Approved Text
12.06.2020

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between:

ALAN MICHAEL CHICK **Plaintiff**

and

GUERNSEY FINANCIAL SERVICES COMMISSION **Defendant**

Application for Strike Out

Judgment handed down: 12th June 2020

Before: Sir Richard Collas, Lieutenant Bailiff

The Plaintiff was unrepresented
Advocate for the Commission: Advocate C H Edwards

Cases, Texts and Materials referred to in Judgment:

The Royal Court Civil Rules 2007
The European Convention on Human Rights
The Human Rights (Bailiwick of Guernsey) Law, 2000
The Regulation of Fiduciaries, Administration of Business and Company Directors, etc (Bailiwick of Guernsey) Law, 2000
The Financial Services Commission (Bailiwick of Guernsey) Law, 1987
Porter v Magill [2002] 2 AC 337
Tehrani v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2001] IRLR 208
Y v the Chairman of the Guernsey Financial Services Commission & Her Majesty's Procureur (Unreported judgment 47/2018)
ECHR cases:
Jussila v Finland [GC]
Bendenoun v France;
Benham v the United Kingdom
Őztürk v Germany
Campbell and Fell v the United Kingdom
Demicoli v Malta
Engel and Others v the Netherlands
Lutz v Germany
Nicoleta Gheorghe v Romania
Müller-Hartburg v Austria

Introduction

1. The Guernsey Financial Services Commission ("GFSC" and the "Commission") has brought an application ("the Strike Out Application") under Rule 52(2) of the Royal Court Civil Rules 2007 to have struck out a Cause issued by Alan Michael Chick ("Mr Chick") on the basis that the allegations disclose no reasonable grounds for bringing the action, or alternatively that the allegations are an abuse of the Court's process. Or, if the entire Cause is not to be struck out,

the Application seeks to have struck out a part or parts of the Cause. Advocate Edwards appeared for the GFSC and Mr Chick was unrepresented, having been unable to secure representation and being unable to obtain legal aid.

The Substantive Claim

2. Mr Chick's substantive claim was commenced by summons served on the GFSC pursuant to an order of the then Deputy Bailiff, Richard McMahon, under Rule 90 of the Royal Court Civil Rules 2007. In it, he seeks damages in the sum of £7,430,326.83 plus further damages including punitive or exemplary damages as compensation for alleged breaches of Articles 6, 7 and 14 of the European Convention on Human Rights as incorporated into Guernsey Law by the Human Rights (Bailiwick of Guernsey) Law, 2000. It is not necessary in this judgment to set out the facts in detail. A short summary will suffice.

3. Mr Chick is a former shareholder and former director of companies regulated under the Regulation of Fiduciaries, Administration of Business and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000 ("The Fiduciaries Law").

4. In or around March 2014, one of those companies submitted to the GFSC the results of an internal investigation which the GFSC referred to its Enforcement Division for review. Following an interview with Mr Chick in October 2015, the Commission issued a draft Enforcement Report on 19th August 2016, to which Mr Chick responded on 9th November 2016, alleging it contained numerous inaccurate accusations. He refused to accept the GFSC's offer of an early compromise because of the inaccurate information and unfounded statements on which they were relying. The GFSC submitted a further version of the draft Enforcement Report to him on 4th April 2017, to which he responded on 29th June 2017, identifying more than 120 instances of alleged misrepresentation of information.

5. A further attempt to agree a settlement with the GFSC came to nothing because Mr Chick was not prepared to sign any settlement agreement which he considered contained knowingly incorrect information. On 17th September 2017, Mr Chick wrote to the Chairman of the GFSC asking him to review the actions of the Enforcement Division, following which the GFSC's offer of a settlement was formally withdrawn and the matter was submitted to a Senior Decision Maker ("SDM") for consideration.

6. Pursuant to the GFSC's complaints procedures, Mr Chick submitted a formal complaint to the Director General on the 18th October 2017, to which the Director General responded saying the complaint did not comply with the complaints procedure because it did not relate to a regulatory matter. A further complaint to the Chairman of the GFSC received a similar response.

7. The Cause alleges that the SDM conducted an inadequate investigation. The SDM failed to call for all the evidence that was available and failed to correct inaccurate information and therefore arrived at an incomplete and inaccurate conclusion.

