Approved Text
29.11.2018

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between:

Y — **Appellant**

-and-

THE CHAIRMAN OF THE GUERNSEY FINANCIAL SERVICES COMMISSION — **Respondent**

-and-

HER MAJESTY'S PROCUREUR — **Intervenor**

Hearing dates: 1st, 2nd and 8th August 2018

Judgment handed down: 29th November 2018

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocate for the Appellant: **Advocate N J Barnes**
Advocate for the Respondent: **Advocate T M J Shires**
Advocate for the Intervenor: **Advocate J Hill**

Cases & legislation referred to:

The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000
The Financial Services Commission (Bailiwick of Guernsey) Law, 1987
The Human Rights (Bailiwick of Guernsey) Law, 2000
Merrien v GFSC (unreported, 25 September 2015)
The Criminal Justice (Proceeds of Crime) (Legal Professionals, Accountants and Estate Agents) (Bailiwick of Guernsey) Regulations, 2008
Decision-Making Process Relating to the Use of Enforcement Powers (October 2017)
The Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002
The Insurance Business (Bailiwick of Guernsey) Law, 2002
The Banking Supervision (Bailiwick of Guernsey) Law, 1994
The Protection of Investors (Bailiwick of Guernsey) Law, 1987
The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) (Amendment) Law, 2003
The Financial Services and Markets Act 2000
Burns v Financial Conduct Authority [2015] UKUT 0252 (TCC)
The Financial Services Act 2012
Bordeaux Services (Guernsey) Limited v Guernsey Financial Services Commission (unreported, 11 May 2016)
Bennion on Statute Law/Bennion on Statutory Interpretation, 7th ed.
Pepper v Hart [1993] AC 593
Billet d'État for 2002

Billet d'État for 2007
The Interpretation and Standard Provisions (Bailiwick of Guernsey) Law, 2016
Sparks v Harland [1996] 1 WLR 143
Hitchins v Hill (unreported, 16 November 2010)
Toynton v Registrar of Companies (unreported, 3 April 2013)
Billet d'État for 2000
The Interpretation and Standard Provisions (Bailiwick of Guernsey) Law, 2016 (Commencement and Amendment) Ordinance, 2018
Fernandes v Lieutenant-Governor [2016] GLR 285
SS (Nigeria) v Home Secretary [2014] 1 WLR 998
The Financial Services Commission (Bailiwick of Guernsey) (Amendment) Law, 2016
Warbrick, *Law of the European Convention on Human Rights*, 3rd ed.
Porter v Magill [2002] 2 AC 357
Tehrani v United Kingdom Central Council for Nursing , Midwifery and Health Visiting [2001] IRLR 208
Bryan v United Kingdom (1995) 21 EHRR 342
Walters v States Housing Authority (1997) 24.GLJ.76
The Nurses, Midwives and Health Visitors Act 1997

Introduction

1. This is an appeal brought by the Appellant, to whom I will refer simply as "Y", from the decisions of the Guernsey Financial Services Commission ("the GFSC") made on 8 June 2018 and contained in a Final Notice. That decision was made by one of the Queen's Counsel who constitute a panel maintained by the GFSC to act as Senior Decision Makers. That Senior Decision Maker ("the SDM") acted with the benefit of full delegated powers in accordance with the Instrument of Appointment dated 13 September 2017 and the GFSC's preceding Instrument of Delegation dated 2 December 2016. Accordingly, the decisions that are the subject of this appeal were made by the SDM but treated for all purposes as having been made by the GFSC.

2. For the reasons appended to the SDM's Final Notice, the sanctions imposed on Y were:

    (a) orders pursuant to each of the suite of Regulatory Laws prohibiting Y, for a period of four years, from (i) holding the position of director, controller, partner, manager, financial adviser, general representative or authorised insurance representative (as applicable); and (ii) acting as Money Laundering Reporting Officer or Compliance Officer within a person licensed under any of the Regulatory Laws;

    (b) the disapplication of 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, as amended ("the Fiduciaries Law") for a period of four years;

    (c) a discretionary financial penalty of £13,000 under section 11D of the Financial Services Commission (Bailiwick of Guernsey) Law, 1987, as amended ("the FSC Law"); and

    (d) the issuing of a public statement under section 11C of the FSC Law.

3. Y appeals against all aspects of the SDM's decision. Y's grounds of appeal evolved from when they were first before the Court shortly after the SDM's Final Notice. By the conclusion of the hearing, they were in the following form:

    "*1. The senior decision maker decided that the Appellant acted in breach of the Fiduciaries Law by forming twelve limited liability Guernsey registered companies between 2012 and 2016. That decision was wrong because the companies were in fact formed by [Licensee X] which was a licensed fiduciary both technically using [its] Guernsey Registry portal and legally because the Appellant acted as a director of*

[Licensee X], [Licensee X] was a corporate services provider authorised to form companies and because nothing in [its] memorandum or articles or resolutions of its board of directors required [Y] to obtain any other person's consent before forming a company via the portal. The senior decision maker's decision on that issue was therefore ultra vires.

2. *Having found that the Appellant formed the companies in [Y's] personal capacity the senior decision maker had no jurisdiction to make an order against [Y] because [Y] was not a 'relevant officer' within the meaning of the FSC Law 11C(3) as [Y] was acting in [Y's] private capacity and the legislation is designed to control the behaviour of persons acting in their capacities as licensees or employees of licensees. The senior decision maker's decision was therefore ultra vires.*

3. *In making the order for the public statement, imposing a fine of £13,000 and in making the prohibition orders and in disapplying the exemption set out in s.3(1)(g) of the Fiduciaries Law the senior decision maker imposed sanctions which were wholly disproportionate to the conduct complained of, were such that no reasonable decision maker acting reasonably would have made them and did not bear comparison to the decisions in other cases particularly in cases where much graver conduct was involved and no prohibition order made. The senior decision maker also failed to have regard to 11C(2)(f) and [the SDM's] decision was therefore ultra vires, unreasonable and lacked proportionality.*

4. *In directing that the public statement be issued the senior decision maker had no regard to the terms of 11C(1) of the FSC Law which only permits publication of the particulars of any law or laws broken and/or any non-fulfilment of any minimum criteria specified. The eleven page public statement covered matters not permitted by 11C and was therefore ultra vires.*

5. *The SDM wrongly decided that the Appellant had advertised company secretarial services in breach of the Fiduciaries Law when chartered accountants are permitted to carry out such services pursuant to exemptions.*

6. *The SDM took into account irrelevant matters in reaching [the SDM's] decision and therefore acted ultra vires namely, inconsistencies in the Appellant's answers to questions and in [Y's] representations, the alleged breach of [Y's] employment contract, [Y's] alleged lack of knowledge of company law, that company formations did not form part of [Licensee X's] business and was not covered by its business risk assessment when both findings were incorrect, and [Y's] alleged failure to take the allegation against [Y] sufficiently seriously.*

7. *The SDM found incorrectly that the Appellant did not satisfy the minimum criteria for licensing without specifying what those criteria were.*

8. *The Regulatory Laws give the Commission power to impose prohibition orders which are unlimited in time and to disapply the s.3(1)(g) exemption for an unlimited period, they give no power to impose orders limited in time, the orders were therefore made without jurisdiction.*

9. *The SDM failed to have appropriate regard to relevant considerations namely all the criteria specified in s.11C(2) and s.11D(2) and [the SDM's] decision was therefore ultra vires.*"

Advocate Barnes, who appears on behalf of the Appellant, did not pursue the seventh of those grounds at the appeal hearing. However, all of the other eight grounds were advanced on behalf of Y.

4. In addition to these grounds of appeal, Advocate Barnes indicated by way of a document in the form

of an application dated 4 July 2018 (which was the date of the expanded grounds of appeal on which Y relied, subject to further amendments made at the hearing), that Y also invites the Court to make a declaration of incompatibility in respect of what occurred before the SDM because "*the process involved the determination of the Appellant's civil rights and was not conducted by an independent tribunal*". In accordance with section 5 of the Human Rights (Bailiwick of Guernsey) Law, 2000, notice was provided to Her Majesty's Procureur, who then applied to intervene in these appeal proceedings. That application met with no opposition on behalf of the parties to the appeal and so was granted on the papers. Advocate Hill appears on behalf of Her Majesty's Procureur.

Private hearing

5. Despite what I stated in *Merrien v GFSC* (unreported, 25 September 2015) about the likelihood of the Court ordering that any future appeal against a public statement would be held in public rather than in private, I concluded that this appeal hearing should be held in private in accordance with section 11H(7) of the FSC Law. Although Advocate Tania Shires, on behalf of the GFSC, indicated a willingness on the part of the Respondent for the appeal to be heard in public, para. (a) of section 11H(7) did not apply because Advocate Barnes did not agree that any part of the hearing should be held in public. Section 11H(7) relates only to an appeal against a decision to publish a statement. I decided that it was impossible to separate the part of the appeal that related to Y's appeal against the SDM's decision to issue a public statement from the other aspects of the appeal. Consequently, I considered that the choice was between holding the entire appeal in private or all of it in public. Given the nature of the grounds of appeal that were being advanced challenging the lawfulness of the public statement, and the other grounds that challenged all other aspects of the sanctions imposed by the GFSC, it did not appear to be a case in which the broad range of sanctions imposed would all inevitably remain at the conclusion of the appeal. In such a situation (as in the *Merrien* case), the public statement could, as appropriate, be amended to reflect whatever the Court found in much the same way as when there is an appeal from a sentence imposed in criminal proceedings. In particular, though, if Y's second ground of appeal were to be successful, it would mean that no public statement could be issued under section 11C of the FSC Law and it was for that reason that I decided that I should not exercise the power conferred upon the Court by section 11H(7)(b).

6. Further, when the matter first came before the Court, I granted the Appellant interim relief pursuant to section 11H(6) of the FSC Law. The first attempt of Advocate Barnes on 12 June 2018 to secure this relief was rejected on the basis that there had not, at that time, been proper notice given that there was an appeal underway. However, the following day, on a renewed application, it was accepted by Advocate Shires that there had been the institution of an appeal and so section 11H(6) could be engaged. The subsection provides that:

> "*On an appeal under this section against a decision of the Commission the Court may, on the application of the appellant, and on such terms as the Court thinks just, suspend or modify the operation of the decision pending the determination of the appeal.*
>
> *This subsection is without prejudice to the operation of section 11E(3).*"

Although the public statement had already been published on the GFSC's website, I directed that it should be removed pending determination of Y's appeal, thereby suspending that element of the SDM's decision. I did so on the basis that I could not pre-judge whether or not the second of Y's grounds of appeal or any other grounds challenging the decision to publish its contents would succeed but, if it were to, then the public statement, if it were permitted to continue to be published in that fashion, could potentially have been seen by considerably more people than might already have seen it. In those circumstances, I considered that the Appellant was entitled to the interim relief sought.

7. Having decided that the appeal hearing should continue to be conducted in private, upon reserving my judgment at the conclusion of the hearing, I indicated that I was minded to prepare a judgment in an anonymised form so that it would be capable of being disseminated publicly. At the same time, I directed that further written submissions could be lodged on behalf of the parties on matters that had

arisen late in the day during the hearing. Having received those submissions by the beginning of September, I have not felt it necessary to re-convene the oral hearing. This judgment contains my reasons for allowing in part Y's appeal.

The facts

8. The reasons appended to the SDM's Final Notice set out in considerable detail the factual matters on which the sanctions imposed were based. I will not repeat all of them, but will summarise those that are most relevant to the grounds of appeal advanced on Y's behalf by Advocate Barnes. As appropriate, I will expand upon them when considering particular grounds of appeal.

9. The investigation that was subsequently undertaken by the GFSC and led to the SDM's decisions has its origins in Y speaking with an officer at the GFSC in late 2015. At that time, Y was employed as an executive director of an entity licensed under the Fiduciaries Law to which I will refer as "Licensee X". Y indicated that Licensee X was contemplating promoting and providing accountancy services, producing accounts and tax returns for local businesses, and enquired how Licensee X's fiduciary licence could be expanded to cover these activities. Y later suggested that combining Licensee X and the accountancy practice Y's was already running was what Y had had in mind when making this enquiry. The officer promised to revert to Y, but then did not do so as other events intervened.

10. Y had previously been a non-executive director of Licensee X, during which time Y had been an employee of a different licensed fiduciary. As part of the terms and conditions of Y's employment with Licensee X, Y was not permitted to accept any other work or office without the express permission of Licensee X and, without the consent of Licensee X, was not permitted to be engaged in or interested, whether directly or indirectly, in any capacity in any other trade, business or occupation. In 2013, Y became a controller of Licensee X as a result of having a shareholding of approximately one-quarter of the issued shares and, in the following year, became its Money Laundering Reporting Officer ("MLRO").

11. Y is a member of the Institute of Chartered Accountants of England and Wales ("the ICAEW"). Shortly before becoming an executive director of Licensee X, Y established an accountancy practice using a trading name. That trading name changed in time, but I will refer to this business under whichever style was being used as "Y's practice". Y effectively operated as a sole trader, although in time others were employed to assist Y. By late 2014, Y had registered Y's practice with the GFSC under the terms of the Criminal Justice (Proceeds of Crime) (Legal Professionals, Accountants and Estate Agents) (Bailiwick of Guernsey) Regulations, 2008. The business risk assessment ("BRA") completed in respect of Y's practice did not give any indication that Y's practice was to provide the service of incorporating companies. Y was sanctioned by the ICAEW at the end of 2014 in respect of practising whilst not holding a practising certificate and without professional indemnity insurance. Y notified the GFSC about this in January 2015.

12. In February 2016, Licensee X commenced disciplinary proceedings against Y on the basis that Y had, whilst employed, pursued private business interests through Y's practice without Licensee X's permission; had done so during office hours and using Licensee X's facilities; had used Licensee X's registration with the Guernsey Registry to carry out company formations for persons who were not clients of Licensee X without its permission and without ensuring that correct client due diligence information was held by Licensee X; and Y had failed to inform Licensee X about the ICAEW disciplinary process. Those proceedings culminated with a hearing into these allegations held on 31 March and 6 April 2016. However, before those proceedings concluded, Y resigned with immediate effect from Licensee X on 6 April 2016.

13. During the currency of those disciplinary proceedings, Y sent an e-mail to the GFSC's Authorisations Unit. Y explained about Y's practice and Y's employment with Licensee X, indicating that Y had occasionally been incorporating companies for local businesses that used Y's practice and invoicing for these services through Y's practice and not Licensee X. Accordingly, Y thought Y may be in breach of the 2008 Regulations. Y asked what the GFSC wished to be done. When asked why Y

thought a breach may have occurred, Y responded that an e-mail exchange with the Guernsey Registry earlier in March 2016 led Y to realise there may be a problem, hence Y seeking the advice of the GFSC. It was this contact with the GFSC, coupled with the information being provided to it by Licensee X, that precipitated the subsequent investigation into Y's conduct.

14. On 14 April 2016, Y met with two senior officers of the Fiduciary Supervision Policy and Innovations Division of the GFSC. Y was informed that the matter would be referred to the Enforcement Division. The Police also commenced an investigation and Y was arrested on 31 August 2016. As part of that investigation, Y was interviewed under caution. The GFSC investigation was suspended whilst the Police investigation was being undertaken. In January 2017, the Police informed the GFSC that they would take no further action against Y and the GFSC investigation resumed. A copy of the transcript of Y's interview with the Police was provided to the GFSC. Y attended a voluntary interview with the GFSC on 6 April 2017.

