Approved Text
09.10.2020

IN THE COURT OF APPEAL OF
GUERNSEY
CIVIL DIVISION – APPEAL No. 543

Before:

James McNeill, QC
Jonathan Crow, QC
David Perry, QC

Between:

Alan Michael Chick **Applicant**

-and-

The Guernsey Financial Services Commission **Respondent**

Judgment handed down: 9th October 2020

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

Perry JA

1. This is a renewed application for leave to appeal pursued by Alan Michael Chick ("**the Applicant**"). It is made in accordance with sections 15 and 22(2) of the Court of Appeal (Guernsey) Law 1961 ("**1961 Law**") and rule 16 of the Court of Appeal (Civil Division) (Guernsey) Rules 1964. The decision under challenge is a judgment of the Royal Court (Sir Richard Collas LB) dated 12 June 2020 in which it was held that a Cause issued by the Applicant against the Guernsey Financial Services Commission ("**the GFSC**") disclosed no right of action and fell to be struck out under rule 52 of the Royal Court Civil Rules 2007. An initial application for leave to appeal was dismissed in a reasoned judgment handed down by the Royal Court (Sir Richard Collas LB) on 4 August 2020. A second application was dismissed by McNeill JA sitting as a single judge of this Court in a reasoned judgment handed down on 7 September 2020. Notwithstanding these earlier decisions, the Applicant is entitled to have his application determined afresh by this Court as "*duly constituted*" for the hearing of appeals, that is by no "*less than three*" judges (see sections 21(2) and 8 of the 1961 Law). This is that determination.

2. In advance of our consideration of the application, on 25 September 2020, the parties were informed that McNeill JA was a member of the Court as duly constituted. No objection was raised to our ability to consider and determine the matter, notwithstanding McNeill JA's earlier decision. The parties were also informed that, in the absence of submissions to the contrary, the Court would deal with the application "on the papers", that is, on the basis of the documents submitted to the Court by both the Applicant and the Respondent, and without hearing oral submissions from either side. No submissions were received in opposition to this course, and it reflected the procedure adopted in the two previous applications. I should emphasise that each of us has considered the merits of the application afresh in light of this Court's duty to decide whether the decision of the single judge should, in the language of section 21(2) of the 1961 Law, "*be discharged or varied*".

The Background

3. The essential factual background is helpfully contained in the judgment of Sir Richard Collas LB ("**the Judgment**"), dated 12 June 2020 (see paragraphs 2 to 12). It is sufficient for present purposes to note the following:

   (i) The Applicant is a former shareholder and former director of certain companies regulated under the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000 ("**the Regulation Law**").

   (ii) In 2014 one of these companies submitted the results of an internal investigation to the GFSC.

   (iii) The GFSC referred the matter to its Enforcement Division for review.

   (iv) The Applicant was interviewed by the GFSC in October 2015.

   (v) The GFSC issued a draft Enforcement Report on 19 August 2016. This was provided to the Applicant. A revision of the draft Enforcement Report was provided to him on 4 April 2017. The Applicant declined to accept the accuracy of the information and statements contained with the draft Enforcement Reports and declined the GFSC's offer of an early compromise. He later also declined to agree a settlement.

   (vi) The GFSC produced its final Enforcement Report on 5 December 2017.

   (vii) On 6 December 2017, a Senior Decision Maker ("**SDM**") (a senior member of the English Bar) was appointed to consider, hear and determine enforcement proceedings in respect of the Applicant.

   (viii) A draft "Minded To" Notice (that is, a draft notice of a proposal to impose sanctions) was issued by the GFSC and provided to the Applicant on 2 March 2018.

   (ix) A final decision of the SDM was issued on 31 May 2018. It concluded that the Applicant did not satisfy the minimum standards required by those carrying out regulated activities within Guernsey's financial sector. The Applicant was made the subject of a financial penalty in the sum of £50,000 and prohibited for a period of 5 years from holding or carrying out the function of director, controller, partner or manager of any entity licensed under the Regulation Law.

   (x) The final decision contained a notice that it was subject to a statutory right of appeal to the Royal Court exercisable within 28 days of the notice of the GFSC's decision. The statutory grounds of appeal provided by section 11H(2) of the Financial Services Commission (Bailiwick of Guernsey) Law 1987 (as amended) ("**the FSC Law**") are extremely broad and include that: (a) the decision was *ultra vires* or vitiated by 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 in the decision; or (e) there was a material error as to the facts or as to the procedure followed in reaching the decision.

   (xi) The Applicant did not pursue a statutory appeal.

   (xii) The Applicant paid the penalty on 4 October 2018. This was after the GFSC had issued legal proceedings to enforce payment.

The Cause

4. Having decided not to pursue his statutory right of appeal and almost a year after the SDM's final decision, the Applicant issued a civil claim against the GFSC set out in a formal Cause, accompanied by a detailed statement of the material facts.