8. Following the SDM's review, the GFSC published a Sanction Notice on 31st May 2018. The final Enforcement Report produced by the GFSC is also alleged to be inaccurate, based on incomplete information which misrepresented the position. Similar alleged errors were in the Public Statement issued by the Commission. Sanctions were imposed upon Mr Chick including a fine of £50,000 and Prohibition Orders preventing him from holding or carrying out the function of director, controller, partner or manager for 5 years. Mr Chick also complains about subsequent events, including a complaint to the office of the Data Protection Authority and statements made at a presentation by the GFSC at an industry seminar.

9. Mr Chick set out his "Cause of Action" at paragraph 85 of the Cause:

"85. It is claimed during the course of the Commission's investigation which resulted in the publication of the Public Statement and sanctions of 31 May 2018; the Commission's failure to address:

i. The serious issues raised in formal complaints and appeals submitted in accordance with the Commission's published guidelines with regard to the misrepresentation of relevant evidence;
ii. Requests for rectification under The Data Protection (Bailiwick of Guernsey) Law, 2001 and the Data Protection (Bailiwick of Guernsey) Law 2017; and
iii. The inaccurate and unsubstantiated comments made by the Director of Enforcement at the industry seminar on 9 October 2018;

resulted in breaches of Articles 6, 7 and 14 of European Convention on Human Rights as incorporated in the Human Rights (Bailiwick of Guernsey) Law, 2000 and as a consequence breached my Human Rights as enshrined therein."

10. The Commission has filed defences denying the critical allegations in the Cause, the details of which are not material to the present strike-out application.

11. For the purposes of the present hearing, Advocate Edwards submitted that the Court need only be concerned with a limited number of facts:

(1) Mr Chick was a shareholder and director of Richmond Fiduciary Group Limited, a licensed entity.
(2) Mr Chick was invited to attend an interview at the Commission on 12th October 2015.
(3) The Commission produced its final Enforcement Report on 5th December 2017.
(4) An SDM was appointed on 6th December 2017.
(5) A draft Minded To Notice was issued on the 2nd March 2018.
(6) Mr Chick declined the opportunity to make any representations thereafter (a fact disputed by Mr Chick who states that his Advocate at the time responded on his behalf on 13 March 2018 enclosing 9 additional items of evidence for disclosure to the SDM. His Advocate provided a further response on 18 April 2018 with further comments on the legal issues in the Minded To Notice).
(7) The final decision was issued on 31st May 2018 stating that Mr Chick did not satisfy the minimum standards required by those carrying out regulated activities within the Island's fiduciary sector, imposing a financial penalty of £50,000 and 5 years' prohibition from holding or carrying out the function of director, controller, partner or manager.
(8) Mr Chick received notice of the foregoing on 31st May 2018 and was advised of his right to appeal within 28 days of the decision.
(9) Mr Chick did not bring a statutory appeal.
(10) Mr Chick paid the penalty on the 4th October 2018, after civil proceedings were issued to enforce payment.

12. Following the circulation of the draft judgment under the terms of the Practice Direction No 1 of 2012, Mr Chick has requested that the factual background be explained further in this judgment. I do not consider that the additions he requested affect the conclusions or reasoning set out below but nevertheless I have agreed to include in this paragraph the further facts requested by him. (I should add, for the record, that Advocate Edwards has not commented on these additions.)