15. A draft Enforcement Report dated 6 June 2017 was provided to Y. Following receipt of comments from Advocate Barnes, a final Enforcement Report dated 27 July 2017 was provided. Following further comments from Advocate Barnes, an amended Final Enforcement Report dated 15 August 2017 was provided. It was at this point that the matter was referred to the SDM. Thereafter the process involved following the steps outlined in the GFSC's document *Decision-Making Process Relating to the Use of Enforcement Powers* (October 2017), because Y opted to be dealt with under these revised procedures rather than the September 2014 document (*Guidance Note – Decision Making Process*) which it replaced. Accordingly, the SDM issued a draft "Minded To" Notice on 20 November 2017, followed by the actual Minded To Notice required by section 11E of the FSC Law (so far as it concerned the intention to make a decision in respect of which a right of appeal is conferred by section 11H of that Law) on 24 January 2018 and also under similar requirements in the suite of Regulatory Laws. Thereafter, Advocate Barnes and the Enforcement Division lodged written representations and the SDM held a meeting at which oral representations were made on 9 February 2018.

16. At the heart of the allegations to which Y was responding is the incorporation of 12 Guernsey registered companies. Para. 5 of the SDM's reasons relates that these occurred in May, July and November 2012, in February, April, October and November 2014, in March and July 2015 and in February 2016. On each occasion, a single company was incorporated, save in April 2014 when three companies, apparently connected with each other, were incorporated over two days. The SDM further records that in each case this was done for a client of Y's practice and in each case an invoice was raised in the name of Y's practice, save on the final occasion in February 2016 when no invoice had been raised. (It was Licensee X becoming aware of this company formation that led it to institute its disciplinary proceedings against Y.) On the first two occasions, the Guernsey Registry fee for incorporating the company had been charged to Licensee X's account, but then reimbursed by Y. Thereafter, the fees were paid either by a card payment of Y's practice or Y personally without involving Licensee X.

The appeal provisions

17. Y's appeal is brought under the appeal provisions in each of the suite of Regulatory Laws. In respect of appealing against a prohibition order, the terms of section 19 of the Fiduciaries Law, section 43 of the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002, as amended ("the IMII Law"), section 63 of the Insurance Business (Bailiwick of Guernsey) Law, 2002, as amended ("the Insurance Business Law"), section 18 of the Banking Supervision (Bailiwick of Guernsey) Law, 1994, as amended ("the Banking Supervision Law") and section 36 of the Protection of Investors (Bailiwick of Guernsey) Law, 1987, as amended ("the POI Law") are identical. On the basis that section 19 of the Fiduciaries Law is also engaged in relation to Y's appeal against the disapplication of the exemption set out in section 3(1)(g) of that Law, I will use its terms as illustrative of how provision is made for such an appeal:

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

(d) to serve a notice on him under paragraph (g) of section 3(1) disapplying the exemption contained in that paragraph in respect of him, ...

(k) to make a prohibition order under section 17A prohibiting him from performing any function, any specified function or any specified description of function, ...

may appeal to the Court against the decision. ...

(4) 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. ...

(7) 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."

18. Y's appeals in respect of the GFSC's decision to publish a statement under section 11C and to impose a financial penalty under section 11D are brought pursuant to section 11H of the FSC Law (and, in particular, paragraphs (c) and (d) of subsection (1)). The grounds of appeal and the powers of the Court set out in subsections (2) and (5) respectively are in like terms to section 19(4) and (7) of the Fiduciaries Law.

19. Some of Y's grounds of appeal are directed at questions of statutory interpretation. Because they would, if successful, render unlawful the particular sanction imposed by the SDM, I propose to deal with the majority of those grounds before turning to the other grounds of appeal challenging reasonableness and proportionality and the factual findings made.

Prohibition orders

20. The eighth ground of appeal raises a point that has not previously been taken about the approach of the GFSC to prohibition orders. I will use the prohibition order made under the Fiduciaries Law for the purpose of dealing with Y's identical challenge to the lawfulness of the prohibition orders also made under the other Regulatory Laws.

21. Sections 17A to 17C were inserted into the Fiduciaries Law by the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) (Amendment) Law, 2003. Section 17A provides:

> "*(1) If it appears to the Commission, having regard to the provisions of paragraph 3 of Schedule 1, that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by a licensed fiduciary, the Commission may make an order (a* ***"prohibition order"****) prohibiting that individual from performing any function, any specified function or any specified description of function.*

(2) A prohibition order may relate to –

(a) any regulated activity, any specified regulated activity or any specified description of regulated activity,

(b) licensed fiduciaries generally or any specified class of licensed fiduciary.

(3) An individual who performs or agrees to perform any function in breach of a prohibition order is guilty of an offence and liable –

(a) on summary conviction, to a fine not exceeding level 5 on the uniform scale, to imprisonment for a term not exceeding 3 months or to both,

(b) on conviction on indictment, to a fine, to imprisonment for a term not exceeding 2 years or to both.

(4) A licensed fiduciary shall take reasonable care to ensure that none of its functions, in relation to the carrying on of a regulated activity, is performed by a person who is prohibited from performing that function by a prohibition order.

(5) The Commission may, on the application of the individual named in a prohibition order, vary or revoke it.

*(6) In this section **"specified"** means specified in a prohibition order."*

Section 17C requires the GFSC to serve a written notice of an intention to make a prohibition order on the individual in respect of whom it is proposed to be made, enabling representations to be made. In broad terms, this reflects the requirement in section 11E of the FSC Law to serve what has become known as a Minded To Notice. Section 17B provides:

"(1) The Commission shall maintain a list of all individuals to whom a prohibition order applies.

(2) The list referred to in subsection (1) shall specify the functions or description of functions which the individual concerned is prohibited from performing.

(3) The Commission shall make available to any person, on request and on payment of such charge (if any) as the Commission may reasonably demand to cover the cost of preparation, a copy of the list referred to in subsection (1).

(4) The Commission may publish –

(a) the list referred to in subsection (1), and

(b) the fact that a person has been named in a prohibition order or that a prohibition order has been varied or revoked.

(5) Any list or publication under this section may contain such information (if any) in respect of all or any of the persons named therein as the Commission may think desirable or expedient."

22. Advocate Barnes submits that there is nothing in this statutory framework that permits the GFSC to make anything other than a prohibition order of unlimited duration. Further, the nature of the provisions found in the Regulatory Laws closely resembles the provision made by section 56 of the Financial Services and Markets Act 2000, as amended, as it applies in the United Kingdom. Advocate Barnes also referred to a comment made by the Upper Tribunal (Tax and Chancery Chamber) in *Burns v Financial Conduct Authority* [2015] UKUT 0252 (TCC) ("*We do not have*

power to limit the time period of a prohibition order" – see para. 18) as indicating the construction placed on section 56. During the hearing, it became common ground that the approach taken by the regulators in the United Kingdom is to decide whether to make a prohibition order and, if so, whether to give any indication as to when an application to revoke the order might receive favourable treatment. By way of example, a Notice issued in respect of Roger Muse by the Financial Services Authority dated 17 November 2008 records that a prohibition order pursuant to section 56 of the 2000 Act was made having effect from 19 November 2008, but added:

> "*The FSA is minded to revoke the Prohibition Order at any time after 18 November 2011 on your application, in the absence of new evidence that you are not fit and proper, and conditional upon you having undertaken appropriate training in relation to the obligations and responsibilities of an approved person exercising significant influence functions.*"

Similarly, in a Final Notice dated 24 June 2010 in respect of Steven Perkins, the Financial Services Authority made a prohibition order and added:

> "*The FSA may revoke the prohibition order, on Mr Perkins' application, at any time after five years from 24 June 2010. In considering any future applications for approval by Mr Perkins, the FSA will consider whether Mr Perkins' alcoholism continues to present a risk, and any other new evidence that he is not fit and proper.*"

23. The wording of section 56 of the 2000 Act has been amended so that it now covers the way in which both the Financial Conduct Authority and the Prudential Regulation Authority can make prohibition orders. Those amendments were made by the Financial Services Act 2012. Of more relevance, however, is the wording of section 56 as it stood in 2003, which was as follows:

> "*(1) Subsection (2) applies if it appears to the Authority that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person.*
>
> *(2) The Authority may make an order ("a prohibition order") prohibiting the individual from performing a specified function, any function falling within a specified description or any function.*
>
> *(3) A prohibition order may relate to–*
>
> *(a) a specified regulated activity, any regulated activity falling within a specified description or all regulated activities;*
>
> *(b) authorised persons generally or any person within a specified class of authorised person.*
>
> *(4) An individual who performs or agrees to perform a function in breach of a prohibition order is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.*
>
> *(5) In proceedings for an offence under subsection (4) it is a defence for the accused to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence.*
>
> *(6) An authorised person must take reasonable care to ensure that no function of his, in relation to the carrying on of a regulated activity, is performed by a person who is prohibited from performing that function by a prohibition order.*
>
> *(7) The authority may, on the application of the person named in the prohibition order, vary or revoke it.*

(8) This section applies to the performance of functions in relation to a regulated activity carried on by–

(a) a person who is an exempt person in relation to that activity, and

(b) a person to whom, as a result of Part XX, the general prohibition does not apply in relation to that activity,

as it applies to the performance of functions in relation to a regulated activity carried on by an authorised person.

(9) "Specified" means specified in the prohibition order."

Section 57 makes further provision as to the procedure to be followed when considering whether to make and actually making a prohibition order and the right of the person concerned to refer the matter to the Tribunal. Section 58 makes provision in respect of applications to vary or revoke a prohibition order.

24. This issue was raised before the SDM and dealt with in para. 66 of the reasons attached to the Final Notice:

> "*Advocate Barnes also noted that the terms of the legislation which permit the making of prohibition orders by the Commission might be thought to suggest that such orders would be of an unlimited duration. Both he and the Enforcement Division, however, noted that almost all previous prohibition orders had, in fact, been for a specified, limited, period of time. The Enforcement Division explained that the Commission's approach to the legislation is that any prohibition order made ought to be proportionate, reasonable and fair, taking account of considerations of natural justice – which implies that the period of prohibition may be for a limited period of time. [NB there is a footnote here: "I was told that it is anticipated that this point will, in fact, be clarified in future legislation."] I note that in the case of Bordeaux Services (Guernsey) Ltd & others v The Guernsey Financial Services Commission, the Deputy Bailiff inter alia considered whether the duration of a time-limited prohibition order was reasonable and proportionate in the circumstances of the case, and did not suggest that there was any difficulty in proceeding in this way. I accept the Enforcement Division's argument, and am content to proceed upon the basis that any prohibition order ought only to be of a duration that would be reasonable and proportionate in the circumstances of the particular case.*"

25. It is, of course, correct that when I dealt with the appeals in *Bordeaux Services (Guernsey) Limited v Guernsey Financial Services Commission* (unreported, 11 May 2016) I upheld five-year prohibition orders in respect of Messrs Radford and Meader as not being unreasonable or disproportionate. In doing so, as Advocate Shires has reminded me, I commented (at para. 83):

> "*... a finite period of being prohibited under the two Laws to which reference has been made, whilst still having a significant impact on the ability of both of them to earn a living, is less draconian than a permanent ban from working in the whole of the financial services sector.*"

In those proceedings, the appeal was against the length of the prohibition order imposed by the GFSC. The grounds of appeal being advanced were that the length of the prohibition orders was unreasonable and disproportionate. There was no challenge to the legality itself of making a prohibition order for a fixed duration. In that regard, Advocate Barnes has raised an argument that, so far as I am aware, has not previously been deployed. Accordingly, just because this Court has previously upheld a prohibition order imposed for a finite period does not automatically mean that the submission on behalf of Y falls to be rejected, although it is understandable why the SDM chose to refer to this earlier decision.

26. In order to overcome the absence of any express reference to the power of the GFSC to make

prohibitions of limited duration, Advocate Shires first pointed out that this Court is not bound by the construction given to similarly worded legislative provision in another jurisdiction and so can, using the various methods of statutory interpretation available to it, reach a different conclusion. She also drew attention to section 3 of the Human Rights Law, under which primary legislation must be read and given effect in a way which is compatible with Convention rights, so far as it is possible to do that.

27. In the course of her submissions, Advocate Shires referred extensively to the text of *Bennion on Statute Law*, in which ten presumptions were set out and explained. The document provided appears to be from the 1990 edition of that work and taken from a website of the author. As far as I am aware, there is a much more up-to-date work on which reliance could be placed. For example, I note that *Bennion on Statutory Interpretation* was published in its 7th edition only last year. Accordingly, although the presumptions to which Advocate Shires has referred are not particularly contentious, I am unimpressed that an out-of-date work has been used in this way and question the level of assistance that the Court can properly derive from it.

28. The starting point, I think, is to give the statutory words their literal meaning, then to consider whether a purposive interpretation might assist or whether one can divine the mischief at which the legislation is aimed. These are the standard principles of statutory interpretation and do not require citation of authority to support them. The difficulty in the present case, though, is not about how to interpret the words that appear in the sections under which the GFSC can impose a prohibition order, but the absence of anything explicit as to whether a prohibition order can be made for a specified time, rather than just made and then, should the individual named in it apply, varied or revoked as the case may be (eg, under section 17A(5) of the Fiduciaries Law in the same fashion as section 56(7) of the 2000 Act makes available in the United Kingdom).

29. In my opinion, the strongest argument that Advocate Shires has is to look at what the legislative intent was. It is commonplace when the Court has to construe a legislative provision to consider what was set out in the policy letter leading to the measure. This Court is not constrained in that regard by anything comparable to the rule derived from *Pepper v Hart* [1993] AC 593. In the policy letter prior to the enactment of the 2003 Law amending the Fiduciaries Law (at page 1759 of the Billet d'État for 2002), para. 10 states:

> "*The Fiduciary Law requires fiduciaries to notify the Commission that a person has become or has ceased to be a director of a fiduciary. The Commission also proposes it should have the explicit power to suspend or bar individuals from working for a fiduciary in the Bailiwick if it considers relevant individuals not to be fit and proper. Appropriate checks and balances should also be included in the Fiduciary Law, including the ability of the relevant individuals to make representations to the Commission and appeal to the court.*"

(There is very similar content at paragraphs 8 and 14 relating to the Banking Supervision Law and the POI Law respectively.) The changes to the IMII Law and the Insurance Business Law were only introduced later following a policy letter at page 1530 of the Billet d'État for 2007, with para. 2.3.1 as an example stating:

> "*The IMIIL should be updated to include prohibition orders in the same way as is currently provided for under the laws relating to other entities regulated by the Commission. The effect of this will be to empower the Commission to prevent any person, whom it deems not to be fit and proper to perform their duties, from performing duties in relation to the regulated activities of a licensee. The exercise of this power will be subject to the Commission's internal approval procedures and appeal process to the courts.*"

30. Although these two sources briefly set out what was intended by the Committee of the States sponsoring each set of proposals, there is comparatively little detail as to what was envisaged. I accept that the initial intention was to introduce a regime under which power would be afforded to the GFSC "*to suspend or bar*" persons who were not found to be fit and proper persons to work in the sector of the finance industry to be covered by the 2002 proposals. To that extent, I acknowledge

that the purpose was to include within the regime the possibility of a period of suspension (or disqualification as it might have been termed) or, in other cases, something with more permanence. However, what is quite apparent from section 17A (and related provisions) when they were enacted is that there is no content that refers to the suspension of a person and the wording that has been used instead refers only to the making of a prohibition order. Indeed, the reference in 2007 when proposing replicating the existing powers to the final two Regulatory Laws from which such powers had been omitted to empowering the GFSC "*to prevent any person*" who is deemed not to be fit and proper seems to me to confirm that the mechanism envisaged had moved away from the concept of suspending the person's ability to perform regulated activities. Although there is comparatively little assistance that I find in these materials, it is apparent that there has been no express reference in them to prohibition orders being made for only a specified period of time. Instead, what appears more likely than not to have happened following the 2002 policy letter is that section 56 of the 2002 Act has been considered as providing a form of legislative provision that could be used as a model to give effect to the policy then being advanced, by which an outright bar could be imposed (subject, of course, to the person barred having the ability to apply to revoke the order, whether or not the GFSC gave any indication that such an application might be warranted after any stated period of time). In short, the original intention does not appear to have been translated into the legislation subsequently enacted, but the later intention seems to acknowledge that the sanction is about prevention rather than also about suspension for a time.

