Approved Text
11.05.2016

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between:

(1) BORDEAUX SERVICES (GUERNSEY) LIMITED
(2) PETER GORDON RADFORD
(3) GEOFFREY ROBERT TOSTEVIN
(4) NEAL ANTHONY MEADER **Appellants**

-and-

THE GUERNSEY FINANCIAL SERVICES COMMISSION **Respondent**

Hearing dates: 23rd and 24th (am only) February 2016

Judgment handed down: 11th May 2016

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocates for the Appellants: **Advocate C H Edwards**
Advocate for the Respondent: **Crown Advocate J Hill**

Cases & legislation referred to:

The Protection of Investors (Bailiwick of Guernsey) Law, 1987
The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000
The Banking Supervision (Bailiwick of Guernsey) Law, 1994
The Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002
The Insurance Business (Bailiwick of Guernsey) Law, 2002
The Financial Services Commission (Bailiwick of Guernsey) Law, 1987
The Control of Borrowing (Bailiwick of Guernsey) Ordinance, 1959
SPL Private Finance (PF1) IC Limited v Arch Financial Products LLP [2014] EWHC 4268 (Comm)
The Housing (Control of Occupation) (Guernsey) Law, 1994
Walters v States Housing Authority (1997) 24.GLJ.76
R (Daly) v Home Secretary [2001] 2 AC 532
Anchor Trust Company Limited v Jersey Financial Services Commission [2005] JLR 428; [2006] JCA 040
De Smith's Judicial Review (7th ed.)
Selvanathan v General Medical Council [2000] UKPC 37
Gokool v Permanent Secretary of the Ministry of Health and Quality of Life [2008] UKPC 54
R (Khatun) v Newham LBC [2005] QB 37
Explanatory Note on Prohibition Orders (Guernsey Financial Services Commission, January 2013)
Ollerenshaw and Reeh v The Financial Services Authority (10 December 2012)
The Financial Services and Markets Act 2000

Introduction

1. These appeal proceedings concern the decisions reached by the Respondent, the Guernsey Financial Services Commission ("the GFSC"), in July 2015 in respect of the Appellants, Bordeaux Services

(Guernsey) Limited and three individuals who were directors in 2007-2009 of that company, Peter Radford, Geoffrey Tostevin and Neal Meader. The First Appellant ("Bordeaux") appeals only against the imposition on it of a financial penalty of £150,000. The other three Appellants (to whom I will refer collectively as "the Bordeaux Directors") appeal only against the making of prohibition orders against each of them under the full suite of regulatory Laws. (Those Laws are the Protection of Investors (Bailiwick of Guernsey) Law, 1987 ("the POI Law"), the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000 ("the Fiduciaries Law"), the Banking Supervision (Bailiwick of Guernsey) Law, 1994 ("the Banking Supervision Law"), the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002 ("the IMII Law") and the Insurance Business (Bailiwick of Guernsey) Law, 2002 ("the Insurance Business Law").) The other sanctions imposed by the GFSC on the Bordeaux Directors, ie, the disapplication of the exemption set out in section 3(1)(g) of the Fiduciaries Law, the financial penalties of £50,000, £30,000 and £30,000 imposed on them respectively, as well as the making of a public statement pursuant to section 11C of the Financial Services Commission (Bailiwick of Guernsey) Law, 1987 ("the FSC Law") in respect of all four Appellants, have been accepted by the Appellants and are not challenged.

2. Advocate Edwards appears on behalf of all four Appellants. The Amended Notice of Appeal dated 25 August 2015 seeks the reduction in amount of the financial penalty imposed on Bordeaux and the setting aside of the prohibition orders imposed on the Bordeaux Directors. It refers to the Decision given by Terence Mowschenson QC, who is referred to as "the Senior Decision Maker", dated 28 July 2015. That Senior Decision Maker is, of course, one of the GFSC's officers. He acted under authority delegated to him under section 19 of the FSC Law. The appeals are, therefore, brought against the Respondent's decision, albeit a decision taken by the Senior Decision Maker.

3. In the immediate aftermath of the hearing, Advocate Hill, who appears on behalf of the GFSC, provided a copy of a slightly modified Decision, which is dated 31 July 2015. That Decision corrects a handful of technical matters that had been identified by the GFSC's General Counsel in a letter dated 29 July 2015 that he sent to the Senior Decision Maker (and which was copied to Advocate Wessels, who had appeared on behalf of the Appellants at that stage of the proceedings). In particular, the modified Decision refers (in para. 250) to each of the provisions in the full suite of regulatory Laws under which the prohibition orders were being imposed and (in para. 258) refers to the availability of an appeal under each of the regulatory Laws. Ideally, these matters would have been spotted before the GFSC's Decision was promulgated to the Appellants. The public statement issued could also have referred to the modified Decision dated 31 July 2015 rather than to the earlier Decision dated 28 July 2015. The modified Decision addresses some concerns that I had raised at the hearing about the apparent reliance on only section 34E of the POI Law as the basis for the imposition of each prohibition order against the Bordeaux Directors. As a consequence of the modified Decision, I am proceeding on the basis that the Bordeaux Directors wish to invoke all of the appeal provisions available to them and so do not reject the appeal available under the Banking Supervision Law simply because section 17A of it is not pleaded.

4. The grounds advanced on behalf of the Bordeaux Directors in respect of the prohibition orders allege that the Senior Decision Maker erred in law through misdirecting himself as to the correct criteria to apply to determine whether it was appropriate to make a prohibition order or that the prohibition orders were disproportionate and/or unreasonable. The particular matters raised as to why the prohibition orders are disproportionate and/or unreasonable are that there was no dishonesty or market abuse; the severity of the other sanctions imposed upon these Appellants; the failure to show that the conduct of the Bordeaux Directors demonstrably caused any loss to customers, or the public generally; the level of seriousness of their failings; the GFSC's practice in other past cases; and the lack of evidence to support several key findings in the Decision. In respect of Bordeaux, the grounds advanced are that there was a failure properly to take into account the potential financial consequences to Bordeaux of imposing such a penalty and that the level of the penalty was inconsistent with discretionary financial penalties imposed in previous cases and not in accordance with the GFSC's stated policy. These are pleaded as errors of law. It is also alleged that the penalty is disproportionate and/or unreasonable.

Factual background

5. The following summary of the facts is taken from the Decision. Bordeaux was incorporated as a limited company in Guernsey on 2 April 2004. It was issued with a full licence under the Fiduciaries Law on 19 April 2004. It was issued with a licence under section 4 of the POI Law on 14 June 2004. That licence permitted Bordeaux to undertake promotion, subscription, custody, administration, management, advising, dealing and registration in respect of both category 1 and category 2 controlled investment business. On 11 December 2006, a company owned by the Bordeaux Directors, Verity Holdings Limited, acquired the entire shareholding in Bordeaux, which had previously been owned by a company incorporated in Bermuda. Mr Radford owned 50% of the shares in Verity Holdings Limited and Messrs Tostevin and Meader each held 25% of the shares. (When Mr Meader departed from Bordeaux in May 2011, his shareholding was split equally between Messrs Radford and Tostevin.) The Bordeaux Directors were, for the calendar years 2007, 2008 and 2009, which is the period covered by the Decision ("the Relevant Period") the directors, the ultimate beneficial owners and the controllers of Bordeaux. Mr Tostevin was the Compliance Officer at Bordeaux between August 2007 and January 2010. He had previously held that post between 2000 and 2003.

6. Arch Guernsey ICC Limited was incorporated in Guernsey on 21 December 2006 as a closed-ended investment company. (This company has since changed its name to SPL Guernsey ICC Limited but, for the purposes of this appeal, I will refer to it as "Arch Guernsey".) At that time, an incorporated cell company was a comparatively novel concept in Guernsey. The Incorporated Cell Companies Ordinance, 2006 had come into force on 1 May 2006. It enabled the incorporated cell company by special resolution to incorporate one or more incorporated cells. An incorporated cell is itself a company. Arch Guernsey proceeded to incorporate a number of cells. At its largest, there were 26 cells, the majority of which were listed on the Channel Islands Stock Exchange. Arch Guernsey and its incorporated cells are collectively referred to as "the Fund". Mr Radford and Mr Meader were directors of the Fund. The other director was Robert Addison. The Decision states that he was the CEO of Arch Financial Products LLP ("Arch FP"), although it is possible that that was a typographic error because in a judgment dated 18 December 2014 of Walker J, Mr Addison is described as the Chief Operating Officer of Arch FP and the CEO was stated to be Robin Farrell. Arch FP was 97% owned by Arch Group (UK) Limited.

7. Arch FP was appointed as Investment Manager to the Fund. (In the Decision, this is said to have occurred in January 2007, but the only example of an Investment Management Agreement I have been shown, which is between Arch Sustainable Opportunities IC Limited, one of Arch Guernsey's incorporated cells, and Arch FP, is dated 28 December 2006.) The Scheme Particulars for Arch Guernsey are dated January 2007. By an Administration Agreement dated 28 December 2006, Arch Guernsey appointed Bordeaux as Administrator to provide the services set out in that Agreement. I will return to the terms of each of these agreements in more detail in due course.

8. Arch FP had been appointed as the Investment Manager of two UK funds in 2006. Those funds (described as "the UK OEICs") were CF Arch Cru Investment Funds and CF Arch Cru Diversified Funds. The appointments as Investment Manager were made by Capita Financial Managers Limited, the Authorised Corporate Director of the UK OEICs. The UK OEICs were promoted in the United Kingdom by Arch FP and Cru Investment Management Limited. Arch FP invested a significant proportion of the scheme property of the UK OEICs into incorporated cells of the Fund. The stated investment objective of the Fund was to target four investment areas. Those areas were private finance, private equity, sustainable opportunities and real estate. Having been given consent to do so by the Policy Council of the States of Guernsey (which for these purposes had delegated authority to the GFSC for the purposes of the Control of Borrowing (Bailiwick of Guernsey) Ordinance, 1959), the Fund was permitted to raise up to £1 billion by the issue of shares in the Fund. Over 2007 and 2008, total investments in the Fund amounted to approximately £595 million. Some 20% of those investments were the result of inter-cellular trading. The investments in the Fund by the UK OEICs and other external investors amounted to approximately £465 million.

9. In September 2008, the GFSC undertook an onsite visit at the premises of Bordeaux. In a visit report issued on 19 December 2008 the following failings were identified: senior management control; subscriptions and redemptions; compliance monitoring programme; compliance manual; record-keeping; investment restrictions; outsourcing; AML/CFT (reliance introducer test policy and intermediary due diligence); and corporate governance (alternate directors). Two of those issues are regarded as high risk issues and the other seven as medium risk issues.

10. The Arch Cru investment scheme ran into well-publicised difficulties. On 13 March 2009, operation of the UK OEICs was suspended by the Financial Services Authority over liquidity concerns following increased redemptions.

11. On 31 March 2009, a voluntary condition was imposed on the Fund by the GFSC, under which it was prohibited from disposing of any of its assets, including cash balances, without the prior consent of the GFSC. The reason for this condition was that the GFSC's review of the Fund revealed that there were a number of discrepancies in the notifications made by Bordeaux, the GFSC had not been made aware of the launch of a number of the incorporated cells and the accounts had not been submitted on time. This condition was rescinded on 9 December 2009 following the replacement on 1 December 2009 of Arch FP as the Fund's Investment Manager by Spearpoint Limited.

12. From 27 April to 1 May 2009, the GFSC undertook a further onsite visit. Nine high risk issues were identified, which were attributable to failings in senior management control, as set out in a visit report in September 2009: pricing and valuations; subscriptions and redemptions; investment, borrowing and hedging; corporate governance; compliance manual and monitoring; breaches; record-keeping; anti-money laundering; and outsourcing. On 17 September 2009, 18 separate voluntary conditions were imposed on Bordeaux's licence under the POI Law. One of them prohibited Bordeaux from taking on any new controlled investment business. Bordeaux was subjected to monthly reporting to the GFSC.

13. At the request of the Fund's directors, on 27 July 2009 trading on the Channel Islands Stock Exchange of all shares in the listed incorporated cells of the Fund was suspended. On 31 December 2009 Mr Addison resigned as a director of the Fund and three new directors were appointed. Messrs Meader and Radford resigned as directors of the Fund on 28 January 2010. On 4 March 2010, Moore Stephens (Guernsey) LLP resigned as auditor to the Fund and Ernst & Young LLP subsequently took over. With effect from 1 July 2010, Elysium Fund Management Limited replaced Bordeaux as Designated Manager to all the remaining incorporated cells. Also on 1 July 2010, voluntary conditions were imposed on the licence of Bordeaux by the GFSC preventing it from amending, tampering, disposing of or destroying, transferring or re-locating off its premises or archive facility any records relating to Arch without the prior consent of the GFSC.

