



Case update: The appeal in The Guernsey Financial Services Commission v. Domaille and others

Service area / [Dispute Resolution and Litigation](#)

Legal jurisdiction / [Guernsey](#)

Date / [March 2024](#)

The judgment of the Court of Appeal in *The Guernsey Financial Services Commission v. Domaille, Clarke and Hannis* [2024] GCA003 was handed down on 18 January 2024, overturning the decision of Lieutenant Bailiff Marshall KC dated 18 April 2023 and remitting the matter back to a new Senior Decision Maker (“SDM”) at the Commission.

The ramifications of the judgment will be the subject of a fuller opinion piece in due course. This update confines itself to considering the key outcomes from the case.

Whilst this judgment provides some useful guidance on the approach to determining “integrity” and “probity” in the context of the conduct of licensees, it does raise potential issues regarding compliance with Article 6 of the European Convention on Human Rights (the “ECHR”).

Background and judgment of the Royal Court

The Royal Court was seised with an appeal from the SDM’s decision dated 29 July 2022, which decision imposed sanctions on three individuals (the so-called “Individuals”) using powers conferred on it by the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law 2020 (the “EP Law”). These sanctions included discretionary financial penalties, prohibition orders and the making of a public statement.

The Lieutenant Bailiff allowed the appeals on all but one of the five grounds brought by the Individuals, concluding that:

1. the SDM has erred in law in finding that the Individuals had acted “without probity” on the basis that the civil burden and standard of proof had been incorrectly applied;
2. the SDM had not conducted a fair and balanced assessment of the facts;

3. the SDM had erred in law or acted unfairly in imposing financial penalties without regard to the Commission’s more limited powers prior to 13 November 2018; and
4. the SDM failed to have regard to the financial penalties imposed in similar cases.

The Commission was subject to considerable criticism from the Royal Court, with particular focus on its exercise of powers under the EP Law. In her judgment, LB Marshall stated that “there must be a balance in the manner in which the Commission exercises its powers which pay due regard to the individual’s case” and “the sanctions which it imposes ought to show such a balance”. The Royal Court identified a number of factors that led it to conclude that the sanctions imposed on the Individuals were “unreasonable or disproportionate”.

The Commission was granted leave to appeal (having renewed their application for leave before a single Judge of the Court of Appeal) on four grounds as follows.

Court of Appeal judgment

Ground 1 – the jurisdiction of the Royal Court

The Commission’s first ground of appeal was that the Lieutenant Bailiff’s approach of conducting a “detailed re-evaluation of the SDM’s Decision” went beyond the scope of section 106 of the EP Law, which provides that grounds of appeal are limited to findings that: (a) the decision was ultra vires or there was some other error of law; (b) the decision was unreasonable; (c) the decision was made in bad faith; (d) there was a lack of proportionality; or (e) there was a material error as to the facts or as to the procedure.

OFFSHORE LAW SPECIALISTS

Under section 106(6) of the EP Law, the remedies on appeal to the Royal Court are that it may: (a) set aside a decision of the Commission; (b) remit the decision with such directions as it considers fit; or (c) confirm the decision in whole or in part.

In considering the matter, the Court of Appeal noted that the Commission is not an 'independent' tribunal within the meaning of Article 6 because "*it functions as investigator, 'prosecutor' and decision-maker*", but nevertheless allowed this ground of appeal on the basis that the express statutory wording of the EP Law was clear and must be followed in that the Royal Court was exercising an appellate function only and not conducting a full review of the merits of the SDM's decision - "*it cannot usurp the primary decision-making function of the GFSC*". This was a central criticism of the Royal Court's judgment.

This does raise concern as to whether the Royal Court's limited appellate function is compatible with the right to a fair trial under Article 6 of the ECHR, which requires that the appeal be reviewed by a Court having "*full jurisdiction*". In particular, there is European case law which states that a judicial body cannot be said to have full jurisdiction unless it has the power to assess whether a penalty was proportionate to the misconduct.

An interesting parallel can be drawn between appeals brought under the EP Law and section 46 of the Competition (Guernsey) Ordinance, 2012 (the "**Ordinance**"), which entitles a party to appeal a decision of the Guernsey Competition and Regulatory Authority (the "**GCRA**") to the Royal Court. The Court has identical powers under the Ordinance to set aside the decision of the relevant authority, remit the matter with such directions as it thinks fit or confirm the decision in whole or in part. In the judgment in *Medical Specialist Group LLP v. Guernsey Competition and Regulatory Authority* [2023] GRC006, in which this firm represented the Appellant, the Bailiff adopted a different approach, stating: "*Although there is nothing on the face of section 46 that explicitly states that there is a full merits review and there is no power for this Court to substitute its own decision for that of the GCRA, the overall manner in which this Court can either set aside, or set aside and remit with directions, any decision of the GCRA subject to these appellate provisions, means that this independent and impartial Court should be treated as being a Court of full jurisdiction for the purposes of ensuring that the MSG's Article 6 rights are met.*"

Ground 2 - absence of actual harm

The Court of Appeal held that the Commission was correct in saying that evidence of actual harm caused by the Individuals' breaches could be regarded as an aggravating factor, but the absence of any such evidence could not be regarded as a mitigating factor. It noted that as a matter of commonsense, the question of whether any tangible harm has been caused is likely to be outside the knowledge and control of the individuals carrying on the regulated business.

