IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

ON APPEAL FROM THE COURT OF THE SENESCHAL

Between

CASTLE COMPANY MANAGEMENT LLC **Appellant**

and

GUERNSEY FINANCIAL SERVICES COMMISSION **Respondent**

JUDGMENT OF THE BAILIFF IN AN APPEAL BROUGHT UNDER SECTION 19 OF THE REGULATION OF FIDUCIARIES, ADMINISTRATION BUSINESSES AND COMPANY DIRECTORS, ETC. (BAILIWICK OF GUERNSEY) LAW, 2000.

Hearing: 2nd August, 2004
Date judgment delivered: 27th August, 2004

The Appellant was represented by its Director, Mr. Michael Doyle
The Respondent was represented by Crown Advocate R. J. McMahon

Introduction

1. In 2000 the States of Guernsey decided that the time had come to regulate the activities of persons who engaged in the profession or business of "fiduciary" a word that is used to incorporate those who engage in trust business and the management and provision of services to corporate bodies wherever established and a number of other allied activities where those businesses were conducted within the Bailiwick of Guernsey. The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000 ("the Law") followed the pattern of previous legislation controlling other financial services activities such as banking, insurance and the promotion and administration of investment funds.

2. Introducing for those engaged in the business a licensing system to be administered by the Financial Services Commission, a statutory body established under the

Financial Services Commission (Bailiwick of Guernsey) Law, 1986, the Law prescribed in some detail the activities to be regulated thereunder and also developed a number of criteria for the way in which those who were to be licensed were to conduct their activities. As I have said the Law was a Bailiwick Law and the fact that there were then existing businesses established both in Sark and Alderney persuaded the States Advisory and Finance Committee which was promoting the legislation in Guernsey, to recommend involvement of both the governments and the Courts of those islands in the administration of the Law, insofar as was felt appropriate.

3. There was provision for the Commission to consult with the authorities in Alderney and Sark on applications from persons who were engaged in business in those islands. There was also provision as there is in any such legislation that any person, resident or operating within Alderney or Sark, aggrieved by a decision of the Commission to refuse him a licence or impose conditions on him would have a right of appeal not to the Royal Court, but to the Court of Alderney or the Court of the Seneschal as appropriate. In the case of Sark and Alderney matters, there was a further right of appeal to the Royal Court in accordance with the general law relating to appeals from those islands' Courts and in the case of appeals heard throughout the Bailiwick there was at the end of the day to be a right of appeal to the Court of Appeal on a point of law.

4. This is an appeal from the Sark Court against its dismissal of the Appellant's appeal from a decision of the Commission refusing it a licence to conduct business as a fiduciary in that island. It is, incidentally, the first time that this Court has been involved with a matter arising under this relatively new piece of legislation.

The facts of this case

5. The Appellant is a Wyoming company, which since 1996 has traded under the name of Sark Offshore Consultancy under the guidance of Mr. Doyle a Director thereof who has appeared before me on its behalf and by a Miss Lanyon, his co-director, assisted by certain other Sark resident employees. The place of business is stated to be La Connellerie, Sark and the Company has a website where the services it can offer are advertised in the English and Russian languages.

6. In March 2001, shortly before the Law was brought into force, the Appellant made an application to the Commission for a licence under the Law. The licensing process has taken some time and this indeed is in itself a subject of complaint by Mr. Doyle, which I will deal with later. However, the Appellant has not been put out of business by the introduction of the Law as it was acknowledged that there would be a number of people carrying on what was, hitherto an unregulated business, when the Law came in. It was accordingly provided in section 59 of the Law that those so engaged would be able to continue in business until such time as their licence applications were finally determined.

The role of the Royal Court in this appeal

7. Section 23(2) of the Reform (Sark) Law, 1951 (O in C Vol. XV page 215) as amended by the Court of the Seneschal (Increase of Jurisdiction and Transfer of Prisoners) Law, 1971 (Vol. XXIII, page 200) simply says this about appeals from the Court of the Seneschal to this Court

> "(2) The right of appeal from the Court of the Seneschal in criminal matters to the Royal Court of Guernsey sitting as a Full Court and in civil actions to the said Royal Court sitting as an Ordinary Court is hereby confirmed."