31. The technique of interpreting legislation under section 3 of the Human Rights Law so as to make it Convention compliant can extend to "reading in" words. I have, therefore, carefully considered whether in a provision such as section 17A of the Fiduciaries Law I can properly read in words, for example at the end of subsection (1), which would have the effect of permitting a prohibition order to be made for a specified length of time. I am not, however, minded to adopt this technique. Advocate Shires did not offer any suggested wording and nor did she adequately identify how it is that section 17A (and the other provisions) would, if not construed in this manner, violate a person's Convention rights. She referred to the desirability of any sanction being a proportionate response to the circumstances of the case being considered by the GFSC, being one of the matters highlighted before the SDM, and I do understand how such a principle could be engaged in a case like Y's, but she was unable to explain to my satisfaction how it would be necessary to interpret Guernsey's Regulatory Laws regimes on prohibition orders in this way to overcome the problem where the regulator in the United Kingdom can impose prohibition orders but offer an indication of when it might be feasible for the individual named therein to apply to revoke the order. Advocate Shires commented that it could become administratively burdensome for all involved if those on whom prohibition orders were imposed had to apply for the orders to be revoked. However, at the same time, she quite properly pointed out that a person who had been prohibited in this way might not be able to return to perform regulated activities at the expiry of the period because it would depend on whether there was something else that was by then known about the person that would lead to the conclusion that he or she were still not a fit and proper person to perform those functions. I was not, therefore, persuaded that reliance could be placed on section 3 of the Human Rights Law in this case.

32. Advocate Shires also sought to rely on the Interpretation and Standard Provisions (Bailiwick of Guernsey) Law, 2016. At the time of the hearing, this Law had not entered into force. Consequently, she sought to rely on what Sedley J had said in *Sparks v Harland* [1996] 1 WLR 143, as referred to both in *Hitchins v Hill* (unreported, 16 November 2010) and *Toynton v Registrar of Companies* (unreported, 3 April 2013):

> "*... there is in my judgment no rule of law that impending legislative change is never a material consideration in the exercise of the court's powers and discretions. Everything, it seems to me, turns upon the subject matter and the relevance of the pending legislation or possibility of change to the issues which the court has before it.*"

By virtue of the Interpretation and Standard Provisions (Bailiwick of Guernsey) Law, 2016 (Commencement and Amendment) Ordinance, 2018, the Law has now come into force with effect from 1 October 2018. I do not, however, regard that as having any bearing on the interpretation task facing me because I have to determine whether, when the GFSC imposed these prohibition orders for

four-year periods on Y, it was empowered to do so. That involves looking at the position in June and not the position today. In effect, it means that I have to decide whether the SDM was (or would have been) entitled to have regard to any provision in the 2016 Law to assist with construing the provisions under which those prohibition orders were made. In my opinion, section 10 of the 2016 Law ("*Unless the contrary intention appears, an enactment continues to have effect and may be applied from time to time to the circumstances as they arise*") cannot be used retrospectively.

33. The provision in the 2016 Law on which Advocate Shires seeks to rely is section 24(2):

> "*Where an enactment confers a power or imposes a duty, unless the contrary intention appears, all powers –*
>
> *(a) as are reasonably necessary or expedient for the purposes of, or in connection with, or*
>
> *(b) as are ancillary, or incidental to,*
>
> *the exercise of the power or the performance of the duty, shall be regarded as given.*"

In her submission, the effect of this provision is wide enough to empower the GFSC, in the absence of any express wording, to impose time-limited prohibition orders and this provision should have been capable of being relied upon, even if not by then commenced, to justify the orders imposed by the SDM's decision.

34. My reason for rejecting that submission is that I do not think it is the correct way to approach the principle derived from what Sedley J said. Although the 2016 Law had been approved by Her Majesty in Council, and had then been registered on the Records of the Island on 12 March 2016, section 30 of it provides that it needs a Commencement Ordinance for it to enter into force. At the time of the SDM's decision, the draft Commencement Ordinance had not been lodged with HM Greffier. In those circumstances, I take the view that it was not something that crossed the SDM's mind and it was not an issue on which the parties had had the opportunity to make any representations. The position is not the same as in *Hitchins v Hill*, where the issue was whether to adjourn until such time as the coming into force of a new Law because waiting until the 2016 Law came into force was not an option raised before the SDM and doing so by the time of the hearing would not have assisted the GFSC anyway, and so the position is more akin to *Toynton v Registrar of Companies*. Accordingly, I reject the submissions Advocate Shires made relating to effect of the 2016 Law.

35. Another argument raised by Advocate Shires to justify the making of time-limited prohibition orders is to rely on the general power set out in section 8(1) of the FSC Law:

> "*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.*"

Although I appreciate that this subsection confers a wide general power on the GFSC, it does so in respect of "*its functions*". The general functions and statutory functions to which this power must, in my opinion, relate, are set out in sections 2 and 3 of the FSC Law. I am not persuaded that the overall statutory scheme under which the GFSC operates enables me to construe section 8(1) of the FSC Law as incorporating into the section 17A of the Fiduciaries Law (and the corresponding sections of the other Regulatory Laws) an incidental power to make a time-limited prohibition order. In my view, sections 17A to 17C in the Fiduciaries Law comprise the whole legislative framework for prohibition orders under that Law. For example, subsection (2) of section 17A clarifies that the prohibition order may be all-encompassing covering "*any regulated activity*" or it may be something less, whether specifying those regulated activities or by reference to a description of regulated activity. There is nothing setting out that the prohibition can be only for a time specified in the prohibition order. There is also nothing in section 17B about removing a person's name from any published list once the order has lapsed through effluxion of time. Further, the appeal provision in

each case refers to challenging the prohibition order and not to any challenge to its duration. In those circumstances, I do not find that the legislature has given the power that the GFSC has actually exercised in relation to the prohibition orders made against Y.

36. I find further support for that conclusion in what the GFSC must conclude before it can make a prohibition order. Section 17A(1) provides that the GFSC must find that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by a licensed fiduciary. This gateway seems to me to involve a binary choice: either an individual is or is not a fit and proper person. If found not to be a fit and proper person, the consequence is that a prohibition order may be made. It is a form of protection for those using licensed fiduciaries, ensuring that those individuals who the GFSC finds not to be fit and proper cannot perform functions that are prohibited by the order. Once found not to be a fit and proper person, the next stage would be whether or not there are steps that can be taken to rehabilitate the person so that he or she is once again regarded as a fit and proper person. A time-limited prohibition order without any further detail arguably pre-judges the time at which the individual named in the prohibition order is considered to be available to perform these functions, whereas an indefinite order, but one which the individual wishes to have revoked, leaves the prohibition in place until such time as the GFSC has re-considered the position. Accordingly, although the original plan may have been for there to be a power to suspend a person for a finite period of time as the person capable of performing a function in relation to a regulated activity, by adopting similar provisions to those in the 2000 Act, I take the view that the scheme conferred on the GFSC by the legislature results in any prohibition order being indefinite when imposed, but enabling some indication being given as to what steps and over what time the GFSC might be prepared to entertain an application to revoke it. In other words, once found not to be a fit and proper person, there is a degree of logic in placing the onus on the individual to satisfy the GFSC that it should re-assess that person's status. Although a small point, the SDM's footnote about future legislation clarifying the position may amount to an acknowledgement that the implication that time-limited prohibitions, being effectively a form of suspension, is currently not as certain as it ought to be.

37. For all these reasons, I am satisfied that Y's eighth ground of appeal in relation to the prohibition orders imposed under the suite of Regulatory Laws succeeds. (I am conscious that there may be current prohibition orders of a time-limited duration operating, but I was told that the number of persons potentially affected were I to reach this conclusion is in the mid-teens, and so take the view that the problem is not so extensive that I should worry that my conclusion will lead to a flood of applications to bring appeals out of time, although it is a consequence that I have borne in mind in reaching this decision.)

38. As regards the consequences of allowing those parts of Y's appeal, Advocate Barnes suggested that I should simply set aside the decisions and not remit this issue to the GFSC. He argued that the imposition of a time-limited prohibition order inevitably means that the GFSC was satisfied that an unlimited order was not justified. On the other hand, Advocate Shires urged me to exercise the Court's powers to remit the matter to the GFSC with such directions as the Court thinks fit.

39. In my judgment, it would be wrong for this Court simply to quash the decisions because it is quite clear that the SDM was labouring under a misunderstanding of the GFSC's powers in this regard. Indeed, until Advocate Barnes made his submissions on this issue, it is fair to say that it had not previously crossed my mind, as shown by the outcome in *Bordeaux Services (Guernsey) Limited v Guernsey Financial Services Commission*, that time-limited prohibition orders could not be made. Before making a prohibition order, the GFSC needs to find that an individual is not a fit and proper person in accordance with the terms of paragraph 3 of Schedule 1 to the Fiduciaries Law. For reasons I will explain in due course, I am satisfied that the SDM's findings on this question can properly be upheld. The next question is to decide whether or not to make a prohibition order. I disagree with Advocate Barnes' analysis. The SDM did not approach this question on the basis of whether to make an indefinite prohibition order or not to make any order at all. In any event, as the approach of the regulators in the United Kingdom demonstrates, the choice is not as stark as that. What the SDM did, which was consistent with previous practice, was to consider what would be a proportionate response to the findings made. The fact that prohibition orders were made implies that

a sanction of this type was, and so was capable of being, considered appropriate. Accordingly, I am satisfied that the justice of the case involves remitting to the GFSC the question of whether each prohibition order should be re-made and, if so, whether it would also be appropriate to give any indication as to when an application to revoke the prohibition order could sensibly be entertained.

Disapplication of exemption relating to directorships

40. Advocate Barnes made similar submissions in relation to the decision to disapply the exemption contained in section 3(1)(g) of the Fiduciaries Law and Advocate Shires' response was also similar. However, the analysis of this aspect of the appeal cannot be quite the same because there is less assistance from the terms of the legislation under which the power was exercised by the GFSC.

41. Section 3 of the Fiduciaries Law sets out the activities that are exempted from being regulated activities as described in section 2. Section 3(1) provides:

> "*The following activities are exempted from the operation of section 2 and are accordingly not regulated activities – ...*
>
> *(b) acting as a director of a company which has an established place of business within the Bailiwick provided that no services consisting of or comprising a regulated activity are supplied to the company by the director (other than acting as director),*
>
> *(c) acting as a director of a company which is quoted on a stock exchange recognised by the Commission for the purposes of this paragraph,*
>
> *(d) acting as a director where more than half in nominal value of the equity share capital of that company is held by –*
>
> *(i) the director, as beneficial owner,*
>
> *(ii) any close relative of the director, as beneficial owner, or*
>
> *(iii) the trustees of a trust of which a person mentioned in subparagraph (i) or (ii) is a beneficiary,*
>
> *(e) acting as a director of a supervised company,*
>
> *(f) acting as a director of a company which is subsidiary of a company described in paragraph (b), (c), (d) or (e),*
>
> *(g) acting, where the person so acting is an individual, 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 this subsection, except in any case where the Commission disapplies the exemption contained in this paragraph in respect of any person on the grounds that, having regard to the criteria of Schedule 1, the Commission is not satisfied that he is a fit and proper person to be or become a director of a company; and where the Commission decides so to disapply the exemption contained in this paragraph it shall serve notice to that effect on the person concerned, giving particulars of the right of appeal set out in section 19, ...*".

By section 2(1)(b)(iii), it is otherwise a regulated activity to act as "*director of any company or unincorporated body, or as partner of any partnership, whether incorporated, registered or established in or under the laws of the Bailiwick or elsewhere*". By section 4(3), an individual can obtain a personal fiduciary licence so as to be authorised to carry on by way of business *inter alia* acting as "*director of any company or unincorporated body, or as partner of any partnership, whether incorporated, registered or established in or under the laws of the Bailiwick or elsewhere*".

42. The reason for setting these provisions out in this way is because Advocate Shires reminded me that the exemption found in section 3(1)(g) is additional to those found in the preceding paragraphs. Normally, acting as a director of a company is a regulated activity, meaning that an individual so acting needs a personal fiduciary licence, unless an exemption applies. If one of the exemptions in paragraphs (b) to (f) applies, it is not a regulated activity to be a director of the company in question. Under para. (g) an individual is usually permitted to be a director of six or fewer companies not covered by one of the other exemptions without it being a regulated activity requiring to be covered by a fiduciary licence. However, if the GFSC concludes that the individual is not a fit and proper person to be or become a director of a company, it may disapply this exemption. It follows that the individual concerned would not be able to obtain a personal fiduciary licence as he or she would not be able to meet the minimum criteria for licensing contained in Schedule 1 to the Fiduciaries Law.

