



**Cees Schrauwers (Chairman of the Guernsey
Financial Services Commission) v David John Merrien.**
Court of Appeal
17th March, 2016

**JUDGMENT
24/2016**

**Appeal in relation to the setting aside in amount of a financial penalty imposed by the
Guernsey Financial Services Commission and its remission for reconsideration.**

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO. 498

17th March 2016

Before:

**James McNeill QC
Sir David Calvert-Smith
His Honour David Doyle**

Between:

**CEES SCHRAUWERS
(Chairman of the Guernsey Financial Services Commission)**

Appellant

-and-

DAVID JOHN MERRIEN

Respondent

**Advocate P Nicol Gent appeared for the Appellant
The Respondent appeared in person**

McNEILL, JA

THIS IS THE JUDGMENT OF THE COURT

Introduction

1. This is an appeal brought by the Guernsey Financial Service Commission (the "GFSC") from certain parts of a judgment of the Royal Court (Ordinary Division) (McMahon, D.B.) handed

down in private on 25 September 2015. This appeal is presented pursuant to Section 11H (9) of the Financial Services Commission (Bailiwick of Guernsey) Law, 1987 (the "FSC Law"). The proceedings below constituted an appeal by Mr Merrien ("the Respondent") against certain enforcement proceedings against him. As with the judgment of the Royal Court, this judgment is handed down in private so as to reduce the risk of any prejudice to the fairness of pending criminal proceedings. This judgment will be published after the Respondent's criminal trial has been concluded.

2. The GFSC submits that the Royal Court erred in law in its application of Section 11D (2) and Section 11D (2)(e) of the FSC Law. In particular it contends that, in deciding whether to impose a financial penalty under Section 11D (1):
 - (a) Section 11D (2) of the FSC Law does not exhaustfully list the factors which the GFSC may properly take into account; and
 - (b) Section 11D (2)(e) of the FSC Law does not require the GFSC to be satisfied that the person concerned is in a position to pay the penalty either at all, or within a reasonable period of time.

3. The proceedings below comprise an appeal brought by the Respondent, challenging the decision of the GFSC to publish a notice on its website on 19 December 2013 in respect of the Respondent. In that appeal the Respondent also challenged decisions made on 3 December 2014 to make prohibition orders against him under regulatory Laws, to disapply exemptions, to impose a financial penalty of £200,000 and to make a further public statement. The learned Deputy Bailiff dismissed all grounds of appeal save one and remitted to the GFSC for reconsideration the decision to impose the penalty of £200,000. and for consequential amendments to the public statement. The Respondent has not appealed the decision. As was

made clear to the Royal Court, the principal complaint of the Respondent was as to the level of financial penalty imposed.

Background

4. The following short narration is taken from the judgment below. Guernsey Insurance Brokers Limited ("GIBL") was incorporated on 8 July 2010. Shortly thereafter 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. The Managing Director and major shareholder of GIBL, Mr. Wickins, had been involved from the outset. In 2011 the licence to GIBL was extended to long term life insurance products and 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.
5. The Respondent had worked in the insurance sector in Guernsey since 1993, operating under the various licences of those employing him rather than holding a personal licence. He commenced his employment with GIBL in August 2011 and became a director and shareholder in January 2012.
6. The GFSC undertook an audit visit to GIBL on 8 October 2013, apparently having been made aware that the Respondent may have been engaging in restricted activities without being adequately licensed to do so. The visit was conducted by an officer at the GFSC and another individual, and they produced a report dated that day which highlighted serious concerns with regard to regulatory compliance. On 10 October 2013 the GFSC served a notice on GIBL under Section 27 of the POI Law, requesting further information and documentation. On the same day the GFSC also wrote to GIBL seeking its agreement to the imposition of conditions on its licence.