(1) Mr Chick was a director and shareholder of Richmond Corporate Services Limited ("RCSL") from August 1988 until circa 2005/2006 when its business was acquired by Richmond Fiduciary Group Limited ("RFGL").
(2) Mr Chick was a director and shareholder of RFGL from that date in 2005/2006 until December 2015 when RCSL became a wholly owned subsidiary of RFGL.
(3) The shareholders and directors of RCSL were different from those of RFGL until just before the RCSL business was transferred to RFGL following the removal of an external shareholder in RCSL.
(4) Mr Chick was Managing Director, but not a shareholder, of the Pensioneer Trustee Company (Guernsey) Limited ("Pensioneer"), a trust company administered by RCSL for a third party client of RCSL from 4 March 1994 until circa December 2015.
(5) Pensioneer acted as trustee of the various trusts covered by the Commission's investigation and the Pensioneer board was responsible for the investment decisions taken between November 2000 and June 2006 covered by the Commission's investigations.
(6) Penioneer became a wholly-owned subsidiary of RFGL circa 2008/2009 following the purchase of the shares in that company from the original third-party owner.
(7) A major point of contention for Mr Chick is that the Commission alleged that he failed to seek the approval of the RFGL directors before investments were made between November 2000 and June 2006 which included the period between 2000 and 2004 that is to say before RFGL commenced business. Thus it would not have been possible to consult a board that did not exist. In any event, the RCSL board could not provide any fiduciary oversight because he alleges that would have been a breach of RCSL's Memorandum of Association and the Commission's Codes of Practice.

The documents

13. In support of its application, the Commission filed an affidavit dated 19th September 2019 sworn by Advocate Nicol-Gent, General Counsel of the GFSC, a skeleton argument and authorities. In response, Mr Chick filed an affidavit with exhibits, a skeleton argument and authorities. It subsequently became apparent that, in response to the Strike Out Application he intended to rely upon six lever arch files containing evidence and documents in support of his Cause.

14. Advocate Edwards applied for an order that the documents were not relevant and invited me to rule on that at a preliminary hearing in advance of the date set aside to hear the Strike Out Application. It was not possible to agree a convenient date so the issue was raised at the commencement of the hearing of the Strike Out Application on Wednesday 22nd January.

15. I indicated at the outset that I did not consider it necessary to be reviewing evidence at this stage. I held that the hearing of the Strike Out Application would proceed on the basis that the material facts pleaded in Mr Chick's Cause are capable of being proved and hence I do not need to review the supporting evidence. I therefore adjourned hearing the application for the documents to be excluded unless and until it became apparent during the course of the hearing of the Strike Out Application that it was necessary to refer to any of those documents.

16. Although Mr Chick made a number of references to documents contained within those contested files during the hearing, I have not referred to them in this judgment. It is sufficient, as I have said, for me to look only at the material facts contained within the Cause. The issue for me is to decide whether the facts he has pleaded amount to a cause of action when taken at their highest.

17. Whilst I have accepted the facts as pleaded by Mr Chick, I should point out that Advocate Edwards reserved the GFSC's position to challenge them at a trial if the matter proceeds.

The Enforcement Process

18. Before looking at the Convention rights, it is helpful to review the enforcement process adopted by the GFSC.

19. The GFSC is a statutory body, established under the Financial Services Commission (Bailiwick of Guernsey) Law, 1987 ("the FSC Law"). The general enforcement powers of the GFSC are set out in sections 11B to 11J of the FSC Law. We are not concerned with section 11B which deals with disqualification orders against auditors. Section 11C empowers the GFSC to issue a public statement, where satisfied that a licensee, former licensee or relevant officer (11C(1)(b)) *"does not fulfil any of the minimum criteria for licensing specified in the regulatory Laws and applicable to him".*

20. Section 11D provides for a penalty not exceeding £400,000 in the case of a personal fiduciary licensee or former such licensee or relevant officer.

21. Section 11E requires the Commission to serve a notice in writing on a person in respect of which a decision, such as in the present case, is proposed to be made inviting representations from that person, normally within a period of 28 days.

22. After considering any such representations under section 11F, the GFSC shall serve notice of its decision giving particulars of any right of appeal on the person concerned.

23. Section 11G requires a written statement of the reasons for the decision to be served on the person concerned.

24. Section 11H confers a right of appeal to the Royal Court on any person aggrieved by a decision such as in the present case on grounds 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."*

(Section 11H(2))

25. Section 11H(3) requires the appeal to be instituted within 28 days of notice of the GFSC's decision by summons served on the Chairman of the GFSC "stating the grounds and material facts on which the Appellant relies". The remainder of that subsection deals with the Court's powers in respect of an appeal.