43. One of the differences between the disapplication of the exemption and a prohibition order under the Fiduciaries Law is that there are no indications given in the legislation about how to overcome a disapplication once it is imposed. In particular, there is no provision equivalent to section 17A(5). I have, therefore, considered it helpful to have regard to what was set out in the policy letters before section 3 was enacted. The initial policy letter (at page 670 of the Billet d'État for 2000) pointed out (in para. 2.3) that activities were to be regulated activities only if "*undertaken by way of business*" and set out the proposed exemptions, but did not include what became para. (g). When the draft Projet de Loi was submitted for approval, there was a supplementary policy letter (at page 1335 of the Billet for 2000) in which the inclusion of this exemption was explained as follows:

> "*The Commission considers that the result of the exemptions in the original policy letter would be to cast the regulatory net unnecessarily widely in relation to individual company directors. Any individual who acts as company director by way of business will need to obtain a fiduciary licence, irrespective of the number of directorships held, unless an exemption applies to each directorship. Whilst it is necessary, and the States have decided, to regulate the provision of directorship services by way of business, the Commission has concluded that there are many individuals who have a small number of directorships and whose activities pose no real risk to Guernsey's reputation as a finance centre.*
>
> *In particular, it is common for business and professional people to continue to act as director of a few companies after retirement from their principal businesses. Such people generally have the experience and time to provide directorship services in a thorough and responsible manner and, in the view of the Commission and the Committee, it is unnecessary for individuals acting as director of no more than six companies to have to obtain a fiduciary licence or a discretionary exemption and pay the related fees in both cases.*
>
> *The Committee has considered with the Commission whether an exemption for individuals holding up to six directorships which are not otherwise the subject of an exemption can be introduced in a way which would not create a significant regulatory loophole. After due consideration, it is believed that such a provision would not undermine effective fiduciary regulation so long as the Commission is able to disapply it in appropriate cases where it considers that the individual is not fit and proper. That condition is necessary because there would be a serious loophole if individuals who are unfit to act as a company director were automatically entitled to do so by way of business in relation to up to six companies without the Commission having the opportunity to refuse to grant a licence. Any individual in relation to whom the Commission disapplies the proposed exemption should however have a right of appeal to the Court.*
>
> *The proposal for an exemption coupled with a power for the Commission to disapply it would allow the Commission to prevent the abuse of the exemption. At the same time, it would avoid the need for all individuals with small numbers of directorships to apply either for a fiduciary licence or for a discretionary exemption under paragraph 2.5 of the earlier policy letter. This provisions now appears in draft clause 3(1)(g) of the Projet de Loi.*"

44. It appears, therefore, that section 3(1)(g) was a late addition to the Fiduciaries Law and arose when

the draft Law was out for consultation. It was intended to minimise the burden that would otherwise arise for those who have a handful of directorships by way of business. The proviso for disapplication of the exemption is the safeguard to prevent abuse of the regulatory exemption being introduced. It was envisaged to avoid persons who will fail to meet the minimum criteria for licensing as a director to slip through the net of what is otherwise a set of principles that requires fiduciary activity to be regulated.

45. As with the regime for prohibition orders, there is clearly nothing explicit about the disapplication being for any finite period. It strikes me, therefore, that if the GFSC has concluded that an individual is not a fit and proper person, at least so far as being suitable to act as a company director, those concerns about fitness and propriety are going to be for an indefinite period unless and until the individual concerned persuades the GFSC differently. To that extent, there appears to be considerable overlap with the considerations involved before the making of a prohibition order.

46. Although there is nothing express about the person who has been served with a notice of disapplication seeking to have that order revoked (or varied), if an individual wishes to act as a director of a company for which one of the other exemptions does not operate, I think it would be open to that individual to seek a specific exemption pursuant to section 3(1)(y) of the Law. This paragraph was mentioned by Advocate Shires. This could be the mechanism by which such an individual seeks to ascertain whether the GFSC continues to hold the view that he or she continues not to be a fit and proper person. Arguably it would enable the GFSC to issue a written instrument under para. (y) or, if it felt it appropriate to do so, to indicate that the disapplication of the para. (g) exemption would no longer apply. Indeed, in the way that the regulator in the United Kingdom can give an indication of when a suitable application might properly be made, I see no reason why the GFSC should not operate the disapplication regime in a similar way.

47. It was particularly in the context of proportionality that Advocate Shires drew attention to the endorsement by this Court in *Fernandes v Lieutenant-Governor* [2016] GLR 285 of what Laws LJ had said in *SS (Nigeria) v Home Secretary* [2014] 1 WLR 998 (at para. 38, which I have expanded slightly from the short passage quoted by her):

> "*There is no doubt that proportionality imposes a more demanding standard of public decision-making than conventional Wednesbury review, whose essence is simply an appeal to the rule of reason. But the true innovation effected by proportionality is not, in my judgment, to be defined in terms of judicial intrusion or activism. Rather it consists in the introduction into judicial review and like forms of process of a principle which might be a child of the common law itself: it may be (and often has been) called the principle of minimal interference. It is that every intrusion by the State upon the freedom of the individual stands in need of justification. Accordingly, any interference which is greater than required for the State's proper purpose cannot be justified. This is at the core of proportionality; it articulates the discipline which proportionality imposes on decision-makers ...*".

I agree with those sentiments on how to regard the principle of proportionality but they do not of themselves assist in relation to the legality of the decision reached by the GFSC in Y's case. Whether or not a time-limited disapplication of the exemption is permissible is a question of statutory construction and not just about proportionate decision-making. If the legislation conferred a power to make a time-limited disapplication, it would be incumbent on the GFSC to consider whether the length of disapplication it has in mind is more than warranted in the circumstances of the case. However, in a situation where there is nothing in the legislation relating to time-limited disapplication, I do not think that the principle of proportionality means that the legislation as it stands must be construed so as to add a power that is not there. I am not persuaded that it is permissible to imply that such a power is available.

48. Whilst I appreciate that Y does not have an equivalent provision to refer to as an example of how domestic legislation should be construed, I am persuaded that Advocate Barnes' submissions in relation to section 3(1)(g) are to be preferred. There is simply no power conferred on the GFSC to make the disapplication of the exemption time-limited. The level of detail given in para. (g) is not

even comparable to what is provided in para. (y). Despite the best efforts of Advocate Shires, I do not think it is possible to read into this provision the types of powers for which she contends. Further, I take the view that it would be anomalous to treat the GFSC as permitted to disapply the exemption for a specified period when there is no equivalent power in relation to a prohibition order. Both types of sanction arise where the GFSC concludes that the individual does not meet the minimum criteria for licensing. If such a conclusion is reached, I think it follows that if the sanctions are to apply, it is preferable to leave it to the individual concerned to advance the case for a fresh decision to be taken as to their continuing need. I get the impression that the disapplication of the exemption has come to be treated by the GFSC as something to add on to any prohibition order made in respect of someone who has been a director of a regulated entity for the simple reason that the minimum criteria for licensing are not satisfied. If so, it seems appropriate that both should be operated in a comparable fashion.

49. For these reasons, I am satisfied that this aspect of Y's appeal should be allowed and, again for similar reasons to those I have given in relation to the prohibition orders, I take the view that the issue has to be remitted to the GFSC to consider afresh whether to give notice of the disapplication of the exemption.

"Relevant officer"

50. Y's second ground of appeal raises another question of statutory interpretation. Both sections 11C and 11D of the FSC Law commence with the words:

> "*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, ...*".

If such a finding is made, then the issuing of a public statement and/or the imposition of a discretionary financial penalty become available.

51. Advocate Barnes argued that, because the tenor of the SDM's reasoning shows that the SDM treated Y as acting in a personal capacity rather than as a director and employee of Licensee X, Y does not fall into the definition given of a "relevant officer" in section 11C(3):

> "*A **"relevant officer"** means a person who when the contravention or non-fulfilment in question took place was a director, controller, partner, manager, general representative or authorised insurance representative of a licensee or former licensee.*"

His position shifted slightly during the course of the hearing because he had to acknowledge that Y fell within the definition as a director of Licensee X at the relevant times, so he suggested it should be construed as only attaching to a relevant officer who was engaged in regulated business. He gave the example of a person who committed some offence, even of dishonesty, unrelated to his or her employment and suggested that the two sections in the FSC Law could not properly be engaged in such a situation. In his submission, there was, therefore, no authority for the GFSC to use the powers contained in either of these sections because these sanctions are directed at licensed businesses and their senior employees and not those working outside licensed businesses. The same arguments were put to the SDM and rejected for the reasons set out at para. 40 of the SDM's reasons.

52. Advocate Barnes also drew attention to the position of Graeme Neal, who was made subject to two-year prohibition orders under the suite of Regulatory Laws on 10 May 2017, as shown on the GFSC's website, but in respect of whom no public statement was issued. The finding was that Mr Neal had been providing registered office services for five years without the appropriate licence to do so. Although there was nothing directly confirming the position, Advocate Shires invited me to

accept the explanation that the difference between this case and Y's case was that Mr Neal did not fall within the definition of "relevant officer". As a result, instead of there being a finding of non-fulfilment of the minimum licensing criteria (or a contravention of a regulatory Law) leading to the possibility of issuing a public statement or imposing a discretionary financial penalty, the GFSC was limited to publishing the bare details of the prohibition orders made (for example, pursuant to section 17B(4) of the Fiduciaries Law). Realistically, though, without knowing more about the case, there is nothing particularly helpful that either party can derive from referring to this case on the issue of how to construe section 11C(3).

53. In my judgment, there is no merit in this ground of appeal. What matters, as section 11C(3) makes quite clear, is whether the individual against whom either of these sanctions is being considered was acting in any of the capacities listed "*when the contravention or non-fulfilment in question took place*". The inclusion of the words "*former licensee*" demonstrates that, when looking at that historical position, the individual may have been acting in one of these capacities for an entity that is no longer licensed. A distinction is drawn between someone who was not connected to a licensed entity and those who were (and may still be). The former could not be the subject of either sanction whereas the latter could be. This would extend, in my opinion, to activity quite unrelated to the terms of the individual's employment. In this regard, the only issue is whether the legislation covers such a situation. I will deal with the minimum criteria for licensing in more detail in due course but, if such non-fulfilment were found, even as a result of actions outside of the workplace (and the terms of, eg, Schedule 1 to the Fiduciaries Law demonstrate the possibility of such conduct impacting on a person's fitness and propriety), there is the possibility that the GFSC could use its powers under either or both sections. Provided one or more of the capacities listed existed at the material time the person is a relevant officer for the purposes of both sections. I reject Advocate Barnes' attempt to construe the subsection narrowly as requiring acting on behalf of a regulated entity.

54. It was not ultra vires for the GFSC acting through the SDM to consider that, upon making a finding that Y did not fulfil one or more aspects of the minimum criteria for licensing in Schedule 1, it was open to the GFSC to issue a public statement and/or to impose a discretionary financial penalty. Whether to do either thing turns on other issues. I dismiss Y's appeal so far as it relate to this second ground of appeal.

Advertising services

55. Y's fifth ground of appeal relates to an allegation that the SDM reached the wrong conclusion on the application of other exemptions contained in section 3(1) of the Fiduciaries Law. This relates to what was on Y's practice's website. However, there is no challenge to the finding made by the SDM at para. 44 of the reasons:

> "*I am of the view that [Y] did offer on [Y's practice's] website the service of Guernsey Company Formation, and that in doing so [Y] offered to carry on a regulated activity, by way of business, without the required licence. This is a contravention of the Fiduciaries Law.*"

As a result, this ground of appeal does not provide a complete answer to the allegations against Y, but rather goes to the seriousness of Y's non-fulfilment of the minimum licensing criteria.

56. The SDM's explanation of the conclusion (in para. 47 of the reasons) that there had been an offering of company administration and secretarial services on Y's practice's website without Y holding the required licence is set out in para. 46:

> "*'Company or corporate administration' for the purposes of section 2(1)(b) of the Fiduciaries Law is specifically said to include the provision of advice in relation to the formation, management or administration of companies. I am of the view that [Y's practice's] website offered services which fell within 'company or corporate administration' for the purposes of the Fiduciaries Law. It was submitted on [Y's] behalf that the exemptions contained in section 3(1)(q) & (r) of the Fiduciaries Law covered a complete range of*

company administration. It was also drawn to my attention that it was an exempt activity to act "as ... company secretary of a company ... provided that no services consisting of or comprising a regulated activity are supplied to the company by the person concerned (other than acting as ... company secretary)" (Fiduciaries Law, s 3(1)(h)). It was specifically asserted on [Y's] behalf that it was common knowledge that small local businesses could not afford to go to large firms in Guernsey, and hence used their accountants (who were not fiduciaries) to also carry out company secretarial tasks: it was said that the local telephone directory contained an entry for an accountant who was not a fiduciary, who offered company secretarial services (I was not provided with a copy of the relevant entry). This latter emerged during the SDM hearing, however, in the brief time available, the Enforcement Division were able to provide a list of accountants who held fiduciary licences (or were connected to full fiduciaries). They therefore disputed that it was normal that accountants would carry out such services without a fiduciary licence. I do not consider that all of the secretarial and statutory services offered on [Y's practice's] website could be said to fall within the exemption contained in section 3(1)(q) & (r) of the Fiduciaries Law. Guernsey accountants have never been able to incorporate companies for their clients. [Y's practice's] website itself stated that the services offered by [Y's practice] went beyond straightforward accountancy services. Indeed, the website specifically distinguished between the accountancy services which were offered, and the secretarial and statutory services which were offered. The latter went beyond the drafting of meeting minutes."

57. The SDM set out in para. 11 the factual findings of what Y's practice's website contained:

> *"As at 1 June 2017, [Y's practice's] website indicated that its services were directed to Guernsey clients, and that they could assist "local businesses beyond straightforward accountancy services" (including liaising on behalf of clients with the Registry). In detailing the services offered, the introductory statement was: "Below is a list of some of the primary accountancy plus associated services which [Y's practice] offer our clients. We also provide general administration for Guernsey companies, in particular, when dealing with other service companies and Authorities". Under the heading "Accountancy", it was detailed what [Y's practice] could assist with. There were also certain separate headings, one of which was "Secretarial and Statutory". Under the latter heading, it was stated that "Secretarial services ensure that your statutory records, registers and resolutions are up to date and aligned correctly with those of the Registry. This will make certain your business is kept in good standing with statutory paperwork and Guernsey Registry submissions. [Y's practice] engage fiduciaries to incorporate Guernsey companies and we assist with all other start up matters including opening bank accounts to get businesses operational". There was then a list of other secretarial and statutory matters which they could assist with, such as company dissolution, changes of company name, registered office, or Articles of Incorporation, the appointment and removal of directors."*

58. The relevant paragraphs in section 3(1) of the Fiduciaries Law provide that the following exemptions apply making these activities not regulated activities:

> *"(h) acting as a bookkeeper or company secretary of a company which has an established place of business within the Bailiwick provided that no services consisting of or comprising a regulated activity are supplied to the company by the person concerned (other than acting as bookkeeper or company secretary), ...*
>
> *(q) the provision of advice or the drafting of documents by a lawyer, accountant or actuary in the ordinary course of carrying on the profession of lawyer, accountant or (as the case may be) actuary,*
>
> *(r) the drafting of minutes of meetings by a lawyer, accountant or actuary, ...".*

59. Advocate Barnes submits that the SDM reached the conclusions stated in para. 46 of the reasons without fully understanding how what Y's practice advertised was covered by the exemptions in

section 3(1) and so did not constitute a regulated activity for which a licence was required. The SDM has referred to offering company formation services in the context of considering whether paragraphs (q) and (r) applied when the SDM had already identified that this aspect of what was advertised for a time was a contravention.

60. In response, Advocate Shires accepted that some of what Y's practice had advertised was covered by the exemptions. However, in her submission, the finding made that not everything advertised was covered by an exemption was a finding that could not be interfered with. In particular, she pointed to a distinction that had been drawn between company administration services offered by Y's practice, which led to the imposition by the GFSC in June 2017 of conditions on Y's practice's registration, and other services that were advertised.

