr Davis had referred to questions of proportionality within a statutory maximum and the approach often taken of having three or more bands of penalty within such a cap and Mr Mason volunteered that the approach he and Mr Gaudion had been taking to cases that settled rather than those which resulted in a formal decision was for them to be:

    "*… guided by the seriousness of the offence and incidentally the IMF has criticised the lack of our ability to fine anybody more than £200,000 in its findings of 2010, but operating within the £200,000 maximum limit, we have tried to strike notes on the scale as it were, so that the less serious cases received a lesser penalty, and more serious cases received a more serious penalty. Clearly, if we were to have a maximum of £1 million, £5 million, £1 billion, the ability to pay would come into effect to a far greater extent but given how low the penalties are in absolute terms, we have looked at seriousness to probably a greater degree than anything else in deciding what the best route to settle would be.*"

    Mr Davis then proceeded to enquire what the GFSC's position was in relation to the statutory maximum and seriousness, possibly overlooking that he had been appointed, and so was acting, as an officer of the GFSC and not in some capacity external to it, to which Mr Mason explained that the highest penalty reached through a settlement agreement was £190,000 and that it had been agreed in respect of a regulated entity rather than an individual.

73. I have noted that paragraph 6.1.4 of the Guidance Note explains that "*The Commission operates a discount scheme for discretionary financial penalties (and/or in relation to periods of prohibition) on early settlement*". There is a sliding scale of 30% if settlement is achieved before the matter is referred to a decision-maker down to 10% if resolved before three days prior to the end of the period permitted for representations after the issue of a Minded To Notice. The settlement to which the Director-General referred appears at face value to involve no more than a 5% discount from the statutory maximum and it seems to me to be likely that this occurred well before any Minded To Notice was issued and probably before the appointment of a decision-maker. Whilst it is not for me to pass comment on any case other than the Appellant's, I am left with the impression that the GFSC has generally recognised that penalties against entities can be higher than against individuals and that the GFSC is perhaps not paying as much regard to the strictures placed on it by the legislature as it should. In particular, by having regard to the level of penalties imposed in the United Kingdom where, as I understand it, there is no statutory cap, Mr Davis has taken into account something that I find, by reference to section 11D(2), he should not have done. He appears to

have done so in such a way to justify the imposition of a financial penalty at the very maximum permissible. However, in my judgment, he could only do so by reference to the matters he was permitted by the FSC Law to take into consideration. Because this is a type of *Wednesbury* unreasonableness, I have reached the conclusion that the decision to impose the financial penalty of £200,000 was an error of law. I do so having regard to the analysis given by Beloff JA in *Walters v States Housing Authority* (1997) 24.GLJ.76 as such unreasonableness being a matter for the presiding judge and not the Jurats, although under the wording in section 11H(2) of the FSC Law it could equally fall under paragraph (b) as well as paragraph (a).

74. As a matter of principle, imposing the maximum amount permitted does not mean that this has to be the very worst case that could ever be envisaged, as Advocate Shepherd suggested. To that extent, I accept the submissions made by Advocate Hill that there is a band of activity at the upper end of the spectrum of seriousness in which every case, even though some will be worse than others, warrants consideration of the maximum penalty. In considering whether a person's contravention or non-fulfilment is one of the worst examples of its kind, the GFSC should adopt a similar approach to that of a sentencing court and ask whether it falls within a broad band of cases it regards as amongst the worst examples it encounters in practice. The focus should initially be on the experience in Guernsey. This is clear from the requirement to take into consideration penalties imposed in other cases by the GFSC. If it is something about which the GFSC has no prior experience, I see no reason why it cannot look to other jurisdictions for guidance, not so much as to the penalties imposed, which I consider to have been the error into which the Senior Decision Maker fell, but rather to assess whether the contravention or non-fulfilment with which it is dealing can properly be categorised in the most serious category. In this way, the GFSC can build up its own experience at assessing the level of seriousness in order to develop ways in which to categorise the types of case with which it may have to deal again in the future. However, even in a case where the GFSC finds itself considering the imposition of the maximum penalty of £200,000, it ought to bear in mind that it is still required to take into consideration all the matters specified in section 11D(2) of the FSC Law. For example, if there is what might be regarded as significant mitigation, that should be reflected in the penalty imposed. It follows that it would be an exceptional case where the statutory maximum penalty would be imposed if there was substantial mitigation.