14. The Fund generated fees for Bordeaux which amounted to approximately 11%, 24% and 18% of Bordeaux's annual turnovers for 2007, 2008 and 2009 respectively. On 21 December 2010, the Fund's consolidated net asset value ("NAV") was calculated at £234 million. This represented a significant loss to investors. The Decision records that it is the stated objective of the boards and the new Investment Manager to accomplish an orderly winding down of the Fund and the return of its remaining assets to investors.

15. On 16 February 2011, the GFSC formally gave notice to vary the voluntary conditions issued on 17 September 2009. The variation specifically modified the condition of a moratorium on new business to permit Bordeaux to take on specified business from identified existing clients. The general moratorium remained. The variation resulted from a request to take-on certain business by Bordeaux. In modifying the condition the GFSC made an assessment of Bordeaux's remediation action taken up to that point, Bordeaux's resources and their compliance with the conditions that had been imposed on 17 September 2009.

16. On 11 and 12 May 2011, the GFSC undertook a follow-up onsite visit in relation to Bordeaux. The report following that visit identified seven high risk issues remaining from the previous visit of which five related to record-keeping arrangements: compliance monitoring programme; investment

and borrowing powers checks; reconciliations; complaints; and breaches log. On 3 November 2011 and 25 April 2012, further variations were made to the conditions imposed on 17 September 2009. These enabled Bordeaux to take on new business from five existing client relationships and required Bordeaux to obtain prior written consent from the GFSC before accepting any new controlled investment business from either potential or existing clients.

17. A claim form was issued on 21 December 2011 in the Commercial Court of the High Court of Justice in England and Wales by 18 of the incorporated cells against Arch FP. A further claim form was issued by six of the incorporated cells against Mr Farrell. Some of the claims made were tried before Walker J and led to the judgment to which I have referred (see [2014] EWHC 4268 (Comm)) on 18 December 2014 (and to which I will return in due course). Arch Guernsey and 18 of the incorporated cells also commenced proceedings against Messrs Addison, Meader and Radford and Bordeaux before this Court. The Cause was tabled in June 2012. Those proceedings have not yet concluded.

Procedural history

18. The GFSC investigation into Bordeaux began in January 2012. Notices were issued pursuant to section 27 of the POI Law requesting information and compelling certain persons, including each of the Bordeaux Directors, to attend for interview. The notices served, including outside Bordeaux, focused on the role of Bordeaux as the administrator, sponsor and secretary of the Fund and the parts played by the Bordeaux Directors.

19. On 19 November 2013, the GFSC provided the enforcement report that had been prepared as a result of this investigation to the Appellants. The copy of the letter sent by the GFSC's Director of Enforcement to Mr Radford inviting his comments on the facts presented and offering him the opportunity to provide additional information and comment on the recommendations of the Executive that would be put to a decision-maker has been produced to the Court. The enforcement report set out first a proposed decision, summarised the reasons for the sanctions proposed, described the facts in terms broadly similar to how they appeared in the Decision and set out the GFSC's investigation and findings (which cover 39 pages), before turning to a final section setting out aggravating and mitigating factors and dealing with the considerations set out in sections 11C(2) and 11D(2) of the FSC Law. A detailed response was sent on behalf of the Appellants by their Advocate dated 28 February 2014.

20. On 7 May 2014, a final version of the enforcement report was issued. The copy of the letter sent by the GFSC's Director of Enforcement to Mr Meader has been produced to the Court. It explains that "*no further evidence has been added since your legal counsel made representation to us. The changes made to the report are based on the submissions made by Advocate Wessels and his team, where we agreed with them, and clarification on issues raised, where appropriate.*" The proposed decision section appears to be unchanged. The papers were thereafter put to the Senior Decision Maker.

21. A draft decision from the Senior Decision Maker was forwarded by the GFSC to the Advocates acting for the Appellants on 1 July 2014. Much of the material was taken from the terms of the enforcement report. The proposed decision, however, proposed lower discretionary financial penalties in respect of each of the Bordeaux Directors from those contained in the enforcement report. Because of the 28-day period for formal representations commencing on the signing of what has become known as a "Minded To Notice", the covering letter explained that the decision was being provided in draft "*to allow all parties to make representations*". The GFSC issued a slightly modified draft decision of the Senior Decision Maker under cover of a letter to Advocate Wessels dated 23 September 2014. The Senior Decision Maker then issued his Minded To Notice under cover of a letter dated 20 February 2015. The proposal to impose discretionary financial penalties on all four Appellants meant that section 11E of the FSC Law was engaged, under which the 28-day period for the making of written or oral representations provided for in subsection (1)(c) began on the date of the Notice. The financial penalties proposed in the Minded To Notice were £150,000 in respect of Bordeaux, £80,000 each in respect of Messrs Radford and Meader and £40,000 in respect

of Mr Tostevin. The prohibition order proposed in respect of Messrs Radford and Meader was for a period of 15 years and in respect of Mr Tostevin was for a period of five years.

22. Written submissions dated 20 March 2015 were provided to the Senior Decision Maker on behalf of the Appellants. The Senior Decision Maker then invited further comments from the Director of Enforcement, whose response is dated 27 April 2015. Thereafter, an oral hearing took place before the Senior Decision Maker on 2 June 2015. Advocate Wessels spoke on behalf of the Appellants and Advocate Hill also addressed the Senior Decision Maker. The Senior Decision Maker's Decision was then issued on 28 July 2015 (and subsequently modified on 31 July 2015) and it is that Decision of the GFSC (and nothing that preceded it) which is the subject of these appeal proceedings.

The law

23. Bordeaux's appeal against the level of financial penalty imposed against it is brought pursuant to section 11H of the FSC Law. Because the full suite of regulatory Laws has been relied on for the making of the prohibition orders against the Bordeaux Directors, the appeal provisions in each have necessarily had to be relied upon (ie, section 36 of the POI Law, section 19 of the Fiduciaries Law, section 18 of the Banking Supervision Law, section 43 of the IMII Law and section 63 of the Insurance Business Law). However, the grounds of appeal in each Law are in identical terms. Accordingly, I do not need to spell each of them out in any greater detail and I will refer generally only to section 36 of the POI law but, in doing so, I am effectively referring at the same time to the equivalent provisions in all of the other Laws.

24. Section 11H(2) of the FSC Law provides:

> "*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.*"

These grounds of appeal are what might be regarded as the standard, modern grounds included in legislation creating statutory appeals. On behalf of the Appellants, Advocate Edwards advances paragraphs (a), (b) and (d) only.

25. Although the wording of the grounds of appeal has developed from the style used in older statutes, such as the Housing (Control of Occupation) (Guernsey) Law, 1994, where the grounds in section 56(1) are simply whether the decision "*was ultra vires or an unreasonable exercise of the … powers*", the approach explained by Beloff JA in *Walters v States Housing Authority* (1997) 24.GLJ.76 is still regarded as helpful to distinguish between a purely legal determination, ie, something falling within the province of the presiding judge alone, and an approach to reasonableness which takes the appellate process beyond the traditional judicial review, thereby engaging the Jurats:

> "*It seems to us that there are at any rate five possible views which may be taken on appeal by the Royal Court against an exercise of power by the Housing Authority:-*
>
> *(1) That it is the Bailiff's view that the power was exercised ultra vires, in a way other than Wednesbury unreasonably or irrationally. In such a case the Bailiff would withdraw the matter from the Jurats since, as a matter of vires, that is to say, law, it would fall within his exclusive province. The Court would in consequence allow the appeal.*

(2) That it is the Bailiff's view that the decision was Wednesbury unreasonable or irrational. The same procedural consequences would ensue as in (1).

(3) That it is not in the Bailiff's view an ultra vires (including Wednesbury unreasonable) exercise of power, in which case the Bailiff would direct the Jurats that it was for them to determine whether the decision was unreasonable, which, in our view, he should emphasise means something other than that they themselves would have come to a different decision had they been the Authority.

In the case of In re W. to which I have referred above, Lord Hailsham, LC, said at p.700 between letters D and E:-

> *"… Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable. There is a band of decisions within which no Court should seek to replace the individual's judgment with his own. …"*

Mutatis mutandis, it seems to us that this is the approach that the Jurats should be directed to adopt towards the decision of the Authority insofar as they are free to consider such decision. If the Jurats then consider, having weighed up all the evidence, that the decision reached by the Authority was unreasonable, they should say so and the Court would in consequence allow the appeal.

(4) If, upon such direction by the Bailiff, the Jurats merely consider that they themselves would have come to a different decision but that the Authority's decision under appeal is not unreasonable, the appeal must be dismissed.

(5) If, upon such direction by the Bailiff, the Jurats consider that the Authority's decision was right, equally the appeal must be dismissed."

26. In the context of the grounds of appeal in, eg, section 11H(2) of the FSC Law, the distinction between issues for the presiding judge alone and those for the Jurats is of less procedural significance because section 11H(10) provides that the Court is "*constituted by the Bailiff sitting unaccompanied by the Jurats*". However, when considering para. (b), the band of decisions with which the Court should not interfere remains relevant. This might also be put as the Court affording the original decision-maker a degree of deference. As Lord Cooke of Thorndon explained in *R (Daly) v Home Secretary* [2001] 2 AC 532:

> "*… I think that the day will come when it will be more widely recognised that Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223 was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter.*"

27. In relation to the approach to take, I do not find that there is any additional assistance in the cases from Jersey to which Advocate Edwards referred. For example, the formulation of degrees of wrongness set out in para. 13 of the Royal Court of Jersey's judgment in *Anchor Trust Company Limited v Jersey Financial Services Commission* [2005] JLR 428 (approved by the Jersey Court of Appeal: [2006] JCA 040):

> "*In our judgment these authorities confirm that there are at least three possible degrees of 'wrongness' which the Court may find in respect of a decision under appeal. In ascending order of 'wrongness' they are as follows:-*

> *(a) The decision was wrong in the sense that it is not the decision which the Jurats would themselves have reached.*
>
> *(b) The decision was wrong to such an extent that the Jurats would categorise it as unreasonable.*
>
> *(c) The decision was wrong to such an extent that it goes beyond merely being unreasonable and becomes a decision to which no reasonable decision-maker could have come i.e. "Wednesbury unreasonable" or "irrational."*"

really does no more than explain outcomes (2) to (4) from *Walters* in reverse order.

28. The guidance summarised in *De Smith's Judicial Review* (7th ed.), though, is of more relevance. Under the heading "Intensity of Review", the authors state (at para. 11-086):

> "*Whether a court carries out substantive review of a decision by reference to the concept of unreasonableness or proportionality, two questions arise: To what extent should the courts allow a degree of latitude or leeway to the decision-maker? And to what extent should it be uniform? The answers to these questions depend in large part on the respective constitutional roles of the court and the primary decision-maker (the impugned public authority), but also on practical considerations. The willingness of the courts to invalidate a decision on the ground that it is unreasonable or disproportionate will be influenced in part by the administrative scheme under review; the subject matter of the decision; the importance of the countervailing rights or interests and the extent of the interference with the right or interest. Indeed the intensity of review will differ, for the reason that "in public law, context is all". The threshold of intervention is particularly influenced by the respective institutional competence of the decision-maker and the court.*"

Advocate Hill acknowledged that the GFSC could not argue against the intensity of review of its decisions under the regulatory Laws being towards the higher end of the spectrum. The importance of the financial services sector to the Bailiwick's economy is clear. The regulatory environment in which businesses and individuals operate must deliver the GFSC's objectives of maintaining financial stability in the regulated sector, managing risk to the financial system and maintaining market confidence; ensuring fair, efficient and transparent markets, protecting financial services' customers and countering financial crime and the financing of terrorism. It should also not be forgotten that the financial services sector is a significant employer and so decisions taken by the GFSC have the potential to impact on large numbers of people. The availability of discretionary financial penalties as one of the sanctions that can be imposed raises such cases to a level where the process is quasi-criminal. The GFSC's choice of delegating its functions to officers who are Learned Counsel in another jurisdiction is also, in my view, something that means the GFSC's decision can be expected to bear the hallmarks of fairly closely reasoned decisions at, or approaching, the style of decision that would be expected from a judicial tribunal. These are all factors leading me to conclude that the Decision can properly be subjected to a level of review that would not otherwise be appropriate for a more obviously "lay" administrative decision affecting another sector of activity.