61. I was taken to the screenshots from the two websites used by Y's practice that had been before the SDM. The earlier version of the website listed a number of services Y's practice could provide: preparation of financial statements; secretarial services; Guernsey company formation; management accounts; Guernsey Income Tax computations; Income Tax appeals and investigations; States Insurance Authority matters; and set-up of accounting systems. After an explanation of the way Y's practice approached maters, some of that list is repeated and two further services were added: Guernsey bookkeeping services and corporate statutory requirements and filing assistance. The later version of the website, which is the one to which the SDM referred in the extract from para. 11 already quoted, set out at the start that it was a "*practice providing personal and prompt accountancy, bookkeeping, financial reporting, statutory and administrative services for medium and small sized Guernsey businesses, sole traders and individuals*". In addition to the matters to which the SDM referred, the section headed "Accountancy" included references to bookkeeping.

62. Although this is not one of the more significant issues raised on behalf of Y, I am not persuaded that the conclusion in para. 47 that Y "*offered company and administration*" services (emphasis added) is a conclusion that the SDM was permitted to reach. It seems to me that there was an insufficient factual analysis of what it was permissible for Y's practice to advertise and what potentially went further than permitted. Advocate Barnes accepted that there were some services advertised that Y was not permitted to advertise. His criticism of the SDM's decision was about the way in which a broadbrush conclusion has been reached without piecing together the exemptions Y's practice was entitled to rely upon. Section 2(1)(b) of the Fiduciaries Law makes "*company or corporate administration*" a regulated activity. It offers some examples of what is included, but without prejudice to the generality of the words in para. (b). Anything exempted by section 3(1) turns what would be a regulated activity into an unregulated activity. Some of the activities advertised by Y's practice appear to involve drafting meeting minutes and so be covered by para. (r). Other activities were bookkeeping and secretarial services and so potentially covered by para. (h). In relation to para. (q), there seems to me to have been little by way of evidence put before the SDM as to what is covered by the ordinary course of carrying on the profession of accountant and the focus should, in any event, have been on whether what was offered could properly be regarded as the provision of advice (eg, the websites referred at times to assisting with certain matters). In those circumstances, I agree with Advocate Barnes that the way the SDM has approached this question has been slightly flawed. In particular, the reference in para. 46 to Y's practice never being able to form companies was an issue on which a finding of a contravention had already been made and so was not relevant to whether any of the exemptions advanced on behalf of Y about the other services advertised operated and the fact that the website "*stated that the services offered by [Y's practice] went beyond straightforward accountancy services*" does not mean that what was being offered fell outside of any of these exemptions.

63. To this limited extent, I am persuaded that the fifth ground of appeal should be upheld, whether as a material error as to the facts or as irrational, and will return to the consequences of doing so in due course.

Formation of companies

64. Having dealt with most of the grounds of appeal that involved how to construe the various legislative

provisions, I will briefly touch on Y's first ground of appeal before turning to the others. This ground alleges that the SDM fell into error when deciding that the 12 companies had been formed by Y acting in a personal capacity rather than by Licensee X.

65. At para. 35 of the reasons, the SDM expressly rejected the suggestion from Advocate Barnes that using Licensee X's online log-in details with the Guernsey Registry of itself meant that Licensee X formed the companies. The SDM's conclusions on the issue are contained in para. 36:

> *"I am of the view that when incorporating the 12 companies in question, [Y] was acting as the principal of [Y's practice]. I do not think [Y] was employing [Licensee X] (through [Y] in [Y's] capacity as a [Licensee X] director) to carry out this work. I reach that conclusion for the following reasons:*
>
> - *[Y] carried out the 12 company incorporations for [Y's practice's] clients (as part of [Y's practice's] business, not for [Licensee X's] clients;*
> - *for a period of time [Y's practice's] website actively stated that Guernsey company formation was a service which [Y's practice] could offer to its clients;*
> - *if [Y] did not realise that [Y's practice] could not form companies in its own right, there would be no reason for [Y] to engage [Licensee X] to carry out that work;*
> - *most of the registration fees were paid directly by [Y] using a personal, or [Y's practice], debit/credit card, whereas if [Licensee X] were being employed to carry out the incorporations, one might have expected that [Licensee X] would meet all the fees in the first instance, and recover them when charging for their services.*
> - *no charge was made by [Licensee X] for carrying out any of the incorporations – despite the fact that it would be normal for a fiduciary employed to carry out an incorporation to charge for that service, and it would be normal for [Licensee X] to charge for their services;*
> - *the CDD documentation collected by [Y] was not retained by [Licensee X];*
> - *[Y] appeared to be of the view (as stated in the written submission submitted prior to the SDM Hearing) that because [Y] had a stake in [Licensee X], [Y] "was entitled to use one of its facilities ... for [Y's] own benefit" (my emphasis);*
> - *I note that [Y's] contract of employment did not permit [Y] to run [Y's] own business without [Licensee X's] permission, and I think that it is clear from [Y's] own evidence that [Y] did not seek express permission to run [Y's practice's] business and incorporate the 12 companies for [Y's practice's] clients, in the period prior to March 2016, because Y did not think that [Licensee's X's majority owner and fellow director] would consent. Any attempts to raise the issue with [Y's] employer do not ever seem to have passed beyond the most tentative enquiries as to whether [Licensee X] might undertake accountancy work. It seems to me that, at its highest, [Y's] own evidence is essentially that some in [Licensee X's] office may have suspected or realised that [Y] was doing some form of accountancy work which was not part of [Licensee X's] business – but that [Licensee X's majority owner and fellow director] did not know this, and if [Licensee X's that majority owner and fellow director] were to find out [Y] would likely have been dismissed. [Y] accepts that [Y] was in breach of his contract of employment with [Licensee X].*"

66. Although neither Advocate spelt out the test that should be applied to this ground of appeal, I have approached the issue on the basis that I should consider whether Y has persuaded me that the SDM has reached a decision in respect of which there was no evidence or insufficient evidence to support it so that it must be regarded as perverse. Put in that way, it is apparent that there was a clear basis for the SDM's decision and it is one with which I cannot interfere.

67. In agreement with the SDM, I find the suggestion of Advocate Barnes that the formation of these 12 companies should be regarded as having been the action of Licensee X as an artificial analysis of what happened. Unlike the other activities in which Y's practice engaged, the physical step of using the Guernsey Registry portal could not be undertaken by Y from home and had to use the system usually used by Licensee X. However, everything else surrounding these company formations points

towards it being an activity undertaken by Y's practice and not Licensee X. The contention that Y, as a director of Licensee X, could take a decision that Licensee X was forming the companies, and then Y, as the principal of Y's practice could invoice those for whose benefit the companies were formed is sufficient for the SDM rationally to conclude that this was Y acting throughout and, to the extent that Y made use of Licensee X's online registration access with the Guernsey Registry, this was a misuse by Y of that facility. In my opinion, for the reasons given, the SDM was entitled to conclude that there was much more evidence pointing towards these incorporations being directed by Y on behalf of Y's practice than them being an activity of Licensee X. Accordingly, Y's first ground of appeal is rejected.

Rationality

68. The sixth of Y's grounds of appeal alleges that the SDM's decision was irrational because the SDM took into account matters that were not relevant. The matters referred to are the inconsistencies the SDM highlighted in Y's answers to questions put to Y during the investigative process, Y's apparent lack of knowledge of company law, Y's lack of understanding of what Licensee X did as part of its business and what was covered by Licensee X's BRA, and Y's failure to appreciate the seriousness of the allegations.

69. Advocate Shires acknowledged that the intensity of the review of a decision of the GFSC would be towards the higher end of the spectrum (as had been noted in the *Bordeaux Services (Guernsey) Limited* case). However, she argued that it was necessary for the Court to have regard to the whole of what the SDM had decided and referred to as relevant to the decision to impose the sanctions on Y that were imposed and it would only be if there was a shortcoming that undermined the SDM's decision that the Court should consider setting it aside.

70. In this regard, I think it is important to remember the basis on which the SDM's decision proceeds. It is an issue that evolved from the wider terms of the Minded To Notice, no doubt as a result of what was said at the oral hearing to elaborate upon the written submissions. What had initially been put as allegations that both the Fiduciaries Law had been contravened and Y did not fulfil the minimum criteria for licensing ended up as a finding that Y "*fails to fulfil the minimum criteria for licensing under the Fiduciaries Law*" (para. 60). That finding arose from conduct described in para. 59:

> "*As narrated above, I conclude that [Y] contravened the Fiduciaries Law, in that (i) in incorporating companies for clients of [Y's practice], [Y] conducted the regulated business of company administration (by way of business) without the appropriate licence; and (ii) [Y] offered to carry out company formation services, and more general company administration and secretarial services, (by way of business) without having the appropriate licence.*"

The finding that Y is not a fit and proper person is then repeated in paragraphs 61 and 68. When the SDM deals with the factors that must be considered (to which I will turn in more detail in due course), paragraphs 71 and 73 expressly refer to non-fulfilment, and without any reference to contravention, which had featured in the Minded To Notice. I am satisfied, therefore, that this was a conscious decision of the SDM and so now binds the GFSC: the basis for imposing the sanctions was solely on the ground of the finding that Y did not fulfil the minimum criteria for licensing.

71. Those minimum criteria for licensing are set out in Schedule 1 to the Fiduciaries Law. (Similar criteria are set out in the other Regulatory Laws.) Paragraph 3 of that Schedule deals with fit and proper persons and sub-para. (1) provides that "*every person who is, or is to be, a director, controller, partner or manager*" of an applicant for a full fiduciary licence, or a licensed fiduciary, must be a fit and proper person to hold that position. Sub-paragraph (2) set out the matters to which regard must be had in determining if a person is a fit and proper person. It is an extensive list and includes:

> "*(a) his probity, competence, experience and soundness of judgment for fulfilling the responsibilities ... of that position,*
>
> *(b) the diligence with which he is fulfilling or likely to fulfil those responsibilities, ...*

(d) his educational and professional qualifications, his membership of professional or other relevant bodies and any evidence of his continuing professional education or development,

(e) his knowledge and understanding of the legal and professional obligations to be assumed or undertaken, ...".

Sub-paragraph (3) further provides:

"*Without prejudice to the generality of the foregoing provisions, regard may be had to the previous conduct and activities of the person in question and, in particular, to any evidence that he has –*

(a) committed any offence, and in particular any offence involving fraud or other dishonesty or involving violence,

(b) contravened any provision contained in or made under –

(i) this Law,

(ii) the regulatory Laws,

(iii) any enactment relating to money laundering or terrorist financing (including, for the avoidance of doubt, rules, instructions and guidance issued by the Commission in relation thereto), or ...

(c) engaged in any business practices (whether unlawful or not) –

(i) appearing to the Commission to be deceitful or oppressive or otherwise improper, or

(ii) which otherwise reflect discredit on his method of conducting business or his suitability to carry on regulated activities, or

(d) engaged in or been associated with any business practices or otherwise conducted himself in such a way as to cast doubt on his competence and soundness of judgment."

By sub-paragraph (4)(a), "conduct and activities" is defined as including "*any conduct, activity or omission in any jurisdiction*".

72. The SDM regarded the lack of consistency in Y's position as being of concern because it related to Y's "*openness and honesty during the investigation*" (para. 55). As Advocate Shires pointed out, these inconsistencies are relevant because they touch on Y's probity, competence and soundness of judgment. These are all matters to which the GFSC is obliged under para. 3 of Schedule 1 to have regard. It is, therefore, quite clear that referring to these matters cannot be regarded as taking into account anything that is irrelevant. The provisions of Schedule 1 demonstrate that higher standards are expected of those who work in the regulated sectors than might be expected of those who do not.

73. When the SDM refers to Y having breached the contract of employment Y had with Licensee X, the SDM was referring to a concession made on behalf of Y in the written submissions (as noted in the final sentence of para. 36 of the reasons as previously quoted). Advocate Barnes seemed to be criticising the prominence that the SDM gave to this breach of contract. Having regard to the totality of the SDM's reasoning, I am not persuaded that undue prominence has been given to this factor. By reference to the matters to which regard must be had, it seems to me to be relevant to whether or not the minimum criteria for licensing were satisfied for the SDM to consider whether the conduct by Y

of Y's practice without complying with the terms of Y's contract of employment amounted to engaging in improper business practices. Those business practices were not in themselves necessarily unlawful, of course, but this issue potentially also shades into whether or not this was an example of Y not exercising sound judgment. It can also be regarded as a factor going to Y's probity. Advocate Barnes was critical of the attacks made on Y's probity. However, the basic allegations against Y of incorporating companies without the required licence and advertising some services that it was not permissible to advertise have been found proved and it follows from those findings that Y's probity in acting in these ways is brought into question. All of these are matters to which the GFSC was entitled to have regard and so it cannot be said that considering them renders the SDM's decision irrational.

74. Similarly, para. 3(2)(e) of Schedule 1 expressly refers to legal knowledge. In the context of an allegation against Y that Y had formed companies under the umbrella of Y's practice and Y's insistence that this activity had been performed as part of Licensee X's business, I do not find anything irrational in the SDM highlighting Y's apparent lack of understanding of how domestic company law operates. As far as I can see, the legislative framework under which these activities were being undertaken was at the heart of the investigation and it was obviously open to the SDM to draw the conclusions about Y's understanding of these matters, which extends to the inclusion or omission of these matters in the BRAs of Licensee X and Y's practice that are contained in the reasons. Advocate Barnes sought to argue that the SDM overlooked that company formation was covered by the BRA of Licensee X and so fell into error. In my view, there was no error here because the content of Licensee X's BRA was not relevant once it was found that the incorporations were Y's acts and not those of Licensee X. Accordingly, all of these were not irrelevant matters at all.

75. Looking at the detailed reasons in the round, I am satisfied that this sixth ground of appeal is without merit. I think it is an attempt on behalf of Y to de-construct the reasons in such a way as to undermine the finding made that Y is not a fit and proper person and so did not fulfil the minimum licensing criteria. That is a finding that I am satisfied was available to the SDM to reach on all the material considered. Indeed, once the finding was made that the formation of these 12 companies was the action of Y and not Licensee X, as well as the acknowledgement that services had been advertised on the website as part of Y's practice that Y was not permitted to advertise, there was obviously material from which that finding could be made and, in my opinion, was properly made.

Statutory considerations

76. Once the SDM was satisfied that there had been non-fulfilment of the minimum criteria for licensing applicable to Y, the sanction of publishing a statement and/or imposing a discretionary financial penalty became available. Before deciding whether or not to take either or both courses of action, subsection (2) in sections 11C and 11D of the FSC Law list the factors that must be taken into consideration. Each subsection is in near identical terms, the only differences being in paragraphs (e) and (f) (where the words appearing in square brackets relate to each section respectively):

> "*(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 [publishing a statement/imposing a penalty],*
>
> *(f) the [action taken by the Commission under this section/penalties imposed by the Commission] in other cases.*"

77. Y's ninth ground of appeal alleges that the SDM failed to have regard to these considerations as required by the two sections thereby rendering the decision ultra vires. It is apparent from reading the reasons given that the SDM dealt with each of these paragraphs in turn. Accordingly, Y's complaint is not that any of the factors was overlooked, but the way in which the SDM dealt with some of them. In particular, Y argues that the SDM should have acknowledged that Y had self-reported and not treated this as a neutral factor, should have found that the conduct was inadvertent, that it was rectified immediately with no risk of recurrence and treated the financial consequences to Y as much more severe than the SDM did. Advocate Barnes also spent a considerable amount of time pointing out that the other cases to which the GFSC was to have regard under para. (f) did not support the severity of the sanctions imposed on Y.