7. Interviews took place with Mr. Wickins on 16 December 2013 and with the Respondent on 19 December 2013, by which time the Respondent had tendered his resignation from GIBL, to take effect from 31 December 2013. The Respondent was suspended from his employment on 19 December 2013.
8. The GFSC investigation continued into 2014 and, at its conclusion, a draft Enforcement Report was sent out on 2 May 2014. The Respondent did not respond with comments within the requested timeframe and the Respondent was arrested on 2 June 2014 at which time the police took possession of various papers and a laptop computer.
9. A draft form of notice indicating the sanctions which might be imposed, and including an early draft of what eventually became the Statement of Reasons, was hand-delivered to the Respondent, Mr. Wickins and GIBL on 1 August 2014. Although Mr. Wickins made written submissions, there was no response from the Respondent.
10. By this time Mr. Glen Davis QC had been appointed as an officer of the GFSC and a Senior Decision Maker on 9 June 2014 pursuant to Section 11(1) of the FSC Law. This appointment was made in respect of considering, hearing and determining enforcement proceedings involving the possible imposition of sanctions on GIBL, Mr. Wickins and the Respondent.
11. Mr. Davis conducted a hearing on 12 November 2014, with the Respondent being given the opportunity to provide additional written representations thereafter. The Respondent did so and, having considered everything provided to him, Mr. Davis exercised the powers delegated to him and issued his decision on 3 December 2014 with a detailed Statement of Reasons of the same date. His conclusion was that all three of the subjects of the process had contravened in material particulars provisions of or made under the Regulatory laws and did not fulfil any of

the minimum criteria for licensing specified in those laws, and applicable to the person in question. It was that decision which the Respondent appealed in the proceedings below. The decision was set out in a Final Notice signed by Mr. Davis QC.

12. The Final Notice recited the matters that the GFSC was required to take into consideration under Sections 11C (2) and 11D (2) of the FSC Law 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."*

To this was added:

"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 [the Respondent] and Mr. Wickins for the matters described in the Statement of Reasons."

13. As a result of that Decision, the GFSC imposed on the respondent the sanctions of prohibition from performing certain regulated functions, disapplied the exemption in Section 3(1)(g) of the Regulation of Fiduciaries, Administration, Business and Company Directors etc., (Bailiwick of Guernsey) Law 2000 (the "Fiduciaries Law"), which would otherwise permit the Respondent

to act as a director of not more than six companies in regulated activities without requiring a personal fiduciary licence; and imposed the financial penalty of £200,000.

14. The terms of the financial penalty were that it would be paid within seven days of the date of the Final Notice save that, if the Respondent had paid £16,666.74 within seven days of the date of the Final Notice, he might then pay the balance by eleven instalments thereafter of £16,666.66 monthly.
15. The Final Notice also indicated that the GFSC would publish a public statement in a form annexed.

The present Appeal

16. The subject matter of the present appeal comprises elements relating to the financial penalty.
17. The financial penalty was imposed under Section 11D of the FSC Law and was the maximum permitted under that section. Section 11D 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 on him a penalty in respect of the contravention or non-fulfilment of such 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

18. The grounds of appeal advanced below on behalf of the Respondent in respect of the financial penalty embraced alleged errors as to procedure together with reasonableness and proportionality. The learned Deputy Bailiff considered that the general complaint about overall procedure could not be sustained and indicated that, having regard to the seriousness of the findings against the Respondent, there were clear grounds on which to impose a financial penalty rather than not to do so: see paragraph 56 of the judgment below.
19. On behalf of the Respondent a number of findings made by Mr. Davis had been questioned upon the basis that it was unreasonable for him to have made those findings which related to dishonesty, concealment, misrepresentation among others. However the learned Deputy Bailiff did not find that the Respondent had identified anything in the approach taken by Mr. Davis which could lead to the financial penalty being set aside because it was unreasonable: see paragraphs 57 to 63.
20. As I have indicated there is no appeal against the findings below by the Respondent and the issue, for present purposes, is with the determination as it reflected upon the approach of Mr. Davis to the operation of Section 11D (2). In particular it had been submitted that insufficient regard had been had to the fact that the Respondent was an individual and not a corporate entity, that the disparity in penalties as between the Respondent, and GIBL and Mr. Wickins

showed that the approach taken was flawed and that it had been wrong to refer to and rely on penalties imposed in the United Kingdom where there was no statutory cap.

21. The learned Deputy Bailiff addressed these matters in paragraphs 65 to 80 of the judgment below. Having done so, he was satisfied that the appeal against the imposition of the financial penalty of the statutory maximum of £200,000 should be allowed for three reasons which he summarised at paragraph 81.