5. The Applicant's substantive claim was commenced in May 2019 by way of summons served on the GFSC pursuant to rule 90 of the Royal Court Civil Rules 2007. The Applicant claimed damages in the sum of £7,430,326.83 plus further damages, including punitive or exemplary damages as compensation for alleged breaches of Articles 6, 7 and 14 of the European Convention on Human Rights ("**the Convention**"), incorporated into Guernsey law by the Human Rights (Bailiwick of Guernsey) Law, 2000 ("**the Human Rights Law**").

6. Reduced to its essentials, the Applicant's pleaded case in relation to Article 6(1) of the Convention (the right to a fair trial) was that the procedure adopted by the GFSC and the SDM was seriously flawed and unfair. In particular, the GFSC failed to obtain and consider material evidence; was selective in the evidence it did obtain; failed to respond to complaints and explain how it reached its decisions; failed to explain why it had taken enforcement action against the Applicant and not another director similarly involved in a transaction impugned by the GFSC; and failed to identify the legal basis for some of its conclusions and made serious errors of fact. The SDM was also criticised for making serious and obvious errors of fact.

7. In relation to Article 6(2) (the presumption of innocence), the Applicant's pleaded case was that the SDM reached conclusions that were unsupportable and based on a selective view of the evidence, and that the Applicant had been presumed guilty. In relation to Article 6(3) (minimum rights in criminal cases) the Applicant's case was that the GFSC has failed to justify statements contained in the final decision dated 31 May 2018 (as well as the GFSC's public statements also dated 31 May 2018).

8. The Applicant's case in relation to Article 7 (no punishment without law) was that a substantial part of the GFSC's investigation related to events which occurred in November 2000, prior to the introduction of the Regulation Law, and this conduct could not lawfully be the subject of any penalty.

9. In relation to Article 14 (prohibition of discrimination), the Applicant's case was that, while he had been sanctioned, another director concerned in a particular transaction was not. Instead, the director in question continued to be involved in licensed fiduciary business.

The Strike Out Application

10. Having filed defences denying the allegations, the GFSC brought an application pursuant to rule 52(2) of the Royal Court Civil Rules 2007 to have the Cause struck out. This was on the basis that, taken at its highest, the Cause disclosed no reasonable grounds for bringing the action, or alternatively, that the allegations amounted to an abuse of the Court's process.

11. For the purposes of determining the Application, the Royal Court was provided with evidence from the parties (in the form of affidavits) and skeleton arguments, together with a large number legal authorities and associated materials. The Applicant also sought to rely on six lever arch files containing evidence and documents in support of his arguments. The Royal Court proceeded (correctly) on the basis that it was not necessary to review the evidential materials as the Strike Out Application would proceed on the conventional basis, namely on the assumption that the material facts as pleaded in the Cause were capable of being proved at any substantive hearing. Proceeding on this basis, the issue to be decided was whether the facts as pleaded and taken at their highest gave rise to a cause of action.

The GFSC's Case

12. While the GFSC reserved its position to challenge the facts as pleaded by the Applicant, its primary case was that there were no reasonable grounds for bringing the action (or alternatively that the action amounted to an abuse of the Royal Court's process). In response to the alleged breaches of the Convention, the GFSC's arguments were as follows. Article 6(1) is capable of being satisfied either by a right to a fair and public trial or alternatively by a right to challenge the adjudication process by an appeal to a court of full jurisdiction. In the present case the Applicant had a statutory right of appeal to the Royal Court, a court of full jurisdiction, which he failed to exercise. Articles 6(2), 6(3) and 7 are not engaged because, having regard to the criteria in *Engel v The Netherlands* (1971) 1 EHRR 647 (§82), the GFSC's enforcement process is not criminal in nature but regulatory. Article 14 is not engaged because it does not provide a freestanding guarantee of equal treatment without discrimination. Instead, Article 14 is restricted to a parasitic prohibition of discrimination in relation only to the substantive rights and freedoms set out elsewhere in the Convention; there has been no such discrimination in the Applicant's case. In any event, the Applicant had been sanctioned for his individual conduct and he had failed to allege discrimination based on any of the characteristics set out in Article 14 (sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status).

The Hearing

13. The hearing before the Royal Court (Sir Richard Collas B) took place on 22 January 2020.

The Decision of the Royal Court on the Strike Out Application

14. As noted, the decision of the Royal Court was handed down on 12 June 2020 by which time Sir Richard Collas had been appointed Lieutenant Bailiff. This appointment followed immediately upon his retirement as Bailiff on 11 May 2020. In a careful and fully-reasoned judgment, it was concluded that the Applicant's Cause disclosed no right of action and it was to be struck out under rule 52 of the Royal Court Civil Rules 2007. The reasoning in relation to the Convention arguments was as follows:

    (i) Where a decision determinative of an individual's rights and obligations is taken by an adjudicative body which does not in one or more respects comply with Article 6, the fair trial guarantee will nevertheless be satisfied if the State authorities provide a right to challenge the decision before a judicial body with full jurisdiction. If such an appeal process is provided, as in this case, there will be no violation of Article 6(1) (paragraphs 44-46 and 57 of the Judgment).