8. It so happens that recently on an appeal from the Court of Alderney, Day, L.B. has with his usual clarity and thoroughness analysed the approach this Court should now be taking on appeals from Alderney and Sark in civil matters involving as they generally do issues of law and fact. His conclusions may be summarised at paragraph 11of his judgment in the case of Courtney and others v. Alderney Building Company (1992) Ltd (20th May, 2004):-

> "All those authorities consistently identify the test be applied, in civil matters, by the Court of Appeal to factual findings of Jurats in the Ordinary Court as that of perversity. There can be no justification for applying a different test to appeals from the Court of Alderney to the Ordinary Court; indeed the relevant statutory provisions are in effect the same. Therefore I respectfully concur with the statement of Sir Charles Frossard B in Hawkins, that the test of perversity is that to be applied by the Ordinary Court on appeals from factual findings of the Court of Alderney.".

9. This appeal of course involves not issues of fact and law but questions of vires and unreasonableness. It was common ground in the Court below that the Court of the Seneschal should, as this Court does, deal with appeals under a provision such as that contained in section 19 of the Law, which gives the right of appeal, in the way analysed by Beloff, J.A. in Walters v. States Housing Authority 1997 24.GLJ.76. That decision clearly drew the parameters between issues for the judge alone namely those of vires and Wednesbury unreasonableness and those for the jurats of what one might loosely call "ordinary unreasonableness". The Deputy Seneschal in his judgment dismissed any suggestion of "unreasonableness", but as we shall see when I come to analyse the issues raised by the Appellant they are in any event issues of law for me to review.

10. However as matters of reasonableness are for the jurats in Guernsey I should explain why in my view it would not in any event be appropriate for this Court to be sitting with jurats in a case such as this. The only reason why the legislative plan provided for appeals to the Island Courts, could have been that when residents of those islands

were challenging the reasonableness of the Commission's decision, they were to have the right to be heard by the judges of the local courts. It could not have been intended with such a system that this Court should get involved on appeal on issues of "ordinary unreasonableness" which in Guernsey would have been the remit of the jurats. If that were not to be the case, any appeal from Alderney or Sark would involve a hearing before the Bailiff and the Jurats. When it came to a matter of unreasonableness, then as this is an Appellate Court the views on reasonableness of the jurats who would then be sitting with me, could in effect "trump" those of the judge in the relevant Island Court. That, in my opinion, would defeat the whole object of what the Island legislatures have collectively agreed.

11. As I have indicated I do not think that anything turns on this in regard to this particular appeal as Mr. Doyle, perhaps wisely, restricted his attack on the Commission's decision to four distinct heads where he says that there was, as a matter of law, an unfairness in the way that his Company's application was handled rather than challenge head on the other findings, of firstly the officials of the Commission, then the members of the informal Tribunal set up under the chairmanship of Mr. Michael Blair, Q.C. and finally the decision of the Commissioners themselves. As the four issues raised in the Court of the Seneschal are in my view matters of law and procedure, the findings of the Deputy Seneschal thereon, however expressed in his judgment, are in my view issues of law or Wednesbury unreasonableness which are fully within my remit to review and, if I feel appropriate, overrule the conclusions of the judge below.

Proceedings in the Court below

12. Following the filing of a Notice of Appeal a directions hearing was held in Sark before the Seneschal and the appeal was set down for the 13th January, 2004, when it

came before the Deputy Seneschal, Mr. La Trobe-Bateman. The hearing continued until the 14th January. On the 10th February he issued a succinct and clear judgment rejecting the various arguments of the Appellant and dismissing its appeal. I have seen a full transcript of the hearing professionally prepared. I have noted that at the outset the Deputy Seneschal explained that the Seneschal had decided to recuse himself. The Deputy Seneschal went on to invite both parties to make any comments they might wish on his sitting in the matter as Deputy Seneschal. Mr. Doyle said this:

> "I would just like to say from my perspective, my company's perspective, I have every confidence you will be able to convene (sic) this Court and I have no problems with that. What is important is that if Counsel for the Respondent is happy also that you convened this Court that he state that categorically and that he particularly state that this is not a matter where is relying on the doctrine of necessity."

Mr. McMahon for the Respondent explained there was no application to recuse the Deputy Seneschal so that no issue of necessity arose.

13. Before me at the outset of his remarks Mr. Doyle revisited the issue of the competence of the Court. Mr. Doyle queried the fact that the Deputy Seneschal was by profession a carpenter and he questioned whether he could have written the judgment. I have to say that I found this line of argument most unattractive, but I do not consider it appropriate to dismiss it solely because a point like this should have been taken in the Court below.

