IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between:

TREVOR KELHAM **Appellant**

And

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

Final Judgment handed down: 18th April 2023

Before: Jessica E Roland, Deputy Bailiff

Counsel for the Appellant: Advocate M Jones
Counsel for the Respondent: Advocate L Evans

Legislation, texts and cases referred to in Decision:

Protection of Investors (Bailiwick of Guernsey) Law, 1987
Financial Services Commission (Bailiwick of Guernsey) Law, 1987
Banking Supervision (Bailiwick of Guernsey) Law, 1994
Criminal Justice (Proceeds of crime) (Bailiwick of Guernsey) Law, 1999
Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000
Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2000
Regulation of Fiduciaries Administration Business, Company Directors etc (Bailiwick of Guernsey) Law, 2020
Criminal Justice (Proceeds of Crime) (Financial Services Businesses) (Bailiwick of Guernsey) Regulations 2007
Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020

Nada Fadil AL-Medenni v Mars UK Ltd [2005] EWCA civ 1041
Bordeaux Services (Guernsey) and others v GFSC (11 May 2016)
Y v The Chairman of the Guernsey Financial Services Commission (47/2018)
Walters v States Housing Authority (1997) 24.GLJ.76
R v Barnsley Metropolitan Borough Council ex parte Hook [1976] 3 All ER 452
Keeping Kids Company, Official Receiver v Batmanghelidjh [2021] EWHC 175 (Ch)
Carlyle Capital Corporation Limited v Conway Others (38/2017)
R (Khatun) v Newham LBC [2004] EWCA Civ 55, [2005] QB 37
Stuart Malcolm Forsyth v (1) The Financial Conduct Authority and (2) The Prudential Regulation Authority [2021] UKUT 162 (TCC)
Lancashire County Council v Taylor [2005] 1WLR 2668
Chick v Guernsey Financial Services Commission [2020] GRC035
Bushell v Secretary of State for the Environment [1981] AC 75
B. Johnson & Co. (Builders) Ltd. v. Minister of Health [1947] 2 All E.R. 395, 399-400
Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm)

Introduction

1. The Appellant appeals against the decision of the Senior Decision Maker, Mr Ben Hubble, QC ("SDM") on behalf of the Guernsey Financial Services Commission ("GFSC" or "Respondent" or "Commission") made on the 16 of April 2021 (the "Decision").

2. The Decision issued pursuant to:

    (i) Section 19 of the Regulation of Fiduciaries, Administration Businesses, Company Directors etc (Bailiwick of Guernsey) Law, 2000, as amended ("the Fiduciaries Law"),
    (ii) Section 36 of the Protection of Investors (Bailiwick of Guernsey) Law, 1987, as amended ("the POI Law"),
    (iii) Section 63 of the Insurance Business (Bailiwick of Guernsey) Law, 2002, as amended (the "Insurance Business Law").
    (iv) Section 43 of the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2000, as amended (the "IMII Law")
    (v) Section 18 of the Banking Supervision (Bailiwick of Guernsey) Law, 1994, as amended, (the "Banking Law"), and
    (vi) Section 118 of the Financial Services Commission (Bailiwick of Guernsey) Law, 1987, as amended ("the FSC Law") (The Regulatory Laws).

3. The sanctions imposed upon the Appellant were: -

    (i) a prohibition order for a period of 4 years pursuant to section 17 A (1) of the Fiduciaries Law, section 18 A (1) of the IMII Law, section 28 A(1) of the Insurance Business Law, section 17A(1) of the Banking Law and section 34E(1) of the POI Law.
    (ii) the application of the exemption in section 3(1)(g) of the Fiduciaries Law for a period of 4 years;
    (iii) a fine of £45,000 pursuant to section 11D of the FSC Law,
    (iv) a public statement pursuant to section 11C of the FSC Law.

4. All of the Regulatory Laws had the same rights of appeal which were:

    (a) That the decision was ultra vires or that there were 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.

5. At the beginning of the hearing Counsel for the Appellant quite rightly raised the fact that since the Decision was made a new Law, the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020 (the "FSB 2020 Law") has come into force.

6. It was agreed for the purposes of this appeal that the appeal was on the basis of the FSB 2020 Law however, this law, in any event encapsulates the same rights of appeal that were contained within the Regulatory Laws and sanctions that were available to the SDM under the Regulatory Laws.

7. Advocate Jones confirmed at the commencement of his submissions that the Appellant appeals on the basis that certain of the SDM's findings were wrong as a result of material errors as to the facts and/or procedure and/or the decision was unreasonable including in the Wednesbury sense but also

that the Appellant relies on the comments of the learned Deputy Bailiff, as he was then, in *Bordeaux Services (Guernsey) and others v GFSC (11 May 2016)* at paragraph 30 about the breadth of appeal available: -

> *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."*

8. He says that the decision to impose sanctions on the Appellant has no proper foundation such that they should be set aside. The Appellant further seeks that all of the sanctions imposed upon him should be set aside or alternatively reduced and that the Commission should pay the costs of the Appellant's appeal.

9. I have kept the words of the Deputy Bailiff from *Bordeaux* in mind when considering this appeal, along with his comments in *Y v The Chairman of the Guernsey Financial Services Commission (47/2018)* at paragraph 21: -

> " *…it is necessary to consider the subject-matter of the original decisions, the manner in which they were reached, the content of what is now disputed and what Y wishes to argue on this appeal. I am satisfied that the breadth of the potential grounds of appeal, for example in section 19(4) of the Fiduciaries Law (quoted above) extend further that (sic) what might be considered as classic judicial review. This was clear under the former style of statutory appeal grounds common in this jurisdiction (see, eg, the analysis of Beloff JA in Walters v States Housing Authority (1997) 24.GLJ.76). In particular, para. (e) enables an appeal alleging that there has been a material error as to the facts. I regard the grounds of appeal as effectively conferring on the Court the ability to look at anything that an appellant wishes to raise about the decision-making process of the GFSC and the decision reached."*

10. However, although the intensity of the review of the Decision under the FSB 2020 Law is towards the higher end of the spectrum, it is important to remember this is nevertheless a review of the Decision and not a rehearing.

11. When considering whether to exercise its statutory powers or sanction against any person, the Respondent follows its published decision making process which is outlined in its published Guidance Note entitled Decision Making Process Relating to the Use of Enforcement powers ("the Guidance Note"). The version that was relied on during the process applicable to the Appellant is the November 2019 document. A new Guidance Note has been issued dated September 2022

however in accordance with paragraph 3.1 of that Guidance Note that only relates to decisions taken by the Commission in respect of Enforcement sanctions, under the FSB 2020 Law.

12. In order to keep this judgment within manageable proportions, I shall not be referring to all of the documents which I have read or to which I was referred, only to those which I regard as necessary to explain the reasons for my conclusion. Nevertheless, in view of the nature of the arguments put forward by the parties this is of necessity a lengthy judgment.

Background

13. The following summary of facts is taken from the Decision. The Decision concerns events at Standard Chartered Trust (Guernsey) Limited ("SCTG") in the period from 2012 to 2016.

14. SCTG (formerly Amex International Trust (Guernsey) Limited) was incorporated in Guernsey on the 27 December 1991 and held a full fiduciary licence under the Fiduciaries Law since 21 December 2001.

15. The Appellant was the Managing Director and Chief Executive Officer ("CEO") of SCTG from 7 September 2012 to 28 November 2016 when he was suspended as part of an internal investigation. He was then placed on gardening leave on 27 May 2017 and his employment came to an end on 17 August 2017. The Appellant was a director of SCTG from 7 September 2012 to 23 May 2017.

16. Sarah-Jayne Sarre ("Ms Sarre") was the other subject of the Decision but did not appeal. She was the Head of Compliance at SCTG from 1 September 2013 to 21 August 2016. She was the money laundering reporting officer ("MLRO") at SCTG from 1 September 2013 until 1 April 2015. She was a director of SCTG from 1 April 2015 to 11 February 2020. She became the acting MLRO at SCTG from 30 October 2015 to 17 August 2016.

17. At all material times SCTG was a subsidiary of Standard Chartered Bank ("SCB") or ("PvB") a private bank. SCTG's primary business was the establishment and administration of trust and company structures with assets primarily held within SCB. Broadly this meant that the relevant trust or company structure would be based in Guernsey, but the financial assets would primarily be held with SCB in Country X. SCTG services included the establishment and management of corporate structures, the provision of registered office, directors, secretary, trustees and nominee shareholders and estate planning. SCTG acted as a trustee of trusts established for clients or business introduced through SCB via relationship managers ("RMs"), primarily based in Country X.

18. SCTG operated what is termed as a "bank led" model. This meant that clients were introduced to SCTG via RMs typically based in Country X. These RMs were employed by Country X entities within the Standard Chartered Group ("SC Group") but not by SCTG. As the direct contact with the client was undertaken by the RMs and SCB fiduciary specialists in Country X this meant that SCTG did not have direct access to or contact with its clients. This meant that it was for the RMs to collect client due diligence ("CDD") source of wealth ("SoW") or source of funds ("SoF") documentation which was held by SCB and then made available to SCTG staff on a read only basis via the internal computer system. This meant that although SCTG held client assets on trust the SCTG staff had little or no interaction with its clients.

19. There was a service level agreement between SCTG and Company A entered into with SCB dated 30 November 2011 (the "SLA"). In that agreement SCTG is referred to as SCT Guernsey SCB as SCBPB. The terms of the SLA included the following terms:

> *Clause 2 Covenants*
>
> *Each party covenants represents and warrants to the other Parties that for the duration of this agreement, it shall:*

Clause 2.1 *Maintain up-to-date customer data retention policies and processes in accordance with applicable laws.*

Clause 2.3 *Make the other Parties immediately aware any event or circumstance that may prevent it from performing its duties as set out in this agreement, unless prohibited to do so by law;*

Clause 2.4 *Comply at all times with all Applicable laws and maintain all licenses, approvals and other qualifications that it or its employees requires to perform its obligations under this agreement.*

Clause 3 ***Extent of Parties' duties and obligations***

Clause 3.2 *Nothing in this clause shall require either party to take or not to take any action (including (1) Company A and SCT Guernsey's part agreeing to provide Services to a Client) (if in the reasonable opinion of the relevant party taking or failing to take such action would or might be in contravention of any law or regulation with which it is subject or custom to complying or of any guide or code to which is considered good practice to follow in any market in which it carries on business or would or might give rise to any damage to its goodwill or reputation. For the avoidance of doubt, Company A and SCT Guernsey shall have the absolute discretion to determine the terms and conditions in which any Services are to be provided to the Clients and Company A and SCT Guernsey are entitled to alter, vary or terminate any Services to the Clients in accordance with the terms and conditions agreed between the relevant Client and Company A and SCT Guernsey.*

Clause 3.3 *Each Party covenants with the other parties that it shall not perform any act or admit to anything which will or would reasonably be expected to reflect adversely upon the business integrity, goodwill or reputation of the other Parties or which may prejudice or involve a breach of any Applicable Laws or regulatory requirements applicable thereto.*

Clause 4 ***Agreements between Parties***

Clause 4.6 *Pursuant to Clause 5.2 and subject to any reasonable terms that may be described by SCBPB in connection with the use of such systems SCBPB (except where it is Standard Chartered Bank) (Switzerland SA) shall provide access to systems such as Globus and CUPID*

(ii) *to Company A and SCT Guernsey limited to the purpose of facilitating compliance by Company A and SCT Guernsey of their anti-money laundering and know-your-client obligations under Clause 5. Such access will be subject to applicable privacy and confidentiality laws and regulations.*

Clause 4.7 *SCBPB in accordance with its internal polices shall ensure that all funds and other assets that are deposited or placed within an account held through a fiduciary structure managed by Company A or SCT Guernsey are deposited or placed in accordance with SCBPB own procedures for customer due diligence ("CDD") and provide a source of funds verification based on its CDD procedures if requested by Company A or SCT Guernsey.*

Clause 5 ***Compliance with Anti-Money Laundering Guidelines***

Each Party shall remain solely responsible for ensuring that it complies with all Applicable Laws on anti-money laundering and know your client. Without prejudice to the foregoing Company A and SCT Guernsey have agreed to rely on the records of, and documentation held by the SCBPB in the consideration of the undertaking by SCBPB under a proper accurate performance of its obligations under Clause 5.1

5.1 SCBPB confirms and undertakes that, subject to Applicable Laws;

(a) It will accurately complete and provide a client profile and/or periodic review to Company A and SCT Guernsey for each trust or company. SCBPB is responsible for ensuring the accuracy and timeliness of the information in the document and is responsible for updating immediately upon being advise" triggered event" resulting in any material damage to the information contained therein.

Further it is agreed and acknowledged that in order for Company A or SCT Guernsey to provide Services Company A and/or SCT Guernsey (as the case may be) will require approved CDD prepared by SCBPB in accordance with SCBPB's policies and standards. In the event that Company A or SCT Guernsey has been requested to provide a Private Investment Company for a client then SCBPB shall, as part of its account opening process, rely on the fact that Company A or SCT Guernsey will provide the necessary Certificate of Incorporation, Memorandum of Association etc once obtained from the relevant Registrar of Companies, Country A or SCT Guernsey shall from time to time agree with SCBPB a procedure (including on waivers of delivery of documentation) for account opening.

(b) It will perform the customer due diligence and ongoing monitoring on each of its Clients in accordance with Standard Chartered Banks Group policies and standards and shall promptly notify Company A and SCT Guernsey of any event that requires the SCBPB to undertake enhanced due-diligence or file any report with its head office and/or any regulator,

(c) It will, on the Company A's request and SCT Guernsey's request provide any information about the Client and/or his accounts to Company A and SCT Guernsey.

(d) As of the date of this Agreement it is not subject to any prohibitions restricting it from sharing any Clients Information with the Company A and the SCT Guernsey under this Agreement whether by virtue of confidentiality undertakings or secrecy requirements.

5.2 Each Party may, subject to obtaining the relevant Clients prior written consent and to Applicable Laws make available copies of the relevant Clients identification documentation and information to the other client to facilitate the satisfaction of the other Parties anti-money laundering and know your company procedures.

20. At schedule 1 of the SLA

> "*Applicable Laws*" is defined as "*all relevant or appliable statutes, laws (including common law), rules, regulations, directives and circulars (whether of governmental bodies or authorities, exchanges, regulatory bodies or self-regulatory organisations in relation to which Company A or SCT Guernsey or SCBPB is a member or is otherwise regulated) and including any tax laws or rulings*."
>
> "*Services*" is defined as "*services to be provided and received by Company A and SCT Guernsey and SCBPB as set out in the Operating Procedures or such other services as the Parties may from time to time agree in writing or may be set out in the Operating Procedures as amended, supplemented or updated from time to time*."
>
> "*Operating Procedures*" is defined as the document setting out "*the methodology, plans, instructions, polices, procedures to be agreed and established by the Parties which will govern the manner in which the Services are to be provided."*

21. The Respondent was informed on 26 July 2016 that SCTG would be announcing on the 27 July 2016 that following a strategic decision by the SC Group it had been decided to close SCTG and consolidate the structures in Country X.

22. On 9 September 2016 SCTG accepted amongst other conditions the following licence conditions:-

    (i) Appoint an independent party to review, at intervals specified in the defined plan a meaningful sample of client relationships (condition 2c) prior to the transfer or exit. In the event, SCTG decided that it was necessary to have the independent party review all of SCTG's Client files (the "Client File Review"); and

    (ii) Provide a quarterly report to the Commission detailing the number of business relationships where either the assessment or internal assurance had identified issues requiring remediation before the relationship could either be transferred or appropriately dissolved.

23. In or about October 2016 the Compliance Company were appointed by SCTG to carry out the independent assessment. By an email dated 24 December 2019 SCTG informed the Respondent that the Compliance Company and SCTG had completed the Client File Review. SCTG confirmed that the files identified as deficient had also been submitted to the Respondent for review. In excess of 100 files were identified by the Compliance Company as red files i.e. non-compliant with regulations 3, 4, 6 and 14 of the Criminal Justice (Proceeds of Crime) (Financial Services) Businesses (Bailiwick of Guernsey) Regulations, 2007 or self-identified by SCTG as having breached Regulation 5 (Source of Wealth for High Risk Clients). The total amount of assets comprised by such files was calculated to be circa $1.2 billion. As set out in detail in the Decision there were two main events around which the findings against the Appellant and subsequent sanctions are focussed. These relate to transfers from Company A to SCTG (the "Country A Transfers") (which was known internally as Project Zenith) and findings in relation to the Country X Transfers ("the Country X Transfers") (which was known internally as Project Tourmaline).

24. The Appellant was interviewed by the GFSC on a voluntary basis on the 7, 8 and 9 November 2018. A draft Enforcement Report (the "dER") was issued on the 25 June 2019. The Appellant responded to this on 31 October 2019. The Final Enforcement Report (the "FER") was issued on 17 April 2020. The SDM was appointed on the 6 July 2020. He issued a draft Minded To Notice on 7 December 2020. The Appellant and Ms Sarre filed legal submissions in response on 3 February 2021. A final Minded To Notice was issued on 5 February 2021. Legal submissions were filed by the Respondent on 7 February 2021. The Appellant filed a third witness statement dated 18 January

2021 ("the Third Witness Statement") and a fourth witness statement making a correction to his Third Witness Statement on 3 February 2021.

25. There was a meeting before the SDM on the 25 and 26 February 2021 (the "Oral Meeting") where the Appellant, Ms Sarre and the Respondent made, through Counsel, oral submissions to the SDM. During the meeting Ms Sarre's written submissions were materially corrected. The Enforcement Division of the Respondent filed further written submissions on 2 March 2021 and the Appellant filed responsive written submissions on 5 March 2021. The Decision of the SDM was issued dated 16 April 2021.

26. During the course of the process the SDM issued a number of procedural notes.

Grounds of Appeal

27. Although the grounds of appeal relate to the specific allegations, the Appellant made a number of general complaints against the process, and I shall deal with these first before dealing with the specific grounds of appeal.

28. The Appellant argues that the manner in which the Respondent has conducted this matter is contrary to the provisions of its own Guidance Note. The Guidance Note provides that the GFSC must follow the principles of natural justice and fairness whilst being the master of its own procedure. The Guidance Note acknowledges that it undertakes quasi-judicial functions. The Guidance Note provides at paragraph 2 that the Respondent adopts the following as its "*overriding objective*" to enable the relevant decision-maker to deal with matters in a fair and reasonable manner:

> *2.1.1 To deal with matters justly, including (so far as is practicable):*
>
> *(a) ensuring that the parties are on an equal footing;*
> *(b) dealing with the matter in ways that are proportionate to the:*
> *(i) amount of money involved;*
> *(ii) importance of the matter;*
> *(iii) complexity of the issues; and*
> *(iv) financial position of each party; and*
> *(c) ensuring that the matter is dealt with expeditiously and fairly.*

29. The Guidance Note further states (at paragraph 2.2) that the decision-maker must seek to give effect to the overriding objective when it:

> *2.2.1 exercises any Enforcement Powers; or*
> *2.2.2 considers or applies the guidance in this note.*

30. Counsel for the Appellant argued that in the Respondent's submissions, it appears that it does not accept that the GFSC was bound by natural justice and the principles of balance and fairness in the enforcement process specifically where the Respondent submits that (absent any express statutory obligation to the contrary) the duty of a decision maker is only to take reasonable steps to acquaint itself with relevant matter. This, the Appellant says, is contrary to the requirements of the Guidance Note and more particularly its obligations to follow the principles of natural justice and fairness (see also *R v Barnsley Metropolitan Borough Council ex part Hook [1976] EWCA Civ*).

31. The Appellant says that the English case of *Keeping Kids Company, Official Receiver v Batmanghelidjh [2021] EWHC 175 (Ch)* ("*Keeping Kids Company"*) provides useful guidance for how a regulator such as the Respondent should conduct itself in relation to its approach to proceedings. This was a case that the Appellant's Counsel at the Oral Meeting also drew to the SDM's attention. Whilst *Keeping Kids Company* judgment is a case about directors' disqualification by the Official Receiver and not regulatory proceedings, the Appellant says that

there is a clear analogy to a regulatory case where enforcement proceedings are brought like this one. The Appellant argues that the GFSC has similar duties contained within the Guidance Note as those of the Official Receiver identified in the judgment of Mrs Justice Falk. These include the duty to justify its differential treatment of the directors of SCTG where the Appellant says here it is only the Appellant who is said by the Respondent to be unfit (see paragraph 75 of the ***Keeping Kids Company*** judgment); as well as the dangers of hindsight (paragraph 50 of the ***Keeping Kids Company*** judgment). The Appellant relies particularly on paragraphs 900 – 902 of the case where Mrs Justice Falk says: -

> 900. *"My perception is that more emphasis needs to be placed on the requirements of balance and fairness in assembling reports and other evidence. This affects the investigation process – for example the choice of whom to interview and the questions asked – as well as the content of the documentary evidence. For example, Mr Tatham's key criticisms about missing records in relation to clients appear to have been made without the benefit of interviews with staff members who might have been best able to assist in relation to that topic, and with what seems to have been insufficient weight placed on Mr Kerman's views. Ms Jenkins was also not interviewed, which given her role during key periods and in respect of key events (including the 2021 statutory accounts, the 2014 Budget and the cash forecast produced for the July 2015 restructuring) appears to be a surprising omission".*
>
> 901. *Generally, I was concerned that both Mr Hannon and Mr Tatham appeared to have had insufficient appreciation of the importance of the duty to present the case in a balanced way. There was no reason to doubt that this reflects a wider issue within the Department, rather than individual findings. This point is not simply a matter for the court. The content of the Official Receiver's reports determined the decision by the relevant team to permit the proceedings to be brought, and the decision about the period of disqualification to seek. It must be borne in mind that, for proceedings of this nature with potential penal consequences, the existence of the proceedings themselves can have extremely significant consequences for defendants. In many cases there will also be no review by the court, because the defendant chooses to accept a disqualification undertaking. The decision whether to bring disqualification proceedings should be reached with real care with proper regards to all relevant issues. The information presented to enable that decision to be made should be presented "wards and all" to ensure that the decision to proceed, which requires a conclusion that disqualification order is "expedient in the public interest" (s7)1)CDDA), is fully informed"*
>
> 902. *"The requirement for the Official Receiver to present a balanced case extends to submissions on his behalf. Whilst this group of defendants were fortunate enough to be well advised, I think it would have been difficult for many defendants to ensure that sufficient context was provided in connection with individual criticisms, and to ensure that other relevant documents were identified which could cast a different light on documents on which the Official Receiver placed particular emphasis. Even with the assistance from the defendant's advisers, it was frequently a challenge for the court to ensure that, overall it had a balanced and fair understanding of the overall position in this case".*

32. Here the Respondent has failed to have a balanced investigation. This was a failure of SDM and GFSC to have an open mind. They have decided their narrative and conducted the process

accordingly. Further the Respondent has failed to comply with the principles of natural justice in five main ways:

1. a failure to investigate properly;
2. a failure to properly appreciate or understand the information that their inadequate investigation produced;
3. a failure to have an open mind;
4. a failure to act and properly as a prosecuting body;
5. a failure by the SDM to act fairly and properly as a decision making body.

33. These failings are exemplified by the Respondent's failure to obtain witness testimony from relevant individuals involved. By not interviewing all those it should have interviewed, the Respondent is unable to properly obtain a contextualised view of what went on at SCTG during the relevant period and in particular, the Appellant's conduct during this period. There may have been evidence from the individuals identified by the Appellant who could have supported the Appellant's case. This issue was raised by the Appellant on a number of occasions during its enforcement process including: in correspondence dated 31 October 2019 in response to the dER where the Appellant put forward a list of 16 individuals; he also identified individuals during his voluntary interview in November 2018; and in the Appellant's Third Witness Statement dated 18 January 2021 (submitted in response to the draft Minded to Notice) where the Appellant identified 28 witnesses he says that the Enforcement Division should have interviewed but did not. Specifically the Appellant argues by way of example, in relation to the decision for SCTG to take on the Company A clients, the GFSC did not seek to interview (i) A, who was a director of SCTG and was, the Appellant says, the executive in charge of the transfer process, or (ii) B, who was the project manager of the process. Whilst the SDM did not make any findings against the Appellant in this regard, nevertheless the Respondent was obliged to also ensure that there was a balanced investigation and check with these individuals. Its failure to do so was a breach of this duty.