29. In reaching that conclusion, I have taken into account what was said by the Privy Council in *Selvanathan v General Medical Council* [2000] UKPC 37. Advocate Hill reminded the Court that Lord Hope of Craighead, delivering the Opinion of the Judicial Committee, commented on the importance of bearing in mind the composition of the General Medical Council when assessing the adequacy of the reasoning in its decisions. The Council is composed of medical practitioners and lay members, with a Legal Assessor to advise the members on questions of law, and:

> "*In these circumstances it is not to be expected of the Committee that they should give detailed reasons for their findings of fact. A general explanation of the basis for their determination on the questions of serious professional misconduct and of penalty will be sufficient in most cases.*"

But for the fact that the GFSC has chosen to delegate its decision-making in sanctions cases to Senior Decision Makers who, I understand, have been selected for their experience in regulatory matters in the United Kingdom and who, at least in some cases, have experience sitting as a part-time judge, these principles would have more force than I find they do in relation to the Decision of the Senior Decision Maker in the present case.

30. Advocate Edwards has also drawn attention to some further guidance on unreasonableness and proportionality which I consider is equally applicable in Guernsey as it is in England and Wales. Ultimately, though, what matters is whether the GFSC has achieved a fair balance. This can involve consideration of whether the Senior Decision Maker has given disproportionate weight to one or more of the considerations relevant to his Decision, and, if so, whether it is of such significance that the aspect of the Decision affected falls outside the range of reasonable responses that could follow in the circumstances of the case (see, eg, Lord Carswell in *Gokool v Permanent Secretary of the Ministry of Health and Quality of Life* [2008] UKPC 54). It can also involve consideration of whether the end-product of the Decision amounts to a disproportionate interference with an appellant's rights or interests, which is sometimes referred to as an "oppressive" decision. At para. 11-070 in *De Smith's Judicial Review*, the comment of Laws LJ in *R (Khatun) v Newham LBC* [2005] QB 37 is quoted:

> "*Clearly a public body may choose to deploy powers it enjoys under statute in so draconian a fashion that the hardship suffered by affected individuals in consequence will justify the court in condemning the exercise as irrational and perverse.*"

In such a case, the review is less about process and more about outcome. As noted in *De Smith* (at para. 11-071), "*each case must be considered in the context of the nature of the decision, the function of the particular power and the nature of the interests or rights affected.*"

Prohibition orders

Legal basis

31. There is no dispute in this case about the availability of a prohibition order against each of the Bordeaux Directors. Section 34E(1) of the POI Law provides:

> "*If it appears to the Commission, having regard to the provisions of schedule 4, that an individual is not a fit and proper person to perform functions in relation to controlled investment business carried on by a licensee, 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.*"

Schedule 4 to the Law sets out the minimum criteria for licensing. It follows, therefore, that a person who fails to meet any of those minimum criteria is capable in law of being made the subject of a prohibition order. In other words, the basic *vires* for such an order exist, but whether it is appropriate for the GFSC to exercise the discretion available to it will depend on the degree of non-fulfilment of these criteria as part of a review of all the circumstances of the case.

32. Paragraph 1(1) of Schedule 4 requires "*every person who is … a director, controller, partner or manager of the … licensee [to be] a fit and proper person to hold that position*". The subparagraph then lists matters to which regard must be had in determining this question:

> "*(a) his probity, competence, experience and soundness of judgment for fulfilling the responsibilities … of that position,*
>
> *(b) the diligence with which he is fulfilling … those responsibilities,*
>
> *(c) whether the interests of clients or investors (or potential clients or investors), the interests of any other persons or the reputation of the Bailiwick as a finance centre*

are, or are likely to be, in any way jeopardised by his holding … that position,

(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,

(f) his policies, procedures and controls for the vetting of clients and his record of compliance with any provision contained in or made under –

(i) the Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991,

(ii) the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999,

(iii) the Drug Trafficking (Bailiwick of Guernsey) Law, 2000,

(iv) the Terrorism and Crime (Bailiwick of Guernsey) Law, 2002,

(v) the Disclosure (Bailiwick of Guernsey) Law, 2007,

(vi) the Transfer of Funds (Guernsey) Ordinance, 2007, the Transfer of Funds (Alderney) Ordinance, 2007 and the Transfer of Funds (Sark) Ordinance, 2007,

(vii) any legislation implementing European Community or United Nations sanctions and applicable in the Bailiwick, and

(viii) any other enactment prescribed for the purposes hereof by regulation of the Commission, and

(g) his policies, procedures and controls to comply with any rules, codes, guidance, principles and instructions referred to in paragraph 2(2)."

(The list of enactments to which reference is made in item (f) has been supplemented since the time at which the Decision was reached.) Subparagraph (2) also enables regard to be had "*to the previous conduct and activities of the person in question*". This extends to evidence of commission of any offence, particularly one involving fraud, dishonesty or violence and contraventions of the regulatory Laws and other enactments in the areas mentioned.

33. Paragraph 2 of Schedule 4 deals with integrity and skill:

"*(1) The business of the … licensee is … carried on –*

(a) with prudence and integrity,

(b) with professional skill appropriate to the nature and scale of his activities, and

(c) in a manner which will not tend to bring the Bailiwick into disrepute as an international finance centre.

(2) In conducting his business … the licensee shall at all times act in accordance with the following documents issued by the Commission –

> *(a) the Principles of Conduct of Finance Business,*
>
> *(b) any rules, codes, guidance, principles and instructions issued from time to time under this Law and any other enactment as may be applicable to him.*"

The remaining paragraphs of the Schedule are not engaged in relation to the Bordeaux Directors.

Challenge to findings

34. Having identified in the first paragraph of his Decision that he had to consider for the Relevant Period of 1 January 2007 to 31 December 2009 whether the Bordeaux Directors fulfilled the minimum criteria in Schedule 4 (and also similar considerations set out in para. 3 of Schedule 1 to the Fiduciaries Law) and, if not, the nature of the sanction, if any, to be imposed upon them, the Senior Decision Maker proceeded to make a number of findings. It strikes me as the logical place to start my consideration of the arguments advanced by Advocate Edwards to determine how many of those findings are made out. At para. 105 of his Skeleton Argument, Advocate Edwards refers to there being a lack of evidence to support certain key findings. However, there are other findings where there is no challenge. I take the view that the correctness, in terms of rationality, reasonableness and proportionality of the sanctions that were imposed, especially the prohibition orders, can only properly be assessed against those failings that can properly be levelled against the Bordeaux Directors.

35. The first paragraph to which Advocate Edwards has referred is para. 231, in which the Senior Decision Maker stated:

> "*The result of the failings of the parties connected to the Fund and the UK OEIC [sic] may have contributed to investors losing significant amounts of money. In June 2011 the FSA (now known as the FCA) announced a £54 million payout for Arch Cru investors funded by Capita, BNY Mellon and HSBC. In December 2012 the FSA also confirmed plans to go ahead with its consumer redress scheme and estimates the amount it will recoup to be between £20 – 40 million. If the contraventions did not contribute to the losses then that would appear to be a matter of luck.*"

It had been a theme of the submissions made to the Senior Decision Maker by Advocate Wessels that there was no evidence of a causal link to any loss and certainly not any losses of the scale being claimed in the proceedings instituted in Guernsey against Messrs Radford and Meader. The Bordeaux Directors therefore objected to the ongoing linkage to investor losses.

36. Advocate Edwards suggested that the Senior Decision Maker should have had greater regard to the way in which the relationship between Bordeaux and the Fund and Arch FP had been explained in decisions taken in England and Wales. In particular, the judgment of Walker J identified serious concerns about the lack of integrity of Messrs Farrell and Addison. For example, at para. 86, Walker J concluded that "*Mr Farrell's evidence cannot be relied upon generally*" and that Mr Farrell had "*knowingly misled the court in what he said in relation to Arch FP's role in 2007*". In respect of the relationship between Arch FP and Messrs Radford and Meader, at para. 149 His Lordship stated:

> "*I cannot rule out the possibility that either or both of Mr Meader and Mr Radford were told informally prior to 17 August 2007 or prior to 29 October 2007 that some of the cells would be investing in the acquisition, and that Arch FP would be receiving a "fee". It is not suggested that they were told that the "fee" would come in large part from funds invested by the cells. I am sure that they were not told this.*"

and also at para. 264:

> "*This [conflict of interest] would never have come about if Arch FP had recognised that it should not have put itself in the position that it did. It would equally not have come about if Arch FP had made proper disclosure to the independent directors. Had they been informed*

> *that the cells would be funding almost the entirety of a payment of £3m to Arch FP, I am sure that they would have objected in the strongest possible terms.*"

37. Advocate Edwards has also sought to pray in aid material found in the Decision Notice of the Financial Services Authority issued on 14 September 2012 in respect of Arch FP and the appeal from it heard in the Upper Tribunal (Tax and Chancery Chamber, Financial Services) as offering a wider explanation of the proper way to consider the conduct of Bordeaux and the Bordeaux Directors. The Authority's case against Arch FP (and Messrs Farrell and Addison) focused on the management of conflicts of interest, the failure to manage specific conflicts in relation to four particular transactions, compliance monitoring, separation of decision-making and liquidity and spread of risk. In the Decision Notice, there are various instances where it is apparent that Messrs Radford and Meader were being kept in the dark over matters being dealt with by Messrs Farrell and Addison. This is confirmed in the judgment of the Upper Tribunal (which deals with an appeal differently from the regime in Guernsey because it proceeds by way of a complete rehearing before that appellate body). The Upper Tribunal (at para. 233) drew an inference:

> "*... that the reason that Mr Meader and Mr Radford were chosen as directors was because of the need for the ICC [ie, Arch Guernsey] and the Guernsey Cells to have directors who were experienced as acting as directors of Guernsey companies through their roles as administrators (hence Mr Farrell's reference to them as being "professional directors") and they were not expected to perform any in depth role in assessing the quality of investments made by the funds they administered or the terms on which they were acquired.*"

In a similar vein, one of the conclusions reached in respect of the purchase by the incorporated cells of shares in Arch Group (UK) Limited was (at para. 257(5)):

> "*The limited roles assumed by Mr Meader and Mr Radford in their capacity as Guernsey Directors and the fact that they were given very little time to assess the investment and develop and ask probing questions about the terms of the investment and the price to be paid for the shares meant that their consent could not be considered as fully informed. In addition, they were not informed of the upward revision in the valuation and the consequent increase in the price paid for the shares, the increase of the amount of equity acquired and, as we have found, of the fact that some of the shares to be acquired were to be sold by Mr Farrell.*"

38. In response, Advocate Hill contends that the Senior Decision Maker should not be criticised for drawing attention to the apparent link between the incompetent management of Bordeaux by the Directors and losses sustained by investors. The wording in the Decision is noticeably different from that in the Minded To Notice. The causal link has dropped from being an assertion of a direct link to it being referred to as a possible link and a comment that if there is no causal link to losses that is a result of something other than the role played by the Bordeaux Directors.

39. I am not persuaded that Advocate Edwards has shown that the Senior Decision Maker misunderstood the nature of the relationship Bordeaux had with Arch FP. There was no obligation on the Senior Decision Maker to refer expressly to the material capable of being drawn from the judgment of Walker J or the judgment of the Upper Tribunal, both of which I understand to have been placed before him. Provided that the overall impression of the way the relationship operated does not demonstrate such a misunderstanding, I accept Advocate Hill's submissions that this is an area where appropriate deference must be afforded to the GFSC for the way in which the facts have been set out. Further, I have noted the way the Upper Tribunal described the witness statements provided to it by Messrs Radford and Meader (at para. 35(2) of its judgment):

> "*Mr Radford and Mr Meader were the non-AFP directors of the Guernsey Cells and their evidence is relevant to the Four Transactions relied on by the Authority in relation to the conflict of interest issue. The evidence given is sketchy, consisting of very brief answers to a number of detailed questions about the Four Transactions together with an exhibit in the form of the defence filed by them in proceedings relating to these transactions brought*

> *against them by the Guernsey Cells in Guernsey. We have been cautious in attaching much weight to Mr Radford's and Mr Meader's evidence in the light of the fact that they were not available to be cross-examined and we were mindful of the risk that their evidence can be seen as self-serving in the context of the proceedings in Guernsey. Mr Meader and Mr Radford, as residents of Guernsey, are outside the jurisdiction of the Tribunal and could not be made the subject of a witness summons under the Tribunal's Rules. It is perhaps a matter of regret that they did not make themselves available to assist the Tribunal bearing in mind the close links between Guernsey and the UK and the benefits for that jurisdiction in its investment products being used as vehicles for investment by UK investors such as the UK Funds. We also noted in the hearing that the Authority had sought information directly from Mr Meader and Mr Radford rather than seeking the assistance of the Guernsey regulator under mutual co-operation arrangements.*"

In light of these cautionary words and the actual findings made (and those in the original Decision Notice have, as far as I am concerned, been superseded by those in the judgment of the Upper Tribunal), I do not regard any omission on the part of the Senior Decision Maker to refer to how the Upper Tribunal and Walker J found the relationship with Bordeaux to operate as demonstrating that what the Senior Decision Maker had to say in the Decision is flawed in the manner suggested.

