Two related appeals brought by The Medical Specialist Group LLP ("the MSG") against decisions taken by the Guernsey Competition and Regulatory Authority ("the GCRA"). The first relates to the substantive decision dated 16 September 2021 ("the Decision") by which the GCRA found that the MSG had infringed the prohibition imposed by section 5(1) of the Competition (Guernsey) Ordinance, 2012 through entering into agreements with other undertakings which have the object of preventing competition within markets in Guernsey for the provision of services. As a consequence, pursuant to section 32(1) of the 2012 Ordinance, the GCRA gave directions to the MSG. The second appeal relates to the decision of the GCRA dated 16 December 2021 ("the Penalty Decision") to impose a penalty of £1,532,590 on the MSG.

[2023]GRC006

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between	**THE MEDICAL SPECIALIST GROUP LLP**	**Appellant**
	-and-	
	GUERNSEY COMPETITION AND REGULATORY AUTHORITY	**Respondent**

Hearing dates: 30th and 31st March and 1st April 2022

Judgment handed down: 10th March 2023

Before: Richard James McMahon, Esq., Bailiff

Counsel for the Appellant: **Advocate E R Gray**
Counsel for the Respondent: **Advocate M G Ferbrache**

Cases, Texts & Legislation referred to:

The Competition (Guernsey) Ordinance, 2012
The Competition (Calculation of Turnover) (Guernsey) Regulations, 2012
The European Union (Competition) (Brexit) (Guernsey) Regulations, 2021
The European Convention on Human Rights and Fundamental Freedoms
Y v Chairman of the Guernsey Financial Services Commission (unreported, 29 November 2018)
Chick v Guernsey Financial Services Commission [2020] GCA 078)
Channing v The States of Guernsey 2015 GLR 48
Walters v States Housing Authority 1997-99 GLR 15
T-Mobile (UK) Ltd v Ofcom [2009] 1 WLR 1565
Council Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services
R (Wilkinson) v Broadmoor Special Hospital Authority [2002] 1 WLR 419
R (JB) v Haddock [2006] HRLR 1237
Menarini Diagnostics Srl v Italy (case 43509/08, 27 September 2011)
Case C501/11 P *Schindler Holding Ltd v European Commission* (18 July 2013)
de la Torre and Fournier, *Evidence, Proof and Judicial Review in EU Competition Law*

Tobii v Competition and Markets Authority [2020] CAT 1
Litchfield v Director of Environmental Health and Pollution Regulation 2014 GLR 175
Engel v The Netherlands (ECHR, 8 June 1976)
Napp Pharmaceutical Holdings Limited v Director General of Fair Trading (unreported, 15 January 2002)
The Human Rights Act 1998
The Human Rights (Bailiwick of Guernsey) Law, 2000
Ghaidan v Godin-Mendoza [2004] 2 AC 557
Bordeaux Services (Guernsey) Limited v Guernsey Financial Services Commission (unreported, 11 May 2016)
Foley v States Housing Authority 2003-04 GLR 137
Case T-356/15 *Austria v European Commission* (12 July 2018)
Interbrew SA v The Competition Commission [2001] ECC 40
Billet d'État No. XIX of 1990
British Medical Association, *Working in Private Practice – Overview* (September 2020)
Case C-67/13 P *Groupement des Cartes Bancaires v Commission* EU:C:2014:2204
Carewatch Care Services v Focus Caring Services [2014] EWHC 2313 (Ch)
Asda Stores Limited v Mastercard Incorporated [2017] EWHC 93 (Comm)
Kerse & Khan on EU Antitrust Procedure (6th ed)
Joined Cases 29 & 30/83 *Compagnie Royale Asturienne v Commission* [1984] ECR 1679
ChipsAway International Ltd v Kerr [2009] EWCA Civ 320
Competition Act 1998
Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Ermgard Schillgalis* [1986] ECR I-353
ServiceMaster (14 November 1988, OJ 1988 L332/38)
Pirtek (UK) Limited v Joinplace Limited [2010] EWHC 1641 (Ch)
Kall-Kwik Printing (UK) v Bell [1994] FSR 674
Case T-30/89 *Hilti AG v Commission* [1991] ECR II-1439
Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577

Introduction

1. There are two related appeals brought by The Medical Specialist Group LLP ("the MSG") against decisions taken by the Guernsey Competition and Regulatory Authority ("the GCRA"). The first relates to the substantive decision dated 16 September 2021 ("the Decision") by which the GCRA found that the MSG had infringed the prohibition imposed by section 5(1) of the Competition (Guernsey) Ordinance, 2012 through entering into agreements with other undertakings which have the object of preventing competition within markets in Guernsey for the provision of services. As a consequence, pursuant to section 32(1) of the 2012 Ordinance, the GCRA gave directions to the MSG. The second appeal relates to the decision of the GCRA dated 16 December 2021 ("the Penalty Decision") to impose a penalty of £1,532,590 on the MSG.

2. Both appeals are brought under section 46 of the 2012 Ordinance. By its Cause dated 13 October 2021, the MSG seeks to set aside the GCRA's Decision on grounds of unreasonableness, or that it was based on errors of law and material errors of fact or that it lacked proportionality. The additional ground pleaded alleging that it was flawed by reason of procedural impropriety was not pursued once it was clarified that a member of the GCRA who had previously advised the MSG about the provisions in issue had recused herself from any part in this matter. The Cause in respect of the appeal against the Penalty Decision sought to have the penalty set aside, although the prayer refers to there being a reduction of the penalty to nil or to such amount as the Court thinks fair and just (where it is now accepted that there is no power to grant that latter relief), on the grounds that the penalty decision was based on errors of law and/or of facts and/or was unreasonable and/or lacked proportionality, or alternatively that the question of the penalty be remitted with such directions as the Court thinks fit. The two appeals are inter-related because the penalty imposed necessarily depends on upholding the

GCRA's Decision in the first place, although the discrete appeal against the penalty is pursued by the MSG even if that Decision were to be upheld, where the GCRA has acknowledged at the hearing that, in any event, it needs to re-consider the Penalty Decision so that has to be remitted to it.

3. Following service of the MSG's Summons in accordance with section 46(3) of the 2012 Ordinance, the parties agreed directions to progress the appeal against the Decision. They also agreed that the directions given by the GCRA under that Decision should be suspended pending the determination of the appeal, all in accordance with section 46(6) of the Ordinance. By a further Consent Order on 21 January 2022, the parties agreed to adjourn the appeal against the Penalty Decision to a review hearing scheduled for 2 February 2022.

4. At that review hearing, issues dealt with included the need for some of the materials lodged in these appeals to be sealed on the Court file as confidential and the parties were to agree a confidentiality protocol for the purposes of the hearing, which would be held in public. I ordered that both appeals should be heard together, directed that there was no requirement for the GCRA to prepare, serve and file Defences, and fixed the further timetable towards the hearing of the appeals at the end of March.

5. In support of the appeal against the Decision, the MSG relies on an Affidavit sworn by Gary Yarwood, who was the chairman of the MSG at that time. The MSG has also relied on a witness statement of Dean Masterton, who is the chief executive officer of MediLink Consulting Limited. On behalf of the GCRA, reliance is placed on two Affidavits sworn by Sarah Livestro on 17 December 2021 and 18 February 2022, dealing respectively with the Decision and the Penalty Decision. To the extent that I need to do so, I will refer to parts of this evidence when rehearsing the facts.