34. The Appellant acknowledged that whilst some of those identified by him are within the jurisdiction, some were not, however, he said that the GFSC should have sought to interview these individuals regardless of where the individual was resident. Further two of the directors of SCTG during the relevant time (A and Q) who were not resident in Guernsey had been directors of a Guernsey company and the Appellant says that the GFSC should have jurisdiction over them. As the Appellant made clear in his interview as well as in his Third Witness Statement, he worked in a team not as an individual. He frequently in his interview (as well as in email correspondence which was before the SDM) used the word "*socialised*". He uses this word when matters are escalated to other parties. This is used in his interview for example:

> *So, what I am saying to you is absolutely, abundantly clear to me, and I hope to yourselves in this documentation, is the fact that these issues were constantly discussed, constantly escalated, talked about with stakeholders, appropriate stakeholders across the group, socialised with internal audit, socialised with external audit, socialised with the regulator.*

35. In oral submissions, the Appellant said that the Respondent is saying is that by use of the word "*socialised*" it is indicative of a casual approach by the Appellant. This is not the case. In fact it is because he was a team player under the direction of his supervisors and key decisions were made by the Board and not by him. This demonstrates why the investigation was not conducted properly because it failed to take into account that he was not acting alone and the individuals that he had identified were part of the team in which he operated.

36. The failure in the investigation by the Respondent means that it is still not clear, nor has it been adequately explained to the Appellant why it is only him and Ms Sarre who are said to have fallen below the regulatory standards when there were other individuals who were also involved. The Appellant accepts that a regulator can decide regulatory proceedings against some individuals but

not others, but he says the Respondent must be able to justify why when key decisions were made by the Board, only the Appellant and Ms Sarre have been singled out to be subject to personal sanction. This means that the Respondent has impliedly accepted that no other director failed in their regulatory duties even though he was implementing decisions made or approved by SCTG.

37. In response to the position that the Appellant could have also obtained witness evidence from the individuals identified by him, the Appellant says it was for the Respondent to conduct its investigation, decide who to interview and it was not for him to obtain witnesses who may or may not support his case in circumstances where the Appellant did not know what they would say. It was not the role of the Appellant to "*do the Commission's job*" and it is for the Respondent to act in a fair and balanced way in its investigation. Whilst Counsel for the Appellant accepted that paragraph 11.14. of the Guidance Note provides a mechanism for either party to call a witness, he maintained that the Appellant would not know who to call as a witness. Counsel for the Appellant also prayed in aid the confidentiality of the proceedings although he accepted that the Appellant had not requested that confidentiality be waived (save in relation to speaking to C which had been agreed). In answer to the Respondent's position that once it has come to the conclusion that minimum criteria issues has been established, it was not proportionate to continue the investigation, the Appellant says that this is not reasonable. Searches should continue, something else may become relevant due to the responses of the Appellant and these should be investigated by the Respondent. The Respondent should not be guided by proving its case rather it must ensure it has sufficient information to make a balanced and fair judgment. The obligation to act fairly includes whether to pursue a party or what allegations should be made against them. There is no burden on the Appellant to do anything, the burden relies entirely on the Commission. There is no procedure for him to provide evidence when he is a mere witness, and the passage of time means it is unfair for him to recall whether or not documents exist. If there are no documents, then no adverse inferences should be drawn against the Appellant.

38. Counsel for the Appellant said in oral submissions that it was unclear who had been interviewed by the GFSC in their investigation although he had not specifically asked the Respondent who else had been interviewed. I was subsequently provided with a copy of a letter dated 16 June 2020 from the Deputy Director of Enforcement to the Commission Secretary copied to the Appellant which identified the 7 individuals not including the Appellant or Ms Sarre who were interviewed by the Respondent. These had been requested by SCTG but the response copied to Counsel for the Appellant and Counsel for Ms Sarre. Advocate Jones confirmed that the Appellant did not ask for copies of the interview transcripts beyond those which the Respondent relied upon in its case.

39. In response to these complaints, the Respondent submits that the investigation took place into SCTG and its employees. Once the information had been gathered and having been satisfied on that information (including the voluntary interviews which are also conducted before decisions have been made about what enforcement action will be taken) that minimum criteria issues were established, then to continue to investigate after this would not have been proportionate. It is only at this point there will have been internal reviews about what enforcement action will be taken against i.e. only after the collection of the documentation without a pre-conceived idea of what might be found that allegations are considered. The scope of their investigation and who they interviewed for the investigation was fair and proportionate. It says it was always open for the Appellant to speak to others which he wished to do. He had legal counsel from the time of the internal investigation (Project Gorey) in 2016 and there was, during the entire investigation, no request from the Appellant or his counsel to speak to anyone other than C who was resident in Jersey and permission was given that day.

40. The Respondent has no ability to compel witnesses to attend interview outside of the Bailiwick although it was not suggested that other than C and the Appellant, they had invited anyone else to be interviewed from outside the jurisdiction. The transcripts that had been provided (both the ones it was relying on and the ones produced on request from SCTG) amounted to all those invited and they all attended the interviews voluntarily. The Respondent interviewed all Guernsey based

directors. In the letter produced to the Secretary to the SDM dated 16 June 2020 (in order to establish conflicts for the SDM) there is a long list of names referred to as "other parties" including many of the people identified by the Appellant. This list contains many of the names suggested by the Appellant as being potential witnesses. Counsel for the Respondent says that by implication the GFSC looked at and considered them. The Respondent also wrote to the Appellant on 17 April 2020 (enclosing the FER) and stated that in response to the Appellant's assertions that more people should be interviewed:

> "*searches have been made across the data provided by SCTG by way of Notice for all the said named individuals and documentation has been reviewed within the scope of the investigation*".
>
> *No documentation has been identified during these searches that undermines the Commission's case against Mr Kelham.*

41. The Respondent also relies on the principles set out by LB Marshall in *Carlyle Capital Corporation Limited v Conway Others* (38/2017) on the undesirability of excess witnesses which it says is equally applicable in an investigation such as this where the Respondent must remain satisfied that the "*process remains fair, proportionate, transparent, and timely*" (see paragraph 1.4 of the Guidance Note):

> *813. I decline to draw any general adverse inferences from the calling or not calling of witnesses by the Defendants in the circumstances of this case. I thoroughly support the comments of Rose J, in Libyan Investments Authority about the undesirability of any decision of the court which could cause parties to proliferate witnesses in a complex case out of a fear that something would be held against them if they did not.*
>
> *814. I largely accept the propositions that the matters as to which the evidence of these witnesses might be expected to go, either at all or as a matter of being the best available evidence, were either peripheral to the real issues, or criticisms raised only as assertion and not with sufficient evidential support to raise a prima facie case.*

42. In considering these complaints, although the Appellant said that these proceedings were analogous to proceedings by the Official Receiver, I agree with the Respondent that it is not helpful to compare the enforcement process of the GFSC of a regulated business and its officers with the process that was being scrutinised by the High Court against a charity in the *Keeping Kids Company* case. The law, the tests, the underlying allegations and the obligations of the Official Receiver are very different from those of the Respondent and the enforcement of the Regulatory Laws.

43. With regard to the phrase "s*ocialised*", I consider that the SDM seems to clearly understand what the Appellant meant by this phrase, as he sets this out at paragraph 347 of the Decision. The SDM sets outs clearly that he is concerned with how the Appellant discharged his duties which he owed:

> *Mr Kelham has also submitted that the allegations made against him in the Enforcement Report cannot be fairly investigated and assessed without speaking to a number of individuals (typically who were not SCTG directors or staff) to whom issues were escalated or "socialised" as Mr Kelham put it in interview. As to that, I reiterate the general point in relation to the greater importance of contemporaneous documents (rather than the obtaining of after the event testimony). Further and in any event, Mr Kelham's contention misses the point that I am concerned with whether Mr Kelham discharged the duties and obligations which he owed in Guernsey as the Managing Director and CEO of a licensed entity. Escalation of issues to personnel outside of Guernsey and not part of the SCTG*

Board might on occasion be relevant and necessary as part of the discharge of duties and obligations by a CEO in Guernsey, but escalating issues is not the same as addressing and resolving issues. Mr Kelham's obligation was to address and resolve issues, as CEO of SCTG, consistent with the regulatory obligations and duties which he owed in Guernsey. Those obligations and duties were for Mr Kelham, not others outside Guernsey, to discharge. Accordingly, it is the acts or omissions of Mr Kelham and others within SCTG that are of key significance. The same analysis applies in relation to Ms Sarre.

44. The Respondent in its Guidance Note sets out that it is obliged to follow the principles of natural justice and fairness to arrive at a proportionate and reasonable decision (see paragraph 1.6 for example). Contrary to the argument put forward by the Respondent, I do not consider that the Appellant made the requests that the Respondent interview the other individuals late in the day and certainly not too late. It is clear that from the beginning of the Respondent's engagement with the Appellant at his interview that the Appellant thought the Respondent needed to speak to other people within the SC Group and he repeated this at every opportunity within the process, although the numbers varied. However, although the Appellant complains about the process, he is unable to say whether the additional interviews that he says should have taken place might have helped him. Further, at no time did the Appellant try to assist himself and speak to these individuals himself or via his legal counsel. These could have been included as part of the process under a number of sections of the Guidance Note. Further, the Guidance Note evidently does not restrict oral witnesses to the Respondent even if it is not a frequent event (see paragraph 11 of the Guidance Note). Although the process is confidential, it was evident in their response to a request for the Appellant to speak to C that the Appellant could have sought permission for this process. Further, the SDM made quite clear in his Decision why he did not consider that the individuals that the Appellant identified would be of assistance. His focus was on how the Appellant discharged the duties and obligations which he owed in Guernsey as the Managing Director and CEO of a licensed entity. It has been clear throughout the enforcement process that it was because of his role that the Respondent had focused on the Appellant but I will deal with this further below in relation to some of the specific appeal grounds.

45. The case against the Appellant was set out with clarity and supporting documentation relating to each of the allegations has been identified in the dER and FER. This has enabled the Appellant to reply to the allegations made against him. The SDM then made a provisional decision in the draft and final Minded To Notices and then further written and oral representations were made before the SDM handed down his final Decision. I have come to the conclusion that the Appellant has not shown that the GFSC has failed to conduct a fair investigation in this regard. The Respondent is correct in its reliance on the principles *R (Khatun) v Newham LBC [2004] EWCA Civ 55, [2005] QB 37* at paragraph. 35 (Laws LJ) where Laws LJ says "…*it is for the decision-maker and not the court, subject again to Wednesbury review, to decide upon the manner and intensity of inquiring to be undertaken into any relevant factor accepted or demonstrated as such*".[1] This is not contrary to the obligations of natural justice to which the Respondent accepts it is bound. It is for the Appellant to show (which he has not) that no reasonable regulator in the Respondent's position could conclude that the investigation was sufficient. Nor has the Appellant shown that the investigation was unreasonable. In the circumstances I consider that the investigation was reasonable and proportionate.

[1] See also paragraph 35: Laws LJ relies on the judgment of Schiemann J in R v Nottingham City Council, Ex p Costello (1989) 21 HLR 301 at p 309:- "In my view the court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient." Also Neill LJ in R v Kensington and Chelsea Royal London Borough Council, Ex p Bayani [2005] 1 QB 37 at p 415: "The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable housing authority could have been satisfied on the basis of the inquiries made."

46. The Appellant also says that at each stage of the process the GFSC has failed to comply with its obligation to take the steps reasonably available to it to obtain the documentation necessary to be able to provide a balanced and fair view of what went on during the relevant period. Whilst the Respondent's position was that it had disclosed all material which it held which supported the Appellant's case or adversely affected its or the Appellant's case (see paragraph 8.7 of Guidance Note), the Appellant said this failed to take into account that the Respondent (and therefore the Appellant in presenting his defence) was entirely reliant on what SCTG presented as its response to the GFSC's investigation. This, the Appellant asserted, was likely to be very different to what the Appellant would want to present as part of his response if he had had access to the documents. Further, the GFSC never disclosed any of the documentation relevant to the factual points made by the Appellant during the course of the investigation where there was a lack of documentary evidence. As a result, for example, the SDM (and the Court) only has a selection of board minutes without all the attachments/reports to the Board for the relevant period.

47. The Appellant relies on the case of *Stuart Malcolm Forsyth v (1) The Financial Conduct Authority and (2) The Prudential Regulation Authority [2021] UKUT 162 (TCC)* (6 July 2021) that disclosure is the cornerstone of fairness. The Appellant says the Respondent did not carry out a reasonable search as part of their investigation which is part of the Respondent's overarching duty to act fairly. Whilst the Appellant accepts that the disclosure exercise needs to be proportionate, he says that the fact there was no disclosure of all the board minutes shows that there has been an inadequate disclosure process. The Appellant specifically referred to this in his submissions in response to the draft Minded to Notice where he said it was very important to note that the Board meeting on the 1 May 2013 was "*the only Board meeting for which the SDM has been provide with a full set of Board papers which encompassed written reports from….*". Thus the Respondent was alert to this omission but did not rectify this. Other missing documents have also been referred to during the course of this procedure by the Appellant but to no avail. The Appellant had no starting point to identify particular documents (other than missing the Board minutes or supporting papers) because he was not able to access any documents as he left SCTG in 2017. Further, there must be particular diligence on the part of the Respondent in cases like this one where the Appellant has no access to the documents as he is no longer part of the business. He is "*shooting in the dark*." That is why the Appellant's Third Witness Statement is such a detailed document as it was prepared in part based on the documents that were disclosed. He says it is telling that the new guidance note from September 2022 provides "*Disclosure is a two-way process between the parties, and if respondents believe there is material in the possession of the Commission which would meet the descriptions in paragraph 8.10 below, and which has not been disclosed, they are encouraged to apply to the Commission in writing with sufficient detail to identify the document or documents – including search terms if these will assist*." There is no equivalent under the November 2019 Guidance Note applicable here. The Respondent referring in oral submissions to the fact that other people in the Appellant's position have made specific disclosure requests to the Respondent is not helpful and at no time was the Appellant told he could request further documents.

48. The Appellant also relies on paragraph 60 the judgment of Lord Woolf in *Lancashire County Council v Taylor [2005] 1WLR 2668* which he says should be equally applicable to the Respondent where Woolf LJ says:

> *Departments of state need also to bear in mind that they have an advantage in this field. They have access to materials to which other parties have no access or which it would be difficult and expensive for them to search out. But axiomatically an exercise of this kind, if it is to be carried out at all, must disclose the unwelcome along with the helpful. If, for example, there had been internal documents acknowledging an inconsistency in the protection to be given to tenant farmers and advancing no good reason for it, they would have been added to the exhibits. The fact that there were evidently no such documents in the present case does not dilute the cautionary reminder that if research of this kind is to be placed before the court, it cannot be selective in what it tends to show.*

49. In civil proceedings there would be a disclosure statement or an affidavit setting out what had been searched for in the course of disclosure, however here the Appellant has nothing other than assertions from the Respondent. The Respondent had a duty to consider whether the disclosure that had been provided in relation to one party (here SCTG) is sufficient to deal with enforcement action against another party. The burden must be on the Respondent to ensure that the process is undertaken fairly and properly, particularly in these circumstances where the Appellant cannot realistically try to work out what the GFSC might have obtained. The Appellant says that the late provision of the minutes of the meeting with the Respondent of 19 December 2014 raises serious concerns about the Respondent's investigation and its conduct in particular its purported compliance with its disclosure obligations and duty to act fairly.

50. The Respondent says that it has complied with its disclosure obligations. The Respondent says a huge volume of material has been disclosed. The Appellant was provided with 537 documents in October 2018 and another 78 documents were sent prior to his interview on 7 November 2018. A full schedule of documents which the Respondent relied on to support the dER was supplied on 25 June 2019. On 15 July 2019 all unused transcripts of those interviewed were provided to the Appellant after these were requested by SCTG. A further additional 37 documents that were provided with the FER on the 17 April 2020. This amounted to nearly 3000 pages. Further, when the Appellant specifically raised the meeting notes for the 19 December 2014[2] meeting, the Respondent set out in its skeleton that it would search and subsequently produced a set of minutes of the meeting between the Respondent and SCTG from 19 December 2014.

51. The Respondent also relies on the fact that the Appellant never requested any additional documents over and above those disclosed by the GFSC. Whilst the Appellant is very critical of this stance, the Respondent says that this criticism is misplaced. It says that where a party has the benefit of competent legal representation, there must be an expectation that requests for documentation, especially if it is being suggested that such documentation is critical to the case, will be made by them. In almost every matter like this, the Respondent will receive a written request for documents or a class of documents with the reasons why these are being considered.

52. The Respondent accepts that it must disclose all material that the Respondent is asking the SDM to rely on. It must also produce a schedule of any additional material which it has which supports its case or that of the Appellant or material that undermines its case. It also accepts that it has an ongoing duty of disclosure. However it distinguishes this from the obligation that the Appellant says that it has to trawl though the Appellant's various written representations itself so as to identify what further information it should disclose. This the Respondent says is disproportionate amount of time and resources – this runs counter to the principle of proportionality and reasonableness. In so far as the Appellant seeks to rely on *Stuart Malcolm Forsyth v (1) The Financial Conduct Authority and (2) The Prudential Regulation Authority* and *Lancashire County Council v Taylor* decisions, to the extent that they are relevant, there is nothing in either of these cases which undermines the approach to disclosure exercise carried out by the Respondent.

53. I agree that the burden is on the Respondent to ensure disclosure has been undertaken fairly and in accordance with the principles of natural justice and its own Guidance Note. It is a "self-policing" duty and places a particularly onerous burden upon the Respondent to ensure fairness and transparency in relation to the documentations disclosed. It must also be proportionate. During its enforcement process, the Respondent by means of serving a series of notices for information under Section 23 of the Fiduciaries Law ("Section 23 Notices") obtained documents from SCTG. As set out above it is only after the collection of the documentation that allegations are considered. These documents are the pool of documents which the Respondent then relies on in compiling first its dER and then the FER. This may be supplemented by the party with information which the party considers material or relevant.

[2] Although in the Appellant's skeleton the meeting is referred to as occurring on 19 November 2014 but it clear that it is the 19 December 2014 meeting so further references will be to 19 December 2014.

54. In accordance with the Guidance Note the party is entitled to see all the documents that the Respondent is proposing to rely on in asking the SDM to act. The residue of documents which the Respondent holds but is unused is treated in accordance with paragraphs 8.6-8.9 of the Guidance Note. In this case the Respondent did not identify any further material that it believed was disclosable[3].

55. At paragraph 8.6 of the Guidance Note there is a reference to "standard disclosure" as per Rule 65(4) of the Royal Court Civil Rules, 2007. As I indicated at the hearing, I consider that the reference to rule 65 (4) of the Royal Court Civil Rules (the "RCCR") in the Guidance Note to the unused material creates a tension in the process because it is taken out of context from the remainder of the RCCR (and then in any event the Guidance Note provides a modified version at paragraph 8.7). The "cut and paste" approach to the RCCR excerpting a rule from an adversarial civil procedure into a process which is administrative in nature and in this particular case, asymmetrical in terms of the disclosure obligations as the documents are all in the hands of the Respondent and is only by reference to unused material, creates unnecessary confusion.

56. However, the reference to the RCCR does not have the effect of incorporating any other obligations in relation to disclosure found under Part X of the RCCR. For example, there is no obligation to search similar to that found under Rule 66 of the RCCR. Unlike the civil process where disclosure follows the issue of proceedings between the parties, the obligation on the Respondent to disclose documentation is centred on the documentation that the Enforcement Division have provided to the SDM to make the decision and thereafter on the undisclosed material they received if the material comes within paragraph 8.7.

57. I note that in the letter to the SDM from Counsel for the Appellant dated 14 July 2020 and another email which I have not seen but that is referred to in Procedural Note 2 by the SDM the fact that the Appellant has no separate access to documents is referred to, but the Appellant did not request access or disclosure of any particular document. Although it is frequently the case that parties do ask for additional documentation, the Guidance Note relevant to the Appellant's case does not provide for this specific disclosure for a party and thus I have considered whether this creates a procedural unfairness that undermines the Respondent's case. It is important to emphasise the distinction between disclosure which will be of documents which the Respondent has but has not disclosed and further information beyond the documents which the Respondent holds which would require one of the parties to obtain the information.

58. At paragraphs 11.1 or 11.5 of the Guidance Note the SDM can request further information on specific issues or seek further information and/or clarification at any stage:

> *11.1 Within 10 working days of receiving the referral the decision-maker should consider the Enforcement Report and evidential documents presented to it, and decide whether it is necessary to request further information on specific issues that arise out of the Enforcement Report:*
>
> *11.1.1 from the Enforcement Division; or*
>
> *11.1.2 from the parties, via the Enforcement Division.*
>
> *……*
>
> *11.5 A decision-maker has a right to seek further information and/or clarification at any stage. Where a SDM wishes further information to be provided, requests will be sent via the Secretary who will seek the information from the relevant party or from the Commission, and revert to the SDM.*

Also at paragraph 11.13 (and 11.15) which provides:

[3] Letter dated 17 April 2020 from Respondent to the Appellant.

11.13 The purpose of issuing a draft "minded to" notice (as provided for in 11.11) is to allow the Enforcement Division and the parties:

……..

11.13.2 To agree whether any identified additional documents should now be disclosed;

……..

11.15 Where agreement under paragraphs 11.13.1 or 11.13.2 cannot be reached within 10 working days or where a witness is to be called under paragraph 11.14 then the decision-maker may, in the furtherance of the overriding objective, issue a procedural ruling on those aspects on the basis of the documentary and written material provided to him.

59. Whilst this does not amount to specific disclosure nevertheless it is apparent that there is an opportunity for the party to apply to the SDM to exercise these powers to obtain further information or further disclosure. However, in the Oral Meeting, whilst Counsel representing the Respondent specifically referred to the fact that no documentation had been requested by the Appellant, this did not prompt the Appellant to make such an application.

60. I also note that at paragraph 17 (1) of the Legal submissions of the Respondent dated 17 February 2021, the Respondent says as follows:

> *(1) In so far as Mr Kelham complains of an absence of documentation the ED can confirm that it has disclosed all the material to the parties in its possession, which, in accordance with the Guidance Note, either adversely affects the ED's case, or supports or adversely affects the Respondents case. In any event, if is of note that Mr Kelham's representatives have never made any requests for documents. Moreover, despite Mr Kelham's protestation in his witness statement that there are potentially thousands of emails which have not been produced to the SDM, SCTG specifically confirmed to the Commission that Mr Kelham's emails were "backed up" from September 2012 and therefore if any relevant emails did exist, SCTG would have presented them to the Commission as part of its response to Notices.*

61. Again despite this, the Appellant did not make any requests for documentation nor make any applications to the SDM for him to request any documents.

62. I also note that the letter of 25 June 2019 enclosing the dER includes an invitation to confirm facts are correct or what changes might be made to make them correct and to provide any additional information which the party considers material or relevant in any way to the matter although it does not suggest what a party might do if they cannot access the material directly themselves. I also take into account that SCTG requested the transcripts of the interviews that the Respondent was not relying on, which led to the Appellant receiving copies of them as well but did not lead to him requesting any documents from the Respondent in a similar way.

63. Whilst the Guidance Note refers directly to the RCCR and the continuing obligation to provide disclosure which does not depend on requests, the Respondent must hold the documentation already, it does not compel the Respondent to extend its investigation if it considers that the documentation it has is sufficient. There is no obligation upon the Respondent to have an ongoing investigation if it considered, subject to the obligations set out in the Guidance Note including natural justice and fairness, that it possessed the information necessary for the decision.

64. In the absence of a specific disclosure provision and taking into account the wording of paragraph 8.9, there is an ongoing obligation on the Respondent to consider whether they have documents within the pool of relevant undisclosed material which fall within the categories identified in 8.7 and this will include after new submissions or witness statements by the party. It was argued that this should mean that no specific disclosure is necessary, although this submission assumes that the

Respondent's and the party's views of the application of paragraph 8.7 is the same. However although the Respondent protests that it is not for it to "trawl" through submissions to identify additional documents nevertheless it also says that it has complied with the disclosure process in terms of assessing whether it has documents that come within the 8.7 categories.

65. In relation to the wording in the Guidance Note, it is important to take into account that when the documents are in the Respondent's hands as in this case without an obligation to provide a list of all the documents that it holds but only a list of those that fulfil the criteria set out under paragraph 8.7, it places a weighty responsibility on the Respondent to ensure that it discharges its obligation fairly. This self-policing process is based on the principle of the maintenance of the highest standards by the Respondent as a regulatory body. Whilst it is always unfortunate when documents are not provided and sometimes can create an injustice, this is not the case here. However, although the Respondent refers to the Commission's notes for the December 2014 meeting being raised in the skeleton argument made in support of this Appeal, I note that in the response to the draft Minded To Notice, the Appellant refers to the possibility of notes being made by the GFSC so this should have been disclosed earlier. Nevertheless, whilst I deal with the importance of the minutes in due course, assuming here that they do fall into the 8.7 criteria, the Respondent having noted the comments in the skeleton, the Respondent disclosed them, in my view supporting (rather than undermining) the position that the Respondent is aware of its obligations of disclosure and has complied with the disclosure rules even if belatedly.