26. The foregoing sets out the statutory framework. The process followed by the GFSC is explained in a guidance note issued by it. A copy of that note dated October 2017 is exhibited to the affidavit of Advocate Nicol-Gent. I do not need to set out the process in detail in this judgment although I will make reference to it later. However, I observe at the outset that the guidance note explains that the GFSC may, when it considers it appropriate to do so, appoint as an officer of the GFSC an SDM chosen from a panel of SDMs that have been selected to exercise the GFSC's powers of consideration, determination and sanction in respect of enforcement powers under the regulatory laws, with the exception of any powers to revoke, cancel, suspend or withdraw a licence, authorisation, registration, permission or consent to make an application for the winding up of a body corporate. The delegation of such powers to an SDM is prohibited by section 19 of the FSC Law.

The European Convention on Human Rights ("the Convention")

27. In paragraph 85 of the Cause, quoted above, Mr Chick pleads breaches of Articles 6, 7 and 14 of the Convention. The alleged breaches are set out in some detail at paragraphs 88 to 94 of the Cause and I will summarise them.

28. At paragraph 88 of the Cause, Mr Chick pleads that Article 6 paragraph 1 of the Convention has been breached in nine respects:

    1) The GFSC delayed by 20 months before instigating an investigation, by which time Mr Chick had left the organisation concerned and no longer had access to the relevant client files, as a result of which he was prejudiced because the GFSC failed to request, and the organisation concerned failed to provide, the evidence on which he was to be judged.

    2) At all stages in the process, the persons concerned were officers of the GFSC, including the SDM. He was therefore denied the opportunity to have a hearing before an independent and impartial decision maker.

    3) The GFSC was selective in the evidence elected by them and produced during the investigation, thereby denying him a fair hearing.

    4) The GFSC's refusal to respond to the complaints, appeals and the request for rectification under the Data Protection (Bailiwick of Guernsey) Law, 2017 failed to provide an explanation as to how it had reached its decisions when significant amounts of known evidence were not requested and were not produced by the GFSC.

    5) The GFSC erroneously stated that certain documents had not been created when in fact they had been.

    6) The GFSC failed to explain how it had discriminated between Mr Chick who it sanctioned and another director involved in the same transaction who was not sanctioned.

    7) The GFSC failed to identify the relevant section of the Trusts (Guernsey) Law 2007 or the earlier enactment thereof in 1989 that it alleged had been breached by Mr Chick when taking an investment decision on behalf of the sole beneficiary concerned without obtaining the acquiescence of all beneficiaries.

       Mr Chick made much of this issue during the course of the hearing by reference to, in particular, a decision of the Deputy Bailiff in T Limited (as trustee) (Unreported, Royal Court, 25th July 2016), the facts of which he said were very similar, in which the Court approved the action taken by the trustee contrary to the view formed by the SDM and the GFSC in his case.

    8) The SDM referred to the wrong trust structure when reaching conclusions in his reports.

    9) The SDM erroneously referred to a decision taken by a trustee of one trust structure, when it had in fact been taken by the trustees of totally different trust structures.

29. In relation to Article 6 paragraph 2, Mr Chick contends that the SDM drew conclusions which were not supported by the documented or recorded facts available and drew inferences as to what was known or not known by individual persons without speaking to any of the

individuals involved. Instead of presuming innocence, the SDM jumped to a presumption and conclusion of guilt.

30. In respect of Article 6 paragraph 3, Mr Chick contends that the GFSC failed to substantiate statements made by it, including the statement that Mr Chick had not been believed.

31. In respect of Article 7, Mr Chick contends that a substantial section of the GFSC's investigation related to a trustee's decision which occurred in November 2000, prior to the introduction of the Fiduciaries Law and hence could not be subject to penalty or sanction.

32. Article 14 is alleged to have been breached because of the discrimination whereby Mr Chick was sanctioned but another director concerned in the decision making under the 'four eyes' principles was not sanctioned and continues to be involved in licensed fiduciary business.

The GFSC's response to the alleged breaches of Articles 6, 7 and 14

33. Advocate Edwards' submissions in respect of the alleged breaches of Articles 6, 7 and 14 of the Convention can be summarized. Article 6.1 is satisfied either if the individual has a right to a fair and public trial or if there is a right to challenge the process. It is sufficient if one or other of those limbs exist, there is no need for both to exist. In the present case, Mr Chick had an adequate right of appeal to the Royal Court which he failed to exercise.