75. Because of the imposition in the Appellant's case of the maximum financial penalty available, regard needs to be had on its effect in the future as well as by reference to what has happened previously. This is because of the terms of section 11D(2)(f) of the FSC Law, which refers to "*penalties imposed by the Commission in other cases*" and does not qualify it in any way by limiting the consideration only to cases resolved previously. Once a maximum financial penalty has been imposed, as it was in respect of the Appellant, there is simply no headroom left for use in any other case. That is why it is essential that any personal mitigation is taken into consideration so that appropriate distinctions between the penalties imposed of persons in different situations can be reflected. I note that all that is said about the financial penalty of £30,000 imposed on Willow Trust Limited on 17 June 2014, ie, during the time when the investigation in the present case had been completed and it was in the hands of Mr Davis, is that it was "*for systematic failings in its anti-money laundering procedures, systems and controls*". Whether or not that case was treated as falling outside the highest range of cases as regards seriousness is unclear. However, the reference to "*systematic failings*" certainly suggests to me that this was something that might have been regarded by the GFSC as being very serious, yet I infer from the level of penalty, even if a substantial discount had been applied, that it was not placed in the same top category of seriousness.

76. In relating to the matters he was dealing with, I am satisfied that it was appropriate for the Senior Decision Maker to apportion the blame more to the Appellant than to Mr Wickins. The distinction drawn between serious and very serious was clearly justified. Similarly, it was appropriate to draw a distinction between the Appellant having been found to have acted deliberately and Mr Wickins not to have done so. As I have already indicated, I am not persuaded that Mr Davis was correct in treating the Appellant as having made no effort to

prevent a recurrence, but it has to be recognised that GIBL under the control of Mr Wickins was doing its best to rectify matters. These are all considerations that point squarely towards Mr Davis being quite justified in approaching the Appellant's case differently from that of Mr Wickins. One issue, though, is whether these differences explain the very different approach that was taken or, to put it another way, whether the financial penalties imposed were so disparate as to call that imposed on the Appellant into question.

77. The financial penalties imposed on GIBL and Mr Wickins were £8,000 each. The Minded To Notice had intimated that Mr Davis was contemplating penalties of £10,000 each. Paragraph 21 of the Statement of Reasons records that "*By a letter dated 20 October 2014, Mr Wickins accepted the imposition on him and on GIBL of the sanctions set out in the 'Minded To' Notice.*" Mr Wickins waived his and GIBL's entitlement to attend at the meeting fixed for 12 November 2014. Referring again to paragraph 6.1.4 of the Guidance Note, no express mention is made about a discount of 20%, which is what has been applied here. I accept, of course, that any discount ultimately rests in the discretion of the Senior Decision Maker and that the content of the Guidance Note is in no way prescriptive of the approach to take. However, on the basis that the Minded To Notice must already have taken into account the level of cooperation during the course of the investigation, and the Guidance Note making explicit reference to accepting the content of the Minded To Notice without more ado, this apparent discrepancy in approach is something to which Advocate Shepherd has drawn attention as relevant to the disparity of treatment between Mr Wickins and GIBL on the one hand and the Appellant on the other. I also accept Advocate Hill's suggestion that I must recognise that the sanctions imposed on Mr Wickins and GIBL are not the subject of this appeal, but rather that any comparisons to be drawn between the positions of the three persons dealt with by Mr Davis must be firmly based in the grounds of appeal advanced on behalf of the Appellant.

78. Advocate Shepherd has highlighted the fact that, without further analysis, anyone looking simply at the financial penalties imposed will be led to believe that the culpability of the Appellant was at least 20 times worse than that of Mr Wickins and GIBL. Adopting and adapting an approach that operates in criminal appeals against sentences, I have asked myself whether right-thinking members of the public might consider that something appears to have gone wrong with the administration of justice. It is clear that any financial penalty to be imposed must be fair and proportionate. Accordingly, any explanation given for why the penalties in the Appellant's case are so severe by comparison to those for Mr Wickins and GIBL would need to be clear and compelling. I am not persuaded that the Statement of Reasons meets that requirement (and would add that the same comment applies equally to the Minded To Notice).