66. I have not been persuaded that the Respondent has not conformed to the disclosure process. The Appellant had seen all the documents that the SDM has seen in coming to his decision. Although the ***Forsyth*** case is an English regulatory case, I do not consider it is of much assistance. The English regulatory system is different from our own regime and in that case the issues that the Tribunal were critical of were in relation to the FCA's own records and systems which went to the issue of limitation period of action against the individual.

67. Nevertheless, if the Appellant is able to establish that in the absence of the material which the Appellant says should have been part of the investigation, the SDM could not perform his functions and that the SDM could not apprise himself of all factors relevant to its decision as to fitness and propriety of the Appellant, then this has the basis for a potentially successful ground of appeal. However, to do this it is necessary to consider the findings made against the Appellants and where it is alleged by the Appellants that additional material was necessary in order for the SDM to properly make his decision. In view of the seriousness of this allegation I have considered this issue in relation to each finding where it is raised by the Appellant, even if I do not explicitly mention it in this judgment.

68. Going forward I do consider it would be helpful for the Respondent to consider reviewing the disclosure process including whether the parties should be supplied with a list of all material which the Respondent has but is not relying on for the decision, particularly in circumstances where the parties are not still part of the organisation where the documents have been sourced. This would alleviate the guessing game which the current system produces in these circumstances and more importantly provides the parties with an understanding of the full breadth of documents that the Respondent has obtained, subject of course, to any obligations of privilege or appropriate confidentiality. This should mean that if a party is aware of a document that it considers comes within paragraph 8.7 but the Respondent has taken a contrary review and therefore not included it on its schedule of documents under 8.7, this can be challenged.

69. In terms of the breadth of the collection of documents, in this matter the Court was helpfully provided on request, with 2 of the 3 Section 23 Notices that were issued to SCTG. The dates of the Section 23 Notices were 14 June 2017, 15 July 2017 and 4 May 2018. These notices were widely drafted and in line with the submissions of the Respondent that no decision had been made about what findings would be sought and against whom when they were issued. Counsel for the Respondent explained that the gap between the second and third Section 23 Notices was because

of the amount of documentation that had been provided and the need for it to be considered. In this case Section 23 Notices cover all the documentation provided by SCTG. The Respondent should consider whether as a matter of course (subject of course to obligations of confidentiality and privilege) whether the Section 23 Notices should be disclosed and/or providing a statement when the disclosure is produced of what steps have been taken to obtain it. It may assist in resolving unnecessary concerns about the nature of the investigation in cases like this where the Appellant did not see the Section 23 Notices as he was first on garden leave and then no longer employed by SCTG when the notices came in.

70. The Appellant says that an example of the failure of the Respondent during the investigation to disclose documentation or to appreciate the information given by the Appellant or have an open mind by an example found at paragraph 14 of the Decision where the SDM says as follows:

> *That being so, I apply the following approach to Mr Kelham's Third Witness Statement:*
>
> > *a. For the reasons set out above, where there is contemporaneous documentary evidence as to material events I am guided by that evidence, which is a much surer guide than recollection provided several years after the material events and in response to a draft Minded To Notice, which itself identifies the provisional views of the Decision-Maker as to the Respondent's conduct;……*
> >
> > *c. In relation to Mr Kelham's visit to Country A in December 2012 in respect of which there is no such contemporaneous documentary evidence, there is no good reason not to accept Mr Kelham's evidence in his Third Witness Statement (albeit I remain mindful of the limitations imposed by the passage of time and the dangers of inadvertent reconstruction)…*

71. Further, at paragraph 49 of the Decision where the SDM finds:

> *49. In circumstances where (i) it is not in dispute that Mr Kelham did indeed visit Company A in Country A in late December 2012 and attended a Board meeting, (ii) there is no contemporaneous documentary evidence to contradict such evidence, and (iii) such evidence is broadly consistent (or at least is not materially inconsistent) with Mr Kelham's evidence in interview in November 2018, I accept such evidence and find that such events took place.*

72. The Appellant says that this demonstrates that the Respondent has failed to act in a fair and balanced way by seeking findings that went to the underlying circumstances in which the Country A Transfers were accepted and the acceptance of the Country A Transfers pursuant to a "grandfathering" arrangement. I disagree. This submission fails to recognise that the Respondent is one body. The Respondent includes the SDM. When the SDM came to the conclusions that he did, he did so as the Respondent. Rather than demonstrating a failure of the process to the detriment of the Appellant it shows that the SDM by rejecting the case put forward by the Enforcement Division is exercising an independent mind in his considerations as he should do.

73. The Appellant also says that the GFSC has failed to act fairly and properly as a prosecuting body. The Appellant accepts that that the proceedings before the SDM are not criminal, quasi-criminal or civil proceedings. However he says that the proceedings are potentially penal due to the sanctions that the GFSC can impose upon an individual which may well adversely affect the entire future career and employment prospects of a party. The burden upon the party facing regulatory proceedings is significant. Due to their significance despite not being criminal proceedings, they should be treated in the same way i.e. that in a criminal prosecution the Defendant cannot be convicted of a charge other than which appears on the indictment. Furthermore, in civil proceedings it is not open to the judge to reach a conclusion that a case has been made out, unless that case is the one for which a party contends and which has been pleaded. The Appellant relies

on a statement by Lord Dyson in *Nada Fadil AL-Medenni v Mars UK Ltd [2005] EWCA civ 1041* where he says:

> *"it is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the Judge is to adjudicate it on those issues alone".*

74. Again he says directors' disqualification proceedings or at least their effects are analogous to these and thus the comments of Falk J in *Keeping Kids Company* at paragraph 798 are apposite:

> *"the Defendant should be able to ascertain with clarity exactly what the allegations are and on what evidence the Applicant intends to rely, and there is a duty not to overstate this case against the Defendant, to put it in a balanced way, and not to omit significant evidence in their favour".*

75. Thus, when considering the proceedings undertaken by the Respondent, the court should expect as a matter of procedural propriety that "charges" or "allegations" are made with clarity and specificity so that the party can understand the case he needs to meet. Further, the Appellant says that any changes to them should require formal amendment. This is part of the fairness and natural justice that should be a requirement of regulatory proceedings. Whilst the Respondent is master of its own procedure it does not give the GFSC untrammelled power to do what it wants and must tailor its approach in light of those requirements.

76. The Appellant says it is necessary to consider the steps in the enforcement process. The Enforcement Division discloses to the party the dER and all of the relevant information on which it proposes to rely in asking the decision-maker (see paragraph 8.2 of the Guidance Note). The party is then asked to respond providing any additional information it considers to be material or relevant to the matter. All comments and material received will be considered and evaluated prior to the FER being produced by the Enforcement Division. It is this report that is presented to the Case Review Panel (the "CRP"). The CRP will review the matter and decide whether the initial proposed sanctions should be varied, and whether referral to a decision-maker remains appropriate. If the CRP decides that the matter should proceed to a decision-maker, the FER will be provided to the party (paragraph 8.5 of the Guidance Note).

77. In this case the allegations did not change between the dER and the FER. The CRP referred the matter to the SDM, this the Appellant says is the equivalent of a decision to prosecute on the basis set out in the FER. The Guidance Note provides that any settlement (including significantly any discount for settlement) will be based on these allegations. These were the allegations that the Appellant sought to "defend". The Appellant argues that the Respondent's obligations require the GFSC to be limited to the allegations in the FER because the entire process proceeding it, is based on and tied to the allegations made therein by the GFSC. The SDM is bound to find or dismiss the allegation put forward by the Enforcement Division. His failure to do so is a breach of his obligation to act fairly and properly as a decision making body. To argue otherwise is tantamount to the Respondent arguing that the particularised allegation made by the GFSC is somehow irrelevant and as long as the underlying facts justify some adverse regulatory finding that is all that is required. The Appellant says that this is not fair, reasonable, or just given the provisions of the Guidance Note. It is contrary to natural justice for the Respondent to argue that as the Appellant has an opportunity to respond to the amended or new allegation, there is no prejudice to the Appellant. It is fundamental to the requirements of natural justice and fairness that this sort of amendment or new allegation is not to be permitted otherwise he says this makes a mockery of the process.

78. As the Appellant says, the Guidance Note sets out that it is a general guide to the way in which the Respondent approaches the exercise of its statutory powers which involves the exercise of the Respondent's enforcement powers. The Guidance Note states that the objective is to enable those

affected to understand where they are in the process. It also says that it is designed to ensure that each decision has been arrived at in accordance with the principles of natural justice, is proportionate and reasonable based on all relevant information. As I have already said I do not consider that the ***Keeping Kids Company*** case is of assistance in this matter. The Guidance Note states at 1.3 "*the Commission is not a judicial body"* but that it undertakes quasi – judicial functions. As the Appellant acknowledges at paragraph 1.3 goes on to say "*whilst the Commission is not bound to follow fixed rules of procedure in reaching decisions, it must follow principles of natural justice and fairness. In doing this, the Commission is the master of its own procedure*". Nevertheless, in considering the Appellant's submissions, it is necessary to set out further relevant paragraphs from the Guidance Note:

a. The process of selecting the SDM is set out at paragraph 1.5:

"the SDM will be chosen from a panel of SDM's that have been selected to exercise the Commission's power of consideration, determination and sanction in respect of Enforcement Powers under the Regulatory Laws ("the SDM Panel"). The SDM will have all applicable Enforcement Powers with the exception of any powers to revoke, cancel, suspend or withdraw a licence authorisation, registration, commission or consent to make an application for the winding up of a body corporate".

b. Further, as set out in paragraph 5.3 the Guidance Notes says, as follows: -

"in most circumstances the Decision Maker will follow the process described in this Guidance Note, but will otherwise conduct itself in the manner that it considers suitable, in order to enable it to determine the matter fairly and expeditiously. Throughout the process all decisions made by the Decision Maker shall be made in accordance with the over-riding objective of ensuring that the final decision is fair, reasonable and proportionate. Thus, the Decision Maker also has the ultimate discretion in how a matter should be conducted."

c. At paragraph 11.3 of the Guidance Notes it says, as follows: -

11.3 after considering the Enforcement Report, the evidential documents provided and any further information provided, pursuant to paragraph 11.1.1 or 11.12, the Decision Maker may:
11.3.1 decide it is minded to take the recommended enforcement action;
11.3.2 decide that it is minded to take some other enforcement action;
11.3.3 decide to take no enforcement action; or
11.3.4 refer the matter to a person with the authority to take the appropriate enforcement action.

d. At paragraph 12.5.15 in relation to the Meeting:

The process is intended to be interactive rather than adversarial in nature. For the avoidance of doubt, court rules, process and procedures do not apply. Whilst a party may instruct a lawyer to assist them this does not make the process of the meeting judicial.

e. At paragraph 13 headed Deliberations of the Decision-Maker, the Guidance Note provides:

13.1 The decision-maker must consider any representations made in response to a "minded to" notice before giving further consideration to the decision that has been proposed.

> *13.2 The Party and the Principal Executive Officer will be given an opportunity to comment on any new information or matters that emerge during the decision-maker's deliberations. In such a case, the decision -maker may delay taking its final decision for a reasonable period to allow the person(s) concerned to make comments, while still ensuring that matters are deal with expeditiously.*

79. Comparisons to a criminal prosecution (or referring to the GFSC as a prosecuting authority) or using adversarial private civil litigation comparisons are not useful. In *Chick v Guernsey Financial Services Commission* [2020] GRC035 Sir Richard Collas the then Bailiff held:

> *52. The sanctions that were imposed, a fine, a Prohibition Order preventing Mr Chick from conducting a regulated activity, and a Public Statement are classic disciplinary sanctions liable to be imposed on professional people. The legislative intent no doubt included a deterrent and punitive element but the level of the fine was assessed having regard to Mr Chick's means to pay. Importantly, there was no risk of non-payment being enforced by a committal to prison through the criminal courts. Section 11D (6) of the FSC Law provides that any penalty imposed under section 11D is recoverable by the Commission as a civil debt; the Commission does not possess its own enforcement powers.*
>
> *53. Furthermore, the legal rules in question are not in the nature of those that are usually protected by the criminal law. The proceedings are comparable to those in other jurisdictions which are considered to be disciplinary and regulatory in nature.*
>
> *54. In conclusion on this issue, I am satisfied that the procedures are not criminal or quasi-criminal in nature…"*

80. I concur with the learned Bailiff's conclusions that these are not criminal proceedings however nor are these civil proceedings. The *Nada Fadil Al-Medenni v Mars UK Ltd* case relied on by the Appellant has no relevance to these proceedings. Unlike private law proceedings: these are regulatory proceedings brought in the public (not private) interest, they are interactive and despite the robust manner in which they are conducted, are not part of the adversarial system of civil litigation.

81. The words of Lord Diplock in *Bushell v Secretary of State for the Environment [1981] AC 75* at page 95 are apposite:

> *"In exercising that discretion, as in exercising any other administrative function, they owe a constitutional duty to perform it fairly and honestly and to the best of their ability, as Lord Greene M.R. pointed out in his neglected but luminous analysis of the quasi-judicial and administrative functions of a minister as confirming authority of a compulsory purchase order made by a local authority, which is to be found in B. Johnson & Co. (Builders) Ltd. v. Minister of Health [1947] 2 All E.R. 395, 399-400. That judgment contains a salutary warning against applying to procedures involved in the making of administrative decisions concepts that are appropriate to the conduct of ordinary civil litigation between private parties."*

82. Without repeating the relevant paragraphs of the Guidance Note, as it makes clear where an SDM is appointed in enforcement matters, the decision of the SDM is the end of the decision making process which is neither civil or criminal in character. The SDM is still part of the process as an officer of the GFSC. It is clear from paragraph 11.3 it is open to him to take other enforcement action other than that set out in the FER nor is he confined to those allegations that have been set out in the FER. The question for me in relation to the grounds of appeal where the challenge is made by the Appellant on the basis that there has been a material error of process where the SDM

has not taken the enforcement action set in the FER but other action, is whether the Appellant had an opportunity for a full and fair response to any changes that emerged after the FER. I will consider this further in relation to the specific ground of appeal of material error below.

Individual Grounds of Appeal
Country A Transfers

83. The Appellant appeals at paragraph 6 of his grounds of appeal on the basis that the SDM made material errors in procedure in coming to his conclusion at paragraph 364 of the Decision where he finds that the Appellant had *failed from January 2014 to July 2016 to ensure that there was an effective and timely programme to identify and remediate the deficiencies within the Country A transfers, such that he allowed and caused STG to be in ongoing breach of Regulations 3,4,5 11 and 15, is the result of a series of material error as to procedure.*

84. The Appellant asserts that the only relevant allegation made in the FER was expressly limited to the time period "*between June 2013 and February 2014*". He says that this must have been after careful consideration of the Enforcement Division. Acting in accordance with requirements of natural justice and the Guidance Note, it was not open to the SDM to make a finding in respect of an entirely different and much longer time period than had been alleged in the FER. Similarly, the allegation made in the FER was particularised as being in a breach by the Appellant of "*guidance 3.4 of the Code of Corporate Governance*". Therefore, the Appellant says that it was not for the SDM to make findings in respect of breaches of Regulations 3, 4, 5, 11 and 15 instead. Further, in circumstances where the SDM found at paragraph 376 of the Decision that paragraph 3.4 of the Code of Corporate Governance is intended to be reflective of the fiduciary duty of a Director to act in the best interests of the Company, the only relevant allegation made in the FER was bound (as a matter of law) to fail because no evidence was produced to support such a finding and no allegation was made that the Appellant had failed to meet the subjective test. Therefore, the Appellant argues that it is not open to the SDM to substitute a new suite of allegations and then make findings based on those allegations to remedy an allegation that was always bound to fail. The Appellant says not only should the SDM not have made the decision but also that the facts do not support it.

85. The Respondent says that the SDM is not bound to the terms of the FER but in any event the FER sets out the breaches by SCTG in respect of Regulations 3, 4, 5, 11 and 15, and at paragraph 326 of the FER expressly concludes that Mr Kelham was culpable because he failed to ensure that SCTG complied with these Regulations and at paragraph 301 of the FER that the Appellant failed to ensure that SCTG complied with the requirements of Regulations 11 and breached Rules 27 and 28.

86. The Appellant raised the similar contentions that he now relies on appeal in his representations before the SDM however as the SDM set out at paragraph 374 of the Decision, "*those submissions proceeded on an erroneously narrow reading of the ambit of the Enforcement Report. But in any event, for reasons set out above such submissions fail to take into account the underlying nature of the process whereby (i) the SDM brings an independent mind to bear in deciding, what if any, form of enforcement action to bring (ii) a full and fair response to the draft and final minded to notices as then afforded to the Respondent*."

87. I do not agree with the Respondent that these allegations were set out in the FER. They are not the same although some of the constituent elements are the same. However, as I have already found it is open to the SDM to make findings other than those set out in the FER therefore he was not bound by those allegations. I also consider that the Appellant did have a full and fair opportunity to respond to these allegations that became the findings in the Decision. They are contained in the SDM's draft Minded to Notice and in the final Minded to Notice. The Appellant was able to respond in the form of written submissions and oral submissions at the Oral Meeting as well as in his witness statements. I therefore conclude that the SDM acted within his powers and did so reasonably. He did not make a material error as to procedure in relation to his conclusions at paragraph 364.

88. It is also important to take into account that whilst the SDM concluded that the Appellant had not breached 3.4 of the Code of Corporate Governance, this should not be taken out of context from paragraphs 376 -379 and in particular paragraph 377.

> *This is not a claim by SCTG against Mr Kelham and Ms Sarre as directors; nuanced legal points as to the distinctions between fiduciary and tortious or contractual duties do not arise. This is an enforcement action aimed at determining whether Mr Kelham and Ms Sarre failed to meet the requirements of the Minimum Criteria for Licensing.*

89. As I will reiterate on a number of occasions in this judgment, the SDM's Decision must be read as a whole as it sets out the entire background as well as how it is the SDM has come to the findings that he has.

90. The Appellant further appeals under paragraph 7 of his grounds of appeal that the findings in paragraphs 364 of the Decision is the result of a number of material errors as to the facts at earlier points in the Decision. Also, the Appellant says that in his conclusion at paragraph 351 of the Decision, the SDM found that rather than making the findings that the Enforcement Division sought in relation to the acceptance of the Country A Transfers, the Appellant acted properly. Having done so, the Appellant says the SDM must judge the Appellant's actions in the context where there is no suggestion that the Appellant is at fault for the situation that SCTG found itself in.

91. The first factual error he says is found at paragraph 114 of the Decision where the SDM states:

> *A Board meeting followed on 30 April 2014. There is no record of any consideration of the Country A and the need for their remediation. The minutes do though record:*
>
> *[Q, Global Head of Investment Advisory & Client Segment Management] enquired as to whether TJK as CEO was comfortable that the processes are being followed and the various groups/committees are working properly. TJK confirmed that they were but added that there are a lot of manual processes …*

92. The Appellant says that the implication from this finding is that the Board was not made aware at this juncture of the need for remediation and that it was the Appellant who had not informed them. He says that the board minutes were not a verbatim note of everything that was discussed. He criticises the SDM for not relying on other evidence which would show that the Board was aware. He says that the SDM was not provided with any of the reports to the Board Meeting for this particular meeting due, the Appellant says, to the deficiencies of the investigation and/or disclosure.

93. He says that the assertion by the Respondent that the reports to the Board for the 30 April 2014 meeting were not produced because the Appellant never requested them is "*outrageous*". He says once it was apparent that the Appellant was contending that the Country A remediation programme was discussed at a board meeting prior to May 2015 which he did in his Third Witness Statement, the Respondent should have disclosed the reports. The Appellant says that the only available conclusions are either that the Respondent does not have the reports or does have them but decided for itself not to disclose them, despite their clear relevance: the former would reveal the poor investigation; the latter would reveal wholly reprehensible conduct. Further that the Respondent should explain to the Court which it is.

94. Advocate Jones took me to the SCTG Breaches Errors and Omissions register which was part of the evidence before the SDM (he refers to it at paragraph 102 of the Decision) which records on the 8 April 2014:

> *"As part of the sale of Company A, the administration of a number of managed client entities was transferred to Standard Chartered Trustees Guernsey. It was understood that SCTG's take-on process was partially waived. A full review was to be undertaken within an agreed time frame. Subsequently, some potential gaps were identified during compliance monitoring and a full review of all business transferred from Company A in preparation for submission to SCTG's Client Committee has been initiated."*

95. There is also an undated entry[4]:

> *Esclated (sic) to Board. Client Committee have discussed all 'Country A Project' structures. Notified to the GFSC with regular updates. Project expected to be completed by end of September 2015.*

96. Advocate Jones then referred to the board minutes on 30 April 2014 which says that Ms Sarre presented the Breaches Errors and Omissions Register which was considered by the Board with "*no issues arising*" and to the Appellant's Third Witness Statement says:

> *I certainly recall that the issues with the Country A Transfers were discussed at a Board Meeting before the Commission visited SCTG, but, it may well be the case that for whatever reason, that discussion was not documented in the Minutes. That does not, however, mean that the discussion did not take place.*

97. Further, he says that the conclusion of the SDM is contrary to the evidence of C which was that the Board was aware of the remediation process in mid-2014.

98. In considering this ground of appeal I will deal first with the submission that the Appellant acted properly in relation to the acceptance of the Country A Transfers, I find that this is not an accurate summary of the SDM's conclusion at paragraph 351. Rather the SDM found it was too early on in the Appellant's tenure as CEO and Managing Director of SCTG for him to have responsibility for the mistakes that were made in the decision that SCTG was to accept the Country A Transfers.

99. Further, I do not consider that the Appellant's complaint in relation to paragraph 114 is made out. The Appellant is complaining about his construction of what this finding implies rather than what the SDM actually says in the Decision. The SDM is simply recording at paragraph 114 what the board minutes did or rather did not say and it is reasonable for the SDM to rely on the board minutes as a record of the meeting even if not a verbatim record. There is no proper basis for the complaints that the Appellant raises about additional documentation given the actual finding of the SDM at paragraph 114. Further, the Appellant does not say how in fact these additional papers may have helped his case. Nor do I see how the fact that Ms Sarre presented the Breaches Register "*with no issues arising*" assists the Appellant's case. The SDM's conclusion at paragraph 114 was a reasonable one for him to come to on the evidence before him. Further, whilst the Breaches Errors and Omissions Register was included as an agenda item for the Board, according to the response to dER from SCTG which the Appellant had the opportunity to comment on, the Register was not provided as part of the packs for the meetings. In any event, there was no specific mention in the board minutes of the issue other than as referred to by the SDM nor any sense of the size of the task.

100. The Appellant also says that the finding at paragraph 118 of the Decision is wrong or unsafe. Paragraph 118 records that:

> *Although it is right to note that the RMP was self-identified to the Commission by those at SCTG (including Mr Kelham), it is also the case that the RMP did not reveal the true severity*

[4] It was accepted during the hearing that it was not known when this entry was completed.

of the issues faced by SCTG – as set out in the history recounted above, particularly in relation to (i) the state of the Country A Transfers and the ongoing delays in remediating the underlying files, and (ii) the adverse consequences of the continuing failures to address the lack of staff resource and to progress the new IT Platform timeously on the ability, within SCTG, to implement policies, procedures and controls in relation to CDD and AML.

101. In submitting that the SDM is wrong, he relies on the letter dated 27 June 2014 from the GFSC following their attendance at SCTG on 13 and 16 May 2014 where the remediation was raised where the GFSC noted that "*the Firm had a number of self-identified ongoing risk mitigation programme work streams*". The Appellant also complains that the lack of notes from the May 2014 visit means that the SDM was reliant on the draft RMP to inform the SDM about what the GFSC garnered from the visit. He says that the absence of these notes is unfair. The Appellant says there must have been pre-visit preparation and documentation that must have been done by the GFSC which would give a clearer idea of what the GFSC knew also what the Appellant says that they must have been told during their visit. The risk mitigation work streams from Sarah Sarre (dated 20 June 2014) included the 10 point Remediation plan (the RMP). The Appellant also says that the RMP was a plan designed to be implemented over a period of time. At that point the RMP could not reveal the true extent of what was needed because no one knew prior to the work actually being undertaken what would be the full extent of the work that would be required by individual client structures or the scale of the problem.

102. Again in considering this ground of appeal it is important to look carefully at what the SDM said and to look at in the context of the overall conclusions. The Respondent is correct where it submits that although the Appellant relies on this alleged error to support his appeal against paragraph 364 (he also refers to paragraph 362 in his skeleton argument), paragraph 118 is about revealing the extent of the issues to the GFSC, whereas the conclusion of the SDM at paragraph 364 goes to the alleged failings of the Appellant to ensure that there was an effective and timely programme.