40. Indeed, I am satisfied from para. 45 of the Decision that the Senior Decision Maker understood the way in which the Fund had been structured and that, having reviewed the various constitutive documents and agreements as he did (see, eg, para. 39), he had fully appreciated the submissions made to him by Advocate Wessels:

> "*Accordingly, I reject any criticism of Bordeaux and its directors in relation to the adoption of the particular structure of the Fund and do so because of the absence of any evidence that the structure and its terms are unusual.*"

As a result, I am further satisfied that the passages from the Scheme Particulars of Arch Guernsey dated January 2007, the Investment Management Agreements and the Administration Agreement, all dated 28 December 2006, had been reviewed by the Senior Decision Maker and that, when he made his findings, he was alive to the limitations that had been placed on the relationship of Bordeaux with the Fund. At para. 53 of the Decision, the Senior Decision Maker quoted from how the Scheme Particulars set out Bordeaux's role. The fact that an investment in shares of an incorporated cell "*involves a high degree of risk*" was spelt out in the Scheme Particulars. The highly specialist investments to be held by the incorporated cells were also mentioned, with a warning that "*Such investment is only for sophisticated investors who understand the risks involved and who have no need for liquidity of investment*". The fact that Arch FP, as Investment Manager, was to have "*complete discretion*" was clarified in the Investment Management Agreement. The duties and functions of Bordeaux as Administrator were, in my view, appreciated even if the Senior Decision Maker chose not to extract into the GFSC's Decision precisely what it was that Bordeaux agreed with Arch Guernsey to do.

41. The first finding in the Decision arises in the context of conflicts of interest (see para. 52):

> "*In failing to put in place and implement procedures for dealing with conflicts of interest Bordeaux acted in breach of POI Law para 2 (1) Schedule 4 and Fiduciaries Law Schedule 1 para 1(1) under which Bordeaux was required to carry on business with prudence and integrity and with professional skill appropriate to the nature and scale of its activities. Furthermore, in allowing Bordeaux to act as described the Bordeaux Directors failed to ensure that Bordeaux fulfilled its obligations under the POI and Fiduciary Laws and so failed to fulfil the criteria in POI Schedule 1 para 1 (1) (A) (b) (c) and (e) and similar provision in the Fiduciaries Law. These were serious failings.*"

This paragraph did not feature in the Minded To Notice. Indeed, this part of the Decision is generally of quite a different tone from the way this issue had been put in the Minded To Notice. (I am going to ignore the typographic error in referring towards the end to Schedule 1 to the POI Law

and read it instead as if it meant to refer to Schedule 4.)

42. Advocate Edwards concedes that it was open to the Senior Decision Maker to reach a finding on the issue of conflicts of interest. He opposes the categorisation of the finding as being "*serious failings*". In doing so, he drew attention to para. 42 of the Decision, in which the Senior Decision Maker recognised "*that investors and potential investors were aware that investments might be made in circumstances in which there was a conflict of interest*". However, in para. 51, the Senior Decision Maker also recorded that "*There is no evidence that the Bordeaux Directors ever managed a conflict of interest and within the Fund structure, Bordeaux was the only independent entity in a position to fulfil the role*". On the basis that any failure to manage conflicts of interest that were acknowledged as being likely to exist, eg, the Scheme Particulars stated (on page 11) that "*Such positions may involve a conflict of interest which shall be resolved by the Directors using their judgement as to what is in the best interest of those investors*", is going to result in a finding of non-fulfilment of the minimum licensing criteria, it follows that multiple failings are likely to be regarded as making the non-fulfilment worse. Accordingly, I cannot quibble at the conclusion of the Senior Decision Maker that "*These were serious failings*".

43. Advocate Edwards accepts that the functions of Bordeaux to which the Senior Decision Maker referred at para. 55 were what Bordeaux was engaged to perform. Further, the finding in para. 58 relating to slippage in the production of NAVs was something that could be found, although he included in para. 105 of his Skeleton Argument criticism of the failure to refer to the contribution to the slippage made by the delays in third parties producing the valuations needed by Bordeaux to perform their own function. I do not regard any such omission as being particularly heinous. The Senior Decision Maker was entitled on the material produced to him to make the finding recorded. It is not described as being a serious failing. The contribution to Bordeaux's non-fulfilment of the minimum licensing criteria in this respect as a result of what other entities failed to do would, at best, amount to a form of mitigation in relation to this particular failing. Accordingly, the finding itself still stands.

44. Similarly, at para. 59, there is a finding that Bordeaux should have notified the NAVs to the Channel Islands Stock Exchange, but Advocate Edwards submits that this should have been coupled with an acknowledgement that the Channel Islands Stock Exchange did not complain about the delays in receipt of information. Moreover, as a closed-ended vehicle, the monthly valuations were less relevant than they would have been for an open-ended vehicle. Again, I find that these are matters that potentially go to the weight to be afforded to the finding, because the bare finding cannot be challenged. The summary given at para. 62 of the Decision, therefore, remains justified on the material before the GFSC:

> "*The delays appear to be in part attributable in failures on the part of Bordeaux to organise its business with the appropriate degree of diligence and professionalism in breach of POI Schedule 4 para 1 (1)(b) and para 2 (1)(a) and (b) and Fiduciaries law Schedule 1 para 1 (1)(a) and (b).*"

I accept the submission of Advocate Edwards that these findings do not, if viewed in isolation, add up to much. They are the type of shortcomings that would not of themselves merit the making of a prohibition order.

45. In relation to para. 67, Advocate Edwards has pointed out that there was no evidence that the valuation method being used by Arch FP was incorrect, which would have led to Messrs Radford and Meader questioning the methodology. The Senior Decision Maker has concluded that it would have been prudent to have scrutinised matters more. He accepted that "*Bordeaux was totally reliant on the Investment Manager to provide such valuations*" and found (at para. 69) that, even though this were the case, Bordeaux "*should have taken steps to understand the methodology employed and put in place a procedure to check on the valuations produced by Arch FP.*" The omission of the Senior Decision Maker to mention what Advocate Edwards suggests he should have about the correctness or otherwise of the valuations is not, in my view, directly relevant to the finding he has made. The non-compliance to which this finding relates is about not taking steps to supervise Arch FP, ie, to

provide some form of check and balance appropriate to the role of Administrator. As such, I do not regard the alleged omission as affecting the finding made. Indeed, Advocate Edwards has really been more critical about the apparent weight attached to findings such as these rather than the fact that such findings have been made.

46. Moving on to para. 78, this is a further finding about undue reliance on Arch FP in respect of pricing information and the failure to question the rationale for significant variances in the value of the shares. Advocate Edwards submitted that it was necessary to view this in context. In my opinion, this is what the Senior Decision Maker has done. It is the number of findings of failings that gives rise to the overall impression that the Bordeaux Directors were not to be regarded as fit and proper persons. There are further examples where Advocate Edwards has highlighted perceived shortcomings in the approach of the Senior Decision Maker in para. 105 of his Skeleton Argument but he skipped over several of these. Although I will not address each in turn, I have considered them all and bear them in mind.

47. There is a further example, however, at para. 116 of the Decision relating to the shipping notes, where the Senior Decision Maker has found that the stance taken by the Bordeaux Directors "*was completely unquestioning*". Advocate Edwards is correct to point out that Bordeaux was permitted by its relationship with Arch FP to delegate, and the Upper Tribunal had noted that the Bordeaux Directors were not expected to have any investment expertise, but I consider that the Senior Decision Maker was entitled to conclude that the absence of appropriate oversight had been demonstrated and that "*These failures involves a failure to act with competence and soundness of judgment, with diligence and prudence and with appropriate professional skill: POI Schedule 4 para 1 (1) (a), (b), and para 2 (1) (a) and (b) and Fiduciaries Law Schedule 1 para 1 (1) (a) and (b) and para 3 (2) (a) (b).*" The Senior Decision Maker was not disregarding the contractual position, to which reference had been made earlier in the Decision but was, in my view correctly, referring to the non-fulfilment by the Bordeaux Directors of their statutory obligations in any event. This was a further finding that the Senior Decision Maker properly made.

48. Advocate Edwards does not accept that the finding recorded at para. 125 should have been made. He does so on the basis that there was no evidence that the investments were outside the Scheme documents. He is, of course, correct, because it is stated in that paragraph in any event that "*there is no evidence that the investments made were in breach of the Scheme Documents*". The finding is not directed towards there being a breach of what was contained in the documentation, but rather that "*the failure to monitor whether investments complied with the Scheme Particulars manifested lack of a competence and soundness of judgment, diligence and prudence and appropriate skill*". Although no reference is made to it here, this strikes me as referring directly to the requirements of schedule 4 to the POI Law and schedule 1 to the Fiduciaries Law. This is a further example of the Senior Decision Maker concluding that the Bordeaux Directors did not meet the minimum criteria to be regarded as a fit and proper person.

49. When the finding is placed into its proper context, I am satisfied that there was material entitling the Senior Decision Maker to make this finding. He sets out the concerns that were raised about the times when funds were released without sufficient scrutiny, leading to him concluding (at para. 119) that it was:

> "*… apparent that Bordeaux did not have adequate procedures in place relating to the making of payments. These functions were not adequately understood by staff resulting in a gap surrounding the review of payments contributing to a failure to ensure compliance with the Fund's documentation and to protect the interests of investors.*"

Mr Meader placed undue reliance on another member of staff and Mr Tostevin did not consider that this type of monitoring was part of the overall compliance monitoring programme. In my opinion, when it is recognised that the finding is not an allegation of breach but another finding relating to the absence of adequate monitoring, the Senior Decision Maker cannot be criticised for reaching this conclusion. It was a finding he was permitted to make on the material before him. Paragraph 125 is also something that has been inserted into the Decision in addition to the paragraphs that were in the

Minded To Notice (acknowledging that para. 142 of that Notice has been omitted from the Decision), which I regard as indicative that the Senior Decision Maker properly took into account the submissions made by Advocate Wessels and so clarified the precise basis on which he was finding that this amounted to non-fulfilment of the applicable criteria. I am not, therefore, persuaded that this is a finding I should now reject.

50. At para. 134 of the Decision, dealing with the ships and whether they could be regarded as a sustainable opportunity, the Senior Decision Maker has described the impact of the failings as "*serious*". This is the only occasion other than para. 52, where the failings identified have been combined with the use of the term "*serious*", albeit that this description has been applied to the impact of them rather than directly to the failings themselves. Advocate Edwards has again challenged this finding on the basis that there was no analysis of how any Scheme Particulars had been breached and the causative link to any losses to investors. The paragraph was modified from that in the Minded To Notice and became:

> "*The requirements of the Scheme Particulars and investors' best interests were not considered by Bordeaux. The impact of these failings were serious and greater scrutiny and due diligence on payments may have saved the investors from some of the losses they incurred. The losses on the shipping investments were in excess of US$160 million. Albeit the losses may have been due to a reduction in the value of the ships, had consideration been given as to whether investments related to shipping could properly be regarded as shipping, instructions could have been given to Arch FP not to invest in such investments as they do not appear to fall within the description sustainable investments. Some of the loss, at least, might have been avoided.*"

I wonder if the second reference to "*shipping*" in the penultimate sentence was intended to be "*sustainable*".

51. This is a further example where the context of what is being dealt with is important. The Senior Decision Maker added the second part to this paragraph from the text of the Minded To Notice. In doing so, he appears to have accepted the submissions made by Advocate Wessels that it was wrong to link any such finding to the full losses alleged to have been sustained by investors. The Senior Decision Maker was not, however, prepared to disregard any possible link between the absence of adequate scrutiny and those losses. He did not go so far as to find that the shipping investments were not a sustainable opportunity, although he appears to have queried how this could have been regarded as being so, but has concentrated instead on Bordeaux not giving sufficient thought to that possibility. In that way, I take the view that he was again giving proper consideration to the submissions that had been made on behalf of the Respondents. The position could not be stated in as stark a fashion as it had been in the Minded To Notice, and its effect needed to be modified in some way. I am satisfied, therefore, that this was a finding that the Senior Decision Maker was able to make in the light of the material placed before him and the submissions he heard.