    (ii) Having regard to the criteria in *Engel v The Netherlands*, *supra*, the enforcement process as laid down by the FSC Law and other applicable regulatory laws is not criminal in nature and does not lead to a criminal sanction so as to engage Articles 6(2), 6(3) or 7(1) of the Convention (paragraphs 47-54 and 58 of the Judgment).

    (iii) In the absence of any interference with the rights and freedoms set forth in the Convention, Article 14 has no role to play. It is parasitic on the other provisions of the Convention and does not stand alone.

15. It is also helpful to set out part of the Royal Court's concluding remarks (at paragraph 60):

> "*I have to express some sympathy for Mr Chick who incurred great expense in the enforcement proceedings instigated against him and has a lingering and lasting*

dissatisfaction with the process. However, his remedy was to pursue an appeal. It is regrettable that he says that he did not have the means to afford legal representation but in the presentation of the present case he has demonstrated that he would have been capable of presenting the appeal himself. I make no comment as to whether the appeal would have been successful as I have not looked into the merits of the allegations pleaded by him but an appeal would have enabled him to ventilate his arguments and to have them heard by a Court that is accepted to be an independent and impartial tribunal."

16. I would wish to echo the comments concerning Mr Chick's obvious ability to present his case. He has produced detailed Grounds of Appeal (running to 40 pages of closely argued text) supplemented by detailed arguments in letters to the Registrar of the Court of Appeal, the most recent of which, dated 17 September 2020, runs to 68 pages and contains 649 paragraphs.

The Application for Leave to Appeal

17. On 6 July 2020, the Applicant gave notice of his intention to seek leave to appeal against the decision of the Royal Court and provided detailed arguments in support of nine particularised Grounds of Appeal.

18. The particularised Grounds of Appeal are in the following terms:

> *"(1) The validity of the Lt. Bailiff's Judgement handed down on 12 June 220 as it is argued that the Lt. Bailiff became "Functus Officio" in this case at the moment he retired as Bailiff. Accordingly, the Lt. Bailiff cannot now deliver a judgement acting judicially in a different judicial capacity;*
>
> *(2) Subject to 1) the validity of the Lt Bailiff's Judgement with regard to the time in which an appeal could be lodged, The Financial Services Commission (Bailiwick of Guernsey) Law (as amended) ("FSC Law") v the Human Rights (Bailiwick of Guernsey) Law 2000, now it has been established sanctions were imposed against the Plaintiff by an invalidly appointed Senior Decision Maker, in contravention of section 19 (5) of the FSC Law, and were therefore ultra vires and should be set aside by the Court;*
>
> *(3) The GFSC Commissioners' and senior politicians violation of their respective oaths of office by continually appointing Senior Decision Makers from 2014 onwards to review enforcement matters knowingly in contravention of section 19(5) of the FSC Law.*
>
> *(4) The status of ultra vires decisions made by an invalidly appointed Senior Decision Maker;*
>
> *(5) The "criminal" or "civil" nature of disciplinary hearings, the applicability of Articles 6, 7 and 14 of the European Convention on Human Rights, and the GFSC's compliance with the European Convention of Human Rights generally;*
>
> *(6) Natural justice, the GFSC's Duty of Candour and the Commissioners and Executive of the GFSC continually acting in bad faith from 2014 by referring matters to invalidly appointed Senior Decision Makers in contravention of section 19(5) of the FSC Law;*

(7) The inadmissibility of evidence and the dismissal of the Plaintiff's Application for the GFSC's own evidence bundle and associated files (referred to as the 6 lever arch files) to be admitted into evidence.

(8) The decision not to refer the Plaintiff's original application to a full hearing of the Royal Court sitting with Jurats to enable the Plaintiff's Application to be heard by a truly independent tribunal and if the matters claimed by the Plaintiff were found to be justified, for the sought after compensation and damages to be considered and awarded as originally requested by the Plaintiff.

(9) Any other matters which may be raised during the course of the Appeal if granted."

19. The GFSC opposed the application for leave to appeal and provided written submissions in response dated 21 July 2020.

The Lieutenant Bailiff's Judgment on the Application for Leave to Appeal

20. The application for leave to appeal was refused by Sir Richard Collas LB in a decision handed down on 4 August 2020. His reasons can be stated quite shortly.

21. In relation to Ground 1 (that having retired as the Bailiff after hearing oral submissions, he was *functus officio*), he was appointed a Lieutenant Bailiff immediately upon his retirement as Bailiff. The change in status did not prevent him from handing down the Judgment. While the delay between the hearing in January and the Judgment in June was to be regretted, it was the result of the time he had spent in his final weeks and months as Bailiff dealing with the coronavirus pandemic. Accordingly, it was concluded that the Ground was without merit.