34. Article 6.2, 6.3 and 7 are not engaged because the GFSC's enforcement process is not criminal in nature but regulatory. Article 14 is not engaged for two reasons. First, by its nature it is parasitic on other Articles, so if there is no breach of another Article of the Convention, there can be no breach of Article 14. Secondly, even if there has been a breach of another Article of the Convention, Mr Chick has failed to allege discrimination of any of the characteristics set out in Article 14.

Mr Chick's response re Articles 6, 7 and 14 of the Convention

35. Mr Chick's skeleton argument ran to 35 pages of typed A4. In it, and in much of his oral submissions, he addressed me at length on the inadequacies of the investigation, the failure to obtain all relevant documents, the misunderstandings, misstatements, misrepresentations and misinterpretation of the Trusts Law and the other mistakes and misstatements throughout the GSFC's investigation and subsequently. I do not propose to review those in detail because they are not relevant to the present Strike Out Application. As I have said, they can be taken as 'read', even though they are disputed by the GFSC because the issue is whether they give rise to a cause of action. I have taken the factual allegations pleaded in the Cause at face value, without questioning them.

36. Mr Chick contended that Articles 6.2, 6.3 and 7 are engaged because there are decisions of the European Court (to which I refer below) which establish that a person who is subject to regulatory or disciplinary proceedings is entitled to a fair and public trial in the same way as in a criminal case, it being accepted that the GFSC is a public authority. The characteristics of Article 14, as Advocate Edwards described them, are broad, extending beyond matters such as sex, race, colour and so on or to *"other status",* a definition which is broad enough to apply in the present case.

37. Mr Chick relied heavily on Article 6.1 and the faults and deficiencies in the process followed by the GFSC which evidence the fact that he was denied a fair hearing. He was not heard by an independent and impartial tribunal because the SDM is not independent. The panel of SDMs are appointed by the GFSC, paid by the GFSC, trained by the GFSC in matters relating to Guernsey, entertained by the GFSC when in Guernsey and, for all purposes, they are officers of the GFSC, exercising powers and functions vested in the GFSC.

38. Mr Chick also placed reliance upon the States of Guernsey's failure to legislate to establish a financial services tribunal as had been referred to in the assessment of the supervision and regulation of the financial services sector in the Bailiwick conducted by the International Monetary Fund who reported in October 2003. The report assessed whether the GFSC's disciplinary processes complied with Article 6 of the Convention and stated*: "The GFSC has received clear legal advice that it should not be 'judge and jury in its own cause'. Guernsey has therefore resolved to establish a financial services tribunal."* Instead of acting as then envisaged, the Commission initially established a shadow tribunal which Mr Chick said was compliant until it was disbanded in 2009 when the GFSC introduced the Commissions Decisions Committee comprising three Commissioners, consistent with section 19(5) of the FSC Law but not compliant with the IMF's recommendation. Then, in 2014, the Commission introduced the SDMs who are officers of the GFSC and, as such, do not comply with either Article 6 or section 19(5) of the FSC Law so that the IMF's recommendations remain outstanding. The SDM is responsible for determining the penalty, the prohibition and the terms of the public statement, although in his case, the SDM directed the Enforcement Division to draft the public statement, a fact which Mr Chick said would inevitably result in the GFSC being reported in the best possible light, neither impartially nor independently. Further evidence of the SDM's lack of impartiality is the fact that he wrote to Mr Chick on GFSC notepaper. Although the case review panel approves the enforcement reports, in Mr Chick's case it was littered with mistakes and, he contends, was finalised by the officer who had conducted the investigation which amounted to further evidence of the lack of independence and impartiality.

39. Although the guidance note issued by the GFSC explaining its enforcement process states, at paragraph 1.6, that it is designed to ensure that each decision has been arrived at in accordance with principles of natural justice and is proportionate and reasonable based on all relevant information that patently did not happen in this case having regard to all the errors made both during the investigation and in the reports and statements issued by the GFSC.