103. In any event, it is axiomatic that the GFSC's knowledge of the situation was based on the information provided to it by SCTG. As the Respondent says in its letter of 27 June 2014 to SCTG *"[SCTG] had a number of self-verified ongoing risk mitigation programme work streams*." The Appellant's submissions fail to take into account that the expectation is that regulated businesses will be open and transparent to the Respondent. It is reasonable for the SDM to conclude that there is no evidence that the GFSC knew more than that contained in the RMP and in any event it is the RMP produced by SCTG that the SDM has found to have minimised the true state of affairs.

104. As the Decision makes clear, when he comes to the conclusion "*that the RMP did not reveal the true severity of the issues faced by SCTG*", the SDM has taken into account the emails that are being passed between the officers of SCTG including from the Appellant which described the situation as *"a very poor state of affairs and rectification and remediation work has and is ongoing to bringf [sic] them up to Country X and Guernsey local standards."* at around the same time. Also, the fact that the RMP did not reveal the true severity of the issues is to some extent acknowledged by the Appellant (without accepting that this should have been known) when he submits that no one knew prior to the work actually being undertaken what the full extent of the work which was not finally completed until January 2016. The SDM did not make a material error of fact and the finding is a reasonable one on the evidence before the SDM.

105. The Appellant also says that the SDM was wrong (or it was an unfair conclusion) to find at paragraph 141 of the Decision that the GFSC was not informed in the Appellant's letter dated 5 January 2015 of the severity of the issues on the Country A transfers and of the true scale of the outstanding remediation exercise.

106. The Appellant says that at the meeting on 19 December 2014 there was a verbal update. He says that the state of the RMP must have been discussed at this meeting and after receiving the late provision of the minutes by the Respondent, that this is supported by the minutes. In submissions

before the SDM the Appellant said the importance and seriousness would have been apparent from the seniority of those who attended. No SDM could properly have reached the conclusion that the SDM did at paragraph 141 if he had known about, and properly taken into account, the December meeting to which the letter is expressly stated to be a follow up. Read in its proper context, therefore, the Appellant's letter dated 5 January 2015 was intended to do no more than provide a summary of what progress had been made with the RMP, as had already been discussed in person with the GFSC, which included informing the GFSC that the process was still underway (and had not been completed in September 2014 as had previously been hoped). This the Appellant says undermines the SDM's conclusion or at least renders it unsafe as the Respondent was aware of the severity and the scale of the outstanding remediation exercise.

107. The Respondent says that *"unfair"* is not a ground of appeal. Further, that the SDM was entitled to come to the conclusion that he did in relation to this paragraph on the evidence before him and the minutes which are very brief do not advance either party's case. Further the SDM did not have the benefit of the Appellant's own evidence on the meeting in his Third Witness Statement. I do not accept this latter point as the Appellant's position on the Meeting was within the written submissions of the Appellant before the SDM.

108. Again it is important to focus on what the SDM found at paragraph 141. It was that the letter dated 5 January 2015 did not inform the GFSC of the severity of the issues on the Country A transfers and of the true scale of the outstanding remediation exercise. The SDM's finding is a reasonable one for him to have made. In any event paragraph 141 must be read in the context of the following paragraphs for example paragraph 142 of the Decision which sets out a very different assessment by a SCTG officer to the Appellant of the current state of affairs only 3 weeks after this letter. The minutes which the SDM did not have but that were subsequently provided do not in my view assist the Appellant or the Respondent save that although the remediation was mentioned at paragraph 2.3 where the minutes report "…*He also explained how SCTGL were fulfilling the Risk Mitigation Plan*". There is no sense that as a consequence of this meeting the GFSC was aware of the severity and the scale of the outstanding remediation. I have therefore come to the conclusion that the Appellant has failed to show that the SDM made a material error. The finding was a reasonable one for him to come to (the Respondent is right to say that the test is not unfairness).

109. The Appellant further appeals on the basis that the SDM was wrong (or at least the factual conclusion was unsafe) at paragraph 161 of the Decision where he concludes that the Appellant's letter of 5 October 2015 to the Respondent (which is set out at paragraph 160) "*did not bring home the severity of the issues encountered in respect of the Country A Transfers."*

110. The Appellant says that the letter clearly informed the GFSC that 18 months after the RMP had been initiated, there still remained some 8 (out of 51) structures with deficiencies that were still being addressed and that those deficiencies could only be addressed through co-ordination with local business and relationship risk management teams. Therefore, the Appellant says the Respondent was being told about the delays that had occurred, of the number of issues that remained to be resolved, and of the reliance on others for the required information to resolve the issues. The Appellant says that there was no evidence before the SDM that the Respondent considered that it had not been properly informed at this time about the scale of the issues with the Country A transfers, nor was any such allegation made in the FER. The Appellant asserts that some consideration must have been given by the GFSC staff who received this letter (and he says it is likely that some internal GFSC report was prepared) but no documentation has ever been produced by the GFSC. The Appellant therefore remains in the dark as to the state of knowledge of the GFSC as the result of this letter. The Appellant asks in effect what didn't the GFSC know about the severity of the issues that was not revealed by this letter?

111. Here again, the careful deconstruction of the findings of the SDM by the Appellant mean that the Appellant's submissions fail to take account the context of the paragraphs that follow paragraph 161 in the Decision. In particular, the SDM records at paragraph 163 of the Decision that:

> *The Country A Remediation Project was treated within SCTG as completed in January 2016, some 2.5 years after the first of the Country A Transfers were received in July 2013. However, by email as late as 5 July 2016 (13.32) to the Commission, Ms Sarre attached a "Country A transfer list ... with details of CAR tracker items highlighted in red" which showed that 6 out of the 51 structures had still not been fully remediated and indeed for 4 of them significant requests for necessary CDD were still outstanding. Accordingly, the reality is that, at the point when the decision was taken in July 2016 that SCTG would be closed, the Country A Remediation Project had not completed.*

112. At paragraph 161 the SDM is not saying, as the Appellant appears to have interpreted it, that the Respondent was aware in October 2015 that the situation was worse than the update revealed. Nor to be clear is this misplaced hindsight. Again, the GFSC was reliant on the Appellant in his dealings with the Respondent to provide it with the full and accurate description of the situation. The SDM was entitled to conclude that the letter of 5 October 2015 did not bring home the severity of the issues given the lack of progress that still had not been made by July 2016, and the reality of the lack of progress taking into account the value of the assets this represented. He was also able to take into account in his Decision that at the time the Country A remediation project was treated as completed in Jan 2016 but when SC Group took the decision to close Guernsey in July 2016, 6 out of 51 matters had still had not been remediated 4 of which were significant. Further in 2018 the Compliance Company review highlighted structures that could not be remediated due to lack of CDD or SOW etc. As I have already found he is not bound by the allegations in the FER. His conclusion at paragraph 161 was a reasonable one for him to come to on the evidence before him (unsafe is not an appeal ground).

113. The Appellant says that further factual errors are present in the SDM's decision and therefore he appeals on this basis in relation to the SDM's conclusions at sub-paragraphs 363a and 363b where he finds:

> *Mr Kelham's failures are not ameliorated or excused by the imposition of the internal block on dealings in November 2014:*
>
> *a. First, the internal total block was only imposed more than a year after receipt of the Country A Transfers;*
> *b. Second, transactions will have been occurring on structures received as part of the Country A Transfers in the intervening period without all outstanding verification data and CDD documentation being obtained;*

114. The Appellant says that the SDM knew but did not refer to the fact that the Appellant had imposed an internal transaction specific block prior to the November 2014 block referred to in the oral submissions at the Oral Meeting and in his Third Witness Statement. His evidence he says is that from the time of receipt of the Country A transfers, "*he imposed a block on any transaction unless and until satisfactory documentation was obtained for that particular transaction*." The SDM should have referred to this and either accepted the Appellant's evidence or said why he did not. Nevertheless the Appellant accepts that there is possible inference of this transaction specific transfer block at paragraph 138 of the Decision. Although this evidence from the Appellant is contained in the Third Witness Statement but not in any contemporaneous evidence, the Appellant argues that this should be viewed in the same way as the SDM dealt with the introduction of the Country A Transfers and therefore rely on the evidence from the Appellant's Third Witness Statement. The Appellant says that there is no evidence that any transactions were effected by SCTG for clients who were in default in relation to CDD or EDD save for one. The Appellant said the findings and conclusion should distinguish between regulatory failings where transactions have taken place when none should have done so, and failings that were properly managed and ameliorated by other steps that were taken (such that no contravening transaction took place, nor

was there any risk of that). The Appellant says that the latter is the case here, but the SDM proceeded as if it was the former.

115. The Respondent says that the conclusions of the SDM are supported by the contemporaneous evidence. The email of 12 November 2014, drafted by the Appellant which makes no reference to any existing block. In any event, the GFSC says it is plain from the email that whatever action he had taken earlier was ineffective hence why the Appellant was forced to state that:

> "*…earlier this afternoon, I have decided to impose a blanket BLOCK on any activity…*"

116. Accordingly, the SDM was entitled to reach the conclusion that the email of 12 November 2014 did not excuse any prior failings. The SDM's conclusion in respect of the transactions was correct because one transaction did in fact proceed. Further the Decision makes clear, the regulatory failings of SCTG were not *'...properly managed and ameliorated...*'. The decision of the SDM is a reasonable one and the finding of the SDM is one which was open to him.

117. To consider this appeal ground, I start at paragraph 138 of the Decision, where the SDM sets out by reference to the November Block

> "*Mr Kelham then decided to impose a block on transactions (i.e. distributions) on any Country A Transfer absent express authorisation. So, whereas previously, only the outstanding CDD material to facilitate a particular distribution had to be obtained, from this point no distribution could be made without all outstanding CDD material being obtained*."

118. The written representations the Appellant made to the SDM were as follows:

> a. *At the outset the internal block required that SCTG be provided with the specific CDD/KYC information that was necessary in order for the particular requested transaction to be effected*.
>
> b. *Then, under the terms of the 12 November 2014 email from Mr Kelham, the internal block was expanded in effect, so as to require all outstanding CDD/KYC information for that client file to be provided to SCTG prior to the transaction being effected*.

119. I therefore consider that the Appellant is incorrect to say that the SDM has ignored or forgotten this element of the Appellant's case (even though other than the written submissions there was no other evidence that this internal transaction specific block was in place) as he has effectively summarised what the Appellant has said in his written submissions. Further, sub-paragraphs 363a and 363b must be read in context of the paragraphs running from 361 under the heading "*the wrongful failure to ensure remediation of the Country A Remediation Project*" rather than de-constructing these sub-paragraphs from the remainder of this section. In this section of the Decision, the SDM sets out the reasons why between January 2014 and July 2016 he found that the Appellant had failed to ensure there was a proper remediation programme and why the internal block of November 2014 was not a sufficient step to counteract this failure. Having done so, it was not necessary for the SDM to say more explicitly than he had done already at paragraph 138, that the less significant measure that was already in place with regard to specific transaction CDD/KYC was not adequate, particularly given the Appellant's own wording in the email of November 2014. The SDM refers to a transaction that occurred on a structure received as part of the Country A Transfers without all outstanding verification data and CDD documentation being obtained at paragraph 137 of the Decision. This, he said, served as an example "*to highlight the severity of the underlying issues*". Therefore, I have come to the conclusion that the Appellant has failed to show that the SDM's conclusions at 363 a and b are material errors as to the facts. The SDM was entitled to come to the conclusions that he did on the basis of the evidence before him. Further, I agree with the Respondent that contrary to the submission of the Appellant, the

SDM makes clear in his Decision that he did not consider that the failings were properly managed and ameliorated and he was entitled on the evidence before him to come to that conclusion.

120. The Appellant also appeals at paragraph 8 of his grounds of appeal that the finding made at paragraph 364 was unreasonable. First, in circumstances where it is clear that (i) the creation of the programme for the remediation of the Country A Transfers was known to and approved by the Board of SCTG and (ii) the implementation of that programme was closely supervised by the Board of SCTG, it was necessary for the SDM to address the submission that was made to him that the GFSC must explain, and the SDM must be satisfied with that explanation, as to why (in circumstances where the relevant decisions were made by, or at least known to and agreed with by, the entire Board of SCTG) it was the Appellant alone who was considered to have failed to meet his regulatory obligations in relation to the Country A transfers. The Appellant complains that no explanation was ever put forward by the GFSC as to why the Appellant alone out of the members of the Board was considered unfit and says that the SDM does not anywhere address this striking omission. The Appellant distinguishes between a complaint by the Appellant about the unfairness of being singled out for regulatory action (which he says it is not) and a complaint about the need for the GFSC (and the SDM) to be able to explain why (when all of the members of the Board were aware of and involved in and oversaw the remediation programme), it is only the Appellant who is said to have failed in his responsibilities and to have had sole responsibility for this.

121. He also says that the Decision is unreasonable where SCTG was in a position (unlike in relation to a new client) of already having been appointed trustee/director of the structures that had been transferred from Company A. SCTG could not, therefore, turn the client away unless and until the required information was produced as it had already taken the client on.

122. He also says the Decision at paragraph 364 is unreasonable because SCTG was not in a position where it had (as it would have done had it been a standalone entity) any direct contact with the clients in question. Rather, those who had the contact with the clients were the RMs at the PvB, and it was those RMs who SCTG would need to push to obtain the required information and who had little incentive to do so properly. The Appellant says that the SDM had to answer (with proper reasons) the question as to what it is that the Appellant ought to have done but failed to do.

123. Further, the situation was exacerbated by the fact that the M office of the PvB (which had mainly dealt with Country A clients) had been closed, thus even the RMs did not have much of a relationship with the clients. Therefore the Appellant says, even if the RMs were inclined to try to resolve the issues raised by SCTG, they were likely to face their own problems in approaching clients who were essentially new to them.

124. The Appellant says he sought to create an understanding within the SC Group as to the importance of the required information being produced to SCTG by involving both the Group business (in the form of A, Global Head of Trust and Fiduciary and also his replacement, R) and the Group compliance functions. The Appellant says it was due to his efforts that there was an increased allocation of staff resource to assist SCTG resolve the issues with the Country A files. In particular, D who drove the remediation process forward. The Appellant ensured by the original block that SCTG refused to action a transaction requested by the client (via the RM) unless and until the required documentation was produced. This leverage was increased with the complete block commencing on 12 November 2014 as set out in the Appellant's email of that date, driven by the Appellant's recognition that the Country A Remediation Project was not running to the timetable that he (and the Board) had wanted which had been to complete it by August 2014 and then by the end of November 2014. He says the Country A issues were discussed "in detail" at the (presumably October 2014) SCTG Board meeting. The Appellant says "presumably" because he says the GFSC has not disclosed those Board minutes. The Appellant says that the Board was concerned, and that there needed to be a change of approach.

125. The Appellant says that there was little else he could do other than to use (i) his line of communication to R (as Global Head of Trust & Fiduciary), (ii) his lines of communication with SC Group compliance function, and (iii) to apply a more wide-ranging internal block which he did. He says he could not force RMs to chase clients for information, nor could he force the clients to provide that information. Nonetheless, he sought to use all of the tools that he had available. What the Appellant could and should have done with "*appropriate vigour*" must be explained but it is not because the Appellant's position is that it cannot be. The Appellant says that whilst it was not an unfair observation for the SDM to make that the Country A Remediation Project took longer than had been anticipated, unless some action can be identified that the Appellant could and should have taken, but did not, the mere passage of (even a great deal of) time cannot justify a conclusion that the Appellant failed in his duties in any material respect.

126. The Respondent says that the SDM was entitled to come to the conclusions that he did on the evidence before him. Whilst the Appellant inherited issues in September 2012, he had benefit of SC Group internal audit report on SCTG (the "2012 Audit") as well as the 2011 Audit. The 2012 Audit was published December 2012 (and presented to the Board by the Appellant) so he knew very early on about the heavy reliance on manual processes, paper based processes, staffing issues and staff not following group procedures on AML, CDD etc. (see paragraphs 40-42 of the Decision). He also knew the early warning system of compliance monitoring had been suspended for 11 months. In the 1 May 2013 Board Meeting the Appellant says that there is one issue to be "*closed off*" in relation to the 2012 Audit however this was inaccurate. The other issues had not been closed off, rather he had delegated the tasks to others (see paragraph 53 of the Decision). The SDM sets out in the Decision that not only was the Appellant identified by R to take on the Country A remediation role it is evident that R was not satisfied that the Appellant was doing all that he can. The reason why he had been put in charge was said by Ms Sarre in interview to be because:

> *"as Trevor is managing director, he should take overall responsibility and accountability for the project. He also has significant compliance and MLRO experience previously so it was felt that he was best placed to…"*

127. Therefore, although the SDM did not uphold the allegation that the Appellant should not have agreed to the transfers happening to SCTG, he did properly uphold the conclusion that the Appellant could have and should have executed the Country A remediation project far more efficiently and rigorously than he did. The Respondent says that the SDM is clear throughout the Decision that the reason why the findings are made against the Appellant is because of his role. The obligations and duties that he had in that role cannot be delegated up or down. Where the submissions refer to the Appellant being "*subject to the directions of his supervisors*" in the SC Group, the Respondent identifies this as where "*it has gone wrong*". He cannot abdicate responsibility for his regulatory obligations and the requirements of Guernsey Law.

128. The Respondent relies on the words of LB Marshall in *Carlyle Capital Corporation Limited v Conway Others (ibid)* to support this contention at paragraph 518:

> *It is common ground that a director is generally entitled to delegate his functions, to some degree, although he cannot delegate his "irreducible minimum" duty to oversee and monitor the affairs of the company even in areas where he may permissibly have delegated particular functions. It is also common ground that the permissible degree of delegation in any situation is fact-sensitive. The court will determine the dividing line between (in effect) permissible efficiency and impermissible abdication of responsibility. The dispute between the parties is thus, once again, a fact-dependent matter to be considered later in the context of the material evidence.*

Also paragraph 524:

> *I accept this proposition subject to the qualification that the director must examine the situation sufficiently rigorously and critically as to satisfy himself that there are no matters giving grounds for caution, enquiry or suspicion.*

129. The Respondent argues that a regulator is not obliged to take action against all directors and is entitled to exercise its discretion as to who is formally investigated and who it decides to take action against, however the Appellant's position that other directors of SCTG were in a materially identical position to him is wrong. Not only was he CEO and Managing Director from 7 September 2012, he was expressly tasked with responsibility for the Country A Transfers remediations exercise, he was the director reporting to the Board on this and he was identified in the Risk Mitigation Plan provided to the Commission as the person who was accountable for ensuring its implementation; Accordingly, rather than others being in a materially identical position to the Appellant, he was in a unique position.

130. Again in considering this ground of appeal I start with the Decision, the SDM makes clear at paragraph 347 that the SDM is "*concerned with whether Mr Kelham discharged the duties and obligations which he owed in Guernsey as the Managing Director and CEO of a licensed entity.*" He says at paragraph 348 that he finds that "*Mr Kelham has acted in breach of relevant regulations, codes and principles in relation to three aspects of his conduct as Managing Director and CEO of SCTG in the period January 2014 to July 2016*". At paragraph 415 the SDM found that "*Mr Kelham, as Managing Director and CEO, oversaw and had ultimate responsibility for SCTG during the period of contravention. It was his responsibility to ensure that SCTG discharged its regulatory duties and obligations. This Mr Kelham failed to do in the respects I have set out. Mr Kelham failed to bring sufficient independence and challenge to bear in his dealings with Standard Chartered personnel that were outside SCTG."*

131. Thus, as these paragraphs demonstrate the SDM, to the extent it was necessary for him to do so, has made it clear why it is that it is the Appellant's conduct that is being addressed by these enforcement proceedings. I agree with the Respondent's submissions that the SDM does not suggest that the Appellant had sole responsibility for this situation and in any event enforcement action was taken against SCTG. He was the Guernsey Managing Director and CEO. This is enough. In relation to these particular findings as identified by the SDM in addition the Appellant was told to drive the remediations by R and the Appellant accepts that he was given specific responsibility. Thus the Appellant can be distinguished from his colleagues on a rational basis because of his role and additionally because of his ownership of the issue. This was in addition to the "Action Owner" responsibility the Appellant had identified in the 2012 Audit. Taking action against the Appellant is not an arbitrary or a partial distinction from the other members of the Board. Taking action against the Appellant was reasonable and within the range of responses that a reasonable decision-maker might make in the circumstances.

132. The particular circumstances which surrounded the Country A Transfers including the bank led model without direct contact with the clients, the closure of the M office, the fact that these clients were already clients of the SC Group, were all challenges for the Appellant to deal with however this does not mean that it was unreasonable for the SDM to come to the conclusions that he did. Whilst he does not specifically mention the closure of the M office, the SDM recognises the context within which the Appellant was working. At this juncture I deal with the submission that the Appellant made at various points in his submissions that there is a failure by the SDM to appreciate or properly understand that SCTG operated a bank led model although he makes no criticisms of the SDM's description of what that means at paragraph 23. Contrary to the Appellant's submissions, the Decision does show that the SDM had a proper understanding of the model, however, what he did not accept is that the model meant that SCTG or in turn the Appellant as CEO and Managing Director had any lesser obligations to comply with the law and the Guernsey regulatory framework even if the business model created internal challenges for them to do so.

133. The Respondent says it is not its role to identify what action the Appellant should have taken but did not take or some action that he took but should have taken earlier. This must be right. It is the business and the directors of the business who know their business model and who must run their business subject to the regulatory framework within which they operate. The regulatory framework sets out the expected standards of conduct. Where regulated entities or their officers fall short, enforcement action is taken.

134. Further, having found that the SDM did not make any material factual errors as alleged by the Appellant in his grounds of appeal, it was reasonable for the SDM to conclude on the evidence before him that the Appellant allowed and caused SCTG to be in ongoing breach of the regulations identified at paragraph 364. The SDM acknowledges in the Decision what the Appellant did but was entitled to find on the evidence that it was insufficient. The SDM sets out in detail in the Decision the facts that led the SDM to come to his conclusion including by way of example setting out the Appellant's own emails, the emails of those members of staff tasked with dealing with the reviews (including directly after the October 2014 Board Meeting where the reaction to what was apparently agreed at the meeting was described as "*ludicrous*") and those of his colleagues (including the Appellant's line manager) describing the state of affairs in stark terms. Further, whilst acknowledging that this diminished over time as the outstanding action points on the Country A Transfers reduced, the period over which the breaches of the Regulations were ongoing was much longer than it should have been, because of the failure by the Appellant to ensure that the remediation programme was pursued with appropriate vigour. The SDM's conclusions are clear and do not require, contrary to the Appellant's submissions, a further blush or inference on what they mean.

135. Having found that the Appellant has not been successful in any of his grounds of appeal at paragraph 364, I find likewise that the SDM's conclusion at paragraph 366 that for the same reasons that the Appellant failed to meet the Minimum Criteria for Licensing under Schedule 1 paragraph 3(2)(a), (b) and (e), including that the Appellant did not act with a lack of probity, was a reasonable one for him to come to and was within the range of reasonable responses as well as being proportionate.

136. I note that in the Section 23 Notice dated 4 May 2018 which was provided shortly before the third day of the appeal hearing, there was a request to SCTG for 3 October 2014 Board Meeting minutes and Board Packs. As I have set out above the Appellant did not make any requests to the Respondent for documents. The Appellant has not shown that there are grounds for any allegation of a breach of the Respondent's obligations in relation to disclosure, however, I have no doubt that the Appellant knowing that this had been requested and the response from SCTG would have been helpful in the ongoing enforcement process.

The Country X Transfers

137. The Appellant appeals the finding by the SDM at paragraph 368 of the Decision (paragraph 10 of his grounds of appeal) on the basis that there is a material error as to procedure. At paragraph 368 the SDM found the Appellant *failed to ensure that the Board of SCTG:a. Maintained (and implemented) a sound system of internal controls to safeguard assets and manage risks, contrary to paragraph 4.4 of the Code; b. Provided suitable oversight of risk management within SCTG, contrary to principle 5 of the Code*.

138. The Appellant says that in the FER it is SCTG who it is alleged has breached the code. There is no allegation that the Appellant has breached the code nor is it said that the Appellant had any particular or specific responsibility for the failure on the part of SCTG and its Board, nor that the Appellant had himself failed in any particular respect. The Appellant says it was not open to the SDM (acting in accordance with the requirements of natural justice and the Guidance Note) to

amend the allegation in the FER (which was against SCTG and its Board) so that it forms an allegation against the Appellant.

139. I do not agree with the Respondent's submissions that this conclusion by the SDM is simply reordering what is contained in the FER. It only refers to SCTG breaching this section in this context[5], however as I have set out above the SDM is not bound to the allegations contained in the FER and it was open to him to make the finding in circumstances where he had given the Appellant an opportunity to respond to this as the draft Minded To Notice included this potential finding. Therefore, I reject this ground of appeal.

140. The Appellant says that the SDM's finding in paragraph 218 of the Decision was an impermissible finding, in light of the applicable procedural requirements. I am treating this as a ground of appeal on the basis of material error as to procedure and as to facts.