79. Advocate Hill suggested that if the financial penalties imposed on Mr Wickins and GIBL are regarded as being too low, that in itself will not assist this Appellant if the penalty imposed on him is unobjectionable. I accept that submission so far as it goes. On this appeal I cannot, of course, change the outcome in respect of Mr Wickins or GIBL. However, the potential disparity in approach arose from the time of the Minded To Notice. Having regard to the approach in other cases, the GFSC was required not only to consider the penalties imposed on other occasions but also the penalties being imposed in the instant case. What is necessary to comply with section 11D(2)(f) of the FSC Law is to have an approach that is objectively consistent. Anyone considering the level of penalties imposed across the board should be able to understand, from a full appreciation of the relevant facts and circumstances in each case, why the financial penalty has been fixed at the level it has. I take the view that the alignment of GIBL to the position of Mr Wickins rather than the position of the Appellant, when the Statement of Reasons clarifies that GIBL necessarily has to take some responsibility for the acts of the Appellant, sends a confused message. Accordingly, whilst I am satisfied that Mr Davis could legitimately put the Appellant's case into a different band from that of Mr Wickins and of GIBL, I regard the disparity of approach as being so great that it brings into question whether the financial penalty imposed on the Appellant is disproportionate. In my judgment, this constitutes a further reason why the decision to impose this financial penalty should be set aside.

80. A final consideration in this regard is that I am not persuaded that the approach taken to section 11D(2)(e) of the FSC Law in respect of the potential financial consequences to the person concerned, ie, the Appellant, was the correct one. As I have already set out, there were changes to the text from the Minded To Notice and what became paragraph 355 in the Statement of Reasons. These rehearsed the matters that the Appellant had raised in his letter dated 14 November 2014 about his ability to pay. In my view, the GFSC must, when imposing any financial penalty, have regard to a person's ability to pay the level of financial penalty to be imposed. It would be wrong in principle to impose a financial penalty that the GFSC knew a person would simply be unable to pay within a reasonable time. The Final Notice required payment of £200,000 by the Appellant within seven days. In the alternative, 12 monthly payments could be made. This option of paying over a year is, in my view, consistent with the sort of length of time that could properly be permitted. There is, however, no indication in the Statement of Reasons that the Appellant was in any position to make those monthly payments out of income, which seems unlikely given the fairly dire prospects of the Appellant securing reasonably well-paid employment, which are mentioned in paragraph 355 anyway, or through liquidating assets, to which no reference is made at all. Indeed, Mr Davis noted that the Appellant had been unemployed since his employment with GIBL ended almost a year earlier and also that the other sanctions being imposed means that he will be unable to earn his living from the financial services sector in which he had been employed for the bulk of his working life. The impression is that none of these factors has had any bearing at all on the level of financial penalty to be imposed. It looks as though a decision had been taken to impose the statutory maximum to make an example of the Appellant whatever his financial circumstances and ability to pay. Without a closer analysis of his financial circumstances being undertaken, it also appears that Mr Davis has adopted the approach mentioned by the Director-General that the GFSC had got into the habit of looking at seriousness to a greater degree than anything else, thereby paying little or no regard to a person's ability to pay, and had done so because the statutory cap was regarded as unduly inhibiting. If so, this is a further example of a form of non-compliance with the statutory regime, because it amounts to affording paragraph (b) of section 11D(2) significantly more weight that paragraph (e) where the legislature has simply provided that all these matters must be taken into consideration. In my judgment, the Senior Decision Maker failed to address his mind properly to section 11D(2)(e) because he has not indicated that he satisfied himself that the Appellant is in a position to pay the penalty imposed, with the consequence that I cannot be satisfied that the financial penalty imposed is proportionate.

81. For all these reasons, the Appellant has satisfied me that his appeal against the imposition of the financial penalty of the statutory maximum of £200,000 should be allowed. The reference of the Senior Decision Maker to the higher penalties imposed in cases in the United Kingdom as a means of questioning the propriety of the statutory cap and providing the basis for indicating that an even larger financial penalty would have been imposed as appropriate had it been available to him was, in my judgment, an error because he took into account something that he should not have taken into account. Mr Davis was obliged to address his mind only to the matters set out in section 11D(2) of the FSC Law. It also demonstrates that he was not paying sufficient attention to the legislative framework under which a statutory maximum financial penalty exists. Further, his approach seems to have overlooked the requirement to deal with the Appellant's case in a manner that did not create any disparity between the penalties being imposed not just with regard to previous decisions of the GFSC, because there is no mention in the paragraph of only looking at earlier cases, but also the decisions in respect of the other persons being dealt with in the present case. Whilst different levels of penalty are capable of being imposed, when the disparity is as great as it is, the explanation given for it must be sufficiently clear to enable anyone considering it to understand the reasons for the differences that have been drawn. I take the view that the differences between serious and very serious and deliberate and not deliberate may well not have warranted such a great difference of financial penalty. Moreover, having aired the difficult financial circumstances in which the Appellant has found himself, being the principal personal mitigation he advanced on his behalf, I think it was incumbent on Mr Davis to spell out that the financial penalty being imposed was capable of being satisfied by the Appellant. If it was

not, then the level of penalty is wrong in principle. If the penalty has been designed to be at a level that is meant to be harsh, but still fair and proportionate to the seriousness of the Appellant's actions and the Appellant's present and foreseeable financial circumstances, then I think that needed to be explained more fully than it has been. From the Statement of Reasons, the decision in respect of the level of the penalty simply appears to be disproportionate.