22. In the first place he took the view that Mr. Davis had misdirected himself when considering his approach to the appropriate financial penalty to impose. In the view of the learned Deputy Bailiff the matters set out in Section 11D (2) of the FSC Law provided an exhaustive list of what could be taken into account and there was no general catch-all permitting the GFSC to take into consideration any other relevant matter. In particular, it had to be recognised and respected that the legislature had seen fit to impose a statutory cap: see paragraph 71. The learned Deputy Bailiff was concerned that Mr. Davis had misdirected himself because of the terms expressed in paragraph 361 of the Statement of Reasons which is set out as follows:

"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."

23. It seemed to the learned Deputy Bailiff that this passage reflected the fact that the GFSC had also had regard to recent cases of a similar nature in the United Kingdom where there was no statutory cap: see paragraph 69 and paragraph 73 below, read together with paragraph 81.
24. In the second place, the learned Deputy Bailiff considered that the approach of Mr. Davis appeared to have overlooked the requirement to deal with the case for the Respondent in a manner that did not create any disparity between penalties being imposed, among other matters, in respect of the other persons being dealt with in the case. Without more full explanation, the level of penalty appeared to the learned Deputy Bailiff to be disproportionate: see paragraph 81 read together with paragraphs 74 to 79.
25. In the third place the learned Deputy Bailiff took the view that, having aired the difficult financial circumstances in which the Respondent had found himself, it was incumbent upon Mr. Davis to spell out that the financial penalty being imposed was capable of being satisfied by him. If it was not, the level of penalty was wrong in principle. If the penalty had been designed to be at a level that was meant to be harsh but still fair and proportionate to the seriousness of the actions, it needed to be explained more fully than it had been: see paragraph 81.

Submissions

26. For the GFSC, Advocate Nicol-Gent submitted that Section 11D (2) had to be read in conjunction with the suite of regulatory laws which conferred the powers and discretion that the GFSC is permitted to exercise to discharge its functions.

27. The GFSC was a creation of statute through Section 1 of the Financial Services Commission (Bailiwick of Guernsey) Law 1987 (the "FSC Law"). Its functions are described in Section 2 of the FSC Law as follows:

"(2) The general functions of the Commission are –

(a) to take such steps as the Commission considers necessary or expedient for the
... effective supervision of finance business in the Bailiwick,

...

...

(e) 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, certainness and integrity of that part of the Bailiwick's
financial services sector for which it has supervised a responsibility, ...

...

...

(3) The statutory functions of the Commission are –

(a) the functions transferred to it by Section 3,

(b) the functions assigned to it by or under any enactment ...

(c) to provide for [the Policy Council], when the [Policy Council] so requests,
reports, advice and assistance in relation to the exercise of the [Policy
Council's] functions under any enactment relating to finance business."

28. In addition, Section 8(1) of the FSC Law sets down the overarching powers of the GFSC that it "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".

29. Turning to the POI Law, Advocate Nicol-Gent submitted that the POI Law was the statutory regime created to protect investors in respect of certain controlled investments. Licensing was required and, in order to undertake restricted activities, licensees had to meet the minimum criteria for licensing set out in Schedule 4. In supervising licensees, the GFSC could take steps to ensure that licensees were acting in compliance with the minimum criteria for licensing and, where they were not, take action. In carrying out its functions under Section 2A of the POI Law, the GFSC had to have regard to the following objectives:

"(a) *Protecting –*

(i) *investors,*

(ii) *the public, and*

(iii) *the reputation of the Bailiwick as a financial centre,*

(b) *...*

(c) *reducing risks to a financial system in the Bailiwick."*

30. These supervisory functions were statutory functions of the Commission within the meaning of Section 2(3)(b) of the FSC Law.

31. Section 11D (1) of the FSC Law allowed for the imposition of financial penalties for not meeting the minimum criteria for licensing under the Regulatory Laws. Section 24 of the FSC Law provided that the "prescribed Laws" included "the regulatory Laws" which were inclusive of, but not limited to, the POI Law. The act of imposing a financial penalty was, along with other enforcement sanctions, in support of a statutory function assigned to the GFSC under any enactment which, in this case, was the FSC Law read together with the contraventions of the POI Law.