14. A disinterested bystander could observe that this matter proceeded in a Court with lay judge unassisted by a qualified clerk. This may be unusual but there are two clear answers to any such concerns. The first is that, as I have explained, appeals challenging the reasonableness of the Commission's decision were clearly intended to be brought before the Court in the island where the dissatisfied applicant carried on

business rather than in Guernsey. Secondly, there is as I have explained a right to appeal to this Court and onwards on any issue of law.

15. So far as the complaint about somebody else writing the judgment. I see nothing in the judgment that would point to it being prepared other than by the Deputy Seneschal. He had had full oral submissions made to him and also had very helpful written submissions from which he was able to distil the points that he felt that he should adopt in his judgment.

16. A further reason why I have made reference to these points is that I have noticed in the "consultation" correspondence, which I will be considering shortly there is reference to a Mr. C. J. La Trobe-Bateman as being a person who has applied for a personal fiduciary licence.

The Appellant's lack of representation

17. Before going further into the complaints I think I should record that Mr. Doyle has appeared on behalf of the Company and has expressed the Company's case clearly and with courtesy. Both in the Blair Tribunal and in the proceedings before the Seneschal there was some criticism that he had not had legal representation. This was very properly dealt with by the Deputy Seneschal at the end of the hearing, but I repeat his sentiments. It is inevitable that on occasions courts and Tribunals will lament the fact that an Appellant is not represented by Counsel and that therefore the Court has not had the benefit of argument of the quality it might have had had the Appellant had professional representation. However, Courts can only make recommendations, but if at the end of the day an Appellant such as this Appellant chooses not to engage the services of an advocate that is entirely a matter for him.

18. As far as I am concerned Mr. Doyle seems to me to have taken every point that could properly be taken on behalf of his company. Whilst a judge must never underestimate the ingenuity of Counsel I do not feel that I have been in any way hampered in dealing with this case by virtue of the fact that Mr. Doyle has not been represented and I hope that at this stage we have teased out every argument that can be properly taken on behalf of his Company.

The Appellant's case in summary

19. Mr. Doyle had put in on behalf of the Appellant a skeleton argument, in which he outlined the points where he felt that the Commission had acted unlawfully or unfairly. As I have indicated all these complaints were rejected by the Deputy Seneschal and the Appellant's Notice of Appeal in effect simply says that in respect of each point the Deputy Seneschal has got it wrong. Therefore it behoves me to work through these arguments again and see whether the decision of the Commission was indeed flawed for one or other of the reasons that Mr. Doyle now urges.

First complaint: The Commission's failure to consult Sark properly

20. On the 7th June, 2001, a letter was written by the Assistant Director of the Fiduciary Services and Enforcement Division of the Commission, Mr. Trevor to Mr. Harris who at that time was the Vice-President of the General Purposes and Finance Committee in Sark. Mr. Trevor referred to a conversation they had had, when he had discussed the obligation of the Commission under the Law to consult with General Purposes and Finance Committee, where an applicant for a fiduciary licence intended to carry on business in Sark. They had apparently agreed that the Commission would forward a list of those who had expressed such an interest once the application period for existing businesses had closed on the 31st May. The letter of 7th June then gives a

list of number of individuals (including the Deputy Seneschal) who were seeking personal fiduciary licences. There was then reference to application for four full fiduciary licences including one from the Appellant. The letter finishes with the words "Pursuant to section 5(9) of the Law the Commission would welcome any views which the General Purposes and Finance Committee may have on these applications."

21. On the 19th June Mr. Trevor faxed Mr. Harris with some further names of applicants both for personal fiduciary licences and for full fiduciary licences. Again he referred to section 5(9) of the Law and indicated that the Commission would welcome any views, which the General Purposes and Finance Committee may have on the applications. The Committee replied through Mr. Harris on the 6th July and I will set out the letter in full:-

"The General Purposes & Finance Committee met yesterday and inter alia reviewed the list of applicants given in your letter of 7th June and subsequent fax.

We believe that the following comments may assist the Commission in reviewing applications received :

1. all the applications for personal fiduciary licences are from individuals who have been Sark resident for at least ten years. None are from transient or newly resident applicants;
2. the view of the Committee is that it is for the economic benefit of Sark that a nucleus of regulated fiduciaries be established so as to permit the development of fiduciary business in the island. We are therefore satisfied with the number of applications made and consider the overall outcome to be for the economic benefit of the island.

As a further comment the Committee remains committed on behalf of the island to attracting business rejected by the GFSC in respect of the island of Guernsey as providing insufficient economic benefit, provided such rejection is bona fide on economic benefit grounds and not for other reason. We would ask you to note Sark's interest in business in this category and to advise us of potential opportunities."