40. Mr Chick also relied upon paragraph 1.4 of the guidance note which provides: *"This guidance note does not hold the force of law and is not prescriptive of the process that will always be followed."* Because it does not have the force of law, a statement with which he agrees, it does not comply with the requirements of the IMF for an independent and impartial tribunal. The model that Mr Chick alleges that the States of Guernsey should have adopted would include a tribunal along the lines of the Tax Tribunal established under the Income Tax (Guernsey) Law, which is independent in all respects including the fact that its members are appointed by the Royal Court. The shadow tribunal initially established by the GFSC was similar to the Tax Tribunal, but following its dissolution, the GFSC through its SDMs, now acts as judge and jury in its own matters contrary to the clear legal advice cited to the IMF.

41. Further evidence of the lack of impartiality of the SDM is that he made out a case against Mr Chick that had not been investigated and put forward by the Enforcement Division of the GFSC.

42. Mr Chick strongly objects to the fact that by taking technical legal points by way of a Strike Out Application, the GFSC are seeking to avoid justifying their decision at a full hearing before Judge and Jurats. If the Strike Out Application is successful, he will be denied the opportunity to counter the damage that has been inflicted on him through the GFSC's criticisms of his honesty and integrity.

Discussion

43. The role of an SDM was considered by the then Deputy Bailiff in a careful and detailed judgment handed down on the 29th November 2018 in Y v the Chairman of the Guernsey Financial Services Commission and Her Majesty's Procureur (Unreported judgment 47/2018).

44. Advocate Barnes who appeared for the Appellant, Y, had made submissions seeking a declaration of incompatibility pursuant to section 4 of the Human Rights Law, evoking Article 6 of the Convention and focusing on the position of the SDM as not being an independent and impartial tribunal. Having allowed the appeal in part on other grounds, it was not necessary for the Deputy Bailiff to consider the question of incompatibility but he briefly set out reasons why he would not have been minded to make such a declaration in that case. At paragraph 114 he said that Advocate Barnes had submitted that civil rights were engaged, a submission with which the Deputy Bailiff agreed. He also said he thought that Advocate Barnes was going to argue that the proceedings had become quasi-criminal because they involved the imposition of a financial penalty but he had not done so. The Deputy Bailiff expressly left open the question of whether they are quasi-criminal in nature. However, because the Appellant's civil rights were engaged he went on to explain why he would not have made a declaration of incompatibility in relation to Article 6 if it had been relevant. Although his remarks are strictly *obiter dictum* I respectfully concur with his reasoning and his conclusion.

45. At paragraphs 120 to 124 of his judgment, the Deputy Bailiff considered whether an appeal to the Royal Court satisfied the requirements of an appeal to a court of full jurisdiction. He said it was common ground that the Royal Court is an independent and impartial tribunal for the purposes of Article 6.1. He was satisfied that the breadth of the grounds of appeal in section 11H of the FSC Law extend beyond a classic judicial review and effectively confer 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. He was also satisfied that the enforcement regime adopted by the GFSC came as close as it could to giving a semblance of independence and impartiality without referring the decision to an external person. He was satisfied that any Queen's Counsel appointed as an SDM would not take kindly to interference by the GFSC in the decision making process he or she has to conduct, even if structurally that might be possible given that the SDM is an officer of the GFSC, but the reality is that there is a high degree of independence and hence the SDM would conduct a proper and thorough review of the case advanced by the independent Enforcement Division. Every argument could then be advanced before the Royal Court and although the Court does not have the power to quash a penalty and impose instead a lower penalty, the Deputy Bailiff was satisfied that through the use of directions it would be possible to indicate a maximum level below which any fresh penalty imposed on remitting the issue to the GFSC would not be regarded as disproportionate or unreasonable. He concluded in paragraph 124: *"In this manner, I regard this as satisfying the requirement that there be an appeal by a court of full jurisdiction."*

46. I summarise his conclusion as saying that any defect in the process that exists at the GFSC level is cured by the independent and impartial right of appeal to the Royal Court and thus satisfies the requirements of Article 6.1. In accordance with the principle in Porter v Magill [2002] 2 AC 337 and other cases referred to by the Deputy Bailiff at paragraph 115, including Tehrani v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2001] IRLR 208: *"it is clear that there is no requirement for every body dealing with 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".*