78. In my view, there is so much of an overlap between this ninth ground of appeal and Y's third ground of appeal alleging that the sanctions imposed were disproportionate or unreasonable that it will not assist to deal with these two lines of challenge distinctly. For example, if the decision to make a public statement or the decision to impose a financial penalty of £13,000 is found to have been based on a misapplication of any of these paragraphs, it is more likely also to touch on the proportionality of what has been done as to whether the sanction itself could lawfully be imposed. This is because paragraphs 69 *et seq.* of the SDM's reasons deal with each paragraph in turn and in some detail.

Proportionality and reasonableness

79. Y's third ground of appeal contends that all the sanctions imposed by the SDM were "*wholly disproportionate*" and such that no reasonable decision-maker would have made. Particular reference is made to the sanctions not bearing comparison to other cases decided by the GFSC. In response, Advocate Shires contends that these sanctions were well within the range of responses open to the GFSC and so should not be set aside.

80. I will concentrate on the SDM's decisions under sections 11C and 11D of the FSC Law before briefly commenting on the prohibition orders and the disapplication of the exemption in section 3(1)(g) of the Fiduciaries Law, which are sanctions that I have already indicated will be set aside and remitted to the GFSC and so anything further I say about those sanctions is not strictly required to determine Y's appeals. Following the approach of the SDM, I will address each of the factors in subsection (2) of both sections in turn.

81. In respect of para. (a), the SDM concluded at para. 70 that Y could not be given much credit for contacting the GFSC and that "*in all the circumstances, this can be no better than a neutral factor*". As the SDM also noted in that paragraph, the incorporation of companies had been ongoing for a number of years. The number of occasions on which this happened was spaced out over that period and it was something that was only brought to the attention of the GFSC when Y was already being investigated by Licensee X. I regard the approach taken by the SDM as recognising that there had been contact by Y, but it was contact that had been delayed until discovery of what Y had been engaged in doing for a number of years when that was on the verge of being unearthed to the GFSC through contact from Licensee X. To that extent, I understand the conclusion of the SDM to be that Y was only self-reporting, and doing so in the context of how Y could regularise the position of Y's practice, when discovery was inevitable. Although it is an imprecise analogy, there are occasions when the discount to be afforded to a defendant pleading guilty to a criminal matter is reduced because there really was no choice but to plead guilty. I cannot, therefore, find that the approach taken by the SDM is a misapplication of the paragraph, although it may have been a little harsh, though not unreasonable, to describe it as "*no better than a neutral factor*" when at the start of para. 70 reference had been made to Y not getting much credit for it, implying that it could be treated as a marginally positive factor. Ultimately, this is a small point that needs to be viewed in the round to put it into context.

82. In relation to para. (b), the SDM regarded Y's non-fulfilment of the minimum criteria for licensing as serious, and added that it "*tends towards the lower end of the scale in the range of that which has occurred or may occur*" (para. 71). The explanation at the start of that paragraph for reaching that conclusion is that:

> *"The licensing regime in the Fiduciaries Law safeguards the public by ensuring appropriate standards of professional conduct, and also safeguards the reputation of the Bailiwick as a financial centre. Whilst Advocate Barnes sought to argue that the circumstances of [Y's] case involved no reputational risk to Guernsey, I agree with the Enforcement Division's submission that there is such reputational risk if breaches of Regulatory Laws and the carrying on of unlicensed activity are not dealt with appropriately."*

Paragraph 72 (which was not in the Minded To Notice) rehearses the arguments the SDM heard but appears not to draw any conclusion:

> *"In the written submissions lodged in advance of the SDM hearing, Advocate Barnes sought to develop a submission as to the proportionality of the penalty, having specific regard to the fine which might have been imposed had [Y] been prosecuted and found guilty of an offence under the Fiduciaries Law. He drew attention to the fact that the maximum fine, had [Y] been prosecuted in summary proceedings, for each offence would be in the sum of £10,000. However, the Enforcement Division in turn noted that, on this hypothesis, [Y's] conduct would give rise to more than one offence in breach of each of section 1, and section 37, of the Fiduciaries Law – which would bring out a maximum potential fine of between £110,000 and £140,000."*

83. By including this paragraph, it suggests that the SDM had in mind the overlap that exists where there might also be a criminal prosecution. Although the SDM does not say as much, I think it ought to be a relevant consideration in dealing with an individual for the GFSC to take into account whether the individual facing a regulatory sanction has also been fined by a Court for the same conduct. There is not necessarily a direct correlation between any penalty that has been imposed by a Court and any discretionary financial penalty being considered by the GFSC and it is arguable that this issue relates as much to para. (e) as to the seriousness of the contravention or, as in Y's case, the non-fulfilment, in the sense that the GFSC is not obliged to give full credit in respect of whatever fine has been imposed. However, there is, in my view, some relevance to the submission made by Advocate Barnes to the SDM that does not appear to have led to a conclusion. In particular, it is unrealistic for the SDM to have noted the submission from the Enforcement Division without adding that a criminal Court would not have considered anything approaching the maximum fines available under the Fiduciaries Law for the conduct of Y. This is obvious on the basis that the GFSC did not impose a financial penalty of anywhere near the maximum then available of £400,000, or even the previous maximum of £200,000. (That new maximum amount was substituted by the Financial Services Commission (Bailiwick of Guernsey) (Amendment) Law, 2016, which also added into section 11D(2) a new para. (g): "*in the case of a personal fiduciary licensee or former such licensee a relevant officer, the emoluments arising from or otherwise in respect of the relevant position held by him, at the time when the contravention or non-fulfilment took place and otherwise.*" No reference was made to that paragraph by either Advocate nor does it appear to have been covered in the SDM's reasons and so I make no further comment in relation to it.) What would have been helpful in the light of the submissions made by Advocate Barnes would have been some comment from the SDM as to the relevance of this issue. However, I also appreciate that there is a risk of descending into unwarranted speculation given the paucity of prosecutions under the Fiduciaries Law.

84. There is one other aspect of the assessment of seriousness that was not perhaps addressed by the SDM as fully as would have been desirable. The note of the meeting Y attended with officers of the GFSC on 14 April 2016 includes a reference that one officer "*sought to reassure [Y] that this was not one of the Enforcement Division's most serious investigations but that it did require further investigation*". (That note also added that "*mitigating factors such as self-reporting would be taken into account*".) There is, of course, more than one way to read this comment. If the emphasis is placed on "*most*", it could still be a serious non-fulfilment, but not at the upper end of the spectrum. The alternative reading, and the one on which Advocate Barnes relies, is that Y's non-fulfilment should not have been elevated into the serious category at all.

85. In my opinion, it cannot be said that the SDM fell into error in categorising what Y did as serious,

but at the lowest point in that category. The GFSC has published a one-page table offering guidance as to the approach to be taken in categorising conduct in respect of which a discretionary financial penalty is to be imposed into one of four bands. The document notes that these are starting points and each case will depend on its particular facts. The reason for mentioning it is that there is a distinction drawn between regulatory failings that are serious in nature and those that are not. In other words, the approach the GFSC has chosen to take is to distinguish this one characteristic in this simple fashion. The GFSC has not chosen to have more than these two categories in relation to basic seriousness. If the regulatory failings are assessed as not being serious in nature, it clearly means that this conduct in principle falls into the lowest band. As soon as the assessment is made that at least some of the failings are serious, the conduct moves up into a higher band and the assessment of which band is most appropriate will depend on other characteristics. Naturally, these bands should not be treated as impermeable, and the GFSC should, I think, be prepared to re-categorise between the bands as circumstances dictate. For example, just because the regulatory failings are thought to be serious, it does not automatically mean that the approach indicated by the lowest band is inappropriate. It is the overall assessment that matters, not a rigid or mechanistic approach that once a certain category has been reached no departure from it is permissible. Indeed, in Y's case, it would have been possible to have decided that the failings were not serious but were at the higher end of those not serious failings and the end result may have been unaffected. Accordingly, I do not consider that the categorisation of the SDM can be said to be wrong. The non-fulfilment found included conducting a regulated activity without a licence and it seems to me to be reasonable to regard that as serious rather than not serious.

86. In relation to para. (c) and inadvertence, the SDM found that Y's non-fulfilment "*occurred by way of deliberate actions on [Y's] part*". The basis of the non-fulfilment found was the incorporation of the 12 companies through Y's practice and the offering of services on the practice's website relating to company formation and, as I have already explained, some aspects of company administration. Y acknowledged that the content of the website was Y's responsibility. Y may have been sloppy about the services Y's practice offered, and may have reaped no benefit from it, but the inclusion of those aspects in the practice's advertising can only have been through positive action and so not inadvertent. Similarly, the company incorporations did not arise through inadvertence. Y may not have realised at the time that this would lead to a finding of non-fulfilment of the minimum licensing criteria, but the inadvertence must, in my opinion, relate to the act or omission involved and not the consequences of that act or omission. I am satisfied that the SDM's approach to this paragraph was justified.

87. In terms of rectification and preventing any non-recurrence, the SDM accepted Y's indication that steps were taken immediately to avoid any recurrence. Because Y's employment with Licensee X terminated, the prospect of any recurrence fell squarely within Y's own hands and the SDM indicated that these factors would be taken into account in mitigation (para. 74). There is nothing further to say about para. (d).

88. In relation to para. (e), the SDM identified that the means of Y were such that a discretionary financial penalty of the level the SDM had had in mind was apparently affordable and acknowledged that "*the issuing of a public statements may have a detrimental effect on [Y's] reputation, and hence on [Y's practice's] business*", before adding that (at para. 77):

> "*The Enforcement Division drew my attention to some of the general purposes served by the issuing of a public statement, namely to highlight bad practices so that lessons may be learned by those working in the finance industry, and also to act as a deterrent.*"

89. On behalf of Y, Advocate Barnes has argued that the GFSC's decision to issue a public statement put Y's livelihood at risk. Y has also sworn two Affidavits (on 12 June and 27 July 2018) to support that contention. Y explains that some work to which remuneration was attached has already been lost.

90. I am satisfied that the SDM was alive to the financial consequences of deciding to impose a financial penalty and also to issue a public statement. I take the view that the SDM has appropriately balanced the likely adverse financial consequences to Y of issuing a public statement setting out that there has

been a finding that Y failed to meet the minimum criteria for licensing with the likely benefit in the GFSC being able to explain the consequences of such a finding in respect of a relevant officer. In this regard, I think it is important to remember that the making of a prohibition order in itself can be publicised by the GFSC (eg, under section 17B of the Fiduciaries Law, as happened in relation to Mr Neal), so the difference in a case where a public statement is to be issued in respect of a relevant officer is about the additional detail that can be included. Similarly, section 11D(3) of the FSC Law provides that "*Where a penalty is imposed on a person under this section, the Commission may publish his name and the amount of the penalty.*" In those circumstances, I get the impression that Y has rather overlooked the difference between there being information capable of being put into the public domain under other provisions in the suite of Regulatory Laws that would give the bare details of the sanctions imposed, which in itself would be likely to have certain adverse consequences, and the more detailed analysis of the findings made as underpinning why these sanctions have been imposed that get included in a public statement. Subject to what I will add shortly, in some respects, therefore, the making of the public statement can be beneficial because it enables those who read about an individual on whom sanctions have been imposed to become more fully conversant with the reasons for those sanctions and it avoids unwarranted speculation as to exactly what happened. I am not, therefore, persuaded that the SDM took insufficient account of the financial consequences to Y of deciding to issue a public statement.

91. Paragraph (f) was the area on which Advocate Barnes focused most of his attention. The relevant paragraphs of the SDM's decision are as follows:

> "*78. I have duly considered the penalties which have been imposed by the Commission in other cases, and the other cases in which the Commission have made a public statement. None of these cases seem to me to set a direct precedent.*
>
> *79. However, it seems to me that:*
>
> – *[Y's] conduct may be said to be more serious that that involved in the cases of Mr Ian Banneville (£7,000 penalty imposed) and of Mr Richard Wickins (£8,000 penalty reflecting a discount in respect of early settlement, and certain prohibition orders and relevant licence conditions, imposed); and*
>
> – *[Y's] conduct is more comparable with, but still somewhat more serious than, cases such as that of Mr Christopher Hubbard (£10,000 penalty, and 5 years prohibition order, imposed), and of Mr King and Mrs Chapman (£10,500 penalty imposed on each, reflecting a discount for early settlement).*
>
> *Particular aspects of [Y's] case which have been key in my drawing these distinctions are that: (i) the actions which constituted the non-fulfilment were carried out by [Y] at [Y's] own hand over a period of around 4 years; (ii) I consider that [Y] has attempted to downplay the seriousness of [Y's] conduct; and (iii) the inconsistencies in [Y's] position since [Y's] actions have come to light, raise concerns as to [Y's] openness and honesty during the investigation process.*
>
> *80. I have also had regard to the case of Mr Graeme Neal ...*
>
> *81. In all of the cases which I have mentioned above, a public statement was made by the Commission.*
>
> *82. At the SDM hearing, it was submitted by Advocate Barnes that previous cases where the Commission had acted might be seen as either (i) cases where a fiduciary had behaved negligently, recklessly or even fraudulently, such that clients had been exposed to risk; or (ii) cases where the fiduciary had not complied with the regulations designed to ensure that the businesses do not deal with the proceeds of crime (even if there is no evidence that such dealing actually occurred). Advocate Barnes sought to argue that [Y's] conduct did not readily fall into either category.*

He specifically addressed me on the cases referred to in para 79 above. I have given these submissions careful consideration, however, I am not persuaded that the circumstances of [Y's] case may be so starkly differentiated in that way. The cases referred to contain examples of failure to carry out a risk assessment or keep appropriate records, or of a person failing to show sound judgment or a proper appreciation of the responsibilities of a licensee. The Regulatory Laws and the POC Regulations are enacted in those terms in order to serve a purpose, and I think it is difficult convincingly to argue that they may somehow be breached in such a way that none of the dangers against which they guard could have come about.

83. In all these circumstances, I consider that the penalties to be imposed on [Y] are fair, reasonable and proportionate when compared to penalties imposed by the Commission in other case, such as those discussed above."

(The SDM's comment in para. 81 that a public statement was made in every case discussed does not, of course, apply to the case of Mr Neal, in which there was the bare publication of the making of the prohibition orders and no public statement pursuant to section 11C of the FSC Law. However, I do not think that that slip makes the rest of what the SDM said about comparison with other cases flawed.)