6. Oral submissions were made by Advocate Gray on behalf of the MSG and Advocate Mark Ferbrache on behalf of the GCRA at the hearing commencing on 29 March 2022, following which I reserved judgment. I am grateful to both Advocates for the clarity of the submissions they made.

The Decision

7. In order to place the primary appeal against the Decision into context, I will refer quite extensively to its content.

8. The GCRA's conclusions are summarised in section 5. This notes that the 2012 Ordinance entered into force on 1 August 2012 and so the infringements of section 5(1) found relate to two periods. The first is from that date to the end of 2017 in respect of clause 35 of the General Partnership Agreement ("the GPA"), under which the predecessor to the MSG operated before it became a limited liability partnership, and subsequently under clause 81.1 of the new partnership agreement effective from 1 January 2018 ("the LLP Agreement"). As regards those employed as associates, the offending clauses in those employment contracts would also be viewed under similar periods because of the different language used. Paragraph 5.3 notes that "*The duration of each infringement in principle only begins once a former partner or associate has left MSG and so becomes a separate undertaking.*" As a result, the GCRA directed the MSG first "*to remove the non-compete provisions identified in this Decision from its current LLP Agreement and its contracts with its current associates*" and further directed that the MSG must "*inform in writing each former MSG consultant still subject to any of the non-compete provisions identified in this Decision that those non-compete provisions are void and unenforceable.*" The Decision also indicated that consideration was being given to imposing a financial penalty.

9. The route taken to those conclusions involved a detailed analysis of the provisions contained both in the partnership agreements and in employment contracts of associates against a factual background that I will summarise subsequently. At paragraph 4.95 of the Decision, the GCRA concludes that each of the offending clauses *prima facie* amounts to an infringement of competition by object. As further explained in paragraph 4.70:

> "*Object infringements are those forms of agreement between undertakings which can be regarded, by their very nature, as being injurious to the proper functioning of normal competition. In such cases, the restrictive effect on competition is presumed.*"

10. Despite this conclusion, the Decision also sets out (in paragraph 4.90) that:

> "*Non-compete (restraint of trade) clauses fall outside of the scope of the prohibition on anti-competitive agreements, provided that they go no further than is objectively necessary, in both scope and duration, to allow the primary agreement to which they relate to operate. The GCRA bears the legal burden of proof and MSG the evidential burden of proof in respect of determining whether or not a restraint is ancillary to the agreement in question.*"

It is in relation to this assessment where the parties disagree because, in paragraph 4.162, the GCRA concluded:

> "*For the reasons set out above, the GCRA finds that MSG has not demonstrated that the non-compete clauses are objectively justifiable because, in their absence, the partnership would not be able to operate.*"

11. The reasons are set out in the preceding paragraphs. In doing so, the GCRA summarised the contentions on behalf of the MSG in paragraph 4.100:

> "*MSG put forward a number of arguments as to why the non-compete clauses were objectively justified:*
>
> *(a)* ***Incentive****. MSG argued that a consultant's role in Guernsey was unattractive for a number of reasons, such as the absence of junior doctors, the small size of the hospital and the higher workload compared with the UK. To offset these disadvantages, MSG needed to be able to offer prospective consultants some amount of private work in order to attract them to Guernsey. Without the non-compete clause in its current form, MSG's package would no longer be sufficiently attractive to recruit suitable doctors.*
>
> *(b)* ***Cross-subsidisation****. MSG argued that the non-compete clauses were necessary to secure (i.e. cross-subsidise) the provision of the unattractive aspects of the service provided by MSG, namely the provision of emergency secondary healthcare. It was argued that, in the absence of the non-compete restraints, additional remuneration for the provision of these unattractive public emergency secondary healthcare services would be required to attract consultants to join MSG.*
>
> *(c)* ***Reputation and contacts****. MSG argued that a departing consultant should not be able to benefit from the reputation and contacts they have built up during their time with MSG. It stated that a new consultant must win the trust of patients and their families in order to attract private work. It was important that they were not undermined by a recently departing consultant as they tried to build that trust.*

> *(d)* ***Time taken to recruit****. MSG argued that the time taken to recruit new consultants could be substantial and that it must be able to "protect [the] work" until it had been able to recruit a replacement consultant.*"

12. In relation to the first issue (incentive), the GCRA concluded (at paragraph 4.111) that:

> "*Since the evidence demonstrates that incoming consultants are not made aware of the fact that their predecessor is subject to a non-compete clause, the existence of that non-compete clause cannot be a factor that incentivises them to join MSG. As the non-compete clause cannot, therefore, as a matter of logic have any incentive effect, it follows that MSG has not demonstrated that the non-compete clause is objectively necessary to the operation of the partnership on the grounds that it incentivises consultants to join MSG.*"

It adds, on the issue of incentivising consultants to remain with the MSG (at paragraph 4.115):

> "*In that regard, the GCRA finds that, on the balance of probabilities, a portion of the private elective work for Guernsey patients would be non-contestable (i.e. could only be carried out by, and would therefore always be won by, MSG consultants). This is because:*
>
> *(a) A departing consultant would not be able to carry out operations on-island but rather would be limited to undertaking on-island consultations and either operating on patients off-island themselves or referring those patients to an off-island surgeon.*
>
> *(b) GPs are the main source of referrals to private secondary healthcare services and they indicated that there is a preference amongst patients that they prefer (some of whom will require surgery) to be seen on-island.*"

Further, based on that latter finding, the GCRA concluded (at paragraph 4.121(b)) that:

> "*Because a portion of private work (private elective surgical work for patients who wish to be treated on-island) is non-contestable, a non-compete clause is not required to secure it for MSG consultants. It is therefore the case that even in the absence of a non-compete restriction in any form, MSG would be able to offer <u>some</u> private work to an incoming consultant (i.e. at a minimum those patients seeking private elective care who wished to be operated on on-island). Even if it were to be accepted that the MSG partnership could not operate if it were not able to offer some level of private work to MSG consultants, the evidence does not demonstrate that a non-compete clause is required to secure some level of private work for MSG. The non-compete clause cannot, therefore, be objectively justifiable on that basis.*"

13. In relation to the second issue (cross-subsidisation), the GCRA repeats its finding that "*even in the absence of any non-compete clause, MSG consultants would achieve some level of private elective work*" (paragraph 4.124) before noting that "*all consultants are initially engaged as employees*", meaning that "*an employed consultant retains the option to remain as an employee, and to receive the salary that fully takes account of the fact that certain aspects of the role are, according to MSG, unattractive*", which means that "*the remuneration is already set at a level that takes into account the fact that "unattractive" services will have to be provided and, as such, "double compensation" through cross-subsidisation is not required*" (paragraph 4.125). Further, the GCRA assessed the package on offer to consultants as being ostensibly competitive because it balances factors particular to Guernsey with being "*at the top of, or above the top of, the UK pay scale*" (paragraph 4.127). The GCRA also refers here to clause 7.6 of the contract that the MSG has with the States of Guernsey for the provision of secondary healthcare services

("the SHC") and considers that it could be invoked "*rather than seeking to recover those costs by restricting competition in other markets*", referring to the private secondary healthcare markets (paragraph 4.130). Its final reason for rejecting any argument relating to cross-subsidisation is that "*private undertakings cannot justify action that is anti-competitive on the basis that it is designed to achieve a public policy objective*" (paragraph 4.131), which relies on a case with which I will have to deal in some detail below.