52. In respect of record-keeping and missing documentation, the Senior Decision Maker found (at para. 144) that "*Bordeaux's level of control over the role of the Investment Manager was significantly reduced by not maintaining or having sight of original documentation*". He also found that "*original documents relating to the Fund were not kept in Guernsey; transaction documents were missing for up to a year and a half*" (para. 138). Advocate Edwards challenged this finding on the basis that it was not a breach of the Licensees (Financial Resources, Notification, Conduct of Business and Compliance) Rules 1998 for Bordeaux not to have custody of original documentation in Guernsey. All records were readily accessible anyway and these types of findings could not be regarded as earth-shattering.

53. Having regard to the 1998 Rules, which were the applicable Rules during the Relevant Period that the GFSC had to consider, the Senior Decision Maker was, in my view, entitled to conclude that missing documentation was symptomatic of an absence of proper internal organisation. The scheme of the Rules is to ensure that there are proper compliance procedures in place and that licensees do not permit their staff to act outside their areas of competence. Whilst Advocate Edwards' assessment

of the appropriate way to regard this finding of a failure on the part of Bordeaux and the Bordeaux Directors may be reasonably accurate, it is a finding (or series of findings) with which I cannot interfere on this appeal because, in my view, the Senior Decision Maker was entitled to record what he has. The level of oversight, and so control, was reduced below what it would have been had more stringent steps been taken by Bordeaux. This all forms part of a pattern of the level of scrutiny of what was taking place by the Bordeaux Directors being inadequate.

54. There is a similar finding in para. 159:

> "*Whilst, at all material times Bordeaux was aware of the transactions being entered into on behalf of the ICs, albeit after the event, the structure of these transactions and the fees being taken by Arch FP, any enquiry by Bordeaux was limited and insufficient. Bordeaux should have ensured that procedures were in place to prevent the fees being charged or paid as opposed to having to recover the fees after they had been paid.*"

Advocate Edwards suggests that this finding appears to be about the inadequacy of Bordeaux's policies, procedures and controls, even though not expressed in that way. More particularly, he has highlighted that this failing is not described as being a serious one. I accept that the Senior Decision Maker has not given any indication that he regards this failing as being of the same level of seriousness as his finding at para. 52. I accept that I must read the Decision as a whole. Accordingly, where the Senior Decision Maker expresses his concerns about any particular matter in a way that he does not in respect of another matter he has addressed, I treat that as being indicative that any matter not so qualified as being serious is to be taken to be an "ordinary" failing. This is a further finding with which I cannot interfere, but I have considered it in the way I have indicated when considering what all the findings collectively amount to.

55. The final matter addressed in the findings of the Senior Decision Maker to which Advocate Edwards objected is at para. 171. It relates to Board minutes. In his submission, it is common practice for there to be template minutes used. This was something to which Mr Meader had referred (as recorded in para. 168). This reality should have been taken into account by the GFSC. I acknowledge that companies will often use templates and that prepared draft minutes can be used. However, there was also evidence referred to that some meetings were apparently minuted by a person not actually in attendance. In those circumstances, I reject the submission that the finding at para. 171 was one that could not be made and consider that the Senior Decision Maker was justified in concluding that "*the records of the company would not have been accurate and represented a misleading record of affairs*", with the result that "*The conduct of the Board of Bordeaux demonstrates a failure to understand the requirement to keep full, proper and not misleading records in respect of the controlled investment business undertaken.*"

56. There are certain findings in the section of the Decision dealing with compliance arrangements to which no reference was made. I mention them here to put the totality of the findings against which the GFSC imposed sanctions into their context. The Senior Decision Maker was critical about the absence of adequate compliance procedures, particularly the required periodic reviews of its written procedures (see, eg, para. 188), noting that the Bordeaux Directors failed to ensure that Bordeaux did what the 1998 Rules required. In this regard, it is also fair to point out that the wording used here has removed the reference to investors having been "*put at significant risk by the lack of an effective compliance monitoring programme of the scheme*", which had been used in the Minded To Notice. There has been a similar deletion when dealing with client take-on procedures, although on this occasion a reference to there being a risk to the reputation of Guernsey has also been removed. I regard these deletions as being further evidence that the Senior Decision Maker had largely accepted the submissions made by Advocate Wessels. Instead, the finding refers to particular aspects of the non-fulfilment of the minimum licensing criteria (at para. 197):

> "*Although Arch FP was authorised and regulated by the FSA, Bordeaux should have taken appropriate steps to monitor Arch FP, particularly as they were a new client to Bordeaux and Arch FP had not previously managed a Guernsey closed-ended fund before. Bordeaux should have ensured that appropriate client take-on procedures were in place to identify*

> *potential risks with new business. Failure to do so was (amongst other matters) a failure to fulfil the Fiduciary Law Schedule 1 para 3 (2) (f). It also showed a failure to act with the appropriate level of skill and competence, and diligence.*"

57. There are two other findings made in relation to training. There was no relevant or effective sanctions training. This constituted a breach of rule 351 in the GFSC's Handbook (para. 200) and so did not comply with the requirements of the POI Law and the Fiduciaries Law (para. 201). The Senior Decision Maker also recorded Bordeaux's failure to ensure that staff were trained adequately or experienced enough, with the consequence that para. 5(3)(a) of schedule 4 to the POI Law was not fulfilled (para. 211).

58. My conclusion, therefore, on the challenge mounted by Advocate Edwards to the findings made by the Senior Decision Maker is that each of those challenges fails for the reasons I have given. The consequence is that the various failings identified in the Decision were all properly matters to be taken into account by the Senior Decision Maker. The key question in the appeals of the Bordeaux Directors is whether these failings satisfy the test in section 34E(1) of the POI Law that each of them is not a fit and proper person to perform functions in relation to controlled investment business carried on by a licensee. In that regard, Advocate Edwards has drawn attention to the GFSC's published Explanatory Note on Prohibition Orders dated January 2013.

Circumstances where order might be made

59. This Explanatory Note is, of course, not to be construed in the same way as one would a legislative instrument. It does not bind, but the importance of the GFSC adopting a consistent approach is the very reason why it sets out its likely approach to matters. In Section 3, the GFSC explains that "*more assertive enforcement action*" may be appropriate "*where co-operation on the part of the person is lacking and/or where the contravention or misconduct is such that a deterrence response in warranted*". It states that it "*is also aware of the serious detrimental effect that a Prohibition Order may have on the reputation, livelihood or business of the individual concerned*".

60. In Section 5 of the Note, the GFSC sets out its approach, explaining that:

> "*It is not possible nor would it be appropriate for the Commission to try and produce a definitive list of matters that the Commission might take into account. The Commission must consider in each case whether, consistent with its Enforcement Policy, the imposition, variation or revocation is appropriate. A non-exhaustive list, illustrating the types of additional factors that may be taken into consideration, is provided in the Appendix to this Note.*"

The Note further states that:

> "*The Commission will generally consider imposing a Prohibition Order where the contravention or misconduct is by an individual with greater responsibility or who undertakes a more senior role or where the behaviour of an individual, irrespective of their level, is such that the contravention has caused or is likely to cause damage to the reputation of the Bailiwick or the individual poses a risk to Customers or the public.*"

61. The non-exhaustive list in the Appendix to the Note mentions 13 matters:

- *The individual failed to be open and honest with the Commission.*
- *The individual provided information to the Commission, whether deliberately or recklessly, which he knew, or should have known, was false or misleading.*
- *The individual, without reasonable excuse, failed to provide information to the Commission which was or may have been relevant to the Commission in determining whether the individual was fit and proper.*
- *The individual was knowingly concerned in a Breach by an entity supervised by the*

Commission under one of the regulatory Laws,

- *The individual's general compliance history, both with the Commission, or other regulatory or professional bodies.*
- *The person directly caused or bears responsibility for the contravention or misconduct and/or failing to prevent it or minimising its impact.*
- *The individual knew about the contravention or misconduct but concealed, downplayed or misled the Commission about the contravention or misconduct and its impact.*
- *The person denies or refuses to take any responsibility for the contravention or misconduct and its impact.*
- *No steps or insufficient steps were taken by the person to address the contravention or misconduct or reduce the risk or re-occurrence.*
- *The individual has previously been involved with an entity which has been the subject of a previous regulatory sanction imposed by a regulatory body, whether in the Bailiwick or elsewhere.*
- *The Commission has previously issued instructions or warnings or guidance in relation to the type of non-compliance in question.*
- *The severity of the risk which the individual poses to Customers and to confidence in the Bailiwick's regulated financial services' sector.*
- *Whether it is appropriate to advise the public about the regulatory non-compliance or behaviour and make it aware of the conduct expected of regulated entities and persons.*

Advocate Edwards points out that none of the examples given relating to misleading behaviour, lack of honesty with the GFSC or concealment or downplaying the contraventions found can be levelled at the Bordeaux Directors. Instead, the failings found related to their competence, judgment and diligence, rather than honesty and integrity, and were largely concerned with their failures to ensure that Bordeaux had appropriate systems in place.

62. Advocate Edwards also prays in aid the approach taken by the United Kingdom's Financial Conduct Authority under its own Enforcement Guide from April 2014. He stresses the importance of having regard to the totality of the sanctions being imposed and the way in which that Authority will consider whether its objectives can be met through other means. In doing so, and by reference to a number of decisions taken in situations he submits demonstrate much more serious misconduct upon the part of those having prohibition orders imposed on them, he suggests that the prohibition orders imposed on the Directors are wrong in law, or alternatively are disproportionate or unreasonable, because they have been imposed in circumstances that cannot be regarded as being in the most serious category of misconduct for which a prohibition order should be reserved. In the absence of a finding of dishonesty or serious lack of competence impacting on a person's integrity, no prohibition orders should have been made.

63. In response, Advocate Hill concentrates first on the fact that there are findings that each of the Directors has engaged in conduct that makes him no longer a fit and proper person. Accordingly, the gateway for the making of a prohibition order has been opened because the statutory test has been established. In his submission it is wrong in law to suggest that a prohibition order must be restricted to only the most serious of cases. The real question is whether the option of making a prohibition order is available and, if so, whether it is a reasonable response to the findings made to proceed to make a prohibition order. If an order is to be made, the ancillary question will be the extent of it and the appropriate length of prohibition. In any event, the GFSC has followed its Explanatory Note because, if nothing else, the penultimate bullet point in the Appendix is satisfied. It has not, therefore, strayed beyond the circumstances in which it is open to it to make prohibition orders.

Discussion about legality

64. Looking initially at whether the GFSC was entitled as a matter of law to impose prohibition orders on the Bordeaux Directors, I am satisfied that it has not acted ultra vires or made some other error of law (see section 36(1)(a) of the POI Law). It is apparent that the GFSC has rooted the imposition of the prohibition orders by having regard to the provisions of schedule 4 to the POI Law as it was

obliged to do. Because the findings made relate to non-fulfilment of the criteria set out therein, each of the Bordeaux Directors can potentially be regarded as not a fit and proper person to perform functions in relation to controlled investment business. Further, the Senior Decision Maker was alive to the consequences of imposing prohibition orders (see para. 248 of the Decision):

> "*A withdrawal of a licence or prohibition is a draconian penalty which obviously affects the ability of the person upon whom it is imposed to earn a living in the financial sector. In Guernsey the financial sector forms substantial part of the economy in which a person may earn a living. A prohibition is not to be imposed lightly and is more likely to be imposed where a lack of integrity is shown as opposed to a lack of diligence, skill and competence. Nevertheless it is an appropriate sanction in circumstances where the departure from the standards expected is substantial or there may be a risk to the public in the future due to the extent and nature of the failures. The failures suggest that in the absence of prohibitions there may well be a risk to the public.*"

It appears that the Senior Decision Maker has recognised that this case was not what might be regarded as the obvious case in which to make prohibition orders because of there being no finding as to lack of integrity (or dishonesty), but that prohibition orders are not confined to those circumstances. They can be imposed where the combination of the failings identified leads to a risk to the public. I agree that the decisions to make prohibition orders on each of the Bordeaux Directors under the POI Law do not amount to errors of law.

65. I am similarly satisfied that the numerous references to non-fulfilment of the criteria set out in the Fiduciaries Law mean that the prohibition orders made pursuant to section 17A of that Law are similarly not liable to be set aside as errors of law. However, I have reached the conclusion that the attempts to clarify the prohibition orders purporting to be made under the other regulatory Laws in the Decision dated 31 July 2015, following the intervention of the GFSC's General Counsel in his letter dated 29 July 2015, do not address the absence from the Decision of any reasoning that relates the failings found in respect of the POI Law and the Fiduciaries Law to there being similar failings under those other regulatory Laws. In my view, there needed to be something explicit pointing to each of the Bordeaux Directors being found not to be a fit and proper person in respect of the requirements under each of the Laws in respect of which the GFSC made a prohibition order so as to make good that sanction. I do not accept that this can be achieved implicitly in the manner it seems to have been.