92. Advocate Barnes made similar submissions to those recorded by the SDM in relation to this appeal. He suggested that the themes shown by previous decisions of the GFSC pointed towards sanctions arising where investors' money was put at risk or there were failures to deal properly with anti-money laundering issues. In both situations, there was a level of risk attached to the conduct that was absent from Y's case. Instead, Y's conduct could be regarded as bureaucratic failings. A third theme from the previous decisions is that some of the cases arose following GFSC inspections of licensed entities where there had been insufficient action to remedy defects identified. His fourth theme was about the level of seriousness, with him submitting that Y's conduct was less serious than in all the previous cases. He proceeded to analyse the previous decisions, both those referred to by the SDM and others, to show how they supported the themes he had extracted and how each could be differentiated from what had happened in Y's case. In summary, Advocate Barnes suggested that the SDM had lost sight of the sequence of events that led to Y being investigated and dealt with. In doing so, something quite low level had been escalated into something appearing more serious. The position was really that Y's employer, Licensee X, had discovered that Y was forming companies. As a result, Y self-reported to the GFSC. During the course of the investigation, the GFSC also found that Y's practice's website had for a time offered certain services that someone who is not the holder of a fiduciary licence was not permitted to undertake. However, nothing else was found against Y and Y immediately took steps to desist from forming companies without a licence and the conditions imposed on Y's practice's registration under the 2008 Regulations were complied with to prevent any ongoing breaches in respect of advertising services.

93. In response, Advocate Shires maintained that the decisions taken in relation to sanctions were clearly open to the SDM. A more appropriate way of looking at Y's conduct was that Y was engaging in regulated activity from home without authority. This was the type of unregulated activity that the Fiduciaries Law had been introduced to prevent. Comparisons with the United Kingdom could not readily be made because there was no similar regulation of fiduciaries there. Comparisons with Jersey were not readily available because no discretionary financial penalty regime existed there. Given that Guernsey had chosen to introduce a type of regulation and sanctions regime on a different basis meant that anyone who acted without a licence was not subjected to the same level of scrutiny of their activities as someone who had obtained the required licence. Further, there are fees to be paid by licensees and it was a relevant factor that Y had avoided paying a licence fee for the years when Y's practice had been forming companies and advertising a wider range of services than permitted. The previous cases tended to involve those who had been found wanting in the way that activities had been performed in a licensed environment. Y's case was different because Y operated outside of a licensed entity but, being a relevant officer, should have understood and appreciated that what was being done could not be done by Y's practice. Y had the experience in the fiduciaries' sector to know better.

94. I have considered carefully the submissions of Advocate Barnes on behalf of Y. There is some force in his submission that what Y did was not to put investors' money at risk in the same way that some of the other cases decided by the GFSC had involved. This was recognised by the SDM in para. 63 of the reasons as a mitigating factor. Although stated under the heading of prohibition orders and not repeated in the context of the discretionary financial penalty, reading the reasons as a whole, I am satisfied that the SDM had in mind this and other mitigating factors, as well as the aggravating factors found in para. 62 (being Y's direct responsibility and apparent lack of appreciation of, and attempts to downplay, the seriousness of the conduct), and so did not overlook any relevant matter when balancing whether to impose these sanctions and, if so, on what basis. (Paragraph 63 also refers to the SDM's understanding that had Y been licensed for the years in question, fees of over £5,500 would have been payable.) There is also some force in Advocate Barnes' submission that this investigation did not arise out of action already being taken by the GFSC. However, nothing that Advocate Barnes advanced on this appeal in this context had not already been advanced and taken into consideration by the SDM. That is why this ground of appeal tackles whether or not the outcome was a proportionate and reasonable one.

95. Taking the discretionary financial penalty first, I take the view that the previous decisions offer a little guidance and that the requirement in section 11D(2)(f) to have regard to previous decisions is principally designed to avoid inconsistent approaches. However, the only basis on which this Court can set aside the financial penalty imposed is if it falls outside the parameters that are available to a reasonable decision-maker approaching the question in a proportionate fashion. The published document to which I have referred has a penalty range of up to £25,000 for the lowest band. It should not be forgotten that the ceiling for a financial penalty against an individual was doubled by the 2016 Amendment Law. As a result, penalties pre-dating the increase in the maximum have to be viewed in the light of the maximum penalty then available. I agree with the GFSC that it is appropriate that financial penalties imposed should also act as a deterrent to those who might be minded to conduct themselves in a similar non-compliant way. However, previous decisions will not, I expect, be sufficiently analogous on their facts to enable the GFSC, or this Court, to identify the precise level of the penalty that should be imposed in any situation. Just as sentencing in a criminal Court is more nuanced than that, so the approach of the flexibility afforded to the GFSC, and the scope of review in this Court, has to look at the issue more broadly.

96. Had there been a successful prosecution, the Magistrate's Court would, I think, have fixed what it regarded as an appropriate penalty to reflect the offences in respect of which sentencing was taking place. That did not happen in Y's case and I have deliberately refrained from considering what I would, if constituting the Court, have imposed in the event of guilty pleas. I suspect, though, had the sentence been a fine, or set of fines, that the total amount payable by Y may not have reached the level of £13,000. To that extent, I agree with the thrust of Advocate Barnes' submission. However, that is not a complete answer on this appeal because, had there been a prosecution of Y and some fine imposed, it would still have been possible for the GFSC, having found that Y did not fulfil the minimum licensing criteria, to impose its own discretionary financial penalty. In particular, I consider the lost fee income to the GFSC as being a factor that can properly be borne in mind, especially as section 11D(4) of the FSC Law provides:

> "*Any sums which the Commission receives in any calendar year in respect of penalties imposed under this section on persons who are licensees, former licensees or relevant officers for the purposes of a particular regulatory Law shall be taken into account by the Commission in determining the fees payable to it pursuant to that regulatory Law in the following calendar year or, if that is not reasonably practicable, in the subsequent calendar year.*"

As soon as the lost amount is factored in, which is not going to be relevant where the activities in question leading to sanctions resulted from operating in a licensed environment, the level of discretionary financial penalty on top of that lost fee income appears to have been fixed at a level corresponding to those cases where the SDM has said the overall conduct was less serious than Y's.

97. Although £13,000 as a discretionary financial penalty might at first blush seem a little surprising where the benefit to Y was considerably lower than that, having regard to the overall approach of the SDM, I am not persuaded that it is a penalty I can properly set aside. In my judgment, the SDM has conducted an appropriate balancing exercise first as to whether or not to impose any discretionary financial penalty and then as to its amount. The SDM's reasons clearly show that factors to which regard must be had were considered and, taken both individually and collectively, I do not find that any of Advocate Barnes' submissions indicate that the SDM fell into error or reached a conclusion outside the band of reasonable responses. There are small areas where, had it been me deciding the matter, I might have approached the exercise slightly differently, but those differences, including those regarding the finding that company secretarial services were not exempted, so the overall picture of non-fulfilment might have been marginally lower, do not impact on my assessment that the amount of the penalty would still have been in a similar range. Moreover, it is important to give appropriate deference to the exercise actually conducted. As I have indicated, I am satisfied that the SDM was correct to find that Y did not fulfil the minimum criteria for licensing by reference to the Fiduciaries Law. In those circumstances, a discretionary financial penalty could be imposed. I did not understand Advocate Barnes to go so far as to suggest that there should be no financial penalty in this case and I am further satisfied that, having decided correctly that there was good reason to impose a discretionary financial penalty, the amount fixed is not greater than the band of reasonableness and proportionality allows.

98. For these reasons, Y's appeal under the FSC Law against the imposition of a discretionary financial penalty of £13,000 is dismissed.

99. Turning to the public statement, it follows from the decision to allow Y's appeals against the prohibition orders that the public statement that was issued following the SDM's decision cannot stand as it was drafted at that time. To that extent, it inevitably follows from those other decisions that Y's appeal against the public statement must also be successful. Accordingly, what I am really concerned with in the appeal under the FSC Law is whether any public statement should have been issued. If so, then there is a further issue about its content.

100. In the policy letter leading to the insertion of section 11C into the FSC Law (at page 1494 of the Billet d'État for 2007), the following explanation was given:

> "*19. The Policy Council and the Commission consider that the ability for the Commission to issue public statements about failings by regulated person and individuals employed by regulated entitles (including directors) is therefore desirable. The power would need to be used sparingly, where there have been major contraventions of rules or legislation and where publication would be in the interests of the public or consumers. Care would need to be taken to balance the public interest in making the statement against any serious adverse commercial consequences which may impact on the licensee if the statement is made. The effects of public statements in a small community would also need to be borne in mind. Even if the power to issue public statements is used sparingly, it is likely that the introduction of such a power would lead to a cultural change within regulated persons as they would no longer be able to rely on their regulatory problems remaining behind closed doors.*
>
> *20. The power to make public statements about failings by regulated persons and individuals can:*
>
> *(a) focus the attention of regulated persons;*
>
> *(b) clearly demonstrate to both the public and regulated persons that the Commission is aware of, and taking action in response to, problems at regulated persons;*
>
> *(c) provide clear messages about the unacceptability of particular failings; and*

(d) ensure that the Commission is seen to be active and effective.

Clearly, except in the most extreme cases where it is necessary to prevent customers or the public from suffering loss, the Commission would need to discuss (although not necessarily agree) the contents of a public statement with the persons named in it before issuing it.

21. Any decision to issue a public statement, together with its contents, would need to follow the Commission's formal procedures for taking adverse decisions. A regulated person and any employee named in the statement must also be able to challenge the Commission's intention to make a public statement or the contents of a statement and, except in the extreme cases referred to in paragraph 20, this challenge should be considered prior to the issue of that statement."

101. Recent practice of the GFSC may not accord exactly with what was envisaged over a decade ago because I do not get the impression that the power is used sparingly, but rather that it is most likely to be the case that a public statement will be issued rather than the GFSC confining itself to giving the bare details of the sanctions permitted by other provisions. (I have already referred to section 11D(3) of the FSC Law and to the ability to publish in relation to prohibition orders made under the suite of Regulatory Laws.) However, as I have already noted, there can be some benefits to the GFSC publishing a fuller explanation of the sanctions through a public statement in appropriate cases and it seems that regulators elsewhere have become equally accustomed to publishing statements rather than treating it as something only to be done in the cases involving the most significant contraventions.

102. I am persuaded, though, by Advocate Shires, that Y's case is one where it cannot be said to be irrational, unreasonable or disproportionate for the GFSC to exercise its powers to make a public statement. The SDM has, in my opinion, taken into consideration the factors that were required to be considered by section 11C(2) and has reached conclusions on each that are sustainable. Perhaps most pertinently, this is, one hopes, one of those rare occasions where someone who falls within the definition of relevant person does things that are properly found to be non-fulfilment of the minimum criteria for licensing as a result of activities outside of a regulated business. Had there been a prosecution, I imagine that the case and the penalties imposed would have reported in the local newspaper. Unlike a typical criminal case, the regulatory sanctions regime is not conducted in public. The policy letter mentions concerns about "*regulatory problems remaining behind closed doors*" and I think this is a significant factor in a case such as this. Having dismissed Y's appeal against the discretionary financial penalty, section 11D(3) permits publication by the GFSC of the bare details. Because of the close similarity between the matters that have to be taken into account, it is a short step from imposing a discretionary financial penalty to deciding that issuing a public statement should also happen. Subject to what I will now turn to about the content of public statements, I can see no reason in principle why the exercise of the GFSC's power in Y's case should be set aside. I am satisfied that the decision to do so is not irrational, unreasonable or disproportionate.

103. For these reasons, I would not have been minded to allow Y's appeal against the principle of the GFSC issuing an appropriate public statement.

Content of public statement

104. Y's fourth ground of appeal contends that a public statement only permits publication of the particulars of any law or laws broken and/or any non-fulfilment of any minimum criteria specified and so the length of public statement that the SDM decided to issue went further than permitted. This is another ground of appeal that involves an element of statutory interpretation. Section 11C(1) of the FSC Law enables the GFSC, having been satisfied that a contravention has occurred or that a person does not fulfil the minimum criteria for licensing applicable, and also having given notice of that intended decision pursuant to section 11E, to "*publish a statement to that effect*". Advocate Barnes submits that those final words should be given a narrow construction and should not permit the extensive level of analysis contained in the public statement that the GFSC wished to publish in

respect of Y.

105. In response, Advocate Shires submits that there is nothing in the wording of section 11C leading to such a narrow construction. The purpose underlying a public statement requires what is published to be understandable to its reader and serve to protect the reputation of the Bailiwick as an international finance centre. Accordingly, there must be the power to recite the factors that the GFSC was required to take into account.

106. One of the benefits of being provided with an extensive bundle of previous decisions from Guernsey, from the United Kingdom and from Jersey, is that it is possible to see the way in which the format of public statements has developed. My overall impression is that there is more set out in more recent public statements than in those dating back some years. To that extent, I agree with Advocate Shires that something more than the level of detail to which Advocate Barnes has referred is permissible. I take the view that a public statement is inevitably going to contain more detail than the bare information that is permitted, for example, by section 11D(3) of the FSC Law in relation to discretionary financial penalties and section 17B(4) in relation to a prohibition order under the Fiduciaries Law. If a public statement were limited to no more detail than can be published under any of those provisions, it would have been pointless to enact section 11C of the FSC Law. However, I am also persuaded by Advocate Barnes that there is content in the public statement that was issued following the SDM's decision that went further than section 11C permits.

107. I am conscious that I cannot in any event explain in detail in this anonymised judgment the aspects of the public statement that should not have been included because to do so would potentially undermine the interim relief I gave at the outset. However, I feel able to make the general comment that a public statement should be a factual notice for the benefit of persons reading it, in particular for the purpose of protecting them as consumers and to explain sufficiently to ensure that others do not act in a similar fashion or, if they do, will potentially face similar consequences, ie, as a deterrent. The public statement is not, though, a substitute for the SDM's reasoning and the passages that I consider should not have been included are those where the public statement follows too closely the shape of the SDM's reasoning and explains how the submissions made on behalf of Y were dealt with. Those matters, in my opinion, should be kept private as between the officers of the GFSC and the person subject to the regulatory process. Had the legislature wanted the GFSC to be able to publish the full reasoning leading to the imposition of sanctions, the legislature could have made that provision, but it has not done so and there must, in my view, be some constraints on the GFSC as to what can properly be included in a public statement.

108. If the GFSC is minded to re-visit the content of the public statement after whatever it decides in relation to the issues remitted, it would obviously be permissible to set out the sanctions as imposed and the Laws under which they were imposed. Any background section should be confined to the factual findings made. There is no reason necessarily to include in this document every detail so found, but I think it must be permissible under the terms of section 11C to set out those that put into context the sanctions imposed. This is not the basis, however, for describing how any conflict on the facts has been resolved. Instead, the public statement should be limited to what was actually found. In any section dealing with the investigation conducted, this is where the applicable statutory provisions can be recited as well as any relevant policy guidance. Alternatively, the GFSC might choose to adopt the style of the Financial Conduct Authority and include these matters in an Annex. It is the section headed Findings where I think the GFSC has extracted more material from the SDM's reasons than it should have done. In my opinion, this must relate to the basis on which the public statement is being made. Section 11C(1) refers to contraventions and non-fulfilment of the minimum criteria for licensing. In Y's case, it was only the second limb that gave rise to the public statement. The content of this section should, therefore, relate to that conclusion. In particular it should not have dealt with any alternative arguments that had been advanced on Y's behalf or submissions made as to whether any particular course of action was open to the GFSC. Those are matters that were argued and rejected and so do not form the basis for concluding that a public statement should be issued. I think the public statement must always have as its core an explanation of why the conclusion that Y did not fulfil the minimum criteria for licensing was actually reached. It is permissible to explain the aggravating and mitigating factors found and to set out how the

considerations in section 11C(2) have been addressed, but always bearing in mind the entitlement of Y (or any other individual) to respect for any Article 8, ECHR rights engaged. In other words, some facts do not have to be made public if to do so would amount to an unwarranted interference in an individual's right to a private life. I offer these comments by way of guidance as to how to compile a public statement that should not offend the terms of section 11C(1).