141. At paragraph 218 of the Decision the SDM makes the following finding:

> *In light of the express terms of the minutes, I find that on the balance of probabilities:*
>
> *a. The call reports for ISAR 112 were expressly referred to in Ms Sarre's presentation at the Board meeting;*
>
> *b. Ms Sarre's presentation at the Board meeting extended to the fact that, as recorded in the minutes, the client, the subject of ISAR 112, intended to move disclosable assets, being assets that had been "declared … to the authorities", into separate bank accounts;*
>
> *c. Ms Sarre's presentation at the Board meeting identified, at some level, "the imminent amnesty legislation in Country Y" (to quote the call report) because that was the basis on which assets were to be "declared with the Country Y authorities" (again, to quote the call report); this is apparent from the similarity in the phraseology of the minutes as compared to the call report; in other words, without Ms Sarre's presentation to the Board referring to the fact of the imminent amnesty in Country Y, a reference to a client wanting to move assets that had been declared to the authorities into new bank accounts would have made no sense; further, it is the fact of the amnesty that meant that the disclosing of the assets to the authorities gave rise to a suspicion of prior tax evasion; so, again, as a matter of common sense the imminent tax amnesty in Country Y must have been mentioned in light of what is expressly recorded in the minutes; it may well be that there was no express reference to the initials "YTAP" as such, but I find that there was reference to an upcoming amnesty in Country Y at the 19 November 2015 Board meeting;*
>
> *d. In short, the wording of the Board minutes is the best guide to what topics were, or were not, raised at the Board meeting; the fact that Mr Kelham and C do not recall the prospective tax amnesty in Country Y being mentioned and/or that the Board did not appear to follow up on the reference to a tax amnesty simply reflects the collective mindset within management at SCTG at the time in November and December 2015; the mindset was to downplay overarching factors, such as CRS, AEI and also the YTAP and to emphasise instead the need for "case-by-case" assessment; in any event, the determinative factor in deciding whether the imminent tax amnesty in Country Y was raised at the Board meeting is the similarity between the wording of the Board minutes and the call report cited in ISAR 112 in respect of new accounts*

[5] At paragraph 312 of the FER.

being opened for assets that had been declared to the authorities, that being strong contemporaneous evidence as to what was said at the Board meeting.

142. The Appellant says that in the FER, the Enforcement Division's case was that Ms Sarre did not tell the Board about the impending YTAP (also referred to as the tax amnesty). Rather it was the Respondent's case that the Appellant ought to have taken steps such that he acquired an awareness of the tax amnesty. The Appellant made clear in his evidence that he was not aware of the tax amnesty, but he says the allegation that he was aware of the tax amnesty at the board meeting on 19 November 2015 was never made against him, nor was it ever put to him. His evidence on this meeting was set out in his Third Witness Statement subject to his correction in the fourth witness statement. If he had been aware of the tax amnesty (which necessarily would be intended to permit taxpayers who had evaded payment of tax to put matters right), then he would have had a very different view of matters, but he was not aware.

143. Following the SDM setting out his approach to the evidence at paragraph 9 onwards, (which he does not appeal), the SDM ought to have accepted that the Appellant was not aware of the tax amnesty, particularly when neither the GFSC nor those representing Ms Sarre sought to challenge his evidence. He says that there was no evidence to the contrary from anyone. Ms Sarre had had the opportunity to provide evidence to the SDM but had not done so (she provided written submissions but no witness statement), and it was never suggested at any time prior to the Oral Meeting before the SDM that the Appellant had known of the tax amnesty.

144. The Appellant says that Ms Sarre provided the SDM with written submissions which were inconsistent on what she had told the Board at the Board Meeting on the 19 November 2015. Counsel for the Appellant pointed out in his submissions to the SDM that these were inconsistent and therefore wholly unreliable, thereafter Counsel for the Ms Sarre sought (during the course of submissions and after the Appellant had closed his case) to amend the written submissions, to their present form. This was an assertion of a further different version of events, in which (for the first time) it was submitted that Ms Sarre had provided to the Appellant (prior to the Board meeting) photocopies of a call report on one of the ISARs which referred to the tax amnesty. The Appellant says that there was no need to seek to cross-examine Ms Sarre as she still not had provided evidence to the SDM at all, no witness statement was provided, nor was she offered as a witness at the hearing before the SDM. The Appellant submits that the conclusion reached by the SDM is contrary to the evidence before him put forward by the GFSC in the form of the interview with C. The SDM does not address this evidence at all, other than to say that C's lack of memory is evidence of the collective mindset of trying to play down the issues.

145. The Appellant says that the conclusion reached by the SDM is a "*construct of his own making*" which appeared for the first time in the Decision, and which was never put to the Appellant for his comment. The SDM in doing so has drawn inferences from the terms of the Board Minute as to what was "*identified, at some level*" by Ms Sarre in her presentation, and what must have been mentioned "*as a matter of common sense*". The Appellant says that this was not a proper process of fact finding by the SDM based on evidence before him but rather more of "*an act of divination*" based on his guess as to what might have happened. The SDM was entirely wrong to have read the call report (which even Ms Sarre does not say that she provided to the Board) into the Board minutes as if Ms Sarre had read its contents to the meeting. Whatever happened at the meeting, it is clear that this version of events did not happen. All of the above taken together, constitutes a serious failure by the SDM to act in accordance with the requirements of natural justice and of the Guidance Note.

146. The Respondent's position is that the SDM was entitled to come to this conclusion under the process set out in the Guidance Note and that he was entitled to come to the conclusion he did on the facts.

147. In considering this, I accept that there is a distinction to be made between how the SDM deals with this finding and where the SDM has made findings that were not in the FER but nevertheless identified them in the draft Minded To Notice and final Minded To Notice. In the FER, as the Appellant submits, the Respondent's case is that the Appellant should have known about the amnesty and not that the Appellant was informed by Ms Sarre at the time of the Board Meeting. In the draft Minded To Notice at paragraph 352 of the SDM provisionally records:

> *Whether as a result of the failure to ensure that there was a proper investigation by the SCTG Board or in any event, Ms Sarre failed to draw to the Board's attention in November or December 2015 that an intention to participate in the YTAP was a further possible reason for the number of transfer requests from Country Y clients;*
>
> *i. Ms Sarre was aware of the YTAP (i.e. the potential tax amnesty in Country Y) by mid-November 2015 (including because "the imminent amnesty tax legislation in Country Y was expressly mentioned in ISAR 112); Ms Sarre expressly informed the Board on 19 November 2015 of the fact of the making of ISARs 111 and 112 but there is no evidence that she drew the potential relevance of the YTAP to the Board's attention on 19 November 2015;*

This is repeated in the final Minded To Notice. Therefore unlike the other issues where the Appellant had the opportunity to respond to the SDM's provisional views, this is not the case here.

148. It was in the written submissions of Ms Sarre of 3 February 2021 which stated for the first time that the Board of SCTG was aware of the contents of the Internal Suspicious Activity Reports ("ISAR"s) which included the reference to the tax amnesty in ISAR 112. During oral submissions at the Oral Meeting on 25 February 2021 Counsel for Ms Sarre Mr Robin Barclay KC, explained that she had not been directly asked in interview about this and this issue became apparent in the preparation of the submissions. However, he also said that the written submission was not accurate for which he apologised and took responsibility. Mr Barclay then orally amended her position from the 3 February 2021 written submissions to a position that she had provided copies of the call reports to the Appellant and E prior to the Board Meeting and gave an overview of the ISARs to the Board at the meeting on the 19 November 2015. By the direction of the SDM, her written submissions were amended to reflect the oral submissions on 26 February 2021.

149. The Appellant was aware of the position that Ms Sarre has included in her written submissions prior to the Oral Meeting. As is clear from the transcript of the Oral Meeting, Counsel for the Appellant, Mr Nicholas Peacock KC (who went first) addressed the SDM on this in his initial oral submissions setting out the Appellant's case that he was not made aware of the tax amnesty issue by Ms Sarre at the Board Meeting contrary to her written submissions. He set out that it was the Appellant's position that there was no evidence from Ms Sarre as she had not provided a witness statement and that it was a new version of events which had not previously been set out by her. The Counsel for Ms Sarre then made his representations as set out above.

150. On the 25 February 2021 the SDM made clear to Counsel representing the Appellant and Ms Sarre that they would be given the opportunity to reply to new points or matters raised. Counsel for the Appellant took the opportunity to respond to the amended representations on 26 February 2021 where Mr Nicholas Peacock KC says: "*Can I start with Ms Sarre's submission and it's really the point about what occurred at or prior to the 19th of November 2015 board meeting.*". He then proceeds to make comprehensive submissions on this.

151. At paragraph 13 headed Deliberations Of The Decision-Maker, the Guidance Note provides:

> *13.1 The decision-maker must consider any representations made in response to a "minded to" notice before giving further consideration to the decision that has been proposed.*

13.2 The party and the Principal Executive Officer will be given an opportunity to comment on any new information or matters that emerge during the decision-maker's deliberations. In such a case, the decision-maker may delay taking its final decision for a reasonable period to allow the person(s) concerned to make comments, while still ensuring that matters are dealt with expeditiously.

152. This was new information which emerged after the draft Final Minded To Notice in Ms Sarre's submissions. The Appellant through his Counsel was given an opportunity to comment on the information in his submissions in the Oral Meeting including responding to the amendments that were made to Ms Sarre's submissions during the Oral Meeting. Counsel for the Appellant did not make an application for an adjournment to deal with this nor did he seek to submit further written submissions on this although there were additional written submissions after the Oral Meeting on the Structure Formation Mandate Form from the Appellant and the Respondent. Contrary to the submissions of Counsel during this appeal hearing I consider that the Appellant was given the opportunity to deal with this issue during the Oral Meeting.

153. As I have referred to above, the Guidance Note sets out that the Enforcement Procedure as set out in the Guidance Note is: "*designed to ensure that the final decision taken:*

1.6.1 has been arrived at in accordance with principles of natural justice; and
1.6.2 is proportionate and reasonable based on all relevant information before the Executive Officers, SDM or CDC ("the decision-maker") at the time.

154. It also refers to "information-gathering" rather than evidence and throughout refers to information rather than evidence.

155. At paragraph 14.2 of the Guidance Note it says *"In reaching its decision, the decision-maker will have regard to the written and oral representations received and all other information in the documents before it. It is for the decision-maker to decide which of the matters it accepts, and which it does not."*

156. In this case, the SDM sets out in the decision how he has approached this new information. After setting out that he was applying the approach from *Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm)* at paragraph 9 of the Decision, he sets out in paragraph 10 how he will approach matters and then dealing with this particular aspect of the case he says:

11. There is a further aspect to consider in the present case, which arises in part from the nature of the Decision-Making Process and in part from the absence of oral evidence at the Meeting in February 2021. In particular, the issue arises of the status to be afforded to: (i) the Third Witness Statement of Mr Kelham and also (ii) the version of certain events provided by Ms Sarre in the form of her (corrected) Written Submissions for the Meeting.

12. As to the nature of the Decision-Making Process:

a. The process (at the Meeting for oral representation) is intended to be interactive rather than adversarial in nature: see paragraph 12.5.15 of the November 2019 Guidance Note;
b. Oral evidence is the exception rather than the rule, since the parties and potential witnesses will normally have been interviewed by the Enforcement Division and will have had the opportunity to comment on the transcript of interviews: see paragraph 11.14 of the November 2019 Guidance Note;
c. However, the rules of natural justice will apply and in particular any Respondent should have a fair opportunity of knowing and responding to any allegation made against them.

13. As to the particular circumstances of this case:

a. Mr Kelham's Third Witness Statement dated 18 January 2021, which was prepared in response to the draft Minded to Notice, runs to 65 pages;
b. Ms Sarre, by her Counsel, provided an account of events prior to and at a Board meeting on 19 November 2015 (which account is disputed by Mr Kelham) in her Written Submissions, which account was then materially corrected during the course of the Meeting;
c. In advance of the Meeting, I raised (by email timed at 09.00 on 24 February 2021) with the representatives for Mr Kelham and the Enforcement Division that I would be assisted by oral submissions as to the status and weight to be afforded to the content of the Third Witness Statement of Mr Kelham;
d. Neither Counsel for the Enforcement Division nor for Mr Kelham applied for a direction that Mr Kelham should give oral evidence; both Counsel for Mr Kelham and for the Enforcement Division encouraged me to apply the approach laid down by Gestmin in respect of factual evidence (and Counsel for Ms Sarre's submissions during the Meeting itself were to similar effect); Counsel for Mr Kelham submitted that (i) the contents of Mr Kelham's Third Witness Statement should be accepted, if not challenged, and (ii) the evidence given was not out of kilter with previous evidence given by Mr Kelham in interview in November 2018; Counsel for the Enforcement Division did not formally challenge Mr Kelham's evidence in his Third Witness statement by seeking to cross-examine Mr Kelham, rather Counsel for the Enforcement Division submitted that I should be wary of accepting Mr Kelham's evidence at face value and should be guided by the contemporaneous evidence.

14. That being so, I apply the following approach to Mr Kelham's Third Witness Statement:

a. For the reasons set out above, where there is contemporaneous documentary evidence as to material events I am guided by that evidence, which is a much surer guide than recollection provided several years after the material events and in response to a draft Minded To Notice, which itself identifies the provisional views of the Decision-Maker as to the Respondent's conduct;

b. For the bulk of the material events, there is cogent contemporaneous documentary evidence that enables the narrative to be clearly identified; however, for certain events, most particularly Mr Kelham's visit to Country C in December 2012, there is no such contemporaneous evidence made available;

c. In relation to Mr Kelham's visit to Country C in December 2012 in respect of which there is no such contemporaneous documentary evidence, there is no good reason not to accept Mr Kelham's evidence in his Third Witness Statement (albeit I remain mindful of the limitations imposed by the passage of time and the dangers of inadvertent reconstruction); the Enforcement Division did not seek to formally challenge such evidence by cross-examination; the Enforcement Division does not allege (and I have not found) that Mr Kelham acted with a lack of probity; further, whilst his Third Witness Statement provides for the first time considerable further detail about his visit to Country C in December 2012, as was demonstrated by Counsel for Mr Kelham at the Meeting, such detail is not inconsistent with the answers given by Mr Kelham when interviewed by the Enforcement Division in November 2018, particularly allowing for the fact that both the questions and the answers in interview were relatively discursive in nature and so cannot be regarded as definitive.

> *15. As to the evidence of Ms Sarre, in particular as to the events prior to and at the Board meeting on 19 November 2015, I am guided by the contemporaneous documentation, which is available and, to the extent that Ms Sarre's evidence is not supported by the contemporaneous documentation, then I am unable to accept it. I so conclude because (i) Ms Sarre's wider evidence as to events on 19 November 2015 is a matter of dispute between her and Mr Kelham (though neither party sought to cross-examine the other in relation to it), (ii) Ms Sarre's version of events only became clear during the course of the Meeting itself despite the evidence being directly relevant to matters that have long been in issue and (iii) aspects of Ms Sarre's version of events was not consistent with her prior oral evidence in interview or prior written submissions. That said, as set out below, certain aspects of Ms Sarre's version of events on 19 November 2015 are, on analysis, supported by the contemporaneous documentary evidence, in particular the relevant Board minutes.*

157. In his interview on the 7 September 2018 C says he was not aware of the amnesty being referenced at all at that time. He also said he thought it was the latter part of 2016 before he was aware of it. Contrary to the submissions of the Appellant, the SDM does deal with this. The SDM acknowledges that C did not recall the tax amnesty being mentioned but the SDM finds that this was a reflection of the collective mindset of the management of SCTG at the at the time. He was entitled to conclude that this was the general approach that was being taken at the time. Also, although he does not specifically refer to it here, it is evident that C's recollection is not reliable as on 1 February 2016, the "imminent tax amnesty" is referred to in the Compliance Report for Q4 2015, dated 22 January 2016, which was presented by Ms Sarre at the Board Meeting (see paragraph 308). In any event the SDM goes on to say:

> *in any event, the determinative factor in deciding whether the imminent tax amnesty in Country Y was raised at the Board meeting is the similarity between the wording of the Board minutes and the call report cited in ISAR 112 in respect of new accounts*
> *being opened for assets that had been declared to the authorities, that being strong contemporaneous evidence as to what was said at the Board meeting.*

158. I have come to the conclusion that the SDM did not make a material procedural error in relation to this finding and his approach to dealing with this new information from Ms Sarre was reasonable and proportionate and in accordance with the principle of natural justice. Further he was entitled to come to the conclusion that he did at paragraph 218 of the Decision on the balance of probabilities on the evidence before him and it was a reasonable one for him to come to. The conclusion he came to at paragraph 218 was within the range of responses that a reasonable decision-maker might make in the circumstances.

159. At Ground 11 of his Notice of Appeal, the Appellant appeals the finding by the SDM at paragraph 368 on the basis that it is the result of a number of material errors as to facts including multiple errors in the finding of the SDM at paragraph 367 of the Decision:

> *367. Mr Kelham, as Managing Director and CEO, failed to ensure that the concerns raised by SCTG staff, and in particular the Senior Trust Officers, were properly investigated and addressed in the period from October 2015 to January 2016. I rely on the narrative and my findings above, but in particular:*
>
> > *a. Mr Kelham failed to properly consider and address the concerns raised by Senior Trust Officers that the rationales put forward by RMs (such as time differences and ease of administration) were potentially false and misleading, and took insufficient steps to investigate what the real rationales for the rush of transfer requests in late 2015 was likely to reflect;*
> > *b. Mr Kelham failed to give any or any proper consideration to the likelihood that CRS (and the threat of AEI) was the or a motivating factor behind the large number*

of sudden transfer requests; the likelihood that CRS (and the threat of AEI) was the or a motivating factor for the transfer requests was or should have been apparent from:

> *i. The volume of simultaneous transfer requests, the scale of the AUM at issue and the high-risk nature of the home jurisdiction of the applicable clients or settlors (Country Y); these factors pointed towards there being a common motivating factor for the requests;*
> *ii. The fact that Guernsey was an early adopter of CRS;*
> *iii. The fact that the transfer requests typically had a hard deadline of 31 December 2015 i.e. immediately before CRS was to come into effect in Guernsey;*
> *iv. The fact that RMs in Country X and (in relation to the G Trust) external advisors were pressuring Senior Trust Officers to complete transfers (or terminations) prior to the year-end;*
> *v. The fact that uncertainty as to when Country Y would also adopt CRS did not militate against CRS being a factor behind transfer requests out of Guernsey; it was likely that a client concerned at reporting requirements would wish to transfer legal ownership of assets out of an early adopter jurisdiction in any event;*

c. Mr Kelham failed to give any or any proper consideration to the fact that, if the desire to avoid CRS and AEI was the or a motivating factor behind the transfer requests, then it followed that there was a real risk (indeed a likelihood) that the AUM at issue could well consist of funds that were tainted by tax evasion and so involve Financial Crime, both because (i) tax evasion is a crime and so of itself renders some or all of the relevant undeclared assets the proceeds of crime (and thereby means that the structures in questions are involved in money laundering), and (ii) because assets that go undeclared to the relevant tax authorities are more likely themselves to be the fruits of other Financial Crime;

d. Mr Kelham failed to ensure that F's concerns, set out in her emails dated 3 and 13 November 2015, were properly addressed; in particular, the ad hoc Board meeting on 19 November 2015 failed to address and bottom out F's concerns; rather regard was had to input from, among others, G to the effect that it was privacy concerns or general uncertainty that were likely to be motivating Country Y clients; as to that:

> *i. G was not a director of SCTG; rather, he was responsible for UHNW Propositions; as such, his priority was likely to be facilitating the interests of those clients, whereas the focus of the Board should have been on ensuring that SCTG discharged its duties and obligations in Guernsey, including in relation to the Financial Crime risks;*
> *ii. There was an obvious risk that privacy concerns or general uncertainty was simply another way of describing a desire by an individual to ensure that proper reporting as to their relevant tax information was not made to the relevant tax authority; that was likely to be the only uncertainty that was applicable in respect of CRS;*

e. Mr Kelham failed to ensure that (i) there was prompt independent investigation of the concerns identified at the Board meeting, including in relation to the imminent tax amnesty in Country Y which (as I have found) was raised by Ms Sarre in the context of the call report for ISAR 112, and (ii) failed to ensure that there was a follow up Board meeting in good time prior to 31 December 2015 to consider whether, on what was then known, the transfers did or did not give rise to

suspicions of involvement in Financial Crime; as a result of the failure to ensure that there was a proper investigation by the SCTG Board, the Board allowed the Country X Transfers to take effect without properly considering the potential relevance of the YTAP as a further reason for the transfer requests;

f. Mr Kelham failed to ensure that staff, and in particular Trust Officers, felt encouraged to raise concerns and to raise ISARs as they felt appropriate; Mr Kelham's approach in November and December 2015, including at the meeting in the boardroom in mid- November 2015, gave the Senior Trust Officers the impression that, whilst it may have been open to them to register ISARs, that they should not do so lightly and only if they were very sure of their facts because, if they were not, they could expose themselves to personal liability; as a result, the Senior Trust Officers felt discouraged from making iSARS;

g. Further, by reiterating that the Senior Trust Officers should proceed with the transfers and adopt an approach that was based on a 'case by case' analysis, Mr Kelham was in effect downplaying the valid concerns raised by the Senior Trust Officers, because his message was that the concerns raised by Senior Trust Officers were not of themselves sufficient to warrant further investigation (or the making of ISARs) when in fact they were – as was subsequently confirmed by CTIC; the 'case by case' approach simply passed responsibility back to the Senior Trust Officers on a false premise, namely that multiple requests for transfers by 31 December 2015 against a backdrop of the CRS, AEI and the YTAP were not of themselves sufficient to give rise to reasonable suspicion when, on any proper analysis, those factors did in fact give rise to such suspicion;

h. Mr Kelham failed to ensure that the concerns raised by the Senior Trust Officers were fully investigated and resolved before the transfer of legal ownership of the AUM out of the jurisdiction of Guernsey.

160. The Appellant argues that the evidence before the SDM was that all of the professionals (both internal and external) involved at the time considered that the timing of the requests (i.e. for completion before the year-end), in combination with the imminence of CRS/AEI as between Guernsey and Country Y, and in order to take advantage of the likely extra year before CRS/AEI started as between Country X and Country Y, raised a flag as to possible tax evasion. However, those factors by themselves were not sufficient to give rise to a suspicion of criminal activity sufficient to found the making of an ISAR or a SAR, and there needed to be an assessment made by looking at each transfer requesting client on a case by case basis.

161. This strategy in dealing with the issue was considered initially at the Board Meeting of 4 November 2015, and again at the Board Meeting 19 November 2015. The Board was told by Ms Sarre that the case by case approach was working so the Board resolved to continue but the Appellant says that this was not a "proceed come what may" approach. The legal advice received by Law Firm B stated it was "*very important that each case is considered individually and on its own merits and that the reasons for any decision taken are fully recorded."* Again this supported the case by case approach adopted.

162. The Appellant also says that the SDM is wrong to come to the conclusions that he did at sub-paragraphs 367b-g. The Appellant says the SDM was wrong because the Appellant sought and obtained information from the best possible source, the Global Head of HNW Propositions in Country X G, as to the Country Y clients' motivations in seeking to transfer from SCTG to Company B. He said consistently that the substantial reason was the impending Guernsey/Country Y CRS/AEI. He did ensure that there was investigation of issues of concern and did so by a process agreed by the Board. He did not think nor intend that a case by case approach was a means of downplaying trust officer concerns not did he fail to ensure that these concerns were fully

investigated and resolved. The Appellant considered for himself whether or not the motivation appeared to be credible and, for good reason, came to the conclusion that it was. The Appellant gave consideration as to whether or not the CRS/AEI motivation necessarily meant that the underlying motivation was one to conceal financial crime (e.g. tax evasion) and again, for good reason, came to the conclusion that it did not. He was at all times aware that a transfer would not result in the client avoiding AEI for good but merely delay it for a year. The Appellant says the amnesty was never part of his thinking (and the SDM's conclusion in the Decision to the contrary is wrong) that the clients might be seeking to prepare for, or take advantage of, the upcoming Country Y tax amnesty because he was not aware of it. The Appellant sought and obtained guidance and advice from experts in legal, compliance, financial crime and client tax compliance, most notably in the 28 October 2015 phone call. The agreed view that was reached by the Appellant and those experts was (i) that the "delayed AEI" explanation was a valid one in light of the apparently differing timetables in Guernsey, Country X and Country Y, and (ii) that such a motivation was not, of itself, a reason to conclude that each client requesting a transfer was wanting to continue to hide tax evasion. The Appellant was never aware that any of the participants on the 28 October 2015 phone call had, or came to have, any doubts as to these conclusions. The course of action agreed upon by the Appellant and those experts to consider each client on a case by case basis, was not only reasonable, it was the proper course to follow. It was, moreover, the approach that (after the event) Law Firm A had advised, and the SDM's analysis and understanding of the content of that advice is wrong. When trust officers expressed concern that the "in-principle" decision that had been reached was not correct, the Appellant ensured that the matter was considered by the Board on 4 November 2015 and 19 November 2015 on each occasion with the Board having the benefit of advice and analysis from experts.