22. In relation to Grounds 2, 3 and 4 (concerning the legality of appointing SDMs by the GFSC and the consequent *vires* of the SDM's decision), the Applicant had misunderstood the powers of the GFSC, in particular the effect of section 19(5) of the FSC Law. Neither the appointment of the SDM nor the sanctions imposed by him were *ultra vires*. Accordingly, it was concluded that these Grounds were without merit.

23. In relation to Ground 5 (the "criminal" or "civil" nature of disciplinary hearings and the applicability of Articles 6, 7 and 14), the Lieutenant Bailiff held that having applied the appropriate test, namely the test in *Engel v The Netherlands, supra*, the proceedings were not criminal and any alleged lack of independence or deficiencies in the procedures could have been addressed if the Applicant had exercised his right of appeal. Accordingly, it was concluded that this Ground was without merit.

24. In relation to Ground 6 (the failure of the GFSC to act in accordance with the rules of natural justice coupled with its bad faith by referring matters to invalidly-appointed SDMs), it rested on the false premise that the GFSC had appointed SDMs in contravention of section 19(5) of the FSC Law. It followed that this ground, which had not been argued at the original hearing, was also without merit.

25. In relation to Ground 7 (that the Lieutenant Bailiff had failed to consider the Applicant's evidence), the Strike Out Application had been decided on the basis of the material facts as pleaded in the Cause and it was unnecessary to review the evidence that would be adduced at trial to prove those material facts. Accordingly, this Ground too was without merit.

26. In relation to Ground 8 (that the Cause should have been allowed to proceed to a hearing before Jurats), the application to have the claim struck out was well founded and there was no purpose to be served by allowing the matter to proceed to a hearing.

27. The judgment did not address Ground 9 (any other matters that may be raised during the course of the Appeal if granted) for the obvious reason that it raised no point of substance in support of the application.

28. At the conclusion of his judgment, the Lieutenant Bailiff stepped back to consider whether there were nevertheless any exceptional circumstances involving an issue which in the public interest should be examined by the Court of Appeal. On this aspect he stated (at paragraph 13):

> "*I have given careful consideration to the question of whether the delegation to SDMs by the GFSC raises an issue of public interest in that the SDM is not sufficiently independent of the GFSC but I am satisfied that, as I said in the Judgment, the case law concerning the statutory right of appeal to the Royal Court that was available to the Applicant but which he did not exercise is well established and therefore that any deficiency could have been corrected by an appeal.*"

The Renewed Application

29. In a detailed letter dated 10 August 2020 addressed to the Registrar of the Court of Appeal, the Applicant gave formal notice of his application for leave to appeal to be considered by a "*single judge or multiple judges, of the Court of Appeal with experience in matters relating to the European Convention of Human Rights*". The letter, which runs to 17 pages and contains some 200 paragraphs, set out extensive, largely factual arguments in support of the Grounds of Appeal and, in particular, why there had been a violation of Article 6(1) of the Convention.

30. The renewed application was again opposed by the GFSC, which provided concise written submissions dated 27 August 2020.

31. In response to the GFSC's written submissions, the Applicant submitted further detailed submissions, some 382 paragraphs, in a letter dated 1 September 2020.

The Decision of the Single Judge

32. The renewed application was considered by McNeill JA who dismissed it for reasons which can be summarised shortly. They were the same as or largely similar to the reasons given by the Lieutenant Bailiff.

33. In relation to Ground 1 (the *functus officio* argument), Sir Richard Collas's retirement as Bailiff and simultaneous appointment as Lieutenant Bailiff on 11 May 2020 empowered him to preside over the Royal Court and to discharge the judicial functions of the Office of Bailiff. This is made clear by section 6(2)(a) of the Royal Court of Guernsey (Miscellaneous Reform Provisions) Law, 1950 ("**the Royal Court Law**") and Part 1 of the Schedule to the Interpretation and Standard Provisions (Bailiwick of Guernsey) Law, 2016 ("**the Interpretation Law**"), which defines "*Bailiff*" to include "*Lieutenant Bailiff*". On this basis the Judgment was validly issued by Sir Richard in his capacity as Lieutenant Bailiff.

34. In relation to Grounds 2, 3, 4 and 6 (the unlawful nature of the enforcement proceedings), the Applicant's arguments were based on the false premise that the appointment of an SDM was invalid because it contravened section 19(5) of the FSC Law. Section 19(5) is irrelevant to the present circumstances. It is section 19(1) which permitted the GFSC to delegate its functions

to the SDM subject to certain specified and irrelevant exceptions. On this basis the Applicant's arguments had no prospect of success.

35. In relation to Ground 5 (the criminal nature of the proceedings), the Lieutenant Bailiff correctly applied the test in *Engel v The Netherlands, supra*. It was not suggested that he was wrong to do so. On this basis the Applicant's argument had no prospect of success.

36. In relation to Ground 7 (the inadmissibility of evidence), there was no need for the Lieutenant Bailiff to consider the additional evidence. He had proceeded in the Applicant's favour and worked upon the basis that the material facts were capable of being proved. On this basis the Applicant's argument had no prospect of success.