66. This problem started in the approach taken in the Minded To Notice. At paragraphs 2.1, 3.1 and 4.1, setting out the proposed decisions in respect of each of the Bordeaux Directors, reference was made to a prohibition order whereby the Director in question is prohibited pursuant to section 34F of the POI Law for the proposed period from becoming, or continuing to hold, the function of controller, partner, director, or manager, in relation to any controlled investment business carried on by any entity licensed under the POI Law, any entity licensed under the Fiduciaries Law of the Banking Supervision Law, any insurance manager or insurance intermediary licensed under the IMII Law or any entity carrying on insurance business under the Insurance Business Law. The Senior Decision Maker's letter accompanying his Minded To Notice refers only to the 28-day statutory period within which the respondents may make written or oral representations in respect of the Notice. It does not state under which statutes it was being provided. The 28-day period relates to a number of provisions under which the GFSC is obliged to give notice of its intended decision. Section 11E of the FSC Law covers the financial penalties and the public statements. Section 34G(1) of the POI Law provides:

> "*If the Commission proposes to make a prohibition order against any individual, it shall serve on him a notice in writing –*
>
> *(a) stating that the Commission is proposing to make a prohibition order against him,*
>
> *(b) stating the terms of, and the grounds for, the proposed prohibition order,*

(c) stating that he may, within a period of 28 days beginning on the date of the notice, make written or oral representations to the Commission in respect of the proposed prohibition order in such manner as the Commission may from time to time determine, and

(d) giving particulars of the right of appeal which would be exercisable if the Commission were to make the prohibition order."

By way of example, section 28C of the Insurance Business Law is in the same terms.

67. It is clear from the Minded To Notice that the proposed prohibition order (in the singular) was to be made pursuant to the POI Law. Because of the definitions of "licence" and "licensed" in section 44(1) of that Law, a prohibition order under the POI Law cannot purport to prohibit an individual in respect of functions under any of the other regulatory Laws. Advocate Hill accepted that this is the legal position. Accordingly, the case that the Directors had to meet was in respect of a prohibition order that the Senior Decision Maker was minded to make under the POI Law.

68. In the Decision dated 28 July 2015, being the document to which reference was made throughout the hearing, the items marked "a." relating to each of the Directors in para. 250 adopted the wording that had been used in the Minded To Notice. In the final version of the Decision dated 31 July 2015, in addition to referring to the prohibition order being made pursuant to section 34E of the POI Law, references to section 17A of the Fiduciaries Law, section 17A of the Banking Supervision Law, section 18A of the IMII Law and section 28A of the Insurance Business Law have been added. The first thing to note is that, strictly speaking, there is more than one prohibition order. A distinct prohibition order is needed under each of the Laws to which the GFSC wishes to refer. However, I am prepared to read the Decision in its entirety and not to construe it so strictly that the reference to "*A prohibition order*" means that there is only one prohibition order made (ie, the one under the POI Law), with the consequence that all the prohibition orders supposedly made under the other regulatory Laws have to be set aside. In particular, I am satisfied that the grounds set out in the Minded To Notice initially and, more importantly, in the final Decision demonstrate that there have been findings directly relating to non-fulfilment of the criteria specified in the Fiduciaries Law. Accordingly, I take the view that it was permissible in law for the GFSC to make a prohibition order under the Fiduciaries Law because there are express grounds supporting that outcome. However, I do not think that these findings can be used as the grounds supporting prohibition orders under the other Laws where there is no explanation given in the Decision itself that this is being done. It needed more than a bare reference to each of the provisions under which a prohibition order was being made. In my judgment, there needed to be some express reasoning underpinning the decision to impose such a sanction, particularly where it has been recognised that it is a draconian penalty and affects a person's ability to earn a living in the financial sector. In those circumstances, I am satisfied that it is necessary for the GFSC to act with particular care and to endeavour to comply with the statutory regime.

69. Although it would only have taken a paragraph or so to make the connection between the various findings of non-fulfilment under the POI Law and the Fiduciaries Law and findings that there have similarly been failings that could be levelled against each of the Bordeaux Directors under the other Laws, this has not been done. The absence of any reasoning offering some read-across to the other Laws is, in my judgment, sufficient to entitle the Bordeaux Directors to succeed in their appeals against the prohibition orders imposed on them pursuant to the Banking Supervision Law, the IMII Law and the Insurance Business Law. Each such appeal is, therefore, allowed.

Reasonableness and proportionality

70. Having decided that it was open to the GFSC as a matter of law to make prohibition orders in respect of the Bordeaux Directors under the POI Law and the Fiduciaries Law, the next issue is whether those orders should have been made at all or in the terms that they were, whether as a matter of reasonableness or because of proportionality. In that respect, Advocate Edwards submits that the Senior Decision Maker failed properly to take into account that there was no finding of dishonesty or

market abuse, the failure to demonstrate that the conduct of the Bordeaux Directors caused any loss to customers or the public generally, the level of other sanctions imposed on the Bordeaux Directors, the seriousness of the findings ultimately made and the GFSC's practice in more serious cases previously.

71. The aggravating factors to which the Senior Decision Maker referred were criticised by Advocate Edwards. In particular, he pointed out that some of the factors listed repeat the findings already made (eg, paragraphs 217 to 220 of the Decision). Advocate Hill accepted that this was the case. He also accepted that the Decision against Bordeaux and the Bordeaux Directors did not deal with any matters other than the way it dealt with the Fund. In other words, the non-fulfilment of the criteria was focused on that relationship and not the rest of Bordeaux's business. In terms of the way in which Bordeaux and its Advocates responded to procedural matters (see, paragraphs 225 and 226), Advocate Hill suggested this was relevant because it could be argued that there had been an attempt to deluge the GFSC with material, thereby diverting attention away from the failings being identified. It is difficult, however, to understand how this can be found to have aggravated any one or more of the failings actually identified. In summary, therefore, I do not regard everything that has been listed by the Senior Decision Maker as properly being the type of factor that should be treated as aggravating the findings made. I have, therefore, approached those aggravating factors in a more composite way than they have been set out by the Senior Decision Maker.

72. Equally, however, the adverse media attention that has increased the risk to the Bailiwick of Guernsey as a reputable finance centre (para. 223) is something that can justifiably be regarded as aggravating. This was developed by the Senior Decision Maker in para. 233:

> "*The impact on the reputation of the Bailiwick of Guernsey as a reputable financial centre has been significant. There has been extensive coverage regarding Arch in the media, which has largely focused on the UK OEICs and attempts by both the FSA and FCA to secure investor compensation. The issue has also gathered significant political attention including a question asked during Prime Ministers Question Time.*"

Although Advocate Edwards suggests that the media attention in relation to the Fund as a result of the involvement of others connected with Arch FP would have arisen in any event, due in part to coverage stemming from investors complaining, and although Advocate Hill was also unable to point to extensive coverage having been included in the material placed before the Senior Decision Maker, I still consider that the degree of reflected coverage linking these matters to Bordeaux is sufficient to lay the foundation for the way the Senior Decision Maker has referred to it in the Decision. Persons other than the Bordeaux Directors may well have been more directly to blame for what happened, but there clearly has been adverse media attention flowing from events related to the Fund, both here in Guernsey and more widely, and I am satisfied that this has produced an impact on the risk to confidence in the Bailiwick's regulated financial services' sector. Indeed, this reputational risk is probably the most significant aggravating factor identified. In the light of the GFSC's Explanatory Note, it is apparent that this factor is sufficient to bring the conduct within the range of responses where a prohibition order can justifiably be contemplated.

73. Whilst I do not regard the approach the Senior Decision Maker took through referring to certain findings made as aggravating factors, there is a different principle that could have been referred to here, namely that the sheer number of the different failings found mean that the GFSC should have regard to the totality of them when deciding what sanctions to impose. It would be artificial to take each non-fulfilment in isolation (where other failings themselves might be regarded as aggravating factors for that single non-fulfilment) rather than to do as the Senior Decision Maker has done and to combine them all. However, through combining them all, I think it is unhelpful then to repeat certain of the findings as if they amount to aggravating factors. The aggravating factor is that there has been a lot of failings identified.

74. The summation of the Decision is set out at para. 246:

> "*The matters described show a serious failings [sic] in the extent to which Bordeaux and the*

> *Bordeaux Directors fulfilled their obligation as directors and controllers to fulfil the criteria in POI Law Schedule 4 and the Fiduciaries Law Schedule 3. The Bordeaux Directors failed to ensure that Bordeaux carried on its business with appropriate systems to enable it to fulfil function properly and as a result it did not act with prudence and with the exercise of professional skill appropriate to the nature and scale of its activities: POI Schedule 4 para 2 (1) (a) and (b) and Fiduciaries Law Schedule 1 para 1 (1) (a) and (b). The Bordeaux Directors demonstrated a consistent and serious lack of appropriate competence, judgment and diligence and there must be concerns as to the extent to which they would be likely to fulfil the criteria were they to become directors or controllers of a licensee. In addition their conduct demonstrated a lack of understanding and attention to the legal obligations of Bordeaux. These failings suggest that the interests of investors and the reputation of the Bailiwick as a financial centre are, or are likely, to be jeopardised by their holding a position of director, controller, partner or manager of a licensee in the immediate future.*"

It is against that conclusion that the decision to make prohibition orders of five years in respect of each Director has to be assessed.

75. However, under the heading "*Seriousness of the non-fulfilment*" (which is a factor the GFSC is obliged to take into account in respect of the making of a public statement and the imposition of a discretionary financial penalty under sections 11C(2)(b) and 11D(2)(b) of the FSC Law and so has appeared to have been considered generally), the position is put slightly differently (at para. 230):

> "*The contraventions referred to above are very serious and manifest a disregard or lack of appreciation of some of the most essential aspects of the minimum criteria to which Bordeaux and the Bordeaux Directors were subject and the importance of complying with such criteria. In certain aspects the failures manifest a total failure to have regard to the systems and procedures which should have been employed had proper regard been paid to the minimum criteria.*"

I have had to ask myself whether the reference in this paragraph to "*very serious*", when that term is not carried forward into para. 246, is deliberate or a slip. For example, the findings at para. 52 have been described as "*serious failings*" so that, when taken with the other failings not described in that way, ie, "ordinary" failings, the whole conduct could be regarded as "*very serious*". Alternatively, if serious and very serious are considered to be two different categories of conduct, possibly attracting different levels of sanction, the combination of failings, even including a serious one and another where the impact is described as serious (para. 134) might not promote the overall categorisation into the very serious band.

76. Advocate Edwards further suggests that the reasoning started to go off the rails in para. 231 (which I repeat here for ease of reference):

> "*The result of the failings of the parties connected to the Fund and the UK OEIC may have contributed to investors losing significant amounts of money. In June 2011 the FSA (now known as the FCA) announced a £54 million payout for Arch Cru investors funded by Capita, BNY Mellon and HSBC. In December 2012 the FSA also confirmed plans to go ahead with its customer redress scheme and estimates the amount it will recoup to be between £20 – 40 million. If the contraventions did not contribute to the losses then that would appear to be a matter of luck.*"

Advocate Edwards questions what can be made of this paragraph. Bordeaux is not mentioned as being a party to the arrangements to compensate investors. Bordeaux has no responsibility in that regard. The Appellants consider that there is no foundation in the rest of the Decision to have engaged in what is at best speculation based on circumstantial matters and this passage is objected to in the strongest terms.

77. As I have sought to explain where the content of the Decision has been modified from that in the Minded To Notice, the Senior Decision Maker has clearly accepted the submissions made to him by

Advocate Wessels that the earlier content making a direct link between the losses sustained and the failings of Bordeaux and the Bordeaux Directors could not be sustained. In turn, this is the reason why para. 231 is couched in the language it is. I do not regard the final sentence as objectionable. There is no finding of a causal link between the failings identified in the Decision and the investor losses. This is quite clear from reading the Decision as a whole and the use of "*may*" in the opening sentence of this paragraph. The findings of the Senior Decision Maker show that, in their dealings with the Fund, the Bordeaux Directors, and so Bordeaux itself, have consistently failed to exercise the degree of supervision and oversight required because of a lack of competence, judgment and diligence. In those circumstances, I cannot criticise the Senior Decision Maker for his comment that if there is no link to the losses sustained that arises from luck rather than the way the Directors did their jobs. That is an opinion I find he was entitled to express rather than it lacking any rational basis.

78. However, I am more inclined to regard the summation at para. 246, which the Senior Decision Maker has added after taking into account the submissions made and finalising his Decision, as accurately reflected his overall view of the matters referred to him than the inclusion of "*very serious*" in para. 230. I take that view because para. 231 is worded differently from para. 276 in the Minded To Notice and, when what became para. 230 is looked at in the light of the other changes that have been made, it seems to me more likely than not, even with the added wording in that paragraph, that the word "*very*" should also have been removed to make the whole Decision consistent.