14. In relation to the third issue (reputation and contacts), the GCRA first concludes (paragraph 4.136):

> "*… that the reputation of an MSG consultant is generated in the relevant public elective market and not in the private elective market. MSG has a 100% share of each public elective market in Guernsey in which it is active. Because it generates its reputation and contacts in markets where it faces no competition, a non-compete clause is not necessary to protect reputation and contacts; this reputation and these contacts will be built up in the public elective markets irrespective of whether or not there is a non-compete clause in place in the corresponding private elective markets. It follows that the non-compete clause is not objectively necessary to allow the partnership to operate on the grounds that it enables reputation and contacts to be built up.*"

It adds that its finding that a portion of the private elective work is non-contestable means that the MSG's "*stated concern that a departing consultant will be able to corner the market appears to be unfounded*" (paragraph 4.137). In any event, the MSG had produced no evidence to support its arguments in relation to the periods that the non-compete clauses would operate to show those periods were objectively necessary (paragraph 4.138).

15. At paragraph 4.140 of the Decision, the GCRA then states:

> "*Because MSG bears the evidential burden of proof, the GCRA is not required to put forward less restrictive alternative non-compete clauses, in terms of either scope or duration, that might be objectively necessary for the partnership to be able to operate. The GCRA has nevertheless undertaken an assessment of the evidence available in order to assess the level of private income achieved by an incoming consultant to establish whether there is any evidence that incoming consultants achieve lower earnings than their departing counterparts for a period of time as they build reputation and contacts.*"

The conclusion from its assessment is that, on average, "*the replacement specialists start and continue to earn comparable amounts to their departing counterparts from early in their tenure*" (paragraph 4.145), meaning that "*there is no discernible period during which the earnings of an incoming consultant are significantly lower than those of an outgoing consultant that could be attributed to a period of "bedding in"; replacement specialists demonstrate similar private earning capacity to their departing counterparts*" (paragraph 4.146).

16. In relation to the fourth and final issue (time taken to recruit), analysing the recruitment data provided by the MSG led the GCRA to find that there is "*a mean recruitment period of 16.2 months with a range from 6 to 33 months, for the first measure (date of resignation to starting date of new specialist)*" and, for the second (departure date to starting date of new specialist) "*the mean recruitment period is 6.2 months with a range from 0 to 20 months*" (paragraph 4.155). Because "*protection would only be required after the consultant had actually left MSG*" (paragraph 4.159), the conclusion in the following paragraph is that:

> "*… the GCRA's assessment is that the second measure, that is the period between the departing specialist's final day at MSG and the starting date of their replacement, is the only reasonable basis on which the time required to "protect [the] work" could be*

assessed, if any such protection were indeed required. This measure more accurately reflects the length of time a departing specialist, having left the MSG, would have to act in a manner that might arguably require restraint. The analysis suggests that in such a case, a restraint period of no more than about 6 months (the mean recruitment time) would be sufficient."

The appeal grounds

17. The MSG does not dispute the GCRA's analysis that the non-compete provisions referred to exist and that when someone leaves the MSG for the purposes of section 5(1) of the 2012 Ordinance they become a separate undertaking to the MSG (paragraphs 52 and 53 of its Cause).

18. The MSG does not accept the characterisation of the "relevant market" as undertaken by the GCRA, contending that there is no evidence in support of it (para. 54, Cause).

19. The MSG denies that the non-compete provisions have the object or effect of preventing, distorting or restricting competition (para. 55, Cause), again arguing that the way the GCRA assessed the evidence it gave is both factually and legally flawed. In that regard, there should have been an acknowledgement that there was undisputed evidence that the MSG encounters serious difficulties recruiting doctors to Guernsey. The evidence obtained from the GP practices in Guernsey supports the MSG's evidence. Where a specialism at the MSG is one where there is a reasonable expectation of a significant private practice, there has been evidence that this is a very important factor in persuading a potential recruit to accept employment. The MSG's evidence that in its experience and judgment the existence of the non-compete provisions were a critical part of the offer should have been afforded more weight. Consequently, the GCRA's conclusion at para. 4.137 of its Decision rejecting that evidence is a plain and serious error of law. The evidence and reasoning on which the GCRA has relied is its own substitution of its own judgment as to what is needed to recruit doctors to the MSG (para. 62, Cause).

20. In relation to the four issues, on incentive, the GCRA has failed to understand the process of professional recruitment and so acted unreasonably and/or made errors of fact and further, the GCRA regards the element of surgical private work as being one where competition from non-MSG practitioners is impossible anyway, so the non-compete provision has no, or no appreciable, effect on competition, meaning that the reasoning is unreasonable, and/or based on errors of law or material errors of fact (paragraphs 63 and 64, Cause). On cross-subsidisation, the GCRA falls into error when considering salaries payable because it focuses on the present position rather than considering what would need to be paid if the non-compete provisions had to be removed, which is unreasonable and/or based on material errors of fact before referring to the possible way in which the MSG could resolve such matters by reference to clause 7.6 of the SHC, ignoring the likelihood that further delays in recruitment would entail having expensive locum cover, with the consequences associated with that for those who use the MSG, making the reasoning unreasonable and/or erroneous in law (paragraphs 65 and 67, Cause). In terms of reputation and contacts, the MSG highlights the difference between someone who is known and a new arrival when considering the private work where competition can operate, particularly by reference to the length of the non-compete provisions currently in use (2 years for partners and 18 months for employed associates), questioning how the evidence advanced by the MSG could be rejected as it has been. In para. 73 of its Cause, the MSG contends that the GCRA's analysis is:

> "*… obviously flawed and unreasonable. The error is a straightforward one: the GCRA assumes that the period over which restraint is needed ends at the point at which the new recruit arrives (on average, 6 months after the departure of their predecessor): see paragraph 4.160. But that period is self-evidently inadequate: it is precisely at the point at which the new recruit arrives that the need for the non-compete provision becomes most acute, because that is the point at which he or she, without the advantages of recognition achieved by prior service in MSG, will try to establish their private practice. That point appears completely to have escaped the GCRA (which fails to mention it, let alone deal with it): but, in the MSG's judgment and experience, the 2 year/18 month term of the non-compete restriction (which, on the GCRA's analysis, on average means protection during the first 12-18 months of practice, by*

which time a reputation will be achieved) is what is necessary to provide the protection against competition from an immediate predecessor that is an important element of the offer, as far as doctors with specialisms where a private practice is reasonably expected are concerned. The GCRA also wrongly focusses on the historic position and does not give full or proper consideration to the consequences if the restriction is removed and the status quo changed. At present, with the restriction … in place, leavers generally give as much notice as possible to the MSG of their intended departure … is order that patients can be handed over directly to the incoming consultation, without the need for an interim or locum appointee. Were the restriction to be removed, a departing consultant would likely be able to take up private practice in competition in advance of an incoming consultant being appointed and/or taking up position, potentially for several months or even a year. This would have the effect of removing any incentive for an incumbent to give anything other than the minimum period of notice, with all the potentially adverse consequences to patient care that have been referenced above."

