

Regulatory Penalties – what gives?

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It is widely accepted, anecdotally at least, that Guernsey is experiencing an increase in the number of investigations undertaken and sanctions imposed by the Guernsey Financial Services Commission (the **GFSC**). Such sanctions can be hefty financially and may have significant consequences professionally, particularly in cases where a prohibition order is made against an individual. Bearing this in mind, the way in which the GFSC imposes sanctions is subject to scrutiny by the Royal Court of Guernsey (the **Court**) by way of an appeals process.

The Court has recently allowed, in part, an appeal from a decision of the GFSC against a Guernsey-registered and licensed company called Bordeaux Services (Guernsey) Limited (**Bordeaux**) and three individuals who were directors of that company (the **Directors**). Deputy Bailiff McMahon's considered judgment^[1] examines the enforcement process of the GFSC and what it must have regard to and explain in the event that sanctions are imposed.

Background

As against Bordeaux and the Directors, the GFSC found various breaches of the regulatory laws arising from the administration of a Guernsey-registered company which was connected to the Arch Cru investment fund, which itself has been subject to high-profile court proceedings and much media attention in recent years after suffering serious liquidity problems and subsequent regulatory action by the FSA (now the FCA) in the UK in the fall-out from the financial crash in 2008.

As per the GFSC's enforcement process, the decision to impose the sanctions was delegated to an English QC (**Senior Decision Maker**), who first issued a notice of the intended decision (**Minded to Notice**), which stated that two of the Directors be given fifteen-year prohibition orders and the third director a five-year prohibition. All suffered financial penalties. A financial penalty of £150,000 was imposed on Bordeaux and a public statement was to be made.

The Appellants made various submissions to the GFSC which resulted in the prohibition orders for two of the three Directors being reduced from fifteen years to five. However, the original five-year sanction remained in respect of the third director and there was no reduction in the financial penalty against Bordeaux.

An appeal was made to the Court. Bordeaux appealed only against the magnitude of the penalty of £150,000, whereas the Directors appealed only against the making of prohibition orders against them under the full suite of regulatory laws, but not the fines imposed on them. They sought to set aside the prohibition orders imposed on the grounds that the Senior Decision Maker (of the Respondent) erred in law through misdirecting himself as to the correct criteria to apply to determine whether it was appropriate to make a prohibition order, or alternatively that the prohibition orders were disproportionate and/or unreasonable.

The Appeal

The Directors alleged the prohibition orders were disproportionate and/or unreasonable because there was no finding of dishonesty or market abuse, there was a failure to show that the conduct of the Directors caused any loss to customers or the public; the level of seriousness of their failings, the GFSC's practice in other past cases; and the lack of evidence to support several key findings.

In respect of Bordeaux, the grounds advanced (as points of law) were that there was a failure properly to take into account the potential financial consequences to Bordeaux of imposing such a penalty and that the level of the penalty was inconsistent with discretionary financial penalties imposed in previous cases and not in accordance with the GFSC's stated policy. It was also alleged that the penalty was disproportionate and/or unreasonable.

The Court examined the sanctions imposed and the justification for them and held that what mattered was whether the GFSC had achieved a "fair balance". It relied on the guidance of the Privy Council in Gokool v Permanent Secretary of the Ministry of Health and Quality of Life [2008] UKPC 54 when considering whether the GFSC had given disproportionate weight to one or more of the considerations relevant to the decision, and if so, whether it is of significance that such aspect of the decision falls outside the range of reasonable responses. Thus, the review is more about outcome than process.

The Court found that the GFSC was open to impose the prohibition orders it made pursuant to certain of the regulatory laws (the POI Law and the Fiduciaries Law), but not pursuant to others (namely the Banking Supervision Law, the Insurance Managers and Insurance Intermediaries Law and the Insurance Business Law), in respect of which insufficient separate reasoning for the prohibition orders was given.

As to the length of the prohibition orders, the Court could not identify why, following the further submissions made after the Minded to Notice, the length of the prohibition orders had been

reduced for two of the Directors but not the third. It was incumbent upon the GFSC to explain this. As a result, the five-year prohibition order was set aside and that aspect of the case remitted to the GFSC for re-consideration, the orders as against the other Directors remained untouched.

As regards Bordeaux, the GFSC did not explain how it took into consideration the penalties imposed by it in other cases. There was thus little justification for how it reached the figure of £150,000 (particularly given the maximum penalty of £200,000, which maximum amount remains unchanged since the imposition of the penalty). The financial penalty was found to be unreasonable and disproportionate and the matter was remitted to the GFSC to re-consider and provide detailed reasons.

So, what must the GFSC do when seeking to investigate and impose sanctions?

When imposing sanctions, the GFSC must:

- Provide a fully reasoned decision, particularly as regards the imposition of prohibition orders and their length;
- Show they have had proper regard to any financial consequences the imposition of a financial penalty will have on a company;
- Examine previous cases where financial penalties have been imposed and explain how they have taken those into account by way of comparison, by reference to at least one previous case by name;
- For each law under which sanctions are imposed, explain why that is the case.

Conclusion

The Deputy Bailiff's judgment will no doubt be read closely by the various stakeholders in the financial services industry in the island, particularly bearing in mind the heightened regulatory environment and increased enforcement action of recent years. In particular, it adds to a developing body of jurisprudence in Guernsey, which will help guide licensees in the conduct of their business and to better understand how such important decisions made by the GFSC should properly be reached.

[1] Bordeaux Services (Guernsey) Limited & Ors v The Guernsey Financial Services Commission (Judgment 18/2016, Royal Court 11 May 2016)

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Meet the Author



Simon Davies

Partner

Guernsey

E: simon.davies@ogier.com

T: [+44 1481 737175](tel:+441481737175)

Key Contacts



Mathew Newman

Partner

Guernsey

E: mathew.newman@ogier.com

T: [+44 1481 752253](tel:+441481752253)

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