79. Reading the Decision that way, ie, giving greater emphasis to para. 246 than to para. 230, does not, though, affect the conclusion I have reached about the reasonableness and proportionality of the GFSC making prohibition orders in respect of the Bordeaux Directors. I have not been persuaded by Advocate Edwards that I should overturn the GFSC's decisions to make prohibition orders in respect of each of the three Bordeaux Directors as a matter of principle. However, one looks at the findings, they were serious. The Senior Decision Maker properly recorded that a prohibition order is generally reserved for cases where there has been proof of some lack of integrity. However, if the basis for making a prohibition order were to be limited to such cases, the legislature would not have referred to having regard to the minimum licensing criteria. Moreover, as the final words of section 34E of the POI Law demonstrate, the GFSC can choose to make a tailored prohibition order on an individual; it does not have to be an all-encompassing prohibition order. Accordingly, the legislative scheme must be approached on the basis of asking whether a prohibition order of some sort is appropriate and then to consider its extent. As the Decision clearly shows, the three Bordeaux Directors had "*demonstrated a consistent and serious lack of appropriate competence, judgment and diligence*", as a result of which the reputation of the Bailiwick of Guernsey as a financial centre, as well as the interests of investors, has been jeopardised. In my judgment, deciding that this level of non-fulfilment attracts a prohibition order is not a decision outside the range of responses reasonably open to the GFSC.

Length of orders

80. The final question, therefore, is whether any of the Bordeaux Directors can succeed by reference to the duration of the prohibition orders imposed. Although Advocate Edwards did not develop the argument strongly, he did invite the Court to consider each Appellant distinctly. In the Decision, each Director has been made subject to a prohibition order for five years. In the Minded To Notice, the proposed periods were 15 years in respect of Messrs Radford and Meader and five years in respect of Mr Tostevin. I have been unable to identify any reason why the periods in respect of Messrs Radford and Meader have been reduced but no reduction in respect of Mr Tostevin has been made.

81. It is incumbent on the GFSC to explain its reasoning in a way that each of those affected by the Decision can understand. Whilst I certainly do not suggest that it necessarily followed that Mr Tostevin should have been given a proportionate reduction, because it is not an arithmetic exercise, I would have expected either some reduction or some explanation as to why, in the light of the submissions made and taken into account, it had been decided that each Director should face the same length of prohibition. When I read the Decision, many of the changes seem to me to apply to the three Bordeaux Directors without any distinction being drawn. Accordingly, I cannot work out,

for example, whether it was felt by the Senior Decision Maker that the failings have become more heavily focused on the compliance element of Bordeaux's business, which is why Mr Tostevin has now been found to pose the same degree of risk to the public for the same length of time as the others, whereas previously the Senior Decision Maker had been minded to be more lenient in respect of him, perhaps because of the greater involvement in the Fund of Messrs Radford and Meader. It is the absence of any rational explanation for what appears to be quite a significant change in respect of Messrs Radford and Meader, but where there has been no apparent impact on Mr Tostevin, that leads me to conclude that prohibition orders against Mr Tostevin of five years are unreasonable or disproportionate. My understanding of the findings made against them all was that the culpability of Messrs Radford and Meader was regarded as being greater than that of Mr Tostevin, yet this has not been translated into the periods for which the prohibition orders are to apply.

82. The consequence of this conclusion is that I consider I must set aside the five-year prohibition orders made under the POI Law and the Fiduciaries Law in respect of Mr Tostevin. In doing so, I repeat that I consider that a prohibition order against him has been made lawfully, so the purpose of remitting his case to the GFSC is principally to enable it to re-consider the appropriate length of the prohibitions orders to be re-made under the two Laws and to set out the reasoning behind those decisions.

83. I have further considered what to do about the five-year prohibition orders made in respect of Messrs Radford and Meader. I have had regard to the submissions of Advocate Edwards about the need for a consistent approach to be adopted by the GFSC. Equally, however, there is a comparative paucity of other decisions from which to try to ascertain some parameters. The prohibition orders are not indefinite (as was the case of Pippa Harbour on 22 October 2009, where there was a finding of a lack of integrity, and David Merrien on 3 December 2014, where his behaviour was described as being "*at the top end of the scale of severity*"). Accordingly, 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. Advocate Edwards has suggested that there was no need to impose any prohibition order, but rather to deal with Messrs Radford and Meader in a manner similar to how Richard Wickins was dealt with (also on 3 December 2014, alongside Mr Merrien and Guernsey Insurance Brokers Limited). I am not persuaded that the culpability of Messrs Radford and Meader can properly be equated to the position in which Mr Wickins found himself. I am satisfied from the Decision that the findings made against Mr Radford and Mr Meader (and indeed against Mr Tostevin) are all higher up the scale of seriousness than was the case of Mr Wickins or the directors of Kingston Management Limited (24 May 2010), to which Advocate Edwards also referred. As I have already indicated, I am clear that the threshold for making prohibition orders in the light of the findings set out in the Decision, which I am satisfied were properly made, has been passed. In those circumstances, recognising that there is as yet no real body of previous decisions from which any clearer guidance can be gleaned, the question I have had to ask myself is whether I regard the period of five years as being unreasonable and disproportionate thereby taking it beyond what response was appropriate.

84. In reaching my conclusion, I do not find that reference to decisions of bodies outside Guernsey is of assistance. Advocate Edwards placed considerable weight on the decision of the Upper Tribunal (Tax and Chancery Chamber, Financial Services) in *Ollerenshaw and Reeh v The Financial Services Authority* (10 December 2012). In doing so, he drew attention to the fact that a prohibition order was made in respect of Mr Ollenershaw for the reasons largely set out at para. 118, whereas no such order was made against Mr Reeh, who had had the matter hanging over him for years and who had shown that he had been satisfactorily engaged in financial services working for a large and reputable employer for this long period of time. Advocate Edwards suggested that this was something that should have been taken into account by the GFSC when deciding whether to make a prohibition order against, in particular, Mr Radford. The difficulty with these types of decision from England and Wales is that, in my view, there is no direct read-across. The best that could be said here is that this case (and the others to which I have been referred) might be regarded as examples of how a regulator in another jurisdiction has approached cases it has dealt with. They do not establish any particular principles. They are certainly not matters to which the GFSC is obliged to have regard (eg,

under section 11D(2) of the FSC Law on discretionary financial penalties). Accordingly, just because there has or has not been a prohibition order imposed in England and Wales in any given case is, I think, of little bearing on whether or not the prohibition orders made by the GFSC should be set aside.

85. Although I consider that the five-year prohibition orders made in respect of Messrs Radford and Meader are at or very near the upper limit of what is reasonable and proportionate, I have decided that they are orders with which I should not interfere on their appeals. It is appropriate, in my view, to recognise that such orders also encompass a deterrent element, designed to be taken into account by the rest of those operating in the financial services' sector. I have noted that on 19 January 2015 the Upper Tribunal (Tax and Chancery Chamber, Financial Services) considered it appropriate to make orders pursuant to section 56 of the Financial Services and Markets Act 2000 prohibiting Messrs Farrell and Addison from performing any function in relation to any regulated activities carried on by any authorised or exempt persons, or exempt professional firm, on the grounds that they are not fit and proper persons. There has been no attempt by the GFSC to replicate those sanctions here. Instead, the sanction applied to Messrs Radford and Meader is less severe, no doubt recognising that Messrs Farrell and Addison failed to act with integrity. In my view, the GFSC was entitled to regard what Messrs Radford and Meader were responsible for as being of a higher degree of seriousness than in some of the other enforcement actions taken by the GFSC. By section 2(4) of the FSC Law, in exercising its functions, the GFSC must have particular regard to "*the protection of the public interest, including the protection of the public against financial loss due to dishonesty, incompetence or malpractice by persons carrying on finance business*" and "*the protection and enhancement of the reputation of the Bailiwick as a financial centre*". I consider the inclusion of "*incompetence*" here as being applicable to the Bordeaux Directors and the findings show how the impact on the Bailiwick's reputation is a factor that has weighed heavily when it has been taken into account. In my judgment, these were matters that were properly of concern to the GFSC and they provide the foundation for the decision to make prohibition orders for the five-year periods. The periods might have been a little shorter, but I cannot find that their length is unreasonable or disproportionate.

Summary

86. In relation to the prohibition orders, therefore, Mr Tostevin's appeal is allowed. However, in remitting the matter to the GFSC, the principal issue will be to consider the appropriate periods of prohibition under the POI Law and the Fiduciaries Law because I am satisfied that the GFSC is legally justified in imposing some period of prohibition. The appeals from prohibitions orders on all three of the Bordeaux Directors purporting to have been made pursuant to the Banking Supervision Law, the IMII Law and the Insurance Business Law are all allowed because there was no reasoning linking the failings to the relevant criteria under those Laws. All the findings made related only to the POI Law and the Fiduciaries Law. The appeals of Messrs Radford and Meader in respect of the prohibition orders made under the POI Law and the Fiduciaries Law are dismissed.

Financial penalty

87. The appeal of Bordeaux is limited to an appeal against the imposition of a financial penalty on it of £150,000. This appeal is brought pursuant to section 11H(1)(d) of the FSC Law.

88. The financial penalty was imposed under section 11D of that Law, which provides:

> "*(1) Where the Commission is satisfied that a licensee, former licensee or relevant officer –*
>
> *(a) has contravened in a material particular a provision of, or made under, the prescribed Laws, or*
>
> *(b) does not fulfil any of the minimum criteria for licensing specified in the regulatory Laws and applicable to him,*

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

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

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

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

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

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

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

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

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

89. The challenge to this financial penalty is made first on the basis that the GFSC erred in law by failing properly to take into account the potential financial consequences to Bordeaux of imposing such a penalty and acted inconsistently with previous penalties imposed and its stated policy in this regard. In the alternative, it is argued that the GFSC acted disproportionately and/or unreasonably. Given that Bordeaux is already in the process of unwinding its business, in the light of the other sanctions imposed on the Directors, Advocate Edwards submits that there should have been no need for any financial penalty or such a penalty should have been fixed at a much lower level.

90. Paragraph 251 of the Decision (under the heading of potential financial consequences to *inter alia* Bordeaux, albeit this part of the Decision appears to deal more with section 11C of the FSC Law than section 11D) records that:

> "*The latest accounts of Bordeaux show that at the year-end 31 December 2012 it had made a Loss of £216,647 for the year ended 31 December 2012 (compared to a loss of £159,406 for 2011). The most recent accounts for the year ended 31 December 2013 record a loss of £7,349 and shareholder equity of £370,019.*"

Advocate Edwards also refers to paragraph 29 of the Decision, which sets out that "*The Fund generated fees for Bordeaux which amounted to approximately 11 per cent in 2007, 24 per cent in 2008, and 18 per cent in 2009 of Bordeaux's turnover*" and in his Skeleton Argument he repeated what had been provided to the Senior Decision Maker in writing about the actual amount of fees received in each of those years by Bordeaux in relation to the Fund (£194,855, £593,466 and £425,837 respectively). He submits that these numbers show the business of Bordeaux relating to the Fund was a small proportion of its overall business. Further, because the only criticisms of Bordeaux were about how it handled the relationship with the Fund and Arch FP, this should have been a factor for the GFSC in deciding whether to impose a financial penalty and, if so, the appropriate level.

91. The GFSC's published policy on discretionary financial penalties (dated January 2013) explains its approach and sets out in its Appendix a non-exhaustive list of factors to take into account. It emphasises that the GFSC can have regard to the cumulative effect of the factors and that other matters can also be taken into account. The Appendix gives the following examples:

- *The person's regulatory history suggests that the breach forms part of a systemic failure or is likely to be repeated.*
- *The person gained a direct benefit or avoided a direct loss.*
- *The Breach resulted in a financial loss to Customers for which no compensation or equivalent arrangements were made by the date on which the Commission notified the person that it was recommending that a Discretionary financial penalty be imposed.*
- *The Breach has caused or is likely to cause damage to the reputation of the Bailiwick.*
- *The Breach allowed for regulated services or products to be exposed to the risk of being used or were actually used to receive or handle the proceeds of crime, terrorist financing or facilitate other illegal activities.*
- *The person directly caused or bears particular responsibility for the Breach and/or failing to prevent it or minimising its impact.*
- *The person knew about the Breach but concealed, downplayed or misled the Commission about the Breach and its impact.*
- *The person denies or refuses to take any responsibility for the Breach and its impact.*
- *No steps or insufficient steps were taken by the person to address the Breach or reduce the risk or re-occurrence.*
- *The person has been previously warned or has been the subject of a previous regulatory sanction imposed by a regulatory body, whether in the Bailiwick or elsewhere.*

Some of the matters listed are in very similar terms to those set out in the Appendix to the Note dealing with prohibition orders. This makes sense because the considerations about what sanctions to impose are always likely to overlap. In passing, though, I note that section. 5.2 of this policy, dealing with quantum, states that the GFSC will have regard to the factors listed in section 4.2 "*and such additional factors as it determines to be relevant*". The factors listed in section 4.2 are those set out in section 11D(2) of the FSC Law. In my view, those factors set out a complete list of matters that are required to be taken into consideration and so it is not open to the GFSC to have regard to any additional factors it determines are relevant. However, in the context of the present appeal, this is not an issue that has any bearing on the outcome, so I do not need to add anything further about the content of the policy.