22. This seems to me to be a very practical response, giving the views of the Sark authorities to the applications in precisely the way that the Law contemplated. The licensing function rested with the Commission. It would not have been appropriate

for the General Purposes and Finance Committee to go through the list of applicants reviewing their personal qualities as individuals. Questions of fitness and professional competence were entirely those for the Commission.

23. The Committee did however by implication give some support to all the applicants for personal fiduciary licences by drawing attention to their long-standing connection with Sark. The Committee also brought out the important point that activities that might have been too small and insignificant for Guernsey might well be suitable for authorisation in Sark. I have noted the reference to Mr. Harris having an office in Jersey and being a member of the long established practice of E. J. Nigel Harris & Partners, English Solicitors. I am told he does practice law in Jersey, but that he also owns a tenement in Sark, which entitles him to be a member of Chief Pleas. I mention this simply to draw attention to the fact that the representative of Chief Pleas, consulted as a member of the Sark General Purposes and Finance Committee, would not have been an innocent abroad when it comes to matters relating to the offshore fiduciary business. He or his colleagues could have raised any further issues with the Commission if they felt appropriate. In paragraph 19.1 of his Notice of Appeal the Appellant endeavours to show that what this correspondence amounted to was a notification rather than a consultation. I do not agree. I am satisfied that the Deputy Seneschal was correct in his conclusion that the Commission did fulfil its legal obligation to consult Sark. There is no merit in the point that the Appellant is making in this regard.

<u>Second complaint: Improperly gathered information</u>

24. In paragraph 19.2 of his Notice of Appeal the Appellant complains that the Deputy Seneschal failed to find that the information gathered and used by the Commission in refusing the grant of the application was obtained improperly. Mr. Doyle goes on to

say that, in other words, the information was obtained without any sufficient or adequate warning that it would be so used. He complains that the Commission failed to inform the Appellant adequately or at all that the information gathered would be used against the Appellant for the purposes of its application for a fiduciary licence for reasons that are then set out in some detail. The first complaint is that the letter requesting such a visit did not state as its purpose that the visit was to obtain such further information and documents as the Respondent reasonably required for the purposes of the application from the Appellant for a fiduciary licence (paragraph 19.2.2).

25. The letter of the 4th October, 2001, started as follows

> "As part of the fiduciary licensing procedure under the new Law, the Commission is making a number of on-site visits to applicants for licences."

I accept that the letter went on to define aims which were specific to the way in which the company operated and in particular issues of "know your customer" and awareness of money laundering procedures.

26. A further point that the Appellant took was that information can only be obtained under section 5(5) or section 23(13) of the Law. Those are declarations of circumstances where the Commission has a legal right to call for information. They do not provide the only methods by which information can be obtained by the Commission. The Appellant wanted a licence to carry on business as a fiduciary. The Commission asked him for information to help its staff process the licence. The Appellant gave that information voluntarily and what he is in effect saying is that he should have been cautioned before providing it. That cannot be right because had he declined to provide the information then he might not been given the licence he sought.

27. The Appellant seeks to invoke the principles of the Al Fayed case ECHR 21.9.95. He seeks to equate the role of the Commission to that of DTI inspectors and say that they have a duty to act fairly. The Commission's role is not analogous to DTI inspectors as the findings of the latter may lead to criminal sanctions, which is not the case here. There is no natural justice point here and like the Deputy Seneschal, I cannot see that there was any suggestion that the Appellant was in any way "lured" into providing information. This ground of appeal is rejected.

Third complaint: Legitimate expectation of the grant of a licence

28. The point here is that by the time the matter came before the Court of the Seneschal, 2½ years had expired since the original licence application. The Deputy Seneschal reviewed the factual situation with regard to the delays that have taken place. He found that there were no excessive delays other than between October 2002 and June 2003 when the informal Tribunal met. He found that this was partly due to the Appellant's indecision as to whether to take its case to the Tribunal and partly due to the time taken to set up the Tribunal. The whole point is however that section 59(1) expressly provided that pending the consideration of a licence application persons who are already established in business as fiduciaries in the Bailiwick were enabled to carry on their business. In this case at no stage has the Commission indicated other than that it had concerns about this application and as long ago as the 17th December, 2001, clear indications of the matters that were troubling the Assistant Director of the Fiduciaries Services and Enforcement Division of the Commission were being put on record. As is said in the correspondence at some stage the procedure for dealing with these applications was inevitably involved and complex. I will be looking at this when I consider the fourth ground of complaint, but at no time can I see that the applicant had any indication that its application would meet with

the Commission's favour and therefore the short point of legitimate expectation does not arise. Again the Deputy Seneschal was right in his judgment.