37. In relation to Ground 8 (not referring the application to a full hearing), in accordance with section 6(2)(a) of the Royal Court Law, the Lieutenant Bailiff was the sole judge of law and procedure, and the issues arising from the Strike Out Application were confined to legal questions. It followed that there was no question of referring the matter to a full hearing of the Royal Court sitting with Jurats and, accordingly, this Ground of Appeal too had no prospect of success.

38. The single judge then proceeded to address what he referred to as the Applicant's "*overarching argument*" concerning Article 6, based on the decision of the European Court of Human Rights in *McGonnell v The United Kingdom*, 8 February 2000, App. No. 28488/95. In that case, the United Kingdom Government argued that the applicant had failed to exhaust his domestic remedies, on the basis that he had failed to exercise his right of appeal to the Guernsey Court of Appeal. The Strasbourg Court rejected this argument on the basis that it had not been raised before the then European Commission on Human Rights. Thus, the Government was estopped from relying on the argument in proceedings before the Court. Relying on this case, the Applicant submits that, just as Mr McGonnell was not required to lodge an appeal to the domestic court before seeking a remedy from the Strasbourg Court, so the Applicant's failure to submit an appeal to the Royal Court within the 28-day time limit did not prevent him from seeking redress under Guernsey's Human Rights Law. The single judge concluded that the decision in *McGonnell v The United Kingdom* was not inconsistent with the well-settled principle concerning the content of the fair trial guarantee in Article 6(1), namely that even when an administrative body determining a dispute over civil rights and obligations does not comply in all respects with the requirements of that article, there will be no violation of the Convention if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does satisfy the guarantees of Article 6(1).

39. Turning finally to the question of public interest, the single judge explained why in his judgment there were no wider considerations which called for the granting of leave to appeal. The application for leave to appeal was accordingly dismissed.

The Application to the Full Court

40. By letter dated 17 September 2020 addressed to the Registrar, the Applicant invited a further consideration of his application by the full Court of Appeal. The letter makes clear that the Applicant's principal concerns and his reasons for continuing the appeal process focus on the public interest which lies in examining the process adopted by the GFSC and the SDM. The letter contains a detailed analysis of the Applicant's factual case and his criticisms of the investigative and decision-making process followed by the GFSC.

41. In considering afresh the question of whether the Applicant should be granted leave to appeal I have given careful consideration to the contents of the Applicant's letter, as well as the materials that were before the Lieutenant Bailiff and the single judge.

Discussion

42. The criteria for granting leave to appeal are not in dispute. This Court will only grant leave: (a) if an appeal has real prospects of success; or (b) in exceptional circumstances, where there is an issue which should be examined on appeal in the public interest because it is, for example, an issue of great public interest or of general policy. This was the legal test applied by both the Lieutenant Bailiff and the single judge.

Ground 1: Sir Richard Collas's retirement as Bailiff

43. As noted above, the substantive hearing of the Strike Out Application took place on 22 January 2020 before Sir Richard Collas, the then Bailiff. Sir Richard retired as Bailiff on 11 May 2020 and was immediately appointed as Lieutenant Bailiff. When handing down the Judgment on 12 June 2020 he expressed his regret for the delay, which, as he explained, was the result of disruption caused by the coronavirus pandemic. The issue is whether the change in his status has any impact on the validity of the Judgment. The answer to this point is to be found in section 6(2)(a) of the Royal Court Law and Part 1 of the Schedule to the Interpretation Law, which makes clear that the term "*Bailiff*" includes "*Lieutenant Bailiff*". It follows that the Lieutenant Bailiff was authorised to proceed to issue the Judgment and it was validly issued. There is no arguable basis for contending otherwise.

44. I would also add that I would have reached the same result in the absence of Sir Richard's appointment as Lieutenant Bailiff. This is for two reasons. First, a judge once seized of a matter is under a duty to determine it and give his reasons for doing so. That duty survives any change or cessation in the nature of his or her judicial office, such as promotion or retirement. Secondly, it is a well-established principle that the acts of judicial officers *de facto* performed by them within the scope of their assumed official authority, in the interest of the public, are generally as valid and binding as if they were acts of officers *de jure*. This principle is based on considerations of policy and the necessity of protecting the public interest, as well as the rights of individual litigants.

45. The point on invalidity is unarguable. I would therefore refuse leave to appeal on Ground 1.

Ground 2: That the SDM was appointed ultra vires

46. The Applicant's argument is that section 19(5) of the FSC Law prohibits the delegation of the GFSC's sanctioning powers to SDMs. On this basis, the Applicant contends that the appointment of the SDM in his case and all the appointments of SDMs since the enactment of section 19(5) in 2015 were *ultra vires*.