47. In support of his submission that the disciplinary process was criminal in nature and hence invoked Article 6, Mr Chick quoted from a *"Guide on Article 6 of the Convention - Right to a fair trial (criminal limb)"* produced by the Council of Europe and updated as at 31.08.2019. The document states that regulatory offences may come under the autonomous notion of a criminal offence; the notion of *"criminal"* may extend to disciplinary proceedings *"if they may lead to punishment of the person concerned".* When looking at the notion of *"criminal",* the starting-point is based on three criteria established in Engel and Others v the Netherlands (ECHR, 8 June 1976):

    1. Classification in domestic law; and
    2. Nature of the offence; or
    3. Severity of the penalty that the person concerned risks incurring.

    The last two criteria are alternative and not necessarily cumulative.

48. The Guide states at paragraph 18 that: *"The first criterion is of relative weight and serves only as a starting-point. If domestic law classifies an offence as criminal, this will be decisive. Otherwise the Court will look behind the national classification and examine the substantive reality of the procedure in question."* Under our domestic law, the process is disciplinary or regulatory, not criminal so it is necessary to look further.

49. The Guide continues at paragraph 19:

    "In evaluating the second criterion which is considered more important (Jussila v Finland [GC]), the following factors can be taken into consideration:

    - *Whether the legal rule in question is directed solely at a specific group or is of a generally binding character (Bendenoun v France);*
    - *Whether the proceedings are instituted by a public body with statutory powers of enforcement (Benham v the United Kingdom);*
    - *Whether the legal rule has a punitive or deterrent purpose (Öztürk v Germany and Bendenoun v France);*
    - *Whether the legal rule seeks to protect the general interests of society usually protected by criminal law (Produkcija Plus Storitveno podjetje d.o.o. v Slovenia);*
    - *Whether the imposition of any penalty is dependent upon a finding of guilt (Benham v the United Kingdom);*
    - *How comparable procedures are classified in other Council of Europe member States (Öztürk v Germany).*

    20. The third criterion is determined by reference to the maximum potential penalty for which the relevant law provides (Campbell and Fell v the United Kingdom and Demicoli v Malta).

    21 The second and third criteria laid down in Engel and Others v the Netherlands are alternative and not necessarily cumulative; for article 6 to be held to be applicable, it suffices that the offence in question should by its nature be regarded as "criminal" from the point of view of the Convention, or that the offence rendered the person liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere (Lutz v Germany and Öztürk v Germany). The fact that an offence is not punishable by imprisonment is not in itself decisive, since the relevant lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character (Öztürk v Germany and Nicoleta Gheorghe v Romania).

A cumulative approach may, however, be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (Bendenoun v France)."

50. Applying the second and third criteria to the treatment suffered by Mr Chick, he was not charged with any criminal offence and the imposition of a penalty was not dependent upon any finding of guilt. However, he sought to rely upon the decision in Bendenoun v France (ECHR 24 February 1994) which is a case where tax surcharges had been imposed on Mr Bendenoun by an administrative court. The Government had argued that Article 6 was not engaged because they were administrative penalties, not relating to criminal law. The European Court of Human Rights held otherwise having regard to four factors. First, the legal rule in question under the General Tax Code applied to all citizens in their capacity as taxpayers, not to a particular group with a given status. The tax surcharges were not intended as pecuniary compensation for damage but essentially as a punishment to deter reoffending. They were imposed under a general rule, whose purpose was both deterrent and punitive. Finally, the surcharges were very substantial and if the citizen had failed to pay, he was liable to be committed to prison by the criminal courts.

51. Having set out those four factors, it is immediately apparent that the case of Bendenoun is distinguishable from Mr Chick's situation. First, the legal rule in question applies not to the general public but to a professional group possessing special status namely those who are licensed by the GFSC to carry out certain regulated activities in financial services in the Bailiwick (see Müller-Hartburg v Austria (ECHR, 19 February 2013). It is only those persons who would be subject to the disciplinary process.