163. The Appellant says that the SDM is plainly wrong that he failed to properly consider and address the concerns raised by Senior Trust Officers at paragraph 367a. He says that there was no evidence in relation to that the staff were being made not to feel free to make ISARs where they felt that appropriate: he had not admonished F in response to either of her emails but rather, had left her entirely free to do her job of examining matters on a case-by-case basis. He took great pains to speak to her and address her concerns. The SDM has adopted an approach to F's evidence which he says is rejection of what the contemporaneous documents show, in favour of unsupported (and disputed) recollection on the part of F, and moreover a recollection that the Appellant had no opportunity to challenge directly. He says the records show in the form of emails that he wrote at the time what the Appellant thought and that this is the best evidence. He was not leant on by more senior SC Group personnel to achieve a result so there was no motivation for him to lean on the staff in turn. Further, that in F's own email dated 13 November 2015 she made no reference to being discouraged by the Appellant during the course of the meeting the previous day (to which she makes express reference) from filing ISARS. His response was to let her know that he was letting the rest of the Board know as well as having a further discussion with her where it was agreed that she would be left to discuss matters directly with Compliance. He also says that in any event F did lodge an ISAR the day after the November meeting so clearly he had not given the impression to her and others alleged by the SDM. The Appellant relies on a reference to a note being circulated by E which is referred to in the board minutes of 19 November 2015. What the Board including the Appellant were told at the board meeting on 19 November by Ms Sarre showed that the case by case approach was working. Experienced and knowledgeable trust officers were looking at individual transfers and coming to preliminary conclusions based on actual facts, rather prior assumptions. The mandated decision-maker in relation to financial crime concerned was SCTG Compliance under the direction of Ms Sarre. The Appellant's involvement was unnecessary and not permitted. If she had been unable to make the judgment calls without further input then she could have sought further input, but she didn't.

164. The Respondent says that the SDM was entitled to come to the conclusions that he did on the evidence before him. He sets out the picture very clearly that Ms Sarre and the Appellant were "*passing the buck*" onto Company B without any thought for their obligations under the laws and regulations of the Bailiwick. The Respondent says that the ethos has become that the Transfers

had to happen come what may and the risk of further ISARs needed to be managed. The Respondent also submits that crucially the Company X Transfers must be put into context which includes the Company A Transfers. The Appellant must have been aware about the work that needed to be done on the internal procedures at SCTG including the over reliance of paper processes as well as the Remediation Programme not going to plan, the poor staff morale, the lack of resources, the compliance monitoring being suspended for 11 months and IT issues making him more alert and on guard. He was also aware of bank led model and the particular challenges this presented. Nevertheless, this did not displace the legal and regulatory obligations of the Appellant in Guernsey.

165. In considering the multiple complaints that the Appellant makes in relation to paragraph 367, again it is necessary to look at what the SDM says. The starting point is that the frontline officers including Senior Trust Officers were raising concerns during the period October 2015 to January 2016 which the Appellant as Managing Director and CEO failed to address. In doing so the SDM relies on the narrative and findings set out in the Decision beforehand and then sets out at sub-paragraph a-h particular findings that he says support this conclusion. The evidence before the SDM was that these concerns were present throughout this period and that these concerns included tax evasion being a motivator for the transfer requests of the clients from Guernsey to Country X. As the SDM sets out at paragraph 168 this was in the context of Guernsey being an "*early adopter*" of CRS and the "*immediate concern in such circumstances was that individuals would wish to transfer assets out of Guernsey before 1 January 2016*" before automatic exchange of information ("AEI") was implemented between Guernsey and Country Y. It was also evident that there was concern amongst the Country Y clients (even if not correct) that AEI would catch tax information from 1 January 2016. The volumes of requests in themselves were also a real cause for anxiety for the Trust offices, as to what the motivation was, along with the *"soft"* or generic reasons given which did not ring true, the template letters received as well as CRS/AEI/Amnesty justification. It was reasonable for the SDM to conclude as he does at paragraph 171 of the Decision "*Common sense suggests that a client would only be concerned at the impact of AEI if they had something to hide from the Country Y tax authorities.*" Further, as the SDM concludes at paragraph 176 "*application of a base level of professional scepticism should have led to the conclusion that the mere fact that large numbers of clients wanted to move the ownership of high value assets quickly out of a transparent jurisdiction was a concern, irrespective of the legal niceties as to when particular bilateral arrangements would come into effect (which niceties the underlying clients might well not appreciate)*." In addition to the CRS and AEI, the potential tax amnesty in Country Y provided another reason which should have raised concerns. The SDM then sets out in detail in the Decision examples of where there was at a senior level a lack of professional scepticism that tax evasion was a reason why Country Y clients were asking to move their significant assets to Country X despite this background. Further that the 28 October 2015 call which the Appellant relies as where he took "*guidance and advice from experts in legal, compliance, financial crime and client tax compliance*" included senior management from Country X and Guernsey but in terms of SCTG the unavoidable fact was that "*regulatory responsibility to address the financial crime concerns that arose from the requests for the urgent movement of the legal ownership of hundreds of millions of dollars of assets out of Guernsey was that of SCTG and in particular Mr Kelham, as CEO, and Ms Sarre as Head of Compliance and (from 30 October 2015) MLRO; it was for SCTG, Mr Kelham and Ms Sarre to discharge that regulatory function owed within Guernsey*".

166. Further, as the SDM notes (in relation to 19 November Board meeting but is equally applicable here) in relation to G whose expertise the Appellant appears to have placed particular reliance on, as well as not being a director of SCTG, "*he was responsible for UHNW Propositions; as such, his priority was likely to be facilitating the interests of those clients, whereas the focus of the Board should have been on ensuring that SCTG discharged its duties and obligations in Guernsey, including in relation to the Financial Crime risks;"*

167. The SDM details the increasing concerns of the Senior Trust Officers who were observing the trends (see the F emails) and hearing the alleged justifications from those requesting transfers. F called H about the requests at home the evening before she sent her first email on the 3 November 2015. As the SDM notes at paragraph 175 of the Decision the Appellant himself was aware of the "*developing trend*" (although at that time it is recorded it was only 17 cases) as this is a phrase he used[6] (before the F emails). Yet despite this the Board and importantly the Appellant, as the Managing Director and CEO of SCTG, decided to pursue a case by case consideration. The focus instead was on facilitating the Transfers and working "*actively and in a supportive manner to make them happen*" (email from R copied to the Appellant dated 11 November 2015). There was no evidence before the SDM that this focus changed despite all warning signals that the SDM identifies in his decision. This includes F lodging an ISAR on 16 November 2015 after the 12 November 2015 meeting, such were her concerns. It is clear from the evidence before the SDM that the pressure on the trust officers was increasingly intense in terms of the numbers of clients, the value of AUM this represented and urgency to complete by the end of the year including one UHNW arranging for a representative to attend at the Guernsey office to ensure that it did transfer by 31 December 2015 leading to more and more of the proper processes being abandoned and yet as the SDM says at paragraph 174 "*The suggestion that nonetheless there might be other reasons why a large number of Country Y clients should wish to move at the same time and by the same deadline of 31 December 2015, which apparently had nothing to do with tax avoidance, makes little sense.*" A follow up board meeting to the ad hoc meeting on the 19 November was contemplated to address concerns in respect of the Country X Transfers if necessary, but in fact no such meeting ever took place despite the trend continuing including a further ISAR being lodged on 19 November 2015. Whilst by the time of the 19 November meeting two trust officers had made iSARs as reported by Ms Sarre on a case by case basis rather than a "blanket" basis, this is not evidence that the case by case strategy was working given particularly when compared to the outcome of the CTIC report.

168. The SDM found in relation to the Law Firm B advice that this was about facilitating the Country X Transfers and ensuring that what needed to be done by 31 December 2015 was done in order to avoid the impact of CRS (paragraph 227). Although there is not a copy of a letter of instruction, it is my view that the advice is clearly focused on the practical task of implementing the transfers before the end of the year and was to be read in conjunction with the Trusts Procedure check list attached to it. It was not to investigate or address the concerns raised by the Senior Trust Officers.

169. The Appellant also relies on the Law Firm A advice to support his argument that the case-by case approach was the right one. It should be noted that the original advice was not before the SDM (nor has the Appellant seen it) only the summary contained in the internal CTIC report. Also during the relevant period the Appellant was not aware of the advice. In the summary it is recorded that Law Firm A advised "*if a client instructs a financial institution to terminate or transfer their structure from an Early Adopter jurisdiction (e.g., Guernsey) to a Late Adopter jurisdiction (e.g., Country X)*….."*that the receipt of any such instruction is sufficient to put SCTG on notice, obligating the MLRO to make further enquiries to either reasonably confirm or negate any suspicion as to whether clients may have committed an offence under the Income Tax Law."* Thereafter that pursuant to the advice received from Law Firm A, it was incumbent on *"the Guernsey MLRO or delegate thereof [had] to review the client files relating to each structure… in order to gain a better understanding of the extent to which the Guernsey MLRO was required to make a disclosure (or disclosures) under the Disclosure Law*". The MLRO delegated the review to members of the CTIC team who following the review raised ISARs to the Guernsey MLRO in relation to 23 of the 53 client structures reviewed, with recommendations for further review with respect to a further 13 structures. The Law Firm A's advice clearly contemplated stepping back and looking at all the files where clients were asking to transfer out of Guernsey to Country X and this was different from the case by case method advocated by the Appellant and the Board. This does not support the case by case approach as submitted by the Appellant.

[6] See file note of the 28 October 2015 conference call

170. Whilst the Appellant maintains that contrary to the SDM's conclusion at paragraph 367f above that no discouragement was given to the staff lodging ISARs, the evidence that they were discouraged came from a number of staff members who were interviewed as part of Project Gorey in the first half of 2016 and whose evidence was before the SDM. The SDM concluded at paragraph 202:

> *On the balance of the material before me (though placing less weight on the evidence of I as it appears that by May 2016 there was animosity between I and Mr Kelham), I find that Mr Kelham gave the Senior Trust Officers the clear impression at this meeting that, whilst it may have been open to them to register iSARs, that they should not do so lightly and only if they were very sure of their facts because, if they were not, it could expose themselves to personal liability. As a result, the Senior Trust Officers felt discouraged from making iSARs. It was submitted by Counsel for Mr Kelham at the Meeting in February 2021 that such a finding would be illogical because F was not in fact dissuaded from making a ISAR. But that submission fails to take account of the evidence to the effect that F (and others) did feel discouraged following Mr Kelham's address to them, but – having spoken to Ms Sarre – still resolved (to their credit) to make an iSAR nonetheless.*

171. Although F did make an ISAR the day after the meeting with the Appellant, in her Project Gorey interview on 7 May 2016, she says "*I left there feeling as though I would be in the wrong if I wrote a SAR. I was – I felt threatened. So much so that – that was before I raised the SAR for Client A, because I then went in to Sarah, and unfortunately broke down, and said, 'Look, I'm not comfortable, yet I feel I'm in the wrong if I raise a SAR.'.* Her witness statement is not a contradiction of the interview. The interview was an interactive extended process over a period of hours whereas the statement is reasonably concise does not record the meeting with Ms Sarre. Although in his submission the Appellant intimates that the statement came first and the interview afterwards, this is not reflected in the date of the interview and date that F signed the statement. This also seems to be out of step with his own experience (as recorded in his statement dated 16 March 2017). The Appellant also argues that the procedure was flawed because the SDM failed to require F to attend for cross-examination. As the Respondent submits these proceedings are not adversarial court proceedings, and the SDM has discretion over the procedure it adopts. He was not obliged to require Ms Sarre or F to attend for cross-examination. Further at paragraph 11.14 of the Guidance Note it sets out that "*Oral evidence may be given, and cross examination will be permitted only where the decision-maker considers that the interests of justice so require."* Thus the SDM was entitled to proceed without any live evidence. Importantly the SDM made clear in Procedure Note 1 dated 20 July 2020 that any applications for oral evidence would be considered on its merits and Procedural Note 3 issued on 8 September 2020 (by reference to an application for oral evidence dated 7 August 2020 which I have not seen) that it was open to the Appellant to make an application a relation to oral evidence under paragraph 11 of the Guidance Note after the SDM had issued his draft Minded To Notice. It would appear that no Application was made by the Appellant's counsel. The SDM had an opportunity to consider the submissions (both written and oral) put forward by the Appellant as well as the Appellant's Third Witness Statement. Therefore the process accords with the principles of natural justice and fairness and there was no procedural failing.

172. Further, the evidence that other members of staff felt they were discouraged came from a number of staff members who were interviewed as part of Project Gorey in the first half of 2016 and whose evidence was before the SDM. E's note referred to in the minutes of the meeting on 19 November 2015 which the Appellant refers to was not before the SDM. The date of the note is not clear from the minutes although it must have necessarily predated the meeting nor does it appear that the note was shown to the attendees of the meeting. In any event, this does not assist the Appellant as the SDM was entitled to rely on the accounts given by a number of staff members during the Project Gorey investigation in May 2016 that this was how they felt and the impression they had gained

as a consequence of what the Appellant had said in the meeting[7]. Further, in the ISAR dated 21 January 2016 lodged by H she says that the responses from management and senior management about the concerns of those involved in the Transfers "*ranged from fairly to strongly dismissive*.". Further at paragraph 318, the SDM sets out a contemporaneous note of a meeting between Ms Sarre, J and the Supervisory Division of the Respondent on 2 June 2016 which records as follows:

> *The [mid November 2015 boardroom] meeting was convened to allay the fears of SCTGL staff in respect of the client transfers to SCX. SS commented that there was an undercurrent within the meeting, which was "a bit intimidating" …*
> *Following the staff meeting with TK and E, SS had an independent meeting with two members of staff: K and F. K and F commented that from the staff meeting with TK and E that they felt pressured into proceeding with transferring the client accounts to SCX …*
> *TK and E requested the names of the staff members who had submitted internal SAR's. SS declined to provide the names and commented that the two members of staff were very upset.*
> *K and P have since resigned from SCTGL …*

173. Again, this is within 7 months of the November 2015 meeting. Despite the detailed submissions of the Appellant, they do not assist the Appellant with regard to the SDM's conclusions that the Appellant had failed to ensure that the concerns raised by SCTG staff, and in particular the Senior Trust Officers, were properly investigated and addressed in the period from October 2015 to January 2016 given that the evidence is that those concerns clearly continued.

174. Whilst the Appellant in his submissions sets out at length why he considers that the SDM was wrong to come to the finding that he did at paragraph 367, all of which I have considered, nevertheless it is my conclusion that it was reasonable on the evidence for the SDM to conclude that because the Appellant in line with the rest of the Board took the view that its case by case approach with review by the MLRO only if needed when dealing with the transferring clients was the right one, he failed to properly heed the growing concerns of the trust officers. As a consequence the SDM was entitled to conclude that the Appellant as Managing Director and CEO did not ensure that the concerns were properly addressed during this period. Having come to this conclusion I am satisfied that the SDM was entitled to come to the conclusions that he did based on those findings at paragraph 368.

175. The Appellant also appeals the finding at paragraph 368 of the Decision on the basis that it is unreasonable (ground 12). He says it is unreasonable for two reasons. First if the allegations of breach by SCTG of para 4.4 of the Code and Principle 5 of the Code can be read as encompassing an allegation of specific failings on the part of the Appellant, then it was necessary for the SDM to address the submission that was made to him that the GFSC must explain, and the SDM must be satisfied with that explanation, as to why (in circumstances where the relevant decisions were made by, or at least known to and agreed with by, the entire Board) it was the Appellant alone who was considered to have failed to meet his regulatory obligations in these respects.

176. No such explanation was put forward by the GFSC as to why the Appellant alone out of the members of the Board was considered unfit and the SDM does not anywhere address this striking omission. Second, the Appellant did all that could reasonably be expected of him to ensure that the Board met the requirements of the Code (for the reasons given above). There was nothing wrong with the systems of internal control or oversight of risk management within SCTG: a failure in respect of a systems and controls obligation is not established by concluding (as the SDM has, wrongly, done) that an erroneous decision was made after the application of those systems and controls; rather it is established by evidence which demonstrates one or more deficiencies in the systems and controls. There is no such evidence, and nor does the SDM

[7] Project Gorey was an investigation into events in respect of the Country X Transfers and whether they involved a breach of SCTG policies and procedures following a "speaking up" report lodged in February 2016.

refer to any.

177. In response to these submissions the Respondent says as has been set out in relation to argument put forward by the Appellant in relation to Country A remediations, his position is materially different to that of the other directors in that he was the CEO and Managing Director of SCTG. In relation to his second submission, it is nothing more than a bland generic assertion that effectively the Appellant did "all that could reasonably be expected of him…" The Respondent says that on a fair reading of the Decision, it is simply not a credible assertion.

178. In considering this ground of appeal I need to put paragraph 368 in the context of the Decision. Paragraph 368 is the conclusion that the SDM comes to having set out the failings by the Appellant in paragraph 367. As I have already set out I have not found that there were any material errors as to facts in the conclusions that the SDM came to in this paragraph. Having done so and given the nature of the findings it was in my view open to the SDM to conclude that by these failings that the Appellant had failed to ensure that the Board of SCTG did not breach para 4.4 of the Code and Principle 5 of the Code. It is also evident from the nature of those findings that the Appellant could have done things differently. In relation to the Appellant being singled out, this is incorrect as Ms Sarre was also found to have acted failed to ensure that SCTG not acted in breach of paragraph 4.4 of the Code and principle 5 on the basis of her failings in relation to the same issues as a director as well as Acting MLRO. The Appellant was the Guernsey Managing Director and CEO. The SDM found the breaches in relation his failings (as opposed to the Board as a whole) as set out at paragraph 367. It is clear that action against the Appellant is neither arbitrary nor partial. Taking action against the Appellant (and Ms Sarre) was reasonable and within the range of responses that a reasonable decision-maker might make in the circumstances. I also find that the Appellant has not shown that there are any material errors as to facts underpinning paragraph 368 and that the Appellant he is entitled to come to the conclusion that he did at paragraph 368

179. The Appellant appeals the finding at paragraph 372 as a material error as to procedure (ground of appeal paragraph 13). At paragraph 372 the SDM finds that the Appellant:

> *failed to ensure that the Board of SCTG:*
>
> *a. Maintained (and implemented) a sound system of internal controls to safeguard assets and manage risks, contrary to paragraph 4.4 of the Code;*
>
> *b. Provided suitable oversight of risk management within SCTG, contrary to principle 5 of the Code.*

180. The first ground of appeal in relation to this paragraph is that it is not open to the SDM to make a finding that was not in the FER. For the same reasons I have set out above, I find that there is no basis for this ground of appeal and there was no procedural error.

181. The Appellant also appeals this paragraph at paragraph 14 on the basis that it is the result of a number of material errors as to the finding of facts in the paragraphs that led the SDM to come to this conclusion and that it was an unreasonable finding for him to come to.

182. The findings which led to the conclusion at paragraph 372 are set out from paragraph 369-371:-

> *369. Mr Kelham allowed a process to develop in respect of the Country X Transfers whereby no meaningful risk management and controls were undertaken by SCTG to manage the legal, financial crime and regulatory risks arising from the Country X Transfers. In particular:*
>
> *a. The Termination Checklists employed within SCTG were of no use because:*
>
> *i. The rationales provided by clients were not subject to any proper testing or analysis;*
>
> *ii. The section on CDD procedures was not even followed or completed;*

b. As a result, no (or no proper) CDD reviews were undertaken on the Country X Transfers;

c. No independent tax certificates or confirmations were obtained from clients or their tax advisers to establish that the structures in questions did not have any outstanding tax liabilities and/or that the assets were legitimate;

d. SCTG did not participate in any Joint LCCs or LCC of its own in respect of the Country X Transfers; rather, SCTG personnel were relegated to observer status only; SCTG did not even receive proper signed minutes of the Country X LCCs that were held;

e. As Mr Kelham knew, there was no independent investigation being undertaken by Compliance when consent requests were made in respect of "Refer MLRO" coded structures; rather, responsibility was in effect abdicated:

i. The Senior Trust Officers did their best to raise concerns with Mr Kelham, the Board and with Compliance;
ii. Mr Kelham and the Board, by espousing a 'case by case' approach which proceeded on the false premise that there were not generic grounds for concern, left matters in the hands of Compliance and the Senior Trust Officers;
iii. Compliance passed back the responsibility to Senior Trust Officers;

370. Mr Kelham, as CEO of SCTG, should have brought independent scrutiny and challenge to bear on the desire within PvB and SCTX to ensure that the transfers were effected as quickly as possible and with the minimum of input from SCTG. Mr Kelham failed to provide that scrutiny and challenge. In particular:

a. He failed to ensure that independent tax confirmations were received before clients were able to transfer or terminate their structures; such confirmations should have been insisted on as part of attempting to establish that the clients were tax compliant, particularly with the Country Y authorities, and that SCTG was not holding assets that consisted of the proceeds of crime;

b. He failed to challenge Group, in particular by ensuring that there should be Joint LCCs such that the decision making was balanced, such that SCTG had the right first to undertake such investigation and steps as it wished to take in order to establish that the transfers could be effected from a regulatory viewpoint.

371. Mr Kelham, as CEO of SCTG, should have prevented the Country X Transfers from taking place until SCTG was satisfied that they were regulatorily compliant. It is no answer to say that this was not possible for those structures where the Settlor could direct the replacement of the trustees, nor that the concerns raised by the Senior Trust Officers had been referred to CTIC. That could not mean that a trust company could simply wash its hands of its regulatory responsibilities, which included ensuring that (i) proper procedures and controls were followed and (ii) systems were in place such that the MLRO would and could adequately investigate the underlying concerns prior to the transfers being effected such that meaningful external SARs could be made to the FIS.

183. The Appellant says that the most erroneous conclusions are at paragraph 369 of the Decision which I have set out above. However, I find that the different elements that make up the sub-paragraphs of paragraph 369 all of which I have carefully considered, are all ones that the SDM was entitled

to come to on the evidence, are failings by the Appellant and are supported by the relevant paragraphs in the Decision.

184. The Appellant also says at paragraph 15 that the finding of the SDM at paragraph 372 is unreasonable. Having carefully set out the failings in paragraph 369, the SDM was entitled to come to the determinations that he did at paragraph 370 and 371 again highlighting that it is the Appellant's role and the consequential responsibilities of that role which mean that his regulatory obligations should have led him to take the steps which the SDM identifies. These trumped the Appellant's wish to be a Group team player. These findings in turn support the SDM's conclusion at paragraph 372. Also it should be noted that the Appellant was not the only board member against whom action was taken individually, Ms Sarre also failed in not ensuring that the Board did not act in a way contrary to paragraph 4.4 of the Code and principle 5 on the same issues from her perspective as a director as well as Acting MLRO. The conclusion that the SDM came to at paragraph 372 was a reasonable and proportionate one for him to come to, was within the range of reasonable responses and one he was entitled to make on the evidence before him.

185. The Appellant appeals against the SDM's finding at paragraph 380 (grounds of appeal paragraph 16) on a number of bases. The Appellant appeals first on the basis that there is a material error as to procedure because in the FER he says that the only relevant allegation made against the Appellant in the FER was being a failure on the part of the Appellant to "*act in the best interest of SCTG in his position as Managing director and CEO*", when he signed the letters. This allegation is intended to be reflective of the Guernsey fiduciary duty of a director to act (subjectively) in what he bona fide believes to be in the best interests of SCTG. Therefore, the only relevant allegation made in the FER was bound (as a matter of law) to fail in circumstances where (a) no allegation was made that the Appellant had failed to meet that subjective test and (b) no evidence was produced that could ever support a finding that the Appellant had failed to meet that subjective test. It was, accordingly, not open to the SDM (acting in accordance with the requirements of natural justice and of the Note) to substitute a new suite of allegations and then make findings based on those new allegations, in order to remedy the fact that the GFSC had made an allegation that was always bound to fail.

186. Although I have set out the full basis upon which the Appellant appeals the material error as to procedure, in accordance with my previous conclusion it is not a breach of natural justice or the Guidance Note for the SDM to make a finding which was not contained in the FER if the Appellant has been given the opportunity, which he has, to respond to them. In this example the amended finding was contained in the draft Minded To Notice dated 7 December 2020 and the final Minded To Notice on 5 February 2021. The Appellant had had an opportunity to respond to these proposed findings in written and oral submissions as well as his Third Witness Statement dated 18 January 2021. Therefore I do not consider that there was a material error of procedure and this ground of appeal is rejected.