92. The findings made by the Senior Decision Maker relate to Bordeaux, whether expressly or in some cases by implication, as well as the Bordeaux Directors. Accordingly, there is no question about whether or not there has been a contravention or non-fulfilment for the purposes of section 11D(1) of the FSC Law. There clearly were multiple failings and so the option of imposing a financial penalty became available to the GFSC. As such, for similar reasoning to that set out above in respect of the prohibition orders, there has been no error of law in considering whether or not, in its discretion, a financial penalty should be imposed.

93. The Decision itself does not address in any detail the way in which the Senior Decision Maker approached section 11D of the FSC Law. It does, however, deal with the similar considerations set out in section 11C. Covering each briefly, the first is that the matters of concern were not raised by Bordeaux itself. Had they been, that would be a mitigating factor. I have already dealt with whether the seriousness of the non-fulfilment should be regarded as "*very serious*" or "*serious*" and the reasons I have given for treating this as "*serious*" apply equally to the financial penalty imposed on Bordeaux as they do for the prohibition orders. This is an aggravating factor. The Senior Decision Maker found (at para. 235) that the failings "*were not inadvertent but systematic*", which is potentially another aggravating factor. In relation to efforts to rectify, the Decision records that "*Bordeaux no longer acts as administrator to the Fund*" (para. 236). It is also reasonable to point out that it had not done so for several years before the enforcement action by the GFSC began. This is a mitigating factor because there is a much lower risk of repetition. These are all factors in respect of which Advocate Edwards makes no submissions, but I have mentioned them in order to put the GFSC's approach to the financial penalty into its full context before turning to the two paragraphs of section 11D(2) on which he has focused.

94. In relation to para (e), the financial consequence to Bordeaux is that a penalty of £150,000 will impact on its shareholder equity because it represents approximately 40% of what was set out in para. 251. This is not, however, a case in which the penalty imposed cannot be paid. On the information supplied to the Senior Decision Maker, Bordeaux had the funds from which to pay a penalty at this level. It was also apparent that Bordeaux was in the process of being wound up. The impact, therefore, was primarily to be felt in what the beneficial owners of Bordeaux, ie, Messrs Radford and Tostevin, could expect to receive for their investments in this business. In my view, these are matters that the GFSC could properly take into account in deciding where the appropriate level of penalty fitted. I am not persuaded that the GFSC fell into legal error in the manner in which it dealt with Section 11D(2)(e).

95. The fact that the Decision is silent as to how the GFSC took into consideration the penalties imposed by it in other cases (para. (f)) is troubling. Where there is a statutory obligation on the GFSC to take this factor into consideration, it is clearly desirable for it to demonstrate that it has done so. There is a distinction, in my opinion, between a decision not having to refer to every argument advanced, which is a principle on which Advocate Hill relies, and a decision recording that every factor to which consideration must be given has occurred. The Decision does not have to list every previous financial penalty imposed but I suggest that in future every decision should include reference to at least one case to show that this factor has been properly taken into consideration. In this way, the body of determinations grows and everyone can identify why it is that a particular level of penalty has been chosen. The Decision does refer to two previous cases (Pippa Harbour and Kingston Management (Guernsey) Limited ("Kingston")), albeit in the context of the making of a public statement. One of these is amongst the three cases to which Advocate Edwards has referred. Accordingly, I am prepared to accept that there is evidence of the Senior Decision Maker referring to previous decisions, from which I infer he also had in mind the financial penalties imposed in those cases, noting that no financial penalty was imposed on Ms Harbour.

96. Advocate Edwards has referred to various decisions in the United Kingdom on financial penalties. He has also referred to the Enforcement Guide published by the Financial Conduct Authority. As I have indicated, these are not, in my view, relevant considerations because of the terms of section 11D(2) of the FSC Law. There may be principles to be extracted from such cases that can be used to guide the GFSC in the way it develops its approach to imposing financial penalties that are appropriate for Guernsey and consistent with the statutory criteria it must take into consideration, but the actual penalties imposed elsewhere are of little to no assistance. What matters more is the published GFSC policy. Once again, I consider that the conclusion of the Senior Decision Maker that the findings made have an impact on the reputation of the Bailiwick is a significant factor to which he was entitled to have regard.

97. Bordeaux highlights three previous cases to which Advocate Edwards submits insufficient regard has been had by the GFSC. In respect of Christopher Hubbard, a financial penalty of £10,000 was imposed on 15 November 2013. The public statement explains that he had allowed an individual, who had been charged with money laundering offences, to be a sole signatory on the bank account of a company controlled by Mr Hubbard, who was aware of the offences charged. On 24 May 2010, Kingston did not have any financial penalty imposed on it, although the GFSC imposed penalties of £14,000 on each of two of its directors and £7,000 on a third director. The reason for not imposing any sanction on the company itself was that it was in administration and intended to surrender its fiduciary licence as soon as possible. On 15 November 2013, the GFSC imposed a financial penalty of £150,000 on Generali Worldwide Insurance Company Limited ("Generali"). This related to non-compliance with certain reporting requirements and failing to notify staff in a timely manner of a change to the Money Laundering Reporting Officer. No policyholder suffered any actual loss as a result of those failures and the company supported all the costs related to the examination performed by the GFSC and took a proactive approach to dealing with and remedying the GFSC's concerns.

98. Advocate Edwards has questioned how the financial penalty on Bordeaux can be equated to that imposed on Generali, which is a company with resources available to it of many times that of Bordeaux. Whereas the financial penalty imposed on Bordeaux is a significant percentage of the resources it has, that imposed on Generali must be lower than 1% of its turnover. Accordingly, even

if there is no legal error, the quantum of the penalty imposed on Bordeaux is manifestly disproportionate and unreasonable.

99. Fixing an appropriate financial penalty is not an arithmetic exercise. Just because a previous decision has used the same figure as in the present case, it does not follow that if an appellant can identify some differences between the two cases the financial penalty imposed must be regarded as wrong. The considerations are more subtle than that. These are also not penalties imposed in criminal proceedings. They are regulatory penalties where the approach on an appeal is not exactly the same as it would be in respect of a sentence from a criminal court. The public law principles to which I have referred apply. The central question, therefore, is whether a penalty of £150,000 falls within the range of responses open to the GFSC in Bordeaux's case.

100. It is important to remember that the maximum financial penalty that can be imposed is £200,000. In order to be consistent, the GFSC necessarily needs to leave a little headroom so that the maximum penalty is capable of being imposed in respect of all the cases that can properly be regarded as falling within the most serious category. If it does not do so, there is a genuine risk when the pool of decisions increases that there will appear to be a "bunching" of decisions at or about the statutory maximum. There should also potentially be some discount to bring a penalty below the maximum where the person has not contested the findings in respect of which it is imposed. In that respect, I recognise that Bordeaux did not accept all the findings that the Senior Decision Maker proposed to make, but there have been some where they have not been objected to. Moreover, the Senior Decision Maker has accepted some of the submissions made by Advocate Wessels on behalf of Bordeaux and Bordeaux should not be penalised for having succeeded in that way. I also accept as a matter of principle that the GFSC is entitled to approach a licensed entity in a different way to an individual. The penalties imposed on the former will often be higher than those on individuals, unless there is a genuine reason not to do so, as was the case when Kingston and its directors were dealt with.

101. I have already commented on the paucity of reasoning relating to the financial penalty imposed on Bordeaux. In those circumstances, it is difficult for an appellate Court to understand fully how the penalty has been reached. The approach I have taken is similar to that I have already explained in respect of the prohibition orders made in Mr Tostevin's case. In the Minded To Notice, the Senior Decision Maker proposed to impose a penalty of £150,000 on Bordeaux. At that time, the findings that were proposed included a number where the GFSC was making a causal link between the regulatory failings and the losses sustained by investors. As I have set out above, in the light of the submissions made by Advocate Wessels on behalf of the Appellants, those findings have been modified. Although it is not stated expressly, these modifications appear to have led the Senior Decision Maker to conclude that the penalties proposed in respect of the Bordeaux Directors should be reduced. The prohibition orders for Messrs Radford and Meader were reduced from 15 years to five years. The inference I draw is that the reduction in penalties arose from the recognition that the aggravating features previously believed to exist were not as great on a closer analysis of what had taken place. Despite that, the financial penalty to be imposed on Bordeaux remained unchanged. In my judgment, because this has not been dealt with by the Senior Decision Maker explicitly, I am led to the conclusion that the financial penalty of £150,000 is higher than it should be and, more particularly, that it falls outside the range of responses open to the GFSC.

102. In reaching that conclusion, I am conscious that the Court on an appeal should not lightly overturn the exercise of discretion that has been conferred on the GFSC. I am certainly not suggesting that the level of penalty should be reduced to a few tens of thousands of pounds. The failings have been described as serious and they were not inadvertent but systematic and so, subject to any question about ability to pay, which I consider does not apply here, those failings deserve to be met with a significant financial penalty. However, the difficulty I have encountered in this case is that the Decision did not contain any separate consideration of the matters to be taken into consideration under section 11D(2) of the FSC Law and I simply do not understand, because no explanation has been provided, how the modifications to the findings made have not resulted also in some modification to the financial penalty proposed to be imposed. In those circumstances, the decision to fix the financial penalty at £150,000 lacks a rational basis and so appears to me to be unreasonable

and disproportionate. It follows that Bordeaux's appeal is allowed.

Conclusions

103. For the reasons I have given, some of the appeals are allowed and some are dismissed:

(a) Bordeaux's appeal under the FSC Law against the imposition of a financial penalty of £150,000 is allowed to the extent that the amount of the financial penalty needs to be re-visited, with full reasoning given as to why the penalty is being fixed at the level it is;

(b) the appeals of the Bordeaux Directors under the Banking Supervision Law, the IMII Law and Insurance Business Law are all allowed and the decisions to make prohibition orders under those Laws are set aside;

(c) the appeals of Messrs Radford and Meader under the POI Law and the Fiduciaries Law against the five-year prohibition orders made in respect of them are all dismissed; and

(d) the appeals of Mr Tostevin under the POI Law and the Fiduciaries Law are both allowed, again to the extent of requiring the GFSC to re-visit the length of the prohibition orders made.

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

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

(The appeal provisions in the other regulatory Laws each contain a subsection in similar words.) The consequence is that the financial penalty imposed on Bordeaux is set aside and remitted to the GFSC for re-consideration. I do not consider it appropriate to give any further directions than those that will be apparent from the way in which I have dealt with that appeal and commented on what has happened. The prohibition orders imposed on the Bordeaux Directors under the Banking Supervision Law, the IMII Law and the Insurance Business Law are all set aside. It will be a matter for the GFSC as to whether it considers that there is a read-across from the failings found to the fitness and propriety of the Directors under these Laws, in which case some additional enforcement action against them could, if appropriate, be commenced. I confirm the GFSC's decisions to make prohibition orders of five years each under the POI Law and the Fiduciaries Law on Messrs Radford and Meader. Finally, I set aside the decisions to make prohibition orders under the POI Law and the Fiduciaries Law in respect of Mr Tostevin and remit those matters to the GFSC for re-consideration. Again, I do not consider that it is necessary to give further directions. The issue is not whether prohibition orders should have been made, but rather whether the length of them should be shorter than the prohibition orders made in respect of Messrs Radford and Meader.

105. I will reserve the costs of these appeals. 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. In case it assists further discussions, in terms of who have been the successful parties, my provisional view is that Mr Tostevin has clearly succeeded and so, I suspect, has Bordeaux, although the proportion of time and effort associated with Bordeaux's appeal strikes me as having been proportionately lower than that devoted to the Directors' appeals, but in respect of Messrs Radford and Meader, although they have succeeded in a small part, the GFSC has succeeded in upholding the principal sanctions imposed that were the subject of their appeals.