The statutory framework

21. Part II of the 2012 Ordinance deals with anti-competitive practices. Because it is common ground that there are no applicable exemptions or exclusions, the only provision engaged is section 5. The Decision refers to the MSG having contravened this provision.

22. Section 5 provides:

> "*(1) Subject to the provisions of this Part of this Ordinance, agreements between undertakings which have the object or effect of preventing competition within any market in Guernsey for goods or services are prohibited.*
>
> *(2) Subsection (1) applies, in particular, to agreements between undertakings which –*
>
> *(a) directly or indirectly fix purchase or selling prices or any other trading conditions,*
>
> *(b) limit or control production, markets, technical development or investment,*
>
> *(c) share markets or sources of supply,*
>
> *(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,*
>
> *(e) make the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or accordance to commercial usage, have no connection with the subject of the contracts.*
>
> *(3) Subsection (1) applies only if the agreement is, or intended to be, implemented in Guernsey.*
>
> *(4) An agreement is void to the extent that it comprises or includes an agreement prohibited by subsection (1).*

> *(5) An agreement is subject to the prohibition set out in subsection (1) whether or not every party to it is an undertaking, provided that at least two parties are undertakings.*
>
> *(6) Agreements described in subsection (1) are referred to in this Ordnance as "**anti-competitive practices**".*
>
> *(7) For the purposes of this Ordinance an undertaking is considered to be in "**contravention**" of subsection (1) if it is a party to an agreement which is prohibited thereunder.*"

23. Section 60(1) of the Ordinance contains definitions of some of the terms used in section 5. Because just "*preventing*" is used in section 5(1), the definition ""*prevent", in relation to competition, means prevent, restrict or distort competition or, in each case, attempt to do so*" clarifies that the wording found in other examples of anti-competitive legislation does apply. The word "*undertaking*" is defined as meaning "*a person carrying on a business and includes an association, whether or not incorporated, which consists of or includes such persons*". The word "*business*" is then defined as including "*any economic activity, trade or profession, whether or not carried on for profit*". Within the context of the non-compete provisions that are the subject of the Decision, a former employee or a partner of the MSG who leaves can be regarded as a separate undertaking from the MSG.

24. Because of the potential for overlap with principles relating to restraint of trade clauses in contracts, section 58 of the Ordinance is also relevant: "*This Ordinance is in addition to and, except to the extent that there is any inconsistency, not in derogation from the customary and common law of Guernsey relating to restraint of trade.*"

25. Before reaching its Decision, the GCRA conducted an investigation under Part V of the 2012 Ordinance. The starting point is section 22(1):

> "*Where the Authority has reasonable grounds for suspecting that an undertaking –*
>
> *(a) has contravened –*
>
> *(i) section 1(1), 5(1) or 13(1), …*
>
> *it may conduct an investigation into the suspected contravention or intended contravention and exercise the powers conferred by this Part of this Ordinance.*"

26. Within the suite of powers conferred on the GCRA is its ability to request and obtain information and documents under section 23. Subsection (1) permits it to serve written notice "*on an undertaking*" to "*require it to furnish to the Authority … such information as the Authority many reasonably require for the purposes of the investigation under section 22(1)*". Subsection (2) extends to requiring the production of documents and subsection (3) extends these powers to serving a notice on "*any person who appears to be in possession or control of it or able to obtain access to it*" for the furnishing or production of any information or document that could be sought from an undertaking. If any document cannot be produced, the GCRA can require the undertaking or person on whom a notice has been served to state the whereabouts of the document to the best of their knowledge and belief. Non-compliance, without reasonable excuse, is an offence (subsection (7)).

27. Section 43 sets out the procedure that must be followed by the GCRA when it proposes to make a decision in respect of which there is a right of appeal as set out principally in subsections (2) and (3):

"*(2) The relevant authority shall serve on the undertaking concerned a notice in writing –*

(a) stating that the relevant authority is proposing to take the decision,

(b) stating the terms of, and the grounds for, the proposed decision,

(c) stating that the undertaking may, within a period of 28 days beginning on the date of the notice or such longer period as may be specified in the notice, make written or oral representations to the relevant authority in respect of the proposed decision in such manner as the relevant authority may from time to time determine, and

(d) giving particulars of the right of appeal which would be exercisable under section 46 if the relevant authority were to take the proposed decision.

(3) The relevant authority shall consider any representations made in response to a notice served under subsection (2) before giving further consideration to the proposed decision."

Section 44 then provides that, upon making a decision where there is a right of appeal, the GCRA must serve notice in writing on the undertaking of the terms of, and the grounds for, the decision and set out the particulars of the right of appeal.

28. The ability of the GCRA to impose directions, such as those found in the Decision, is set out in section 32, which provides as follows:

"*(1) If the Authority decides that an undertaking is in contravention of –*

(a) section 5(1), …

it may give the undertaking such directions as it considers appropriate to bring the contravention to an end.

(2) A direction under this section may, in particular, require the undertaking to terminate, modify or withdraw from the agreement in question.

(3) A direction under this section –

(a) must be in writing, and

(b) may be varied or rescinded by a subsequent direction hereunder.

(4) The Authority may, in addition to or instead or giving a direction under this section, by order impose a financial penalty on the undertaking."

29. As is clear from the Penalty Decision, the GCRA chose to use its powers in section 32(4). In doing so, it was required to take into consideration section 34:

"*(1) In deciding whether or not to impose a financial penalty under section … 32(4) … and, if so, the amount thereof, the Authority must take into consideration the following factors –*

(a) whether the contravention was brought to the attention of the Authority by the undertaking or person concerned,

(b) the seriousness of the contravention,

(c) whether or not the contravention was intentional, negligent or reckless,

(d) what efforts, if any, have been made to rectify the contravention and to prevent a recurrence,

(e) the potential financial consequences to the undertaking or person concerned, and to third parties including customers and creditors of that undertaking or person, of imposing a penalty, and

(f) the penalties imposed by the Authority in other cases.

(2) Where a financial penalty is imposed on an undertaking or person, the Authority may publish their name and the amount of the penalty in such manner and for such period as it considers appropriate.

(3) The amount of the penalty must not exceed 10% of the turnover of the undertaking or person during the period of the contravention of the prohibition in question, up to a maximum period of 3 years.

(4) The Committee may by regulation prescribe the manner in which the turnover is to be calculated for the purposes of subsection (3).

(5) An order imposing a financial penalty must be in writing and must specify the date by which the penalty is required to be paid.

(6) The order may provide for the penalty to be paid by instalments of such number and amounts and at such times as may be specified in the order.

(7) A financial penalty is, without prejudice to any other remedy in respect of a default in payment, recoverable as a civil debt due to the Authority.

(8) The Authority may, of its own motion or on the application of the undertaking or person concerned, vary –

(a) the amount of a financial penalty, or

(b) the number, amounts and times of the instalments by which the financial penalty is to be paid.

(9) The Authority shall pay any money received by it in payment of a financial penalty to the Committee for the General Revenue Account of the States.

(10) Subsection (9) does not apply if and to the extent that, in accordance with agreed financial procedures, the Committee directs otherwise."