32. Section 2(4) of the FSC Law provides:

"In the exercise of its [...] functions the Commission may take into account any matter, which it considers appropriate, but shall in particular, have regard to –

- (a) [the protection of the public interest, including] the protection of the public against financial loss due to dishonesty, incompetence or malpractice by persons carrying on finance business, and
- (b) the protection and enhancement of the reputation of the Bailiwick as a financial centre."

33. Advocate Nicol-Gent pointed out that the ellipsis in Section 2(4) reflected the repeal of the word "general" by Section 1 of the Financial Services Commission (Bailiwick of Guernsey) (Amendment) Law 2002. It therefore followed that the discretion permitted by Section 2(4) of the FSC Law, on a proper construction, was exercisable in relation to both the GFSC's general and statutory functions.

34. Advocate Nicol-Gent then turned to Section 11D (2) the terms of which we repeat here:

"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."

35. In the submission of Advocate Nicol-Gent, the overriding objectives of the GFSC as set out in Section 2(4) of the FSC Law had to be available to the GFSC in its operation of Section 11D (2), notwithstanding there is no cross reference in the latter section. The factors set out in Section 11D (2) could be categorised as factors of aggravation or mitigation, but largely mitigation. On the other hand the GFSC had to be able to have the widest considerations open to it in respect of protection of the public interest and protection of the reputation of the Bailiwick as a financial centre. There could be any number of unexpected circumstances with which the GFSC might have to deal and it was eminently appropriate for a regulator to have recourse to these considerations as well as having recourse to personal considerations of aggravation or mitigation in deciding whether or not to oppose a penalty under the statute and, if so, in what amount.
36. In effect, the argument for the GFSC was that, in addition to being obliged to take into consideration the factors set out in Section 11D (2), the GFSC was entitled to take into account any other factor relevant to the decision as to whether or not to impose a penalty or as to the amount, at least insofar as the factor also bore a relationship to protection of the public interest and reputational protection for the Bailiwick.
37. Advocate Nicol-Gent then noted that, in interpreting Section 11D (2)(e) the learned Deputy Bailiff, at paragraph 80, had indicated that:

"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."

38. In Advocate Nicol-Gent's submission, on a proper interpretation of the legislation, it was not a mandatory requirement of Section 11D (2) that the person have the ability to pay the level of the financial penalty being considered. All subsections within Section 11D (2) of the FSC Law were for consideration and weight should be accorded to them depending on the circumstances. Within subsection (e) a balancing exercise as between the financial consequences on the person subject to enforcement and other third parties was required.
39. In construing the statute, the Court should have regard to the principle established in *Re Digital Satellite Warranty Cover Limited* [2011] EWHC 122 (Ch) at paragraphs [60] – [62]. There, Warren, J., held that the canon of statutory interpretation requiring a narrow construction of penal provisions did not apply in circumstances where a competing public interest was engaged.
40. It was further submitted that balancing the impact of a proportionate step taken to protect the public against a narrower consideration of the personal interest of the person subject to a financial penalty did not automatically require the court to apply a penalty by reference to their ability to pay. Weight should be given to the overall purpose and spirit of the legislation, here the Suite of regulatory Laws. Reference was made to *IRC v McGuckian* [1997] 1 WLR 991 and the speeches of Lord Steyn at pp 999-1000 and of Lord Cooke of Thordon at page 1005.
41. Turning to the proper interpretation of Section 11D (2)(e), Advocate Nicol-Gent was at pains to emphasise to us the importance of Guernsey being seen by the wider international financial

community as having a firm enforcement process, an effective overall Financial Services regime and clarity in relation to penalties. Whilst he accepted that penalties had to be imposed by reference to concepts of fairness, justice and proportionality, it was important that there was a very real deterrent effect. In particular, the European financial authorities continuously appraised the way in which small jurisdictions such as Guernsey operated and the result of those appraisals had implications for Guernsey's access to markets.