187. At paragraph 17, the Appellant also appeals this finding on the basis of a material error of fact and that such a finding was unreasonable. The Appellant sets detailed submissions both orally and writing as to why he says that the SDM should not have made this finding.

188. Paragraph 380 of the Decision the SDM finds that:

> *Mr Kelham should never have signed the tax confirmation letters, dated 12 July 2016. I reject Mr Kelham's submission that the tax confirmation letters were accurate on their face. They were not accurate; they were misleading. In particular, the letters expressly confirmed in respect of each Trust or PIC that (having adopted policies, procedures and controls as required by Guernsey law), to the best of SCTG's knowledge and belief, SCTG was "not aware of any outstanding tax issues". That was simply not true either as at the date of the Transfers in December 2015 and January 2016 or as at 12 July 2016.*

The SDM then summarises his reasoning in paragraphs 381-383 of the Decision:

> *381. As I have set out above in my narrative but in summary, when Mr Kelham executed the 35 or so tax confirmation letters, he was (or should have been) aware that:*
>
> *a. The original intention had been that Company B would obtain tax confirmations from clients or their tax advisers in advance of the transfers to confirm that there were no outstanding tax issues;*
>
> *b. The position then changed and SCTG agreed to the Country X Transfers on the understanding that Company B would still obtain the relevant tax confirmations but only after the transfers had happened;*
>
> *c. There were no Joint LCCs held; rather the process agreed was that there were only Company X LCCs held on the basis that it was, apparently, for Country X to decide whether to take on the business;*
>
> *d. Mr Kelham was aware that tax issues had been raised in respect of the Country X Transfers arising from the combined timing of multiple requests from Country Y clients to transfer trusts and PICs against a backdrop of the CRS, AEI, the YTAP;*
>
> *e. Mr Kelham had been reminded on 10 May 2016 by his Senior Trust Officers that the provision of tax confirmations by SCTG "was never an agreed action point as part of the Company B transfer project" and that they did not have the data to enable any such tax confirmations to be provided;*
>
> *f. There were outstanding ISARs and indeed external SARs in place identifying suspicions in relation to CRS, the YTAP and/or tax evasion; Mr Kelham was not a MLRO, so ISARs were not made to him and external SARs were a matter for the MLRO rather than him; but the fact of ISARs was reported upon by Ms Sarre to the Board and Mr Kelham was well aware that they had been made; Mr Kelham cannot have checked with Compliance before signing these tax letters (as he plainly should have done) otherwise the multiplicity of ISARs and external SARs would have been drawn to his attention.*
>
> *382. Thus, as at July 2016:*
>
> *a. 14 of the structures were then still the subject of ISARs;*
> *b. 7 of the structures were then subject to external SARs;*
> *c. Those structures would have had "Refer MLRO" codes on Phoenix in respect of them;*
> *d. 2 of the ISARs had been the subject of the ad hoc board meeting on 19 November 2015;*
> *e. ISAR 112 and the YTAP ("… a client contact report makes reference to an imminent tax amnesty …") had been expressly mentioned in Ms Sarre's Compliance Report to the Board for the meeting on 1 February 2016.*
>
> *383. For Mr Kelham to have executed the tax confirmation letters in such circumstances was inexcusable.*

189. At paragraph 330 of the Decision the SDM refers to what he says the Appellant should have known (which is largely repeated at paragraph 381) and which the Appellant says contains material errors by the SDM. Paragraph 330 says:

330. At the time when Mr Kelham signed these letters, Mr Kelham was aware (or should have been had he checked) that:

a. The original intention was that Company B would obtain tax confirmations in advance of the transfers from the clients (or their tax advisers) to confirm that there were no outstanding tax issues in relation to the Country X Transfers;
b. The position then changed and SCTG agreed to the Country X Transfers proceeding on the understanding that Company B would still obtain the relevant tax confirmations but after the event;
c. There were no Joint LCCs held; rather the process agreed was that there were only Country X LCCs held on the basis that it was, apparently, for Country X to decide whether to take on the business;
d. Mr Kelham was aware that tax issues had been raised in respect of the Country X Transfers arising from the combined timing of multiple requests to transfer against a backdrop of the CRS, AEI, the YTAP;
e. Mr Kelham had been reminded on 10 May 2016 by his Senior Trust Officers that the provision of tax confirmations by SCTG "was never an agreed action point as part of the SCTX transfer project" and that they did not have the data to enable any such tax confirmations to be provided;
f. There were outstanding iSARs and indeed external SARs in place identifying suspicions in relation to CRS, YTAP and/or tax evasion; Mr Kelham was not a MLRO, so iSARs were not made to him and external SARs were a matter for the MLRO rather than him; but the fact of iSARs was reported upon by Ms Sarre to the Board and Mr Kelham was well aware that they had been made; Mr Kelham suggests that he had conversations about the tax letters "with members of the SCTG team", but (i) those team members are unidentified, (ii) the concerns of his Senior Trust Officers were drawn expressly to his attention at the time (as set out in the emails addressed above), and (iii) he cannot have checked with Compliance before signing these tax letters otherwise the multiplicity of iSARs and external SARs would have been drawn to his attention.

190. The relevant letters are letters which were sent by the Appellant in July 2016 on behalf of SCTG. They were pro forma letters addressed to SCTX. The heading refers to the relevant client entities and then states:

Following the transfer of trustee/director from Standard Chartered Trust (Guernsey) Limited ("SCTG") to Standard Chartered Trust (Country X) Limited, you have requested confirmation from SC TG on a number of points related to the aforementioned entities.

Standard Chartered Trust (Guernsey) limited is licensed and regulated by The Financial Services Commission (Bailiwick of Guernsey) Ordinance, 2008 and is subject to The Regulation of Fiduciaries, Administration Business and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000. In compliance with the Criminal Justice (Proceeds of crime) (Bailiwick of Guernsey) Law, 1999 and other local legislation, SCTG has adopted certain policies, procedures and controls and in doing so we are able to confirm the following in relation to the Trust and/or Company.

- *To the best of our knowledge and belief, we are not aware of any outstanding tax issues or of any outstanding tax returns for the Trust/Company.*

- *To the best of our knowledge and belief, we are not aware of any outstanding dispute, outstanding litigation involving the Trust/Company.*

With respect to your question as to whether or not there are any Power of attorney's [sic] or contingent liabilities in existence for the Trust/Company, All records and files for the

Trust/Company were forwarded to you following your appointment as Trustees/Directors. We would therefore request that you check the files in your possession to ascertain the answer to these two questions.

We trust the above provides you with the comfort you seek in order to meet with your own internal requirements. But should you require any further information, please do not hesitate to contact us.

191. The Appellant says that the key issue in relation to these letters is what they are properly understood to be and to be saying: in other words, a question of construction (a mixed question of fact and law). The Appellant's submission is that the SDM got the issue of construction wrong and has misunderstood the import of the letters. The reference by the GFSC to "*written guarantee letters*" provided by the Appellant, was a wholly misplaced characterisation of the letters likewise the SDM's reference to "*tax confirmation letters*" by which the Appellant "*confirmed that there were no outstanding tax issues in respect of hundreds of millions of dollars of assets which were then or shortly to be the subject of the YTAP"* (see sub-paragraph 334(b) of the Decision). The Appellant says the context of the letters must be considered: namely that the request made by L (in Country X) by email on 10 May 2016 was for a number of items that (as he explained it) ought to have been obtained by Company B in writing at the time of the Country X Transfers, covering matters such as tax, disputes/litigation, powers of attorney, contingent liabilities etc. In his email he says:

Dear Trevor,

E had an action point, regarding the transfer on cases from Guernsey to Country X, which remain outstanding. As part of the normal on boarding, we should have received a letter for each case confirming a number of items listed below:

- Confirmation in writing – no outstanding tax issues or applicable tax returns have been filed timely –
- Confirmation in writing – no dispute/outstanding litigation between current trustee and trust relevant parties –
- Confirmation in writing – no powers of attorney, if any exist, a description
- Confirmation in writing – no outstanding/contingent liabilities, if any exist, a description
- Confirmation in writing – no existing conflict/outstanding litigation with current trustee and third parties

In order to assist Guernsey in providing this information, we would be happy to prepare a letter listing all entities where this confirmation is required and provide it to you. You will have the opportunity to remove the cases where the confirmation on one or multiple points in not appropriate.

Please note that these confirmations represent the vast majority of the CC tracker points and we are under pressure to solve these outstanding points.

192. The Appellant says that as the email makes clear, these confirmations were something that ought to have been provided by E, Head of Trust Management at SCTG before he left SCTG. There was a further email dated 30 June 2016 from L to M copied to the Appellant and others:

As discussed, please find the list of confirmation and missing documents related to transfer cases from Guernsey to Country X..
I would be grateful if you could provide this information at the earliest to complete the Country X files.

193. The Appellant says the confirmations that were requested were of matters that ought to be within the knowledge of SCTG as the retiring trustee or corporate administrator. The specific request

(which is answered by the first dashed point in the letters) in relation to tax issues was that there were "*no outstanding tax issues or applicable tax returns have been filed timely*". It was wrong to understand L's request for confirmation that there were "no outstanding tax issues" to cover the same ground as had been intended to be covered by the independent tax statements that Country X had, at one time, stated to be a requirement of their accepting a transfer in of a client from the Guernsey office. Those tax statements (which the SDM refers to sub-paragraphs 330a and 330b had been intended to provide verification (from an independent third party) that all the client's affairs were in order from a tax perspective. These letters were just in relation to the tax affairs of the trust or the entities managed by SCTG and nothing about the underlying client.

194. The objections raised within SCTG to these requests were (i) that the provision of this information had never previously been raised by Country X, and (ii) the transfers having already been made, and therefore it was not reasonable for Country X to make these requests when they did. Whilst those objections were understandable, they did not represent a basis on which the requests (if otherwise reasonable) should be refused and therefore SCTG set about the task of answering (in so far as it was able) the requests that L had made.

195. Although the Appellant signed the letters on the same occasion, he only did so after having discussed the required information on each of the relevant client matters with members of his team. Further, as to the terms of the letters: the confirmations provided in the letters were, he says obviously, as at the date of the Transfer to Country X (because SCTG had no continuing knowledge after it ceased to be trustee or administrator). These were not confirmations as at the date of the letter. The confirmation given in relation to tax matters was carefully drafted so as to make clear the limits of the confirmation that was being given. These were not a general confirmation from SCTG and the Appellant that there were no outstanding tax issues in relation to the underlying client. Rather, this was a specific and limited confirmation that there were (to the knowledge of the retiring trustee) no outstanding tax issues in relation to the trustee/trust/administered corporate entity i.e. the usual "clearance" that a new trustee would seek from an old trustee about "trust level" tax issues and this was how the Appellant understood the letters (correctly so, certainly reasonably so) and that is the basis on which the July letters were prepared and signed and were true.

196. Further, the Appellant submits it would be wrong to conclude that the Appellant ought not to have signed any letter as at July 2016 in any terms that mentioned tax because the Appellant was aware of anything outstanding or unresolved ISARs as at the date of transfer; as the Appellant thought (necessarily because the Transfers had been completed) that Compliance had been satisfied on all compliance issues. The position which the SDM sets out at sub-paragraphs 331a-e of the Decision was not known to him when he signed the letters and in any event, these were issues after the Transfers had happened. Also the Appellant was aware that the Transfers had been effected by formal documents (Deeds of Retirement and Appointment) ("DORAs") in which warranties and indemnities would have been provided by SCTG. These would have necessarily confirmed the absence of any issue as at the date of the Transfer having been signed off by the MLRO or the deputy MLRO and the Appellant relied upon this too. He signed those letters believing that the ISARS had been resolved because the Transfers had taken place and that the Transfers would not have taken place if there were outstanding ISARs. He says he was right to rely on this, right to rely on this being evidence that there were no outstanding ISARs, and this is supported by the FER which says in relation to the Transfers:

> *"in each case where an ISAR was raised prior to 31 December 2015 the ISAR was considered and clearance/consent to transfer was given by J."* [8]

[8] Paragraph 169 of the FER.

197. Therefore, in reliance on this process he was right to sign the letters because although the letters were dated July 2016[9] as they reflected the position on 31 December 2015 and it was not part of his role to know this first hand. He signed them heavily caveated that it was to the "*best of our knowledge*" and was entitled to do so. Contrary to the SDM's finding at sub-paragraph 330c of the Decision, the fact that there were no Joint LCCs held was not relevant to this. The Appellant also says that he was aware that in relation to one client, a post-transfer concern had come to light in relation to that client's intention to participate in the Country Y tax amnesty. That client, however, did not transfer to Country X and it must follow, therefore, that none of the letters that the Appellant signed relate to that client. The Appellant was not aware of any external SARs having been made (as the statutory process necessarily did not permit him to have such knowledge), nor would he have been aware of external SARs that were yet to be made. He was not aware of the June 2016 CTIC report, nor of any of the ISARs that had been raised by CTIC nor in accordance with his Third Witness statement was he aware of the tax amnesty (and nor was C). For all these reasons he was not aware of the tax issues the SDM says he was aware of at sub-paragraph 330d of the Decision.

198. The Appellant also argues that there is no evidence that Company B placed any greater reliance on the meaning of the letters than the Appellants says the letters had. It is therefore misconceived to say that the letters were misleading as who did it mislead? The SDM made an assumption based on a misunderstanding of the importance of the letter.

199. The Respondent rejects the submissions of the Appellant and says that the findings of the SDM are correct and reasonable on the evidence before him. He has not erred in fact or law. Further, it is averred that the statutory process does not prevent the Appellant from being informed about a SAR. The Appellant's position on this shows again that he considered himself accountable within the SC Group and was driven by a desire to bend to their will including to the pressure from Company B to get the job done, rather than being concerned about the risks to which he was exposing SCTG and the reputation of the Bailiwick.

200. In considering this ground of appeal I start at paragraph 185 of the Decision where the SDM sets out the details of a telephone call on 9 November 2015 between L and others including Ms Sarre where amongst other things it was agreed that clients must provide information on tax and that a joint LCC, between Company B and SCTG will be held for each transfer case.

201. It is also clear from the email traffic running on the 27 November 2015 between L and members of Company B and SCTG including the Appellant that the issue of the tax certificates was being seen as an obstacle to completing the transfers. In the draft meeting minutes of senior PvB personnel dated 1 December 2015 the SDM records that it says that:

> *certification from clients' independent tax advisers would not be pursued due to the significant time and costs incurred to obtain such certifications. More viable alternatives would be considered. This is to be communicated to the Guernsey manco as necessary.*

202. On 2 December 2015 an officer from Company B sent the following email with reference to a trust which is transferring to Company B:

> *Hi*
>
> *The following documents are missing for this Trust:*
>
> *(1) Sanctions Questionnaire for settlor*

[9] Although in the Third Witness Statement and in submissions they are erroneously referred to as being signed in May they are dated July 2016.

> *(2) Confirmation in writing - No Dispute / Outstanding Litigation between Current Trustee & Trust Relevant Parties*
> *(3) Confirmation in writing - No Existing Conflict / Outstanding Litigation with Current Trustee & 3rd Parties*
> *(4) Confirmation in writing - No Outstanding / Contingent Liabilities, if any exist, a description*
> *(5) Confirmation in writing - No Outstanding Tax Issues Or Applicable Tax Returns have been filed timely*
> *(6) Confirmation in writing -Company's Latest Annual Return is filed, if applicable*
> *(7) Confirmation in writing - Company's Annual Filing & Registration Fee have been paid.*

203. A flurry of emails between the officer and E is answered by N of Company B later on in the day with:

> *Hi E,*
> *For the time being, please disregard W's email request of 2nd December. This is not part of the agreed docs required to take the business to CC in Country X. Company B CC will be looking to provide dispensations for these docs and they will ultimately follow on after the initial transfer has been concluded. Appreciate that certain docs may not be required by SCTG but are by Company B so again we can look at that in due course and we can follow up with the RM to obtain what we require locally in due course.*
>
> *Hope this clears things up.*

204. Therefore, by the turn of the year and the transfer date of 31 December 2015, it is evident that the requirement for the independent tax certificate or confirmation about any outstanding tax issues in writing from SCTG had been abandoned.

205. On 21 January 2016 H filed a generic block ISAR 117 in respect of all the Country X Transfers. At around this time someone submitted an internal "*speaking up*" report. The effect of one or both of these was the internal investigation called Project Gorey which led to officers including the Appellant being interviewed in May 2016.

206. In the Board minutes of the Board Meeting 1 February 2016 (see paragraph 308 of the Decision) Ms Sarre reports that

> "*in respect of the Country Y client transfers to the Country X Trust Company and additional closure requests, a further ISAR has been received by SS in the past few days and is subsequent to those detailed in this report."*

The report referred to is the Quarterly Compliance Report addressed to the Board which refers to the "*imminent tax amnesty*".

207. On 10 May 2016 the Appellant received the email set out above from L. This included a recognition that it might not be appropriate in certain circumstances to provide the confirmations.

208. Relevant to the confirmation sought on tax issues and applicable tax returns, H embedded the following comment into the email in her response to the Appellant:

> *We would require clarity as to who reference is being made to, Trustees/Settlor – from there I do not believe that our core data is sufficient to be able to confirm this point, reliance would need to be placed on the strength of the CAR team reviews for our managed entities.*

209. She also said in the covering email to the Appellant (to which M to whom it was also copied into agreed) that:

> *E and I discussed this topic before he left and this was never an agreed action point as part of the SCTX transfer project, this was a last minute direction from SCTX post event.*
> *As regards the assurances now being requested, I would certainly be extremely guarded about providing these, at best they will need to be heavily caveated. Please see comments below.*
>
> *If L provides a letter I would imagine that in many instances we would need to remove a vast majority of the cases.*
> *Thanks*

210. In response to L's chasing email of 30 June 2016 copying the Appellant M emailing a colleague of hers notes:

> *The all [sic] process was rushed, we were advised by management to proceed and not to worry as the transfer was internal, which did not allow us (the Trust Officers) to follow correct procedure.*

211. Nevertheless, the Appellant signed the letters on at least 35 of the Country X Transfers in the standard form I have set out above. The terms of the letter are wide i.e. confirmation that SCTG was not aware of any outstanding tax issues or of any outstanding tax returns for the Trust/Company. In making this statement, even with the caveat, after having confirmed the laws, regulations and policies that apply to the business and which SCTG had adopted, the SDM was correct to conclude as he does at paragraph 329:

> *On their face, these letters amounted to a confirmation from SCTG that, having applied their policies, procedures and controls in relation to money laundering and combatting financial crime, SCTG was not aware that any of the trusts or PICs, the legal ownership of which was transferred, had any outstanding tax issues.*

212. The SDM does not describe the letters as "written guarantee letters". Rather at paragraph 315 of the Decision he described how originally tax certificates or confirmations were due to be obtained from the clients. As I have set out above, it is clear that the original plan to obtain tax certificates or confirmations was abandoned at the end of November beginning of December 2015. As the SDM sets out in his Decision, by the time that the Appellant signed these letters these were the only letters in relation to tax that were being provided. The argument that these can be said to be misleading because there is no evidence that Company B relied on them is a most surprising contention from someone who has prided themselves on their long history within the trust profession. The expectation must be that these are reliable, true and accurate statements. It is not enough that these were caveated with "*to the best of our knowledge and belief*" as the expectation will still have been that these will not have been signed without the Appellant checking what the corporate state of knowledge was, although in any event the Appellant was or should have been aware of these issues.

213. Further, the distinction made between the entity and the underlying client is not of assistance to the Appellant. The evidence before the SDM is that ISARs and SARs refer to the client entities and not just the underlying clients. With direct reference to the amnesty although this was only one of the issues being red flagged as potential tax evasion, I have already decided that the SDM's conclusion on the Board Meeting in November 2015 was a reasonable one for him to come to. However, even if I had not, during the relevant period, although he was on Block leave the Appellant received an email dated 30 December 2015, O (of CTIC) emailed Mr Kelham, Ms Sarre and E in relation to Country Y clients stating:

> *I understand from previous correspondence with Sarah that a number of call reports have specifically referenced the Country Y tax amnesty/CRS … would it be possible to add in a column and mark to which cases this is applicable?*
>
> *… this information will be extremely beneficial in support of the analytical work we are currently undertaking, including the request for legal opinion.*

214. He returned from Block leave on 4 January 2016. Then on the 18 January 2016 J emailed K, copying Mr Kelham and E, in respect of a request for consent for a MLRO coded transfer that was linked to an ISAR. She stated:

> *I have reviewed the below and just [want] to point out that the RM has previous [sic] stated that the client wishes to participate in the tax amnesty exercise in Country Y "by way of Cupid" so presumably you have had visibility of this which is included in your overall consideration of this termination.*
> *Provided that you have consider [sic] the above and that the Trustees are comfortable with the termination then from a compliance perspective we have nothing further, however the administration team must themselves be comfortable …*

215. Thus, whilst he may not have read the first email until his return, these are two references in quick succession to the amnesty. Further, as I have referred to above on 1 February 2016, the Board of SCTG was informed again about ISAR 112 and the "imminent tax amnesty" in the Compliance Report for Q4 2015, dated 22 January 2016, which was presented by Ms Sarre at the Board Meeting.

216. Nowhere in the letters is there a reference to the letter being as at the 31 December 2015 nor references to the information being as at the transfer date. The letters are dated 12 July 2016. Further, as the SDM found they were not true either as at the 31 December 2015 or as at 12 July 2016. The Appellant was aware that tax issues had been raised with respect to these Transfers both before and after the Transfer dates. He knew this personally and given the red flags that had been waved by members of the Guernsey team both before and after the Transfers as well as the information he had received since, SCTG on whose behalf the Appellant was signing these letters knew this too, so to put it bluntly it was not to the best of its knowledge. The Appellant should have been on high alert to these issues. In response to a question from me as to why he was not on high alert, given he accepts he knew about the two ISARS from the November 2015 Board Meeting in his fourth witness statement, the submissions made on his behalf were that by the time that the Transfers took place he thought they had been resolved and did not make further enquiry. However, the trouble with this submission is that even if that was what he thought was the position at the turn of the year, by the time he signed the letters he knew there were ongoing problems including in relation to those matters where ISARs had been lodged before 31 December 2015.

217. This position by the Appellant also fails to deal with files marked with the "*Refer MLRO*". In his Third Witness Statement, he says:

> *The "Refer To MLRO" Code was merely a code entered on the computer system to alert anyone dealing with the relevant file. It could be entered when there were concerns or observations, but it did not necessarily mean that an ISAR had been filed where the issues were dealt with (as in this case, because Ms Sarre had signed off on all of the transfers) the note was of historical relevance only.*

218. Before the SDM his submissions were that this meant that the consent of Compliance was required and therefore in order for the Transfers to have happened this consent must have been given. As he maintained that the letters were intended to reflect the position on 31 December 2015 this meant, he said, it was in order for him to sign them. Any remaining "*Refer MLRO*" codes on the entry file

(which he accepted were still there) were therefore historic and not a concern for him. This assumption on the part of the Appellant appears to run contrary to SCTG's own Country Anti-Money Laundering and Counter Terrorist Financing Procedure Version 3.0 (see paragraph 313 of the Decision). He also knew that the required processes set out in that procedure dealing with a "*Refer MLRO"* code had not been undertaken.

219. I do not consider that the argument the Appellant makes that the fact that there had already been DORAs where warranties had been provided by SCTG to Company B was something that the Appellant could rely. Regardless of the terms of the DORA (which were not before the SDM), the requests from L had been made after the DORAs had been executed and therefore were required by Company B in addition to the DORA. From the evidence before the SDM in any event the DORAs were executed without the normal procedures in relation to governance being complied with due to the focus on getting the Transfers done and included entities against which ISARs had been raised. However, most importantly the signing of the DORAs does not absolve the Appellant from signing letters in relation to tax that were manifestly inaccurate both on 31 December 2015 and in July 2016. The LCCs which were meant to be joint with Country X to ensure the Guernsey procedures were also being carried out as well as Country X. However, this was changed so that the LCCs were only from a Country X perspective with Guernsey attending for "information only". The failure to engage with the Guernsey side meant that there was no check and balance from the Guernsey Regulatory perspective to ensure the right steps were taken. This should not have been allowed to happen and contributed to the failings in the processes surrounding the Country X Transfers. Contrary to the submissions of the Appellant the SDM does not find that the Appellant was aware of the CTIC Report. The context in which he refers to it is set out at paragraph 322 of the Decision all of which were reasonable for him to conclude. In particular he uses it to highlight the sharp contrast between the position of the Appellant on the Country X Transfers and the conclusions of the report.

220. I can find no basis for criticism of the SDM's conclusion with regard to the tax letters. The SDM was entitled to come to the conclusions that he does in relation to the letters. His finding at paragraph 380 was one he was entitled to come to on the evidence before him and was a reasonable one for him to come to.