In accordance with subsection (4), the Competition (Calculation of Turnover) (Guernsey) Regulations, 2012 were made by the Commerce and Employment Department, which was the body to which this power was given. (That Department has now been replaced by the

Committee *for* Economic Development.) I will deal with these Regulations in more detail when determining the appeal against the Penalty Decision.

30. The right of appeal on which the MSG relies is found in section 46:

> "*(1) An undertaking aggrieved by a decision of the relevant authority –*
>
> *(e) following an investigation conducted under section 22(1) …, that the undertaking – …*
>
> *(i) has contravened section … 5(1) …*
>
> *(j) to impose a financial penalty on the undertaking under section … 32(4) …*
>
> *(l) to give the undertaking a direction under section … 32 …*
>
> *may appeal to the Royal Court against the decision.*
>
> *(2) The grounds of an appeal under this section are that –*
>
> *(a) the decision was ultra vires or there was some other error of law,*
>
> *(b) the decision was unreasonable, …*
>
> *(d) there was a lack of proportionality, or*
>
> *(e) there was a material error as to the facts or as to the procedure. …*
>
> *(5) On an appeal under this section the Royal Court may –*
>
> *(a) set the decision of the relevant authority aside and, if the Royal Court considers it appropriate to do so, remit the matter to the relevant authority with such directions as the Royal Court thinks fit, or*
>
> *(b) confirm the decision, in whole or in part.*
>
> *(6) On an appeal under this section against a decision described in subsection (1)(c), (l) or (m) the Royal Court may, on the application of the appellant, and on such terms and conditions as the Royal Court thinks just, suspend or modify the operation of the condition or direction in question, or the variation or rescission thereof, pending the determination of the appeal.*"

In section 47, "*relevant authority*" is defined for these purposes as being the GCRA.

31. There are two further provisions in the Ordinance that are relevant to the manner in which the GCRA has dealt with these matters. The first is found in section 54, which provides:

> "*The Authority and the Court may in determining questions arising in relation to –*
>
> *(a) the abuse by one or more undertakings of a dominant position within any market in Guernsey for goods and services,*

(b) anti-competitive practices between undertakings, and

(c) the merger and acquisition of undertakings,

take into account the principles laid down by and any relevant decisions of the Court of Justice or General Court of the European Union in respect of corresponding questions arising under Community law in relation to competition within the internal market of the European Union."

In this section when it was originally enacted, "*must*" was used, but the word "*may*" was substituted for it by the European Union (Competition) (Brexit) (Guernsey) Regulations, 2021 with effect from 23 February 2021. This is an example of the changes that have been effected following the decision of the United Kingdom to withdraw from the European Union. As is clear from the Decision, significant weight has been placed by the GCRA on the principles found in relevant decisions of the courts in Luxembourg.

32. The second provision is section 55, which relates to the power of the GCRA to publish guidelines. The areas in which this can be done are set out in subsection (1):

"*The Authority may issue such guidelines as it considers appropriate –*

(a) in connection with the administration, implementation and enforcement of this Ordinance and any matter relating to it (and generally for the purposes of this Ordinance), and

(b) for the purpose of providing practical guidance in respect of any provision made by or under it and any duties, obligations, requirements, restrictions, prohibitions and liabilities arising under or in connection with it and the procedures and best practices to be observed by undertakings affected by it."

Further, the use to which such guidelines can be put is specified in other subsections:

"*(6) Guidelines and any contravention thereof must be taken into account by the Authority in determining whether and in what manner to exercise its functions conferred by or under this Ordinance; but, unless the guidelines provide otherwise –*

(a) they are not binding on the Authority or, except to the extent indicated in subsection (7), on any person or body,

(b) they are merely indicative of the Authority's likely approach to any particular issue,

(c) they do not prejudice the Authority's discretion to decide any particular case or matter differently according to its merits, and

(d) they do not relieve any person of any duty, obligation, requirement, restriction, prohibition or liability imposed by or under this Ordinance.

(7) Without prejudice to any other provision of this Ordinance as to the consequences of any such contravention, a contravention by any person of guidelines does not of itself render him liable to any criminal or civil proceedings; but in any legal proceedings (criminal or otherwise), whether or not under this Ordinance, the guidelines are admissible as evidence, and if the guidelines appear to the court or other

> *tribunal before which the proceedings are being conducted to be relevant to any question arising in the proceedings then the guidelines may be taken into account in determining that question.*"

Nature of appeal

33. Before I turn to the facts, I will deal first with the submissions made by Counsel about how the Court should approach an appeal under the 2012 Ordinance. This will be relevant to the slight difference of opinion as to the admissibility and relevance of certain materials on which the MSG seeks to rely.

34. Advocate Gray submits that an appeal under section 46 of the 2012 Ordinance is not "standard" judicial review. Further, the power for the GCRA to impose a substantial financial penalty means that the proceedings are to be categorised as the determination of a criminal charge for the purposes of Article 6 of the European Convention on Human Rights. There are consequences that flow from such a categorisation as explained in domestic decisions (for example, *Y v Chairman of the Guernsey Financial Services Commission* (unreported, 29 November 2018), where the subsequent appeal to the Court of Appeal did not disturb any of the conclusions about compliance with Article 6, and *Chick v Guernsey Financial Services Commission* [2020] GCA 078), as well as in UK and EU jurisprudence. In particular, there is a requirement for a full merits review, involving effective and thorough judicial scrutiny, of the findings of fact made and evaluations undertaken by the GCRA.

35. On behalf of the GCRA, Advocate Ferbrache points out the way in which Logan Martin JA, giving the judgment of the Court of Appeal in *Channing v The States of Guernsey* 2015 GLR 48, broadly equated the statutory grounds from that case as repeated in section 46(2) of the 2012 Ordinance to the well-known principles of judicial review (at para. 17, following reference to the five grounds enumerated):

> "*It is obvious that at least some of these grounds are equivalents of the well-recognized grounds upon which judicial review may succeed and which are derived from the decision of the Court of Appeal in Associated Provncl. Picture Houses Ltd. v Wednesbury Corp.. It need hardly be said that these judicial review grounds have been the subject of repeated judicial consideration since and, for the purpose of identifying which of the grounds in s.17(2) are the equivalent of the grounds for judicial review, the best exposition is perhaps the passage in the speech of Lord Diplock in Council of Civil Service Unions v. Minister for Civil Service ([1985] A.C. at 410-411). Having regard to that passage, it is reasonable to identify a similarity between the accepted grounds for judicial review and the grounds stated in paras. (a), (b), (c) and (e) of s.17(2).*"

Advocate Ferbrache suggests that the difference lies in the fact that section 46 confers an appeal as of right rather than needing to obtain leave to proceed with a judicial review challenge.

36. He further submits that there is a distinction between an appeal in the United Kingdom to a specialist Competition Appeal Tribunal ("CAT") and so the appeal to this Court is more akin to what happens before the Court of Justice of the European Union ("the CJEU"), which does not have the power to substitute its own decision on the merits for the decision taken by the European Commission (and where the grounds of review are set out in Article 263, TFEU). He contends that this type of statutory appeal is not a general appeal on the merits, citing what Beloff JA stated in *Walters v States Housing Authority* 1997-99 GLR 15 (at para. 21):

> "*We therefore conclude that the States of Guernsey deliberately gave the Royal Court appellate powers not only over issues of vires, which would be questions of law, but over issues of reasonableness, which would be questions of fact. They stopped short of*

> *allowing in effect a general appeal on merits, that is to say, of permitting the Royal Court to substitute its views for those of the Authority …*".