42. Accordingly, all of the factors (a) to (f) require to be considered and an appropriate weight applied to each. The learned Deputy Bailiff, on the other hand, had not approached the matter in that fashion. Advocate Nicol-Gent pointed to paragraph 80 where the Deputy Bailiff had stated: "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." Then, later in the same paragraph: "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." Finally, in paragraph 81 the learned Deputy Bailiff had indicated: "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."
43. In the submission of Advocate Nicol-Gent, this approach by the learned Deputy Bailiff reflected the approach taken from the criminal law as opposed to that within regulatory matters.

44. As regards the approach within the regulatory sector, we were referred to *Atlantic Law LLP and Greystoke v The Financial Services Authority*, and the decision of the Financial Services and Markets Tribunal dated March 2010 (HH Judge Mackie CBE QC). At paragraph 110 the tribunal had indicated that the need for the seriousness of breaches of the rules to be publicly recognised might outweigh the potential consequences for individuals as, in the view of the tribunal, it did in their case. Advocate Nicol-Gent also referred to the determination on appeal in that matter [2011] EWCA Civ 74 at [19] (Lloyd LJ):

"However, if one considers the points on penalty it is clear that the tribunal did take into account the relevant factors. In his second ground of appeal [the appellant] says the tribunal failed to pay any proper regard to the passage that I have cited from [the Decision Procedure and Penalties Manual], but it is plain that they did have regard to that factor; and, although there was no evidence before me that Mr. Greystoke himself had the means to pay, the references that I have already quoted to his dependence on his wife and the absence of any evidence as to his wife's position, means or attitude seem to me to make the tribunal perfectly entitled to take the view that the position in that respect was uncertain; but even if it was the position that neither he nor Atlantic Law could pay, that was not a reason which was determinative against the imposition of penalties of the kind that the RDC had fixed, and the other grounds of appeal relating to the amount of the penalty seem to me to be along the same lines."

45. We were referred to a decision of the Upper Tribunal (Tax and Chancery Chamber) in *Bedford v The Financial Services Authority* dated July 2011. In that case, however, in the determination given by Judge Bishopp, the tribunal stated in paragraph 34:

"It is not, we think, an immaterial consideration that if the imposition of such a penalty should provoke his bankruptcy, that eventuality would quite possibly cause prejudice to his other creditors. Accordingly, although we recognise the force of what was said by the

tribunal in *Atlantic Law LLP and Andrew Greystoke*, we think that course should be adopted only in a clear case, which we are not persuaded this is."

46. A further decision of the Upper Tribunal (Tax and Chancery Chamber), *Andrew Jeffery v The Financial Conduct Authority*, dated 27 June 2013 (Judge Berner) was referred to in written argument. We note, from paragraphs 422 and 423 of the judgment that, whilst the tribunal considered the penalty of £150,000 to be amply justified on the basis of the tribunal's own findings, the final determination in respect of the penalty was adjourned in order that Mr. Jeffery might make submission of evidence as to his means.
47. In *Attorney General v Fleming* [2015] JRC 132 we were referred to a decision of the Royal Court (Samedi Division) in Jersey (Le Cocq, DB), in order to highlight authoritative views that higher penalties may be appropriate in Jersey and in Guernsey by reason of the greater need for integrity there than, perhaps, in the United Kingdom. A similar view had earlier been expressed by the Royal Court (Samedi Division) in *AG v Caversham Fiduciary Services Limited* [2005] JRC 165 at paragraph 6.
48. In the whole circumstances, submitted Advocate Nicol-Gent, it was wrong for the learned Deputy Bailiff to hold that regard must be had to a person's ability to pay.
49. We explained to Mr Merrien that we did not require to hear from him on the technical matters of statutory interpretation but asked as to his current financial position. Mr. Merrien confirmed that he had lost his family home and that he and his family now resided in council accommodation. He was engaged in labouring work, but the weather at this time of year made such work hard to come by. His financial position, accordingly, was as insecure as it had been at the time of the hearing before Mr Davis.

