

Guernsey Royal Court regulatory decision on prohibition orders, fines and public statements

Insights - 04/02/2019

Case

Y v Chairman of the GFSC.

Handed down by the Deputy Bailiff on 29 November 2018.

Facts

Mr Y was an executive director of the Licensee company X. Under the terms of his employment with X, Y was not permitted to accept any other work except with the permission of X. Y also had an accountancy practice which was registered with the GFSC but Y did not have the relevant regulatory permission from the GFSC to incorporate companies for clients.

Licensee X then commenced disciplinary proceedings against Y for using X's registration with the Guernsey Registry to carry out company formations for persons who were not clients of X and without the X's permission. Y subsequently resigned from X and explained what had happened to the GFSC.

The GFSC commenced an investigation and issued a final "minded to" notice on 24 January 2018. The main allegation against Y was that he incorporated 12 Guernsey companies for his own clients through his accountancy practice (and not through company X which was licensed) and that he did not have an appropriate regulatory licence to carry out that type of work.

In the "minded to notice" the GFSC sought to:

- Prohibit Y from acting as a director, controller, partner, manager etc under any of the regulatory laws for a period of 4 years
- Dis-apply the exemption under the Fiduciary Law 2000 which allows an individual to act as a

director of six companies or less without a licence;

- Apply a financial penalty of £13,000
- Issue a public statement under the Financial Services Law

Y appealed to the Royal Court against all of the above findings which were handed down by the GFSC's Senior Decision Maker.

The Royal Court findings

The Deputy Bailiff found that the GFSC did not have the jurisdiction or power to make prohibition orders that are limited in time, they only had the power to make unlimited prohibition orders (as in the UK) against Y albeit they could indicate when it might be appropriate for Y to re-apply for a license.

He therefore remitted the decision to impose the prohibition order back to the GFSC. He also considered that the GFSC could not dis-apply the exemption for the regulation of directorships under section 3(1)(g) of the Fiduciaries Law for a limited period for the same reason ie GFSC could only dis-apply the exemption indefinitely.

However, the Deputy Bailiff did emphasise that he considered that the Senior Decision Maker (appointed by the GFSC) was justified in making a prohibition order as Y had not fulfilled the minimum criteria for licensing.

The Senior Decision Maker cited a lack of openness and honesty displayed by Y during the investigation and Y's probity, competence and soundness of judgment were also questioned. The Deputy Bailiff agreed with these findings and the fact that there was a reputational risk to the Bailiwick caused by Y's actions.

Y had also appealed against the issue of a public statement and the Deputy Bailiff dismissed this aspect of the appeal and said that in some circumstances the public statement can be beneficial to the individual who has been sanctioned as it reduces speculation and explains exactly what had happened. However, he did say that the statement should only provide an explanation as to how the conclusion was reached that Y did not fulfil the minimum level of criteria for licensing and it should not have included alternative arguments raised on Y's behalf .

When comparing the level of punishment to other cases it was argued on behalf of Y that sanctions were only applicable if investors' money had been put at risk, there were failures to deal properly with anti-money laundering procedures or where there had been insufficient action to remedy previous defects identified by the GFSC.

The Deputy Bailiff agreed that no investors' money had been put at risk and nor did the investigation arise out of an action already undertaken by the GFSC in respect of Y. However, he

did not consider the imposition of a fine of £13,000 to be unreasonable as he found that there had been aggravating factors such as Y's direct responsibility, apparent lack of appreciation of, and attempts to downplay, the seriousness of the conduct.

The take away points

- The GFSC can no longer issue fixed-term prohibition orders but, like in the UK, they can prohibit individuals indefinitely but then invite them to reapply for prohibitions to be lifted after a certain number of years
- Public statements must be more focused on explaining exactly what happened and why and should not provide any extraneous material or arguments put forward in defence
- Even if investors' money is not at risk, nor anti money laundering rules breached, an individual can still be prohibited from working as a director etc
- The crucial failing by the individual here was his lack of openness and probity and the fact that he did not seem to realise how serious his mistakes were.

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