221. Having found that the Appellant has not been successful on any of the grounds of appeal in relation to paragraphs 367-383, I find likewise that the SDM's conclusion at paragraph 384 that for the same reasons that the Appellant failed to meet the Minimum Criteria for Licensing under Schedule 1 paragraphs 3 (2) (a) (b) and (e) including that the Appellant did not act with a lack of probity was a reasonable one and within the range of reasonable responses and proportionate.

222. The Appellant also appeals at paragraph 19 of the grounds of appeal against the SDM's finding at paragraph 385 of the Decision that *in the period from January 2014 to July 2016, Mr Kelham failed to take adequate steps to ensure that SCTG followed proper procedures and controls for the purpose of combatting Financial Crime* as detailed in paragraphs 386-390.

223. The Appellant says it was a remarkable finding by the SDM in light of the few documents that there are and what the documents show. The Appellant sets out the documents which he says are relevant from those discussed in the appendix to the skeleton argument. With regard for the need for a new IT platform (see paragraph 386) and the Appellant's failure to address these issues, the Appellant says the documents show that it is not he who had responsibility for the system. The IT expertise was from outside SCTG, the funding, choice of IT platform and implementation of it was subject to SCB control and oversight. The new system IT Microgen 5 was chosen in February 2016 and came into use in the second half of 2016. It had to work within the SCB structures and therefore required their input. The Appellant asserts that integrated projects such as these are notoriously slow and difficult. He relies on the minutes of the Executive Risk Committee dated 4 December 2015 to demonstrate this which sets out the challenges that there were in bringing a new platform on board:

Approval has been given by PvB PRC

- *Historical issue highlighted between vendor and Entity K has been resolved, including additional background checks*
- *Contracts are being finalised between Microgen and SCB Legal/Global Sourcing*
- *Project resources are being identified, where possible backfill resources are being put in place to help with the project mobilisation although there is a general shortage of quality resources which has been flagged as a project risk*
- *GTO tasks are underway specifically focusing on system build and wider integration with T24 and CuPID at this point in time*

224. At no point were there expressions of concern of the time it was taking to implement this by the Respondent although it was kept informed. The Appellant also says that the documents which the GFSC rely on to support this allegation were obtained for other purposes and refashioned for this allegation therefore it cannot be certain that they show a comprehensive record of SCTG's documents in relation to the IT system. He says that there are 24 relevant documents that cover an entire 54 month period from 2012 to 2016. He says that these cannot be all the documents that there are relevant to the issue. He accepts that the documents show that there was an awareness of an overreliance on manual processes. They also show that in February 2016 IT professionals from SCB (not SCTG) made the decision to adopt the IT system and in October 2016 the migration was made. Whilst the Appellant did have access to the profits, expenditure was subject to the oversight and control of the SCB as the shareholder of SCTG. The documents he says show that he was not responsible for example the Board meeting 30 April 2014 which showed that up until he had left A had been the lead on this process and that it was a matter that the Board was concerned about.. Further, he does not know what attempts there were made by the Respondent to interview other members of the SCTG staff on this issue.

225. The Appellant says in relation to staffing levels (in so far as he says it is possible to delve into specifics based on what he refers to as the random documentation), he acknowledged that there were regular staffing issues at SCTG (with staff leaving and replacements needing to be found): for example, at the 12 August 2015 Board meeting the HR Officer reported that new staff resources had been taken on but that attrition levels had also increased. In that meeting, he attributes this to a particular problem with recruitment due to the demand for good trust administrators in Guernsey. There were also staffing budgetary constraints: for example, it was noted at the 5 October 2016 Board meeting that there was a freeze (imposed by the shareholders in SCTG) on employing full-time members of staff. This, he says, was the reality that faced the Appellant's management of SCTG throughout his period as CEO, namely that it was a management that was very much constrained by the requirements of the wider group management. Nonetheless, under the Appellant's tenure, staff numbers at SCTG had increased from some 25 when he first started work in September 2012 to some 70 staff by the time he was suspended on 28 November 2016.

226. He says that it was not correct or reasonable for the SDM to describe the increased staffing levels or the closely managed process of development of the new IT system as constituting a failure on the part of the Appellant to make meaningful progress. The Appellant also says that contrary to paragraph 386 of the Decision that staffing issues and IT platform issues were reported to and considered by the Board on a regular basis. There is no evidence of any Board member ever having expressed a concern to the effect that either of those issues might require SCTG to be closed to new business. In his interview with the GFSC, C expressed no such concerns, even after the event. To conclude, as the SDM does, is, therefore, most unfair.

227. The Appellant also submits that contrary to paragraph 387 of the SDM's Decision there was no breach of Regulation 5, either at all, or as the result of staff resource or IT platform issues. He says that there were no such issues (or no such issues beyond the usual to be expected in any business). He says that Regulation 5 requires either ongoing and effective monitoring and that was properly undertaken both generally, and in relation to the Country A and Country X transfers, as explained above.

228. The Appellant further argues that the SDM cannot, reasonably, refer to "*the remediation post October 2016*" which he does at paragraph 387 of his Decision and assert a failure to corroborate the source of wealth and the source of funds for clients. If the Appellant is to be found wanting in relation to these matters, then the relevant facts need to be identified, the specific clients for whom source of wealth and source of funds information was not corroborated need to be identified, the failings in corroboration need to be identified, and the changes in regulatory landscape over time (both technically and culturally) need to be taken into account.

229. He also says contrary to paragraph 388 there was no breach of Regulation 11 or Rules 274, 276 and 277 of the Handbook. Moreover, it is again insufficient for the SDM merely to record that SCTG "failed to ensure identification data was up to date", without specifying, for whom, when and in what respects.

230. The Appellant also says contrary to paragraph 389 there was no breach of Regulation 14. Most notably that there was no failing in relation to either the acceptance or remediation of the Country A transfers, and there was no process failure (or at least, no failure for which the Appellant is responsible) in relation to the Country X transfers; the "deficiencies in CDD records" on which the SDM relies are not identified by the SDM; and dependence on relationship managers in Country X "for collation of material" was not a breach rather that was the unavoidable reality of the bank led model, and as long as the material was obtained, and as long as SCTG had access to that material (both of which were the case), who collated it was irrelevant.

231. The Appellant also says that there was no failure by him to act in accordance with Rule 27 of the Handbook as found by the SDM at paragraph 389. The Rule deals with board responsibility for oversight of compliance and quite clearly imposes obligations on the Board as a whole. He says he shared that responsibility as a member of the Board of SCTG but it was never his responsibility (indeed, never within his power) to "ensure" any of the matters identified by the SDM. Further he says Rule 27 obliges the Board to "*take responsibility for the policy on reviewing compliance and must consider the appropriateness and effectiveness of compliance*". This is a policy and review responsibility, which can be failed to be discharged by not reviewing or not considering compliance and not by any single specific business decision to take on a new client or clients, with any knock-on consequences for the workload of the compliance function.

232. The Appellant also repeats that it was necessary for the SDM to address the submission that was made to him that the GFSC must explain, and the SDM be satisfied with that explanation, as to why (in circumstances where the relevant decisions were made by, or at least known to and agreed with by, the entire Board) it was the Appellant alone who was considered to have failed to meet his regulatory obligations in these respects. No such explanation was put forward by the GFSC as to why the Appellant alone out of the members of the Board was considered unfit and the SDM does not anywhere address this striking omission.

233. Again when dealing with the conclusions of the SDM it is important that paragraphs or parts of paragraphs are not taken out of context of the Decision. At paragraph 385, the SDM concluded:

> *"In the period from January 2014 to July 2016, Mr Kelham failed to take adequate steps to ensure that SCTG followed proper procedures and controls for the purpose of combatting Financial Crime. I do not find that SCTG lacked policies. SCTG had policies in place. What SCTG lacked was the ability to implement proper procedures and controls."*

234. At paragraph 386-390 the SDM effectively summarises the narrative from the preceding paragraphs of the Decision which led him to come to this conclusion. He acknowledges the challenges that greeted the Appellant when he joined SCTG and the efforts made by the Appellant and the ongoing discussions of the new IT platform but he also by reference to the particular paragraphs of the Decision he notes how from January 2014 onwards until SCTG was closed in July 2016 there was a lack of meaningful progress. At paragraph 386 c), even though this is not required of the SDM, he sets out what the Appellant as CEO and Managing Partner of SCTG should have done. As CEO the Appellant should have been alive to the regulatory framework and had a working knowledge of its demands on SCTG as a regulated business. In the Decision the SDM finds that Ms Sarre is also culpable for failing to ensure that SCTG followed proper procedures and controls for the purpose of combatting crime. The reference to refusing new business again must be put in the context of sub-paragraph 386c of the Decision, where the SDM in essence is saying if the argument is that the Appellant required outside approval (despite SCTG's sizable profits) for resources to deal with the lack of staff resourcing and over-reliance on manual processes, then his lever to those who controlled those resources should have been "*that such approvals were required and, absent such expenditure, SCTG was not in a position to take on any new business*." The SDM was unable to find demonstrations of a sufficient measure of concern and urgency by the Appellant as the Managing Director and CEO. The SDM was entitled to reach this conclusion based on the documentation before him. Whilst the Appellant complains that there is a lack of documentation, there is no evidence that documentation has been withheld. He says that these cannot be all the documents that there are, however, it is evident from the Section 23 Notices that have provided that the documents and information requested was wide in scope and appeared to have been complied with by SCTG. The investigation was a reasonable one and the arguments on disclosure do not assist the Appellant since the conclusions that the SDM came to were all supported by the evidence before him (unfair is not a ground of appeal).

235. Contrary to the submissions of the Appellant I do not consider that it is necessary for the SDM to set out the specific clients for who SoW or SoF was not corroborated, which specific identification data which was not up to date and the other details which the Appellants says should be provided here. There was evidence before the SDM (including the detailed report from the Compliance Company) for him to come to these conclusions and the reasons that the SDM gives are proper, adequate and intelligible and deal with the substantial points that have been raised. I consider that the Decision meets the expectation that it will, "*bear the hallmarks of fairly closely reasoned decisions at, or approaching, the style of decision that would be expected from a judicial tribunal*." Paragraph 28 *Bordeaux Services (Guernsey) Limited v GFSC (ibid).*

236. Regulation 11 (as set out in the Handbook for Financial Serviced Businesses on Countering Financial Crime and Terrorist Financing) is that "*A financial services business shall perform ongoing and effective monitoring of any existing business relationship*". Rules 274, 276 and 277 set out:

> 274. *Monitoring of the activity of a business relationship must be carried out on the basis of a risk-based approach, with high risk relationships being subjected to an appropriate frequency of scrutiny, which must be greater than may be appropriate for low risk relationships.*
>
> *276. Scrutiny of transactions and activity must be undertaken throughout the course of the business relationship to ensure that the transactions and activity being conducted are consistent with the financial services business' knowledge of the customer, their business, source of funds and source of wealth.*
>
> *277. A financial services business must consider the possibility for legal persons and legal arrangements to be used as vehicles for money laundering and terrorist financing.*

237. As I have already said I consider that the SDM was not required to provide further details as the Appellant asserts and also I have come to the conclusion that the SDM was entitled to conclude on the evidence before him that SCTG had breached these provisions and that the Appellant had failed to ensure that SCTG was in a position to take steps to remedy these deficiencies (as above) and also permitted and facilitated these breaches in relation to the Country X Transfers.

238. Regulation 14 provides for the record keeping requirements of a financial services business. The SDM was entitled to find on the evidence before him that the regulation (along with Rule 348) had been breached. Whilst I agree with the Appellant that the collation of the material by the RMs was not itself a breach I consider that the Appellant's submission on this point is a misreading of the SDM's Decision. He is describing what has led to the breach i.e. by depending on the RMs in Country X to collate the material (and for all the reasons articulated by the Appellant that this created challenges) this has contributed to the breach of the regulation but nevertheless despite these challenges it was the obligation of the Guernsey entity and the Appellant as CEO and Managing Director of that entity to ensure that the regulation was not breached.

239. At paragraph 389 the SDM says that the Appellant "*breached Rule 27 of the Handbook in failing to ensure that the Board of SCTG complied with Regulation 14*." Rule 27 under the heading Board Responsibility for Oversight of Compliance sets out: "*The Board has effective responsibility for compliance with the Regulations and the Handbook and references to compliance in this Handbook generally, are to be taken as references to compliance with the Regulations and the Handbook. In particular the Board must take responsibility for the policy on reviewing compliance and must consider the appropriateness and effectiveness of compliance and the review of compliance at appropriate intervals.*"

240. Unlike other breaches where the SDM has articulated that the Appellant has "*failed to ensure*" or "*facilitated these failings*" or similar, here the SDM states that the Appellant has breached the rule himself. As Rule 27 refers to the Board's responsibility as opposed to individual directors, I do consider that on the wording of Rule 27 that the individual director cannot breach the Rule.

241. The Appellant further appeals the finding by the SDM at paragraph 391 of the Decision that "*in relation to financial crime procedures and controls, and for the reasons set out above, Mr Kelham failed to meet the requirements of the Minimum Criteria for Licensing under Schedule 1 paragraph 3(2)(a), (b) and (e) as:*

    a. *Per sub-paragraph (a), he did not act with the competence, experience and soundness of judgment required for fulfilling the responsibilities of a licensed fiduciary; for the avoidance of doubt, I do not find that Mr Kelham acted with a lack of probity;*

    b. *Per sub-paragraph (b), he did not act with sufficient diligence when fulfilling his responsibilities;*

    c. *Per sub-paragraph (c), he did not display sufficient knowledge and understanding of the legal and professional obligations assumed or undertaken.*

242. He says that the finding (i) is the result of a material error as to procedure, (ii) is the result of material errors as to the facts, and (iii) is unreasonable because it is based on the findings at paragraph 376- 381 of the Decision. Based on the previous submissions I believe that this should refer to 385-390, however I have treated this as any paragraphs which go to the SDM's conclusion at paragraph 391.

243. Although I have concluded that the SDM was wrong to find the Appellant in breach of Rule 27, that in itself does not materially undermine his finding at paragraph 391. The findings at paragraph 391 are the conclusion after the SDM summarises his findings at paragraphs 385 -390. Further, I consider that taking into account the evidence before the SDM, and the findings that he made in

relation to the evidence, and in the absence of a material error of procedure, the SDM was entitled to come to the conclusion that he did and that such a conclusion was reasonable and proportionate. Further, I am satisfied that in the relevant paragraphs of the Decision, the SDM has made it clear why action has been taken against the Appellant as Managing Director and CEO of the Guernsey office (along with Ms Sarre as director and Acting MLRO) is not an arbitrary or a partial distinction from the other members of the Board. Taking action against the Appellant was reasonable and within the range of responses that a reasonable decision-maker might make in the circumstances.

Sanctions

244. Having decided that the Appellant has been unsuccessful in his appeal against the findings save in relation to the breach of Rule 27 but that I do not consider that this materially undermines the SDM's conclusion at paragraph 391, it is only necessary for me to consider the third submission by the Appellant on sanctions. This is that no sanction was appropriate in this matter or alternatively only a much lesser sanction than was imposed in the Decision, no matter what conclusions the Court comes to on the Appellant's primary case. He says that none of the sanctions are fair, reasonable or proportionate even based on the findings that the SDM made in the Decision. On the basis that I have found that the SDM was reasonable to conclude that the Appellant was aware of the existence of the Country Y tax amnesty programme from the November 2015 Board Meeting, I shall not consider this part of the Appellant's submission.

245. The starting point to the imposition of any regulatory sanction by the Respondent must be in furtherance of the public interest and must seek to satisfy one or more of the relevant functions of the GFSC as set out in section 2 of the FSC Law. The Appellant says that in this case, the GFSC has already imposed sanctions (including a public statement) on SCTG, it is difficult to see what public interest is served by singling out the Appellant for punishment. Certainly, there is no "*message to the market*" that will follow from sanctions being imposed on the Appellant that will not already have been made by means of the sanctions imposed on SCTG. This is particularly so in circumstances where there is no allegation of lack of probity against the Appellant, rather misjudgement and his genuinely held beliefs as to what was the best course of action to follow are rejected by the SDM.

246. In relation to the obligation to effectively supervise the Bailiwick's finance business, SCTG has been closed to business since mid-2016, there is no on-going supervision role for the Respondent and therefore there is no wider benefit to the GFSC that has not already been obtained by means of the sanctions imposed on SCTG. Further, the Appellant says it is quite clear, on the evidence before the SDM, that no conclusion can be reached that the Appellant was involved in, or facilitated, the commission or concealment of any financial crime in relation to the Country X Transfers. There was, at most, a risk of that being the case, but there is no evidence that any of the assets of customers who were transferred to Country X were in fact the proceeds of any crime. In terms of maintaining confidence of the financial services sector, the Appellant accepts that the imposition of sanctions on a senior individual responsible for misconduct by a regulated firm can serve to maintain confidence in, and preserve the integrity of, the financial services sector. However, sanctions have already been imposed on SCTG so that is not "necessary" in this case; and nor is it "expedient" to do. There is no need for any prohibition – the Appellant has left the Bailiwick and has no intention of returning, let alone returning to work in the financial services sector.

247. The Appellant raises in relation to both the Country A and Country X Transfers that the Appellant's failings found by the SDM were by way of inadvertence and not deliberate. The course adopted was only careful thought that the course was lawful, reasonable and with good faith. He says that the seriousness of the contravention must not be on the basis that the Appellant is responsible for everything that SCTG did (or failed to do). Rather, the Appellant's contraventions must be judged primarily by reference to his own actions and decisions. Decisions around the Country X Transfers were in principle made by the Board (with the benefit of advice and input from legal, compliance

and financial crime experts) on the basis that CRS/AEI did not give rise to any in principle objection to the transfers, but that it was necessary to consider each proposed transfer on a case-by-case basis. There was, at the time it was made, no dissent from that decision. That decision was maintained by the Board even after the concerns that had been raised by trust officers had been reported to the Board, on the basis that those objections did not cause any change of view in relation to the in-principle decision that had been reached, but, rather, reinforced the need for case-by-case consideration. The Appellant says it was never his intention to discourage trust officers from making ISARs; quite the contrary, his intention was to make clear that they were entirely free to do so. If, nonetheless, trust officers felt discouraged then, whilst the Appellant regrets that, he cannot fairly be sanctioned for what was at most a misunderstanding.

248. The Appellant accepts that financial crime must not be facilitated and must be combatted but he maintains that on the information that was available to the Appellant at the time, this did not demonstrate that there was in fact any financial crime reason behind the Country X Transfers. The Appellant also maintains that despite the complaints made by the Respondent there was no evidence before the SDM that there was prejudice to any individual client, nor "Guernsey Plc". The Appellant accepts that there was a risk, but he should be judged primarily by whether or not that risk manifested itself, rather than by its mere existence and that Guernsey's reputation had not been prejudiced by this.

249. With the Country A Transfers, he tried to rectify the position and took the steps that he considered were available to him at the time and at all times had the backing of an informed board. The Appellant says that unless the SDM can identify a particular step that ought to have been taken (but was not), it cannot be fair to sanction the Appellant for the overall period of time taken to deal with what he describes as "*the unexpected consequences*" of the Country A Transfers. The Appellant also argues that despite the complaints of the Respondent there is no evidence of any prejudice to the individual clients, or to the Bailiwick of Guernsey in relation to the Country A transfers.

250. These problems were brought to the attention of the GFSC: both the fact of them and the effect that they were having on the operations of SCTG. The Appellant says that with the Country A Transfers, the Respondent was aware (from the meeting with P) the very senior level at which the issue was being considered. He says it will almost always be the case in any regulatory interaction that more information might have been supplied (either volunteered, or as the result of questions being raised) but, if the GFSC was truly not aware of the scale of the issues, the responsibility for that cannot fairly be laid at the Appellant's door alone. In relation to the Country X Transfers, he does not accept that he bears the sole responsibility for the scale of the Country X Transfers not being brought to the attention of the GFSC – the very future viability of SCTG in light of the transfers was item 1 on the agenda for the December 2015 GFSC visit. He submits that it is difficult to see why, if the GFSC was aware that the size of the transfers potentially effected the viability of SCTG but was not aware of the precise amount of the transfers, that they did not ask for that information. To sanction the Appellant for this would be most unfair.

251. The Appellant also says the SDM failed to take account the fact that he obtained no personal financial benefit from the failings, lost his job with SCTG, lost remuneration, has suffered extreme mental ill-health as the result of these events, and has not found it possible to obtain other employment in the intervening period of time, the financial consequences of both a public statement (which will be available by internet search) and a financial penalty are clear and unfair. The sanctions should also take into account that he lives in the US and has no desire to work in Guernsey or in financial services in Guernsey.

252. The Respondent submits that the SDM's approach towards the sanctions was correct as a matter of law and an approach he was entitled to adopt. The submission that there has been no prejudice or damage to the reputation of Guernsey from the actions of the Appellant is strongly refuted by the Respondent. This, it says, is an extraordinary and concerning submission and this is because

it pays no attention to the reputation of Guernsey as a financial centre in light of what we know was the aftermath of the Country A Transfers and the Country X Transfers. In relation to the latter, internal SARS in the lead up, external SARS immediately after the Transfers and significantly, the Monetary Authority of Country X made findings and fines against Company B and SCB for failures relating to regulatory duties in Country X as a consequence of the Country X Transfers. In relation to the Country A Transfers there were still structures and files that needed remediation as late as the Compliance Company review despite the various reassurances of the Appellant.

253. In considering the appeal against the Sanctions I have taken into account the reasoning of the SDM in the Decision. He goes through the factors relevant to the consequences of the proposed sanctions. He does not mention the loss of the Appellant's job although the SDM knew from the evidence before him that the Appellant was no longer in employment (although as I raised with Counsel for the Appellant in the hearing given the closure of SCTG it must be highly likely that his role was at least time limited), he was aware of the disciplinary sanction imposed on the Appellant after the internal investigation, however what is clear from the reasoning of the SDM is that he has recognised the personal impact that the process has had on the Appellant and his family and that sanctions will have upon them. He recognises that the Appellant fully cooperated with the GFSC at all times, he acknowledges that his failings were not malicious, his probity is not in question, that he inherited a pre-existing difficult situation, and he made attempts to address the underlying issues.

254. Nevertheless, the argument that there is no public interest in there being a public statement about the Appellant is misplaced. Evidently despite the detrimental effect it will have on the Appellant and his family (which the SDM acknowledged), as the SDM makes clear at paragraph 426:

> *However, one of the purposes of issuing a public statement is to highlight poor practices and to promote high standards of conduct among controllers, directors and managers of licensees. Lessons may therefore be learned and the public statement may also serve as a deterrent to those parties who may be committing similar contraventions. A public statement also seeks to provide transparency of decision making in a way that maintains the reputation of the Bailiwick as a well-regulated finance centre.*

255. This must be right. Further, I agree with Counsel for the Respondent that the submissions put forward in relation to the reputation of Guernsey were misplaced particularly in circumstances where the transfers of customers from SCTG to Company B are specifically mentioned in the public statement made by the Monetary Authority of Country X. For a small jurisdiction heavily dependent upon the provision of financial services to persons beyond these shores, the reputation of the Bailiwick is fundamental to the sustainability of the island's economy for the benefit of the population as a whole. Ultimately it is the businesses and individuals who must deliver the Respondent'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. I cannot agree that there are not lessons for other directors in the Appellant's position to learn. It is evident that the SDM did take into account that the matters were self-reported to the GFSC, but did not accept the Appellant's arguments that the information was sufficient or identified the severity of the issues. For example whilst the impact of the Country X transfers on the SCTG was the evidently discussed at the meeting with the GFSC in December 2015 as recorded in the Decision at paragraph 413, it is the failure *to inform the GFSC that that (i) the legal ownership of over USD 1billion of AUM was likely to pass out of the jurisdiction or (ii) of the concerns raised by the Senior Trust Officers in respect of the Country X Transfers* which undermines the Appellant's submission. I am satisfied that the SDM considered carefully all the factors that he should have and has not taken into account factors that he should not. I take the view that the SDM has appropriately balanced the likely adverse consequences financial and otherwise of a public statement. Although I have found that the Appellant did not breach Rule 27 I do not consider that this materially undermines the SDM's conclusion at paragraph 391 nor the

sanction imposed. Also, following his decision not to make certain findings in relation to the Country A Transfers against the Appellant he reduced the financial penalty and the length of prohibition by approximately 20%. It cannot be said to be irrational, unreasonable, or disproportionate for the GFSC to exercise its powers to impose the sanctions contained in the Decision. I am therefore satisfied that the sanctions were rational, reasonable and proportionate in the circumstances.

Conclusion

256. For the reasons I have given, all of the appeals against the Decision are dismissed save in relation to Rule 27 which I do not consider that this materially undermines the SDM's conclusion at paragraph 391 nor the SDM's conclusion on sanctions. Any applications arising from this judgment are to be lodged within 28 days of the formal handing down of this judgment