Discussion

50. The opinion of the learned Deputy Bailiff with which the GFSC takes issue under this head arises only in one paragraph of the judgment below and is expressed in the context of a particular matter which was of concern to the learned Deputy Bailiff. The GFSC, quite properly, raised the issue as a potential error of law but it may be that the issue of statutory interpretation was not as thoroughly addressed by counsel below and before this court as might more carefully have been done. The passage objected to in paragraph 71 is as follows:

"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 sub-section is to ensure that a consistent approach to financial penalties is developed." (emphasis added).

51. Questions of statutory interpretation are often addressed in much greater detail than they have been in this appeal, but the point is a fairly short one. The broad question is whether, notwithstanding that the statute does not indicate that the GFSC may take into consideration any other relevant matter, the GFSC is entitled to do so (a) because of their overarching objectives under Section 2(4) and (b) because the considerations in Section 11D (2) appear to relate to aggravating and mitigating circumstances for the person concerned. It seems to us, however, that, for present purposes, it is not necessary to embark upon so broad a task.

52. It is clear that the concern of the GFSC is, in appropriate circumstances, to be able to take into account the impact of the contravention or matter of non-fulfilment in a wide context, namely, potential impact on a wider sector of the public and potential impact on the reputation of the Bailiwick. Clearly there is a sense in which each and every instance of contravention or non-

fulfilment will have such an impact, but we recognise the concern that in certain cases the contravention or non-fulfilment could be seen as having a potentially wider impact than on those immediately affected.

53. That said, it seems to us that, upon a proper interpretation of Section 11D (2), the ability to meet these concerns can be seen to be embraced. It goes without saying that the penalty must relate to the contravention or non-fulfilment. The magnitude or extent of the impact of a particular instance of contravention or non-fulfilment may vary greatly, but it is that contravention or non-fulfilment which has been penalised: not some general concern.
54. It seems to us that Section 11D (2)(b) is expressed sufficiently widely to enable the concerns of the GFSC to be met. Section 11D (2)(b) indicates that the Commission must take into consideration "the seriousness of the contravention or non-fulfilment". The concept of "seriousness" is a relative one. Clearly the seriousness of an individual instance must be appraised by reference to other instances: either those which have occurred, or those which might yet occur. The subsection refers to the general concept of "seriousness" rather than for example, to "the financial impact" or such like. "Seriousness", therefore, it seems to us, is properly to be interpreted as "seriousness" in the context of the financial operations within the Bailiwick.
55. In our judgment, therefore, the provisions of Section 11D (2)(b) are sufficiently wide to direct the GFSC to take into consideration the seriousness of the contravention or non-fulfilment in the sense of the impact on the public interest and the impact on the reputation of the Bailiwick as a financial centre.

56. Whilst, in expressing the views which we have, and, to an extent, accepting the ground of appeal under this head, we should not be taken as wholly disagreeing with the views expressed by the learned Deputy Bailiff.
57. In the first place, as we have indicated, it is not clear to us that this general line of argument on statutory interpretation was before the Deputy Bailiff. In the second place, the concern of the Deputy Bailiff had arisen out of a different factual context than that which was being put before us by Advocate Nicol-Gent.
58. The view expressed by the learned Deputy Bailiff in paragraph 71 followed on a rehearsal of certain parts of paragraphs 359 to 361 of the Statement of Reasons: see paragraphs 69 and 70 of the judgment below. It seems tolerably clear from paragraphs 69 to 71 of the judgment below, read together with paragraph 74, that the view of the learned Deputy Bailiff was that the error into which the senior decision maker appeared to have fallen, in carrying out the exercise under Section 11D (2) was to look to other jurisdictions for the purpose of taking into consideration the actual penalties imposed in those jurisdictions, notwithstanding that the jurisdiction in question may have had legislation which did not impose a cap.
59. The learned Deputy Bailiff expressed himself in the following way in paragraph 74 below:
- "... 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."