47. It is necessary therefore to look at the relevant statutory provision. It provides as follows:

> "***Delegation to Members and Officers***
>
> *19(1) The Commission may, by an instrument in writing, delegate to any of its members or officers named or described in that instrument, either generally or otherwise as provided by that instrument, any of its functions except–*
>
> *(a) this power of delegation,*
>
> *(b) its duty to make an annual report to the Committee,*

(c) so much of any of its statutory functions as (however framed or worded)–

(i) requires the Commission to consider representations concerning a decision which it proposes to take, being a decision of a description set out in subparagraph (ii), or

(ii) empowers the Commission to make a decision of any of the following descriptions, that is to say, to cancel, revoke, suspend or withdraw a licence, consent, registration, permission or authorisation (except where the cancellation, revocation, suspension or withdrawal is done with the consent of the person who is, or who is acting on behalf of, the holder of the licence, consent, registration, permission or authorisation), or

(iii) empowers the Commission to petition for the winding up of a body corporate.

(2) A function delegated under this section may be carried out by the delegate in accordance with the instrument of delegation and, when so carried out, shall, for the purposes of this Law, be deemed to have been carried out by the Commission.

(3) A delegation under this section is revocable by the Commission at will and does not prevent the carrying out of a function by the Commission.

(4) For the avoidance of doubt, a function may be delegated under this section to a committee of members and/or officers.

(5) Notwithstanding the provisions of subsection (1)(c), any of the statutory functions mentioned in paragraphs (i), (ii) and (iii) of that subsection may be delegated to a committee of not less than 3 members."

48. In addition to these statutory powers, the decision-making process generally followed by the GFSC is explained in a guidance note issued by the GFSC in October 2017. The effect of this note was accurately summarised by the Lieutenant Bailiff in the Judgment (at paragraph 26):

> "*... the guidance note explains that the GFSC may, when it considers it appropriate to do so, appoint as an officer of the GFSC an SDM chosen from a panel of SDMs that have been selected to exercise the GFSC's powers of consideration, determination and sanction in respect of enforcement powers under the regulatory laws, with the exception of any powers to revoke, cancel, suspend or withdraw a licence, authorisation, registration, permission or consent to make an application for the winding up of a body corporate. The delegation of such powers to an SDM is prohibited by section 19 of the FSC Law.*"

49. At the heart of the Applicant's submissions is an assertion that the relevant decision of the SDM was made in exercise of the powers excluded by section 19(5). On analysis, this is not correct. The appointment of the SDM was within the powers of delegation of the GFSC, and the sanctions imposed on the Applicant by the SDM did not include those excluded by section 19(1)(c). As the Lieutenant Bailiff and the single judge observed, section 19(5) is irrelevant to the circumstances of the Applicant's case, and there was no delegation of any of the powers in section 19(1)(c)(i)-(iii). Accordingly, neither the appointment of the SDM nor the sanctions imposed by him were *ultra vires*. The Applicant's case to the contrary is unarguable.

50. I would therefore refuse leave to appeal on Ground 2.

Ground 3: That the GFSC and senior politicians have violated their oaths of office by continually appointing Senior Decision Makers from 2014 onwards in knowing contravention of section 19(5) of the FSC Law

51. This Ground is linked to Ground 2. It is based on the same misunderstanding that the GFSC has appointed SDM in contravention of section 19(5) of the FSC Law. This Ground is also unarguable for the reasons given in relation to Ground 2.

52. I would therefore refuse leave to appeal on Ground 3.

Ground 4: The status of the ultra vires decisions made by an invalidly appointed Senior Decision Maker

53. This Ground of Appeal is related to Grounds 2 and 3, which explains why the Lieutenant Bailiff dealt with them together. As noted, the Applicant contends that section 19(5) of the FSC Law prohibits the delegation of the GFSC's sanctioning powers to SDMs. As is clear from a consideration of the section, the Applicant is mistaken. Section 19(5) does not prevent the delegation of all sanctioning powers to SDMs; it is directed at specific powers, none of which were delegated to the SDM in the Applicant's case. It follows that this Ground is also unarguable.

54. I would therefore refuse leave to appeal on Ground 4.

Ground 5: The "criminal" or "civil" nature of disciplinary hearings, the applicability of Articles 6, 7 and 14 of the Convention, and the GFSC's non-compliance with Convention rights generally

55. Before addressing this Ground of Appeal, it is necessary to put the Applicant's arguments in context. The Lieutenant Bailiff held that the enforcement process adopted by the GFSC was not inconsistent with the requirements of Article 6 of the Convention. The Lieutenant Bailiff relied on the well-known principle that a decision determinative of an individual's rights and obligations taken by an adjudicatory body will not contravene the right to a fair trial guaranteed in Article 6 where the individual has the right to challenge the decision before a judicial body with full jurisdiction. This principle applies to both the civil limb of Article 6 (see for example, *Ramos Nunes de Carvalho e Sá v Portugal*, 6 November 2018, App. No. 5539/13 at [132]) and the criminal limb (see for example, *Judge v United Kingdom*, 8 February 2011, App. No. 35863/10 at [38]). The Lieutenant Bailiff also found, applying the *Engel v The Netherlands* test, that the enforcement process itself as laid down by the FSC Law does not engage the criminal limb of Article 6 and accordingly Articles 6(2), 6(3) and 7 were not engaged. In relation to Article 14, the Lieutenant Bailiff concluded that it did not assist the Applicant because he had failed to establish any interference with his rights and freedoms set forth in the Convention.