109. Accordingly, had it been necessary to do so, I would also have allowed Y's appeal in relation to this fourth ground of appeal.

Summary of conclusions

110. For the reasons I have given, I will allow Y's appeal in part and dismiss the other parts.

111. The prohibition orders for four-year terms imposed under section 17A of the Fiduciaries Law (and other comparable provisions in the other Regulatory Laws) are set aside, but remitted to the GFSC for further consideration. The disapplication of the exemption in section 3(1)(g) of the Fiduciaries Law for a four-year period is similarly set aside and also remitted. The reason why I have remitted these matters to the GFSC is that each of these sanctions has been imposed following a finding that Y is not a fit and proper person to perform the functions in question and I am satisfied that this was a finding that could properly have been made in respect of Y. In those circumstances, it is now necessary for the GFSC to re-consider whether, in the light of the findings made, Y should be prohibited under the Fiduciaries Law and the exemption disapplied. If so, the GFSC can, in my view, also consider whether the prohibition orders in respect of any of the other Regulatory Laws should follow. If it decides to make any prohibition order, the GFSC can then proceed to give any indication it wishes as to when Y might be able to apply to revoke the prohibition order. In doing so, it may be appropriate to consider whether there is anything that Y can do in the meantime, for example by way of additional training, to demonstrate that Y has become a fit and proper person to perform functions in relation to a regulated activity, rather than it just being confined to the passage of time. I also take the view that the GFSC could give such an indication in relation to the disapplication of the exemption, with a view to identifying when an application for a specific exemption pursuant to section 3(1)(y) might be favourably entertained, but it is not, of course, obliged to do so. Aside from these comments and what is set out in the remainder of this judgment, I do not give any directions to the GFSC when remitting these matters.

112. Giving the findings made in respect of Y, who falls within the definition of "relevant officer", I do not consider that the discretionary financial penalty of £13,000 imposed under section 11D of the FSC Law is irrational, unreasonable or disproportionate. As a result, Y's appeal against that particular sanction is dismissed. However, although I am satisfied that the making of a public statement under section 11C of the FSC Law is in principle available to the FSC, the public statement actually made falls to be set aside because it has content that is not, in my view, within the scope of the terms of that section. In any event, that public statement would have had to be re-written once the maters remitted to the GFSC have been re-considered and so Y's appeal against the public statement that was made also succeeds. Once again, I do not give any further specific directions additional to setting aside the public statement made and remitting this issue to the GFSC.

Declaration of incompatibility

113. Having allowed Y's appeal in part, it is not strictly necessary for me to say anything about the parties' arguments in respect of Y's invitation to the Court to make a declaration of incompatibility pursuant to section 4 of the Human Rights Law. However, in case it becomes relevant, I will briefly set out my reasons for why I would not have been minded to make any declaration of incompatibility in Y's case.

114. Advocate Barnes' submissions on this question invoked Article 6 of the European Convention on Human Rights and focused on the position of the SDM as not being an independent and impartial tribunal. He suggested that Y's civil rights were engaged because this covered the right to undertake a commercial activity or to practise a profession. He cited page 381 of Harris, O'Boyle and

Warbrick, *Law of the European Convention on Human Rights*, 3rd ed., for that proposition. None of the other Advocates dissented and I accept that Article 6 is engaged in relation to what has taken place. Indeed, when Advocate Barnes drew distinctions with other cases and Y's case in relation to the imposition of a financial penalty, I thought he was going to argue that the proceedings had become quasi-criminal. Whether or not that is the case is an issue I will expressly leave open.

115. Advocate Barnes placed the greatest reliance on the House of Lords decision in *Porter v Magill* [2002] 2 AC 357. The speech on impartiality and the fairness of the procedure conducted by the auditor and then appealed was given by Lord Hope of Craighead, who explained:

> "*92 That being the structure of the procedure laid down by the statute, there is inevitably some force in the criticism that, where accusations of wilful misconduct are involved, the auditor is being required to act not only as an investigator but also as prosecutor and judge. But this problem has been recognised and dealt with in section 20(3). It provides not only that any person aggrieved by his decision may appeal against the decision to the court but also that the court "may confirm, vary or quash the decision and give any certificate which the auditor could have given". The solution to the problem which section 20(3) provides is that of a complete rehearing by the Divisional Court. The court can exercise afresh all the powers of decision which were given to the auditor. In Lloyd v McMahon [1987] AC 625, 697F-G Lord Keith of Kinkel said that, while there might be extreme cases where it would be appropriate to quash the auditor's decision, the court has a discretion, where it considers that justice can properly be done by its own investigation of the merits, to follow that course.*
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> *93. In Kingsley v United Kingdom The Times, 9 January 2001 (Application No 35605/97), 7 November 2000, the European Court said in paragraph 51 that, even if an adjudicatory body determining disputes over "civil rights and obligations" does not comply with article 6(1), there is no breach of the article if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1); see also Bryan v United Kingdom (1995) 21 EHRR 342, 360-361, paras 44 and 46. The court went on to say this in Kingsley v United Kingdom, at para 58:*
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> > *"The court considers that it is generally inherent in the notion of judicial review that, if a ground of challenge is upheld, the reviewing court has power to quash the impugned decision, and that either the decision will be taken by the review court, or the case will be remitted for a fresh decision by the same or a different body. Thus where, as here, complaint is made of a lack of impartiality on the part of the decision-making body, the concept of 'full jurisdiction' involves that the reviewing court not only considers the complaint but has the ability to quash the impugned decision and to remit the case for a new decision by an impartial body."*
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> *The powers which the Divisional Court has been given by section 20(3) fully satisfy these requirements. Not only does it have power to quash the decision taken by the auditor. It has power to rehear the case, and to take a fresh decision itself in the exercise of the powers given to the auditor. In R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] 2 WLR 1389, 1407C-D Lord Slynn of Hadley observed that the principle of judicial control did not go so far as to provide for a complete rehearing on the merits of the decision. In the case of the procedure governed by section 20(3) however a rehearing on the merits can be conducted, and that is what was done in this case."*

The principle from this case (and others, particularly *Tehrani v United Kingdom Central Council for Nursing , Midwifery and Health Visiting* [2001] IRLR 208 on which Advocate Barnes relied) is that the Court reviewing the decision must have full jurisdiction, by which is meant that there must be a

full rehearing. However, it is clear that there is no requirement for every body deciding such matters to be an independent and impartial tribunal and, provided that there is a right of appeal to a court of full jurisdiction, it means not just that any breach of the ECHR is purged but it prevents such a breach from occurring in the first place.

116. When pressed by me to identify how he argued that section 4 of the Human Rights Law was engaged by identifying which provision or provisions of primary legislation (or, if applicable, subordinate legislation) Advocate Barnes contended was not compatible with Y's Convention right, he referred to the appeal provisions in the Laws, in particular section 11H of the FSC Law in respect of the public statement and discretionary financial penalty and, for example, section 19 of the Fiduciaries Law. He argued that the combination of the grounds of appeal and the powers of the Court when determining the appeal could not meet the test of there being a full rehearing.

117. On this issue, Advocate Shires and Advocate Hill referred to *Bryan v United Kingdom* (1995) 21 EHRR 342, in which the following was said about the review conducted of a planning inspector's decision in the High Court of Justice:

> *"44. The Court notes that the appeal to the High Court, being on "points of law", was not capable of embracing all aspects of the inspector's decision concerning the enforcement notice served on Mr Bryan. In particular, as is not infrequently the case in relation to administrative law appeals in the Council of Europe Member States, there was no rehearing as such of the original complaints submitted to the inspector; the High Court could not substitute its own decision on the merits for that of the inspector; and its jurisdiction over the facts was limited.*
>
> *However, apart from the classic grounds of unlawfulness under English law (going to such issues as fairness, procedural impropriety, independence and impartiality), the inspector's decision could have been quashed by the High Court if it had been made by reference to irrelevant factors or without regard to relevant factors; or if the evidence relied on by the inspector was not capable of supporting a finding of fact; or if the decision was based on an inference from facts which was perverse or irrational in the sense that no inspector properly directing himself would have drawn such an inference.*
>
> *45. Furthermore, in assessing the sufficiency of the review available to Mr Bryan on appeal to the High Court, it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.*
>
> *46. In this connection the Court would once more refer to the uncontested safeguards attending the procedure before the inspector: the quasi-judicial character of the decision-making process; the duty incumbent on each inspector to exercise independent judgment; the requirement that inspectors must not be subject to any improper influence; the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality. Further, any alleged shortcoming in relation to these safeguards could have been subject to review by the High Court.*
>
> *47. In the present case there was no dispute as to the primary facts. Nor was there any challenge made at the hearing in the High Court to the factual inferences drawn by the inspector, following the abandonment by the applicant of his objection to the inspector's reasoning under ground (b). The High Court had jurisdiction to entertain the remaining grounds of the applicant's appeal, and his submissions were adequately dealt with point by point. These submissions, as the Commission noted, went essentially to questions involving "a panoply of policy matters such as development plans, and the fact that the property was situated in a Green Belt and a Conservation Area".*
>
> *Furthermore, even if the applicant had sought to pursue his appeal under*

ground (b), the Court notes that, while the High Court could not have substituted its own findings of fact for those of the inspector, it would have had the power to satisfy itself that the inspector's findings of fact or the inferences based on them were neither perverse not irrational.

Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6(1). It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe Member States. Indeed, in the instant case, the subject matter of the contested decision by the inspector was a typical example of the exercise of discretionary judgment in the regulation of citizens' conduct in the sphere of town and country planning.

The scope of review of the High Court was therefore sufficient to comply with Article 6(1)."

118. Advocate Hill further suggested that the powers of the Court on an appeal enable any decision of the GFSC to be set aside and that the final words in para. (a) in each case, enabling the matter to be remitted to the GFSC "*with such directions as the Court thinks fit*", provided a full answer to Advocate Barnes' submissions because it enabled the Court to achieve the same outcome as if it were empowered to substitute its own decision. Section 3 of the Human Rights Law enables these words to be read in a Convention-compliant manner.

119. In the reply from Advocate Barnes, he sought to distinguish the position in the *Bryan* case and Y's case on the basis that the sanctions imposed were far removed from a planning appeal and reiterated that the only cure was if the independent and impartial tribunal hearing an appeal could hear evidence in the same way as the GFSC acting through the SDM could. In his submission only the type of full rehearing envisaged in *Porter v Magill* and the *Tehrani* case involving a full rehearing of all the evidence would suffice.

120. It was common ground that this Court is an independent and impartial tribunal for the purposes of Article 6(1). I do not need to address any issue relating to the appointment of the SDM, the tenure of office of the SDM, protection from outside pressure and apparent independence, even though strictly speaking an officer of the GFSC, on which Advocate Hill had concentrated in his written submissions, because Advocate Barnes clarified that Y was only suggesting that the appeal provisions did not offer the full rehearing required. Accordingly, the issue was whether this Court cures any defects that must exist at the GFSC level relating to compliance with Article 6.

121. Whether or not this Court has the "*full jurisdiction*" required does not, in my judgment, necessarily require a full merits review with the capacity for this Court to substitute its own views for the decision of the GFSC (as fully delegated to the SDM). Instead, as the cases demonstrate, it is necessary to consider the subject-matter of the original decisions, the manner in which they were reached, the content of what is now disputed and what Y wishes to argue on this appeal. I am satisfied that the breadth of the potential grounds of appeal, for example in section 19(4) of the Fiduciaries Law (quoted above) extend further that what might be considered as classic judicial review. This was clear under the former style of statutory appeal grounds common in this jurisdiction (see, eg, the analysis of Beloff JA in *Walters v States Housing Authority* (1997) 24.GLJ.76). In particular, para. (e) enables an appeal alleging that there has been a material error as to the facts. I regard the grounds of appeal as effectively conferring on the Court the ability to look at anything that an appellant wishes to raise about the decision-making process of the GFSC and the decision reached.

122. If any ground of appeal so advanced has merit, the corresponding decision will be quashed. Equally, if it does not have merit, the decision is confirmed. However, when quashing a decision, as Advocate Barnes sought in this case, that may be an end to the matter or, if the justice of the situation so dictates, the decision is remitted and the Court is empowered to give directions. In the *Tehrani* case, section 12 of the Nurses, Midwives and Health Visitors Act 1997, conferring the right of appeal,

simply provided that "*the court may give such directions in the matter as it thinks proper, including directions as to the costs of the appeal*". The Court of Session held that this unqualified right of appeal viewed in its entirety meant that there was no violation of Article 6. In my opinion, the possibility of remitting the matter to the GFSC with directions offers sufficient scope to indicate the Court's views as if there were power to substitute instead an outcome available to the GFSC.

123. I also consider that it is important to recognise that the way the GFSC operates its enforcement cases is intended to introduce a regime as close as it can come without referring the decision to an external person by giving it a semblance of independence and impartiality. The reason for having a panel of Queen's Counsel from whom the SDM to which a matter is referred for determination is selected is to remove the decision-making from the Commissioners themselves or the other permanent officers of the GFSC. I cannot imagine that any SDM appointed would take kindly to interference in the decision-making process he or she is to conduct, even if structurally there is that possibility. Indeed, it would most likely destroy the foundations on which the current regime is built. To that extent, the absence of independence is inherent in the SDM formally being an officer of the GFSC, but the reality is that there is a high degree of independence in any event. The fact that the SDM accepts the case advanced by the Enforcement Division does not mean that the SDM automatically lacks impartiality. In Y's case, the SDM has listened to and in places accepted what was said on Y's behalf by Advocate Barnes. The process, therefore, has many of the hallmarks of being conducted by an independent and impartial tribunal and I think that this aspect should be borne in mind when considering what needs to be cured through the appellate process to make it compliant with Article 6.

124. Because Y's appeal against the imposition of the discretionary financial penalty is the one area where I have not allowed Y's appeal, I have thought carefully about whether the statutory framework for that particular appeal has forced me to decide the appeal against Y. If so, then a declaration of incompatibility might have been appropriate. However, the reasons given in this judgment as to why I dismissed the appeal against this particular sanction demonstrate that Y was able to advance every argument that Advocate Barnes wished to advance to have this appeal allowed, whether that was a legal ground about whether the penalty could even be imposed on Y, whether the decision was irrational, whether the amount was unreasonable or disproportionate. In effect, no stone was left unturned and I regard this as equivalent to a full merits appeal. It there had been merit in the grounds of appeal directed at the lawfulness of this sanction, the result would have been the quashing of the decision and if there had been merit in the appeal based on proportionality or reasonableness, it is highly likely that the issue would have been remitted. Although there is no power, for example, to quash the penalty and impose instead a lower penalty, through the use of directions it would be possible to indicate a maximum level below which any fresh penalty imposed on remitting the issue would not be regarded as disproportionate or unreasonable. In this manner, I regard this as satisfying the requirement that that there be an appeal by a court of full jurisdiction.

125. For all these reasons, I would not have made the declaration of incompatibility sought by Y.

Costs

126. 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 as soon as reasonably practicable.