37. The GCRA also relies on what the English Court of Appeal explained in *T-Mobile (UK) Ltd v Ofcom* [2009] 1 WLR 1565 about the compatibility with Convention rights of a judicial review case rather than a full re-hearing, particularly in paragraphs 30 and 31. However, those comments are clearly made in the context of what was in issue in that case, which related to whether the CAT was correct to decline jurisdiction, which was the issue that was the subject of the appeal and it involved considering the effect of article 4(1) of Council Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services ("the Framework Directive"). That provision required "*effective mechanisms … under which any user … has [a] right of appeal [provided by] member states*". As set out in para. 13 of the judgment:

> "*Article 4 goes on to require that the "appeal body" be independent, and that: (i) it shall have "appropriate expertise available to it to enable it carry out its functions" ("the expertise requirement"); (ii) "the merits of the case are duly taken into account" (the "merits requirement"); (iii) "there is an effective appeal mechanism"; (iv) if the appeal body is not judicial in character it must give reasons and its decision must be "subject to review by a court or tribunal within the meaning of article 234 of the Treaty".*"

38. Whilst there had been a suggestion that the United Kingdom might be in breach of article 4 of the Framework Directive, it became common ground "*that if the route of challenge to the award must be by way of judicial review rather than appeal to the CAT, such a route would be an "effective appeal mechanism" within the meaning of article 4*" (para. 15). Accordingly, whatever else was said in the judgment delivered by Jacob LJ, it must be viewed in the light of that concession, where Lord Pannick QC had accepted "*that the rules as to judicial review jurisdiction are flexible enough to accommodate whatever standard is required by article 4*" (para. 19). Despite that concession, on behalf of Ofcom, Dinah Rose QC identified why the concession had properly been made, extending to how judicial review can provide a full merits investigation (see, eg, paragraphs 21 *et seq.*, including reference to *R (Wilkinson) v Broadmoor Special Hospital Authority* [2002] 1 WLR 419 and *R (JB) v Haddock* [2006] HRLR 1237). This means that the passages on which Advocate Ferbrache relied ("*it would not be enough to invite the tribunal to consider the matter afresh*" and "*What is called for is an appeal body and no more, a body which can look into whether the regulator had got something material wrong. That may be very difficult if all that is impugned is an overall value judgment based upon competing commercial considerations in the context of a public policy decision*") relate to what is expected by virtue of article 4 and are not necessarily of general application within the context of how section 46 of the 2012 Ordinance is structured. Moreover, the sentence that precedes the latter of those passages is also relevant ("*After all it is inconceivable that article 4, in requiring an appeal which can duly take into account the merits, requires member states to have in effect a fully equipped duplicate regulatory body waiting in the wings just for appeals.*") Further, para. 29 of the judgment helpfully explains:

> "*Accordingly I think there can be no doubt that just as judicial review was adapted because the Human Rights Act 1998 so required, so it can and must be adapted to comply with EU law and in particular article 4 of the Directive. If the CAT did not exist judicial review would have to and could do the job. The CAT's existence does not mean that judicial review is incapable of doing it.*"

39. In these circumstances, although reference is also made to the judgment of the European Court of Human Rights in *Menarini Diagnostics Srl v Italy* (case 43509/08, where the judgment was given on 27 September 2011), what matters is what is set out relating to compliance with Article 6, ECHR. If only for ease of reference, I will quote from the Information Note in English:

> "*The applicant company had been able to challenge the penalty [of €6 million] before the administrative court and to appeal against that court's decision to the Consiglio di Stato. According to the Court's case-law, these bodies met the standards of independence and impartiality required of a court. The administrative courts had examined the applicant company's various allegations, in fact and in law. They had thus examined the evidence produced by the AGCM. The Consiglio di Stato had also pointed out that where the administrative authorities had discretionary powers, even if the administrative court did not have the power to substitute itself for an independent administrative authority, it was able to verify whether the administration had made proper use of its powers. As a result, the role of the administrative courts had not been limited simply to verifying unlawfulness. They had been able to verify whether, in the particular circumstances of the case, the AGCM had made proper use of it [sic] powers. They had been able to examine whether its decisions had been substantiated and proportionate, and even to check its technical findings. Moreover, the review had been carried out by courts having full jurisdiction, in so far as the administrative court and the Consiglio di Stato were able to verify that the penalty was fit the offence, and they could have changed it if necessary. In particular the Consiglio di Stato, had gone beyond a "formal" review of the logical coherency of the AGCM's reasoning and made a detailed analysis of the appropriateness of the penalty, having regard to the relevant parameters, including its proportionality.*"

40. Part of this summary relates to para. 59 of the judgment (in French), but which has also been touched on in a later decision of the CJEU, Case C501/11 P *Schindler Holding Ltd v European Commission* (judgment of 18 July 2013, para. 35):

> "*In paragraph 59 of its judgment in A. Menarini Diagnostics v. Italy, the European Court of Human Rights explained that, in administrative proceedings, the obligation to comply with Article 6 of the ECHR does not preclude a 'penalty' from being imposed by an administrative authority in the first instance. For this to be possible, however, decisions taken by administrative authorities which do not themselves satisfy the requirements laid down in Article 6(1) of the ECHR must be subject to subsequent review by a judicial body that has full jurisdiction. The characteristics of such a body include the power to quash in all respects, on questions of fact and law, the decision of the body below. The judicial body must in particular have jurisdiction to examine all questions of fact and law relevant to the dispute before it.*"

This last sentence is relied on by Advocate Gray, also by reference to the summary of these decisions set out in de la Torre and Fournier, *Evidence, Proof and Judicial Review in EU Competition Law* (paragraphs 1.031 and 1.032). These are also principles that have been referred to in other contexts where considering similarly worded statutory appeal provisions in this jurisdiction. In short, I am not persuaded that there is anything special about an appeal against a decision of the GCRA because the bases on which it can be challenged are standard for the purposes of pursing a statutory appeal.

41. Advocate Ferbrache has quoted extensively from the decision in *Tobii v Competition and Markets Authority* [2020] CAT 1, referring to paragraphs 49 to 56, in the GCRA's Skeleton Argument. Whilst I have considered the approach set out in that case and find some of it helpful as a reminder of how questions of rationality can be addressed, I do not feel obliged to adopt those principles as if they applied to a statutory appeal under the 2012 Ordinance. As I have indicated, the grounds under the 2012 Ordinance are, in my view, wider than conventional judicial review and so any case dealing with judicial review, which this case was because of the effect of the provision in the enactment under which the appeal was brought expressly referring to applying judicial review principles, is not going to be of direct assistance.

42. As a result, I am satisfied that the previous decisions dealing with this question as it concerns appeals against decisions of the Guernsey Financial Services Commission are equally applicable to an appeal under section 46 of the 2012 Ordinance, subject only to the qualification that there appears to be no issue between the parties that, for the purposes of Article 6, ECHR, these are to be categorised as criminal (or quasi-criminal) proceedings.