60. We entirely agree. Section 11D (2) (f) specifically enjoins the Commission to take into consideration the penalties which it has imposed in other cases. It must also appraise the seriousness of the contravention or non-fulfilment, and we have dealt with this above. It seems to us that, in appraising the seriousness of contravention or non-fulfilment it is perfectly appropriate for the GFSC to look to other jurisdictions for guidance as to categorisation. It is, of course, entirely possible that the appropriate calibration in Guernsey should be different from calibration in another jurisdiction, but the broad point remains. If, from another jurisdiction, it can be seen that a particular instance of contravention or non-fulfilment has been appraised at the level of, say, two-thirds of the maximum, it might, at first blush, appear appropriate that a broadly similar approach should be adopted in this jurisdiction. The exercise may be a complex one, but it can be carried out. On the other hand, as the learned Deputy Bailiff was at pains to point out, what simply cannot be done is to look to another jurisdiction, identify the contravention or non-fulfilment, identify the level of fine or other penalty and indicate that it should be imposed here, where a different regime is in place. The States of Guernsey have imposed their own regime, and it is that to which the GFSC must adhere.
61. We should record that, before us, Advocate Nicol-Gent specifically accepted that examples from other jurisdictions could not be treated as precedents and that the GFSC had to operate within its own boundaries.
62. Turning now to the proper approach to the construction of the words "the potential financial consequences to the person concerned, and to third parties including customers and creditors of that person, of imposing a penalty" as they are set out in Section 11D (2) (e), we are inclined to agree with the submissions of Advocate Nicol-Gent that the learned Deputy Bailiff was going

too far in indicating that, having regard to the provisions of the section, a level of penalty would be wrong in principle if it was not capable of being satisfied by the appellant. Whilst we consider that the circumstances are likely to be very rare indeed, it seems to us, on a proper reading of the section, that the potential financial consequences to the person concerned and relevant third parties is merely one of a number of specified factors which the Commission "must take into consideration". It may be that the occasional case will emerge where the seriousness of the contravention or non-fulfilment is of such an order that the weight to be given to it outweighs the obvious additional detriment to the person concerned and the relevant third parties and, accordingly, that a penalty greater than that which can be paid within a reasonable time may be imposed. But it seems to us that the case will have to be very clear.

63. We entirely accept that the approach set out in criminal authorities as to the ability to pay a fine being a determining feature may not be appropriate in regulatory matters: as here, the statute makes the potential financial consequences merely one of a number of factors.

64. We bear in mind the submissions before us as to the importance attached to Guernsey's firmness of purpose in regulating its financial industry; but if that were an overriding factor, there would be no point in Section 11D (2) (e) being expressed in the broad terms in which it is. It seems to us that the general concern expressed by Advocate Nicol-Gent is embraced within the totality of Section 11D (2). Whilst, as he submitted, the words "the potential financial consequences to the person concerned" could, indeed, embrace the possibility of an enhanced penalty in order to ensure that there was some form of hardship, the same cannot be said of the latter part of subsection (e). Those words can only be read as an additional protective mechanism so that other creditors of the person concerned do not have their economic interests harmed by the imposition of a penalty of a particular order.

65. This approach seems consistent with the Jersey cases. In *AG v Caversham* the Royal Court specifically indicated that, at the level of fines contended for by the Attorney General, the individual concerned, Mr. Bell, would have faced bankruptcy and the Royal Court indicated that it was not prepared to allow that to happen. It did not make the same concession for the Caversham companies. As regards *Attorney General v Fleming*, the views expressed by the learned Deputy Bailiff were made in the context of the maximum penalty permitted by statute in Jersey, five years' imprisonment, being rather higher than would be attracted by the equivalent offence in the United Kingdom. Our approach is also consistent with the decisions in the Tax and Chancery Chamber decisions in *Bedford* and *Jeffery*.
66. Notwithstanding our difference of opinion with the learned Deputy Bailiff that a penalty incapable of being satisfied by a relevant person would be wrong in principle, we agree with the general analysis given by him in paragraph 80 of the decision below. The critical relevant reason in the Statement of Reasons is paragraph 355.4 which states:
- "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."
67. As the learned Deputy Bailiff pointed out (in paragraph 66), the substance of what had become paragraph 355.4, referring to proportionality, had remained unchanged from the Formal Notice pursuant to Section 11E of the FSC law (the "Minded To Notice") sent out on 17 October 2014. However, thereafter, and in preparation for the hearing before Mr. Davis on 12 November 2014, the Respondent had raised various matters, as he had also in a letter dated 14 November 2014 specifically dealing his inability to pay.