Ground 3, part 1 - probity/integrity

Probity, integrity, competence and soundness of judgment are crucial minimum licensing requirements under the Commission's regulatory regime. The Court of Appeal held that whilst dishonesty and integrity are distinct concepts, the correct legal test in determining whether there has been dishonesty or lack of integrity is essentially the same. The legal test for a lack of integrity is essentially objective, but it involves a consideration of the facts which the person knew or believed. When assessing probity, it is also important to consider whether the facts known to the individuals, viewed objectively, should have given rise to a suspicion and whether the failure to suspect demonstrates that the individual lacked integrity. It found that the Royal Court erred in law in applying a subjective test involving the state of mind of the relevant individual.

Ground 3, part 2 - standard of proof

The Court of Appeal clarified that there is only one standard of proof applicable, being proof on the balance of probabilities (more likely than not) in rejection of Lieutenant Bailiff Marshall's ruling that more compelling evidence is required for serious allegations of dishonesty or want of professional probity.

In reaching this decision, it referred to English case law (decided after the Royal Court's judgment) which recognised that proof of an improbable event may necessitate further compelling evidence, but "*there is no such thing as a heightened civil standard*". Ultimately, the seriousness of the allegation does not make the conduct any less likely.

Ground 3, part 3 - prohibition orders

A prohibition order is a sanction issued by the Commission which prevents an individual from acting in certain regulated roles. The prohibition can be limited to a certain time period.

The Lieutenant Bailiff, in allowing the appeal, concluded that the prohibition orders imposed on the Individuals were unreasonable and disproportionate and set them aside. This was overturned by the Court of Appeal. It agreed that findings of lack of integrity increase the likelihood that an individual will be subject to a prohibition order, but it is not limited to these cases. The Commission must first establish whether a prohibition order is appropriate and then consider its extent.

Ground 4 - fining powers

Up until 13 November 2017, the Commission's fining powers were limited by statute to a maximum of £200,000. After this date, the fining powers increased to £4 million for a licensee and £400,000 for an individual. When the amended statute came into force, the Commission made a public statement confirming that the increased penalties would be applied in cases commencing after 13 November 2017 but in July 2021 it announced that the increased limits would apply to all cases, irrespective of whether the relevant conduct occurred prior to November 2017.

Continued

In her judgment, Lieutenant Bailiff Marshall found that enforcing new financial penalty limits on relevant conduct that occurred prior to 13 November 2017 would breach the principle of retrospective penalisation and basic fairness, and relevant conduct occurring prior to 13 November 2017 should therefore be subject to the lower penalty limit.

This was rejected by the Court of Appeal, ruling that the wording of the EP Law involved an assessment of whether the individual has currently failed to meet the minimum criteria for licensing requirements, having regard to relevant past conduct. Distinguishing conduct that occurred prior to November 2017 would also result in “*unnecessary complexity*”. Furthermore, it was held that the Commission is not required to have regard to the fact that penalties imposed on the company and the shareholder of the company would lead to the practical consequence of the shareholder being penalised twice.

Additional observations

Whilst the Commission succeeded on all grounds of appeal, the SDM’s decision was found to be flawed and was remitted for determination by a new SDM. The Court of Appeal also had sympathy for Lieutenant Bailiff Marshall’s view that credit should be given for remedial measures taken by the company in relation to the enforcement process.

In its concluding remarks, the Court of Appeal disagreed with any suggestion that the Commission had acted inappropriately as a regulator and noted that the Commission has wide-ranging powers to uphold the Bailiwick’s reputation as an international financial centre.

Commentary

This judgment arguably reinforces the wide-ranging powers of the Commission within the strict interpretation of the EP Law. However, it may cause concern to individuals subject to the Commission’s enforcement process in the knowledge that they may exhaust the appeals process following a (potentially lengthy) investigation, only for the matter to be remitted back to the SDM for redetermination. If that decision remains unsatisfactory, then their only option is to go through a further appeals process via the Courts. The Court of Appeal’s determination that the Royal Court is an appellate Court under the EP Law and should not carry out a review of the merits of the SDM’s decision also gives rise to concerns as to whether this process is compliant with an individual’s right to a fair trial.



FIND US

Carey Olsen (Guernsey) LLP
PO Box 98
Carey House
Les Banques
St Peter Port
Guernsey GY1 4BZ
Channel Islands

T +44 (0)1481 727272

E guernsey@careyolsen.com



FOLLOW US

Visit our dispute resolution and litigation team at [careyolsen.com](https://www.careyolsen.com)



PLEASE NOTE

This briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such. © Carey Olsen (Guernsey) LLP 2024.