43. The first occasion on which this issue arose was in *Y v Chairman of the Guernsey Financial Services Commission*, in which I briefly considered whether this Court has the "*full jurisdiction*" to which these other cases refer. At para. 121, I found that "*the breadth of the potential grounds of appeal … extend further that [sic] what might be considered as classic judicial review.*" In stating that view, I was not departing from what Logan Martin JA had stated in the *Channing* case, but rather explaining that the previous formulation of a statutory appeal in this jurisdiction, about which Beloff JA had commented in the *Walters* case, demonstrated that these grounds went beyond what can generally be argued in judicial review proceedings, particularly in England and Wales, which is often the approach adopted in this jurisdiction (see, eg, *Litchfield v Director of Environmental Health and Pollution Regulation* 2014 GLR 175). One distinction clearly identified from *Walters* is what I will term "*Jurats' unreasonableness*", which is something that goes further than a question of law for determination by a judge alone. Further, the revised "standard" wording of a statutory appeal, such as is found in section 46, in my judgment encompasses what I have called "*Jurats' unreasonableness*" even if the power to determine that now rests with the judge sitting alone. The inclusion of the various paragraphs in section 46(2) lend themselves to an approach reflecting that is "traditional" judicial review, but the overall picture is, in my judgment, wider than the way it was described by Logan Martin JA. It is the breadth of what can be done under such a statutory appeal that led me to conclude (at the end of para. 121 in the *Y* case) that "*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 … and the decision reached.*" I remain of that opinion in the context of this appeal.

44. In relation to the remedies available when determining such an appeal, at para. 122, I expressed the view that:

> "*If any ground of appeal so advanced has merit, the corresponding decision will be quashed. Equally, if it does not have merit, the decision is confirmed. However, when quashing a decision … that may be an end to the matter or, if the justice of the situation so dictates, the decision is remitted and the Court is empowered to give directions. In the Tehrani case, section 12 of the Nurses, Midwives and Health Visitors Act 1997, conferring the right of appeal, simply provided that "the court may give such directions in the matter as it thinks proper, including directions as to the costs of the appeal". The Court of Session held that this unqualified right of appeal viewed in its entirety meant that there was no violation of Article 6. In my opinion, the possibility of remitting the matter to the GFSC with directions offers sufficient scope to indicate the Court's views as if there were power to substitute instead an outcome available to the GFSC.*"

I also added (at para. 124):

> "*In effect, no stone was left unturned and I regard this as equivalent to a full merits appeal. If there had been merit in the grounds of appeal directed at the lawfulness of this [penalty] sanction, the result would have been the quashing of the decision and if there had been merit in the appeal based on proportionality or reasonableness, it is highly likely that the issue would have been remitted. Although there is no power, for example, to quash the penalty and impose instead a lower penalty, through the use of directions it would be possible to indicate a maximum level below which any fresh penalty imposed on remitting the issue would not be regarded as disproportionate or*

unreasonable. In this manner, I regard this as satisfying the requirement that there be an appeal by a court of full jurisdiction."

45. In *Chick* in 2020, sitting in this Court, Lieutenant-Bailiff Sir Richard Collas summarised this reasoning and agreed with it, although he found that the procedures were not criminal or quasi-criminal in nature (para. 54) and proceeded to consider the civil limb of Article 6, ECHR. Part of the reasoning for the conclusion that the criminal limb of Article 6, ECHR was not engaged was through applying *Engel v The Netherlands* (ECHR, 8 June 1976). In refusing leave to appeal, the Court of Appeal (both as a single judge and as a plenary court), accepted that the test in *Engel* had been carefully applied, after considering the relevant case law, resulting in a conclusion that these were proceedings that were disciplinary and regulatory in nature and that conclusion could not be challenged on appeal through applying the test for leave to appeal (see, eg, para. 61 of the plenary Court's judgment). Equally, at para. 58, the first basis on which to conclude that there was no substance to the applicant's arguments was that "*the Lieutenant Bailiff was correct to conclude that the enforcement process does not contravene the right to a fair trial given the full right of appeal to the Royal Court, which enjoys a full jurisdiction to consider whether the decision subject to appeal was (among other matters) ultra vires, unreasonable, made in bad faith or contained a material error as to fact or procedure*". Because the GCRA does not contend that the proceedings are only civil proceedings, this Court is not bound by any reasoning contained in the various decisions in *Chick*.

46. In my judgment, having regard to the wealth of authority on the question, I am satisfied that the regime under the 2012 Ordinance, resulting as it can in significant financial penalties, can properly be categorised in Guernsey law as engaging the criminal jurisdictional elements set out in Article 6, ECHR. There is further support for that conclusion in the decision of the CAT in *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* (unreported, 15 January 2002). As explained therein:

> "*98. As we have already stated in our interim judgment of 8 August 2001, we agree that the Director's concession that these proceedings are "criminal", for the purposes of Article 6 of the ECHR, is properly made: see Case C-235/92P Montecatini v Commission [1999] ECR I-4575, paragraphs 175 and 176. That is particularly so since penalties under the Act are intended to be severe and to have a deterrent effect: see the Director's statutory guidance Guidance as to the appropriate amount of the penalty, (OFT 423, March 2000) issued under section 38(1) of the Act.*
>
> *99. The fact that these proceedings may be classified as "criminal" for the purposes of the ECHR gives Napp the protection of Article 6, and in particular the right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (Article 6(1)), to the presumption of innocence (Article 6(2)), and to the minimum rights envisaged by Article 6(3) including the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him" (Article 6(3)(d)).*"

47. I am also satisfied that it remains appropriate to regard the appeal available to the MSG under the 2012 Ordinance as being an appeal to a Court with full jurisdiction, for the reasons I gave in the *Y* case. The overall effect of the level of scrutiny that can be undertaken of the GCRA's decisions and the powers available to this Court, albeit not going so far as enabling it to re-take the decision, all point towards this Court having the "*full jurisdiction*" required. Further, although the GCRA's written submissions left the impression that the appellate process could be equated with judicial review, during the course of oral argument Advocate Ferbrache acknowledged that the grounds in section 46(2) of the 2012 Ordinance were wider than just *Wednesbury* unreasonableness, so this is not a case where the GCRA is contending that this

Court lacks the "*full jurisdiction*" required. Indeed, that is unsurprising because it would follow that the statutory appellate regime would not be Convention-compliant and consideration would need to be given to how to address that.