56. In response to the Lieutenant Bailiff's reasoning and in support of his application, the Applicant advances a detailed factual analysis of what he claims are the failings of the process and relies on a number of authorities including *McGonnell v The United Kingdom*, *supra*, and *Barclay and others v Secretary of State for Justice and others* GLR 2009, 298-314 (in support of his argument in relation to the fair trial aspect of Article 6(1)), *Bordeaux Services (Guernsey) Limited et al v The Guernsey Financial Services Commission*, Judgment 18/2016 and *Campbell v Hamlet* [2005] UKPC 19 (in support of his argument concerning Articles 6(1), 6(3) and 7, and the criminal nature of the enforcement process).

57. Having considered the materials provided by the Applicant, I have reached the clear conclusion that there is no substance in his arguments and the cases on which he relies provide no basis for acceding to the application for leave to appeal. My reasons are set out below.

58. First, the Lieutenant Bailiff was correct to conclude that the enforcement process does not contravene the right to a fair trial given the full right of appeal to the Royal Court, which enjoys a full jurisdiction to consider whether the decision subject to appeal was (among other matters) *ultra vires*, unreasonable, made in bad faith or contained a material error as to fact or procedure (see section 11H of the FSC Law).

59. Second, the decision in *McGonnell v The United Kingdom* has no relevance to the present application. It cannot be read as permitting the possibility of seeking redress under Guernsey's domestic Human Rights Law, even though an available statutory appeal was not pursued. It is instead a case in which the Government was prevented from relying in the Strasbourg Court on an argument that the applicant had failed to exhaust his domestic remedies (as required by Article 34 of the Convention) because of his failure to exercise his right of appeal to the Guernsey Court of Appeal before petitioning the Strasbourg Court. The Strasbourg Court went on to find a violation of the requirements of independence and impartiality of Article 6(1) where the Bailiff, who had been involved in the passage of legislation, determined a dispute in which the meaning of the legislation and whether reasons existed to permit a departure from its wording was in issue. That is not the situation in the Applicant's case. The relevant decision was taken by the GFSC, acting through an SDM, and the Lieutenant Bailiff has found the Applicant's case to be unarguable even taken at its highest.

60. Third, the decision in *Barclay and others*, *supra*, was "*exceptional*", as the English Court of Appeal acknowledged (at paragraph 41). It concerned the Constitutional position of the Seneschal of Sark, who held a dual role as legislator and judge. The finding of a violation of Article 6 was based on the "*inevitably limited knowledge of the litigant about the involvement of the Seneschal in the Chief Pleas (the unicameral legislature) on any particular occasion or matter*" (per Etherton LJ at para 53). The finding that the Seneschal's independence and impartiality could not be cured by rights of appeal or judicial review was based on a consideration of his legislative and judicial functions in a small community. Put shortly, the Seneschal's close involvement in all proceedings both legislative and judicial made his concurrent role inappropriate. This has no relevance to the Applicant's case and was not intended to represent a departure from the settled case-law of the Strasbourg Court on which the Lieutenant Bailiff relied. The Lieutenant Bailiff was correct to conclude that there is no requirement for the GFSC to be an independent and impartial tribunal, provided there is a full right of appeal to the Royal Court. Such a right of appeal is provided by the FSC Law. I would only add that any decision of the Royal Court would in turn be amenable to appeal to this Court. This is another reason for concluding that the enforcement process complies with the requirements of Article 6.

61. Fourth, the Lieutenant Bailiff was correct to find that the criminal limb of Article 6 was not engaged by the GFSC's decision-making process. He carefully applied the test in *Engel* and, after considering the relevant case law, concluded that the proceedings were disciplinary and regulatory in nature.

62. Fifth, the Applicant's reliance on *Bordeaux Services (Guernsey) Limited et al*, *supra*, does not advance his argument. In that case the Deputy Bailiff, having noted the availability of discretionary financial penalties, referred to the process of imposing sanctions as "*quasi-criminal*" (paragraph 28). But this was not in the context of deciding whether the process was indeed criminal for the purposes of Article 6. Later in his judgment the Deputy Bailiff expressly stated that the penalties were of a regulatory nature "*and not penalties imposed in criminal proceedings*" (paragraph 99). I would also observe in passing that the Deputy Bailiff's decision illustrates the valuable role played by the Royal Court in supervising the GFSC and the width of its powers in appeals under section 11H of the FSC Law.