Fourth complaint: Commission's decision not its own

29. The Appellant's grounds are set out in paragraph 19.4 of the Notice of Appeal. Complaint is made that the Deputy Seneschal failed to find that the Respondent had not reached its own decision. It is necessary to explain the procedure that the Commission adopted to dealing with applications such as this. It is perhaps appropriate to emphasise the point that I made during the hearing that Mr. Doyle and his company have been engaged in a certain kind of business quite legitimately, since they set up their operation in Sark in 1996. The Law requires the company now to obtain a licence to continue to carry on that business.

30. There is no automatic entitlement to carry on business save that contained in section 59 of the Law to which already reference has been made. Whenever the legislature decides to control an activity for the future, it behoves the regulating authority to proceed with care in considering applications from persons who are already properly engaged in the business so that their livelihood is not taken away from them capriciously, or contrary to the principles of natural justice. No doubt in order to try to meet the requirements of the Law in this regard, the Commission set up a procedure for dealing with applications that was intended to meet some of these concerns.

31. The initial work on considering an application was carried out by the Commission's officers. At that time the Director of the Fiduciary and Enforcement Division was a Mr. Talmai Morgan and the Assistant Director, Mr. Trevor. Correspondence was exchanged and there were in fact two visits to Sark by officers of the Commission.

On the 17th June, 2002, Mr. Trevor wrote to Mr. Doyle saying that the Assessment Committee (which we later are to learn comprised of Mr. Morgan, Mr. Trevor and Mr. Bown) met to consider the application. A number of concerns were expressed. The outcome was that the matter was to be referred to Enlarged Assessment Committee, which comprised the Director General and the various directors of the Divisions of the Commission, in addition to the three Fiduciary Services and Enforcement Division Officers to whom I have referred.

32. The Enlarged Assessment Committee met with Mr. Doyle and we have a transcript of its deliberations. The upshot was that the Committee was not persuaded that it could support the Application and accordingly the opportunity to appear before the Shadow Tribunal was given to the Appellant on the 9th October, 2002. The object of the Shadow Tribunal was to enable a review of the decision of the Enlarged Assessment Committee to take place and a report to be prepared for the Commissioners prior to the Commissioners reaching their own decision on the matter. There was no obligation in Law to set up this Shadow Tribunal.

33. Steps were taken to give the Shadow Tribunal a degree of independence. A Mr. Michael Blair, Q.C. was appointed as Chairman. He is not resident in Guernsey and he has had a distinguished career in the public service in the United Kingdom and in latter years with the Regulatory authorities in that jurisdiction. He was assisted by two independent laypersons both of whom were experienced in the Guernsey finance industry. They conducted themselves in a quasi-judicial manner. They heard evidence and gave a very full judgment setting out their conclusions. As they were appointees of the Commission and had no standing under the Law it is not suggested that they were in any way an independent and impartial Tribunal for the purposes of the Human Rights Convention. However the members were clearly independent of

the Commission's officers. They made certain criticisms of the way in which certain matters were handled by the Commission. It is not appropriate for this Court to agree or disagree with those criticisms, as this Court does not have the same level of expertise as members of the Tribunal, particularly Mr. Blair, had in the matter of regulatory good practice. Their opinion supported the view that the Appellant should not be licensed.

34. Their findings were available to the Commissioners when they sat to determine finally the application. On the 6th August, 2003, the opinion of the Tribunal was considered and the Commissioners agreed with it. The application was refused and the right of appeal to the Court was drawn to the Appellant's attention. However it is clear that the Commissioners sat independently and made the final decision. The principles in the case of Mahon v. Air New Zealand (1984) 3 All ER 201 have no application here. The Commissioners had factual information before them to enable them to reach a reasoned conclusion. With respect Mr. Doyle cannot have it both ways. The Commission went to the trouble of bringing in the Shadow Tribunal so as to ensure that there would be independent review of the internal expertise that was being applied to consideration of these applications. When that Tribunal endorsed and amplified the reasoning of the Commission's officers, the Commission cannot be criticised for following that advice. This ground also fails.

35. I reiterate I have approached this appeal on the basis that I am under no duty to follow the conclusions of the Deputy Seneschal in any respect or treat the findings of the Shadow Tribunal as other than part of the workings of the Commission. It follows this appeal is dismissed. I would commend the Court below on the way this matter was handled.