52. The sanctions that were imposed, a fine, a Prohibition Order preventing Mr Chick from conducting a regulated activity, and a Public Statement are classic disciplinary sanctions liable to be imposed on professional people. The legislative intent no doubt included a deterrent and punitive element but the level of the fine was assessed having regard to Mr Chick's means to pay. Importantly, there was no risk of non-payment being enforced by a committal to prison through the criminal courts. Section 11D (6) of the FSC Law provides that any penalty imposed under section 11D is recoverable by the Commission as a civil debt; the Commission does not possess its own enforcement powers.

53. Furthermore, the legal rules in question are not in the nature of those that are usually protected by the criminal law. The proceedings are comparable to those in other jurisdictions which are considered to be disciplinary and regulatory in nature.

54. In conclusion on this issue, I am satisfied that the procedures are not criminal or quasi-criminal in nature. Consequently, the criminal limb of Article 6 is not engaged in relation to these proceedings. However, Article 6 also confers a right to a fair trial in the determination of civil rights and obligations as well as any criminal charge.

55. Many of the issues raised by Mr Chick related to the unfairness, lack of independence and inadequacies of the procedure before the GFSC and the SDM in particular. I respectfully agree with the comments of the then Deputy Bailiff in Y v The Chairman of the GFSC: *"the absence of independence is inherent in the SDM formally being an officer of the GFSC….. The process 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".*

56. There is something unsatisfactory about a disciplinary system that possesses *"many of the hallmarks"* of an independent and impartial tribunal but in which independence is inherently absent. The consolation for a disaffected person who is unhappy with the handling of a complaint against him is that he can appeal to the Royal Court but in practice that might be

little consolation for a person who lacks the financial means to pursue an appeal after a financial sanction has been imposed on him. Mr Chick's claim seeks recovery of legal fees incurred during the investigation of £142,625.25 in addition to the recovery of the sanction imposed of £50,000.00. He informed the Court that he did not have the means to afford an appeal and the only legal aid he could obtain was two hours under the Green Form Scheme. Full details of his financial circumstances have not been provided so I do not know whether it was the level of sanction that deprived him of the resources to pursue an appeal. If it was, the remedy would have been to appeal the level of the penalty.

57. When looking at the civil limb of Article 6, I am satisfied that it is necessary to review the process in its totality, looking not only at the procedure within the GFSC, including the hearing before the SDM but also including the appeal to the Royal Court. For the reasons given above, I am satisfied that any inadequacies can be cured within the appeal procedure which is consistent with the principle in Porter v Magill cited above.

58. Article 7 *"No punishment without law"* is specifically directed at criminal offences as is apparent from the first sentence of article 7.1: *"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed".* So, having concluded that the proceedings faced by Mr Chick were neither criminal nor quasi-criminal, I am satisfied that Article 7 is not engaged.

59. Article 14 provides that: *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground..."* The grounds are indeed as wide as Mr Chick submitted but nonetheless, Article 14 does not assist him because he has failed to establish any interference with his rights and freedoms set forth in the Convention. As Advocate Edwards expressed it, Article 14 is parasitic on the other provisions of the Convention and does not stand alone.

Conclusion

60. In conclusion, the cause of action pleaded by Mr Chick discloses no right of action and therefore falls to be struck out under Rule 52 of the Royal Court Civil Rules 2007. In doing so, I have to express some sympathy for Mr Chick who incurred great expense in the enforcement proceedings instigated against him and has a lingering and lasting dissatisfaction with the process. However, his remedy was to pursue an appeal. It is regrettable that he says he did not have the means to afford legal representation but in the presentation of the present case, he has demonstrated that he would have been capable of presenting the appeal himself. I make no comment as to whether the appeal would have been successful as I have not looked into the merits of the allegations pleaded by him but an appeal would have enabled him to ventilate his arguments and to have them heard by a Court that is accepted to be an independent and impartial tribunal.

61. In this judgment I have made no comment as to the remedy that would have been available to Mr Chick if he had successfully established a breach of the ECHR. I have not done so simply because I have not been asked to do so.

62. I apologise to the parties for the delay in producing this judgment. I had anticipated writing it earlier in the Spring but unfortunately the disruption cause by the current Coronavirus pandemic interfered with my plans and denied me the opportunity to devote to the judgment the period of time I had set aside for it.

63. Any applications arising from this judgment are to be lodged at the Greffe within 14 days of the formal handing down of the judgment.