Public statement

82. Having allowed the Appellant's appeal under section 11H(1)(d), it necessarily follows that I must allow the appeal under section 11H(1)(c) of the FSC Law. For the reasons already set out in relation to whether there has been a material error as to procedure, I am satisfied that the entire process has not been vitiated through any such error. The statutory framework that needed to be followed prior to the publication of the statement pursuant to sections 11C and 11E was complied with. The exercise of the GFSC's discretion to publish a statement setting out the decisions reached was, in the circumstances of this case, fully justified. I am satisfied that, as a matter of general principle, none of the other grounds set out in section 11H(2) applies. However, because the public statement refers to something that is no longer accurate, it is obvious that it cannot stand. Indeed, the publication of the Appellant's name and the amount of the penalty may have been done in reliance on section 11D(3) and so falls to be dealt with as an ancillary aspect of the imposition of the penalty itself, which has now been set aside.

83. In reaching this conclusion about the public statement, however, I should emphasise that I am certainly not allowing the appeal against the GFSC's decision to publish a statement in a general manner, ie, in the sense of holding that the GFSC is not permitted to publish any statement about the Appellant, because that would be quite unwarranted. It was entirely appropriate for the GFSC to publish a statement about the Appellant setting out what it had decided about his contraventions and the finding that he does not fulfil the minimum criteria for licensing. Accordingly, although the statement published relating to its decisions on 3 December 2014 will have to be removed in due course, because it refers to the decision to impose the financial penalty of £200,000, which I am setting aside, the GFSC will be at liberty if, as I suspect it may well wish to, to publish a revised statement relating to the decisions taken on 3 December 2014 that have been upheld and whatever the outcome is of the fresh decision to be taken in respect of the appropriate financial penalty to impose. I have referred to "*in due course*" in relation to when the public statement will have to be removed because I have acceded to the Appellant's request that the effect of allowing the appeal against the public statement should be stayed until the conclusion of the criminal trial he is facing. The GFSC, through Advocate Hill, has raised no objection to the staying of this element of the appeal. I am ordering the stay so as to avoid the risk of there being any prejudice to the administration of justice in those proceedings.

Conclusions

84. Although the Appellant has sought to challenge the entire process leading to the decisions taken by Mr Davis, as a Senior Decision Maker of the GFSC, on 3 December 2014, the only appeal that I have found to have merit is that against the imposition of a financial penalty of £200,000. I have found that Mr Davis took into account the levels of penalties imposed in the United Kingdom and that, in any event, the level of financial penalty imposed is disproportionate. The appeal against the imposition of this financial penalty is, therefore, allowed. As a consequence, the public statement made at that time contains inaccurate information and so must also be modified in due course. It cannot continue to be published in its current form and so the appeal in relation to the public statement is also allowed on this limited basis, but the effect of this aspect of the appeal is stayed until the trial in the criminal proceedings against the Appellant has concluded. All the other appeals advanced on the Appellant's behalf are dismissed.

85. By virtue of section 11H(5) of the FSC Law:

"*On an appeal under this section the Court may –*

> *(a)* *set the decision of the Commission aside and, if the Court considers it appropriate to do so, remit the matter to the Commission with such directions as the Court thinks fit, or*
>
> *(b)* *confirm the decision, in whole or in part.*"

As a result, the decision as to the appropriate level of financial penalty to impose on the Appellant (and consequential changes to the public statement to be made about the sanctions imposed on the Appellant) fall to be remitted to the GFSC. I do not consider it appropriate to give any particular directions to the GFSC save for those that will already be apparent from the reasons I have given for allowing this element of the appeal. In respect of what I acknowledge amount to very serious contraventions by the Appellant that were clearly not inadvertent, the GFSC must respect the statutory cap and must take into account only those factors set out in section 11D(2) of the GFSC Law. In doing so, proper regard must be had to the potential financial consequences to the Appellant and his ability to pay whatever financial penalty is imposed within a reasonable period of time. The remainder of the decisions of the GFSC are confirmed.

86. I will reserve the costs of the appeal. If the parties are able to agree an order in respect of costs, that can be dealt with by way of a Consent Order. If not, the matter should be re-listed at a suitable Interlocutory Court.

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