63. Sixth, the Applicant's reliance on the fact that the Solicitors Disciplinary Tribunal in England and Wales applies the criminal standard of proof (*Campbell v Hamlet*, *supra*) is not relevant to

the issue the Lieutenant Bailiff had to decide. While it is to be noted that the English High Court has questioned whether the Tribunal should apply the criminal standard (see *The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal* [2016] EWHC 2862 (Admin)), the issue in this case is whether the Lieutenant Bailiff correctly applied the *Engel* criteria to the GFSC decision-making powers. I have no doubt that he did.

64. So far as Article 7 of the Convention is concerned, it applies only to criminal matters and, for the reasons set out above, is not engaged in the Applicant's case.

65. The position in relation to Article 14 is that the Lieutenant Bailiff was correct to conclude that it did not assist the Applicant because he had failed to establish any discrimination arising from interference with his rights and freedoms set forth in the Convention. The sole basis on which the Applicant asserted there had been discrimination was that the GFSC had taken proceedings against him but not against another director, who on the Applicant's case (at paragraph 94 of the Cause) was involved in a particular transaction, and that the discrimination would be contrary to the GFSC's own "*four eyes*" principles.

66. The principles in relation to Article 14 are not in doubt. In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish that the relevant circumstances fall within the ambit of a Convention right; that the difference in treatment occurred on the basis of one of the characteristics listed in article 14, or "*other status*"; that the claimant and the person treated differently are in analogous situations; and that there is no objective justification for the different treatment.

67. The Lieutenant Bailiff was correct to hold that the Applicant's case on Article 14 was unarguable for the reason that this provision is restricted to a parasitic prohibition of discrimination in relation only to the substantive rights and freedoms set out elsewhere in the Convention; there has been no such discrimination in the Applicant's case. Furthermore, the Applicant was proceeded against on the basis of his own individual conduct, which is apparent from the Cause, not by reference to his status. His true complaint is not one of discrimination. It is that his conduct was mischaracterised as wrongful. Accordingly, there is no plausible case of discrimination in the enjoyment of his Convention rights based on some "*other status*".

68. It follows that Ground 5 is unarguable and I would refuse leave to appeal.

Ground 6: The GFSC's breach of natural justice and failure to observe its duty of candour and its bad faith in referring matters to invalidly appointed Senior Decision Makers

69. As in the cases of Grounds 2, 3 and 4, this Ground proceeds on a false premise. As explained above, it is incorrect to assert that the GFSC has appointed SDMs in contravention of section 19(5) of the FSC Law. The Applicant's case is unarguable.

70. I would therefore refuse leave to appeal on Ground 6.

Ground 7: The dismissal of the application for the 6 lever arch files to be admitted in evidence

71. There is no substance in this point. As the Lieutenant Bailiff explained, his decision was based on the material facts as pleaded in the Cause and it was unnecessary to review the evidence that would be adduced at trial to prove those material facts.

72. I would therefore refuse leave to appeal on Ground 7.

Ground 8: The decision not to refer the Plaintiff's original application to a full hearing sitting with Jurats

73. This point is also without substance. The issues arising on the Strike Out Application were issues of law to be decided by the Bailiff sitting alone. By reason of section 6(2)(a) of the Royal Court Law, the "*Bailiff shall be the sole judge of Law and of questions of procedure in all causes and matters heard in a court over which he presides*". The short point is that the Bailiff was exercising a jurisdiction which was reserved to him and having found that the Strike Out Application was well-founded, there was nothing to be referred to the Jurats.

74. I would therefore refuse leave to appeal on Ground 8.

Ground 9: Any other matters which may be raised during the course of the Appeal if granted

75. The Applicant submitted extensive and detailed arguments in support of his case which go beyond the strict confines of his Grounds of Appeal. For the purpose of determining this application, I have considered all of them with care and I am satisfied that they contain nothing that would justify the granting of leave to appeal.

76. It follows that none of the Grounds of Appeal has any prospect of success.

Public Interest

77. Having concluded that none of the Grounds of Appeal has any prospect of success, it is nevertheless necessary to consider whether there are exceptional circumstances which would justify the grant of leave to appeal in the public interest. This is a point emphasised by the Applicant in his most recent correspondence. It was also a matter to which the Lieutenant Bailiff gave careful consideration. While the Royal Court judgment provided welcome clarification of a number of questions of law concerning the GFSC decision-making process, this was on the basis of well-settled principles. Certainly, this is not a case where the law is in need of further clarification by the Court of Appeal. The position is straightforward. The Applicant had a statutory right of appeal. Had that right of appeal been exercised the Applicant could have raised all the issues about which he now complains before the Royal Court. The Applicant failed to exercise the statutory right of appeal. Instead, he brought a claim with no prospect of success based on a misunderstanding of the scope of section 19 of the FSC Law. There is no good reason for allowing yet more costs to be incurred or court time to be expended. Nor is there any good reason to subject the GFSC to the prospect of more litigation and the costs of defending a hopeless appeal.

Conclusion

78. For these reasons, I would dismiss the application for leave to appeal. We make no order as to costs.

McNeill JA

79. I agree.

Crow JA

80. I agree.