68. Those submissions from the Respondent in respect of financial issues made their way into paragraph 355, in succinct form, and it appears were not challenged by the GFSC. It recorded that Mr. Merrien said that he was presently unemployed and had been unable to find any work since December 2013. It continued that he had submitted a schedule of assets and liabilities which, Mr Davis said “has been considered and taken into account.” Paragraph 355.3 continued "He maintains that he would be unable to pay any fine and that the imposition of a financial penalty would bankrupt him.”
69. It therefore follows, as the learned Deputy Bailiff hinted, that it is somewhat surprising that paragraph 355.4 makes no reference to proportionality having regard to the respondent’s financial circumstances.
70. Advocate Nicol-Gent sought to impress upon us the importance for the system of there being consistent "headline" amounts of penalties so that those working within the Guernsey financial system were immediately aware of the levels at which penalties would be sought. The natural concomitant of such a suggestion is that it is only the proportionality of the penalty to the seriousness of the behaviour which is to be taken into account and no account is to be taken of the potential financial consequences to the person concerned and relevant third parties. To do so would be to subvert the clear instructions of Section 11D (2) to the effect that all identified factors must be taken into consideration, and we reject the submission.
71. Those intent on engaging in attempted contraventions or non-fulfilments will be aware of the strength with which the GFSC pursues its enforcement obligations. Those who have contravened and who seek to rely upon an apparently modest penalty previously imposed by the commission in other cases will be able to be met with the clear indication as to the mathematics and arithmetic by which a particular result has been reached in a particular case.

To approach matters otherwise, in our view, would be to do so absent considerations of fairness justice and proportionality to the person concerned.

- 72 Advocate Nicol-Gent further submitted to us that whilst the imposing of a financial penalty under the statute was not designed to bring about insolvency, this did not mean that a penalty could not be fixed that might have such a result. We find difficulty with that submission. If a penalty was of such magnitude that it brought about some form of insolvency, Arrêt des Biens (arrest of personality), Arrêt des Gages (arrest of wages), Saisie or state "en desastre" this would undoubtedly have an effect on the creditors and other relevant third parties financially related to the person concerned (always assuming such claims to be valid). Assuming, for the moment, that a penalty under the statute constitutes a civil debt for which the GFSC may sue within, say, six years of the penalty having been imposed, there seems no good reason why the States should benefit at the expense of other legitimate creditors.

Determination

73. For all these reasons we determine the appeal by the GFSC as follows.
1. As a matter of statutory construction, all matters to be taken into account in deciding whether or not to impose a penalty under Section 11D are set out in Section 11D (2);
 2. In applying its mind to the factors set out in Section 11D (2), the commission must take into consideration all of the identified factors, insofar as they exist. In doing so, the fact that a financial penalty being considered is not capable of being satisfied by the appellant will be a relevant factor and the clearest of reasoning will be required in order to show that another factor such as the seriousness of the contravention or non fulfilment is of such magnitude as to provide a satisfactory basis for a determination that the potential of insolvency is warranted.

Conclusions

74. In the Royal Court, the learned Deputy Bailiff had made a finding of possible disproportionality as between the penalty imposed on the respondent and that imposed on Mr. Wickins and GIBL: see paragraph 81 lines 9 to 18. As that finding was not a finding embracing a matter of law, it was not open to challenge by the GFSC on appeal and, accordingly, the decision would have been remitted to the GFSC in any event.
75. Having reached our own conclusions on the points appealed to us, it seems to us that the order made below should remain, namely, that the decision as to the appropriate level of financial penalty to impose on the respondent (and consequential changes to the public statement to be made about the sanctions imposed on the respondent) fall to be remitted to the GFSC.
76. For our own part we would reiterate the views expressed by the learned Deputy Bailiff in paragraph 85. We do not consider it appropriate to give any particular directions to the GFSC save for those that are apparent from the reasons which we have expressed in this judgment. The contraventions by the respondent were very serious and clearly not inadvertent, but the GFSC must respect the statutory cap and must take into account only those factors set out in Section 11D (2), subject to the points of construction which we have dealt with above. In doing so, proper regard must be had to the potential financial consequences to the respondent and his ability to pay whatever financial penalty is imposed within a reasonable period of time.