48. I find support for the conclusion that section 46 of the 2012 is Convention-compliant by reference to cases dealing with section 3 of the Human Rights Act 1998, which is in the same terms as section 3 of the Human Rights (Bailiwick of Guernsey) Law, 2000 ("the Human Rights Law"). I will refer to what was said by the House of Lords in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. In the speech of Lord Nicholls of Birkenhead, some general comments were made in para. 26:

> "*Section 3 is a key section in the Human Rights Act 1998. It is one of the primary means by which Convention rights are brought into the law of this country. Parliament has decreed that all legislation, existing and future, shall be interpreted in a particular way. All legislation must be read and given effect to in a way which is compatible with the Convention rights 'so far as it is possible to do so'. This is the intention of Parliament, expressed in section 3, and the courts must give effect to this intention.*"

Lord Millett (at para. 59) described this obligation as a "*command*". His Lordship added in the following paragraph that "*the obligation arises (or at least has significance) only where the legislation in its natural and ordinary meaning, that is to say as construed in accordance with normal principles, is incompatible with the Convention.*" Consequently, returning to what Lord Nicholls stated (at para. 32):

> "*... the conclusion which seems inescapable is that the mere fact that the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible' a court can modify the meaning, and hence the effect, of primary and secondary legislation.*"

49. In order to give effect to these principles as they apply to section 46 in the 2012 Ordinance, I think it is worth remembering first that the States of Deliberation made this Ordinance after the Human Rights Law had entered into force. Although it uses what might be considered as "standard", rather than tailored, appeal provisions, the legislature must be taken to have addressed its mind to the need for these provisions to be capable of being Convention-compliant. In the same manner that there is a convention that the UK Parliament does not legislate in breach of its international obligations, I consider that the States of Deliberation would not legislate in a manner that it knows will put it in breach of the international obligations to which Guernsey is subject. This necessarily extends to complying with the Convention rights that were also "*brought home*" by virtue of the Human Rights Law. I am, therefore, satisfied that, to the extent that it is necessary to do so, I can construe section 46 in such a way that the powers it confers upon this Court are consistent with the Article 6, ECHR rights enjoyed by the MSG when bringing this appeal. 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. It also follows that the extent of judicial scrutiny when determining such an appeal will inevitably be an intensive one (in similar fashion to the explanation I gave in *Bordeaux Services (Guernsey) Limited v Guernsey Financial Services Commission* (unreported, 11 May 2016)).

50. The upshot of this conclusion is that the GCRA's reference to what had been said in ***Foley v States Housing Authority*** 2003-04 GLR 137 (at para. 10: "*... if the Royal Court is to discharge its duty clearly and with consistency, it seems to me that the general rule should be that the court should try and put itself back into the position of the original decision-maker by taking account solely of what was before that body*") has no direct bearing on the approach to be taken to any additional material on which the parties, and particularly an appellant, wishes to rely on appeal. The first reason for not adhering to this principle is that this decision was given before the Human Rights Law entered into force. As such, direct reliance could not be placed on Article 6, ECHR at that time. Another reason is that the grounds of appeal in ***Foley*** were still the older style commonly used in this jurisdiction, rather than as now set out in section 46(2). Accordingly, the description of those grounds in ***Walters*** was still operating by way of limitation on the approach to be taken. The addition of broader grounds on which to challenge a decision of the GCRA and the impact of Article 6, ECHR in circumstances where this is squarely within the "*criminal*" categorisation mean that a more expansive approach to what can be adduced necessarily has to be given. In order to make the appellate process Convention-compliant, I do not accept the suggestion from Advocate Ferbrache that it follows from Case T-356/15 ***Austria v European Commission*** (12 July 2018), which was in any event a comment at para. 333 relating to a Commission decision on State aid, that this Court can only assess matters "*in the light of information available ... when that decision was adopted*".

51. Initially, there were four additional items put forward by the MSG on which it wished to rely in respect of these appeals. The first of these (an excerpt from the British Medical Association website) was accepted by the GCRA because it had been material provided to the GCRA before it took the Decision. The second item (a confidential letter provided by a consultant with the MSG dated 18 November 2021) was a matter for submission rather than by way of additional material. As I will explain in due course, what was set out in that letter was, in effect, another version of what had been advanced by the MSG anyway. The fact that a consultant was prepared to write in this manner, subject always to confidentiality being maintained, adds some support to the evidence that had already been adduced by the MSG. I take the view that I can properly infer from the institution of the MSG's appeals, that at least a majority of those who are partners support the terms of this appeal. This material does not add anything specific to what can be inferred from the evidence that had been before the GCRA but, as material that the MSG wishes to advance before this Court, I am satisfied I can properly have regard to it. The third item (the 2020 Audit Report for the Intensive Care Unit dated 2 May 2021) was only questioned by Advocate Ferbrache as to its relevance. Accordingly, whether it has any real bearing on the issues in the MSG's appeal does not affect whether or not I should consider this material and, for the reasons given, I am minded to adopt a liberal approach to whatever the MSG wishes to adduce unless there is strenuous opposition to it from the GCRA. I appreciate that the timing is such that it could have been provided to the GCRA before it took its Decision, but I doubt that there is any overarching question about the quality of care provided by the MSG to its patients, whether under the terms of the SHC or privately, that impacts on the issues surrounding the non-compete provisions. Whilst I accept that the fourth and final item (a statement of Dean Masterton dated 19 November 2021) could have been prepared earlier and so provided to the GCRA before it took its Decision, it serves to support the evidence that had already been provided to the GCRA about the difficulties faced by the MSG when undertaking recruitment. I am satisfied that it does little more than confirm the material that had already been provided and, as such, it is additional support for that particular ground of appeal. For the reasons I have already given, I am satisfied that this is the type of material that should be regarded as admissible on this type of appeal in order to ensure that there is Convention-compliance. Accordingly, I have been prepared to take into account all of this material on which the MSG seeks to rely rather than to exclude any of it.

52. I will also briefly deal with a further issue relating to the nature of this statutory appeal because Advocate Ferbrache submitted that what matters is whether the reasons given by the GCRA "*stack up*". In doing so, he referred to the way this had been put by Moses J in ***Interbrew SA v The Competition Commission*** [2001] ECC 40, in particular in para. 32. I think it is important

to recognise here that these were judicial review proceedings where the challenge to the reasoning was on the basis that it lacked cogency and any reasonable foundation (see para. 31). More particularly, Moses J decided that it was not necessary for him to resolve the conflict between the different approaches being advanced in that case. His Lordship added that his ruling did not depend on any extent to which the reasons lacked cogency and that if they "*make no sense and are without foundation*" he should so rule.

53. If it is being suggested that there is an overarching test by which this Court should assess what the GCRA has done through considering whether the reasons "*stack up*", I am not persuaded that this is correct, even within the narrow confines of any challenge on reasonableness. As I have already indicated, reasonableness within section 46(2) of the 2012 Ordinance remains a broad concept, encompassing both a form of legal reasonableness and also extending to factual, or Jurats', unreasonableness. Because this ground forms part of a regime that necessarily has to be Convention-compliant, I am persuaded that it is open to the MSG to seek to challenge the reasoning of the GCRA in any manner it wishes to do so, whether by specific examples or more generally. It will not suffice for the GCRA to avoid the appeal being allowed simply by reference to such a general notion as the overall reasoning stacking up. If I find that there is some reason that lacks foundation or is, in the formal sense, irrational, then that will be a basis for determining that the appeal should be allowed and the remaining question will be whether it is appropriate to remit the matter to the GCRA, with or without directions. Accordingly, I propose to approach the "standard" statutory grounds of appeal found in section 46(2) in a consistent fashion to how they are dealt with in relation to other types of appeal based on identical wording in other enactments that come before this Court.

Facts

54. I do not believe that there is any real factual dispute between the parties as to what was under consideration by the GCRA. What the MSG is arguing is that the GCRA's interpretation of those facts, or instances where little or no weight has been afforded to what the MSG had advanced within the wealth of material provided to the GCRA, mean that the GCRA has fallen into error so that the Decision should be set aside. Accordingly, I am taking the facts summarised in section 3 of the Decision, coupled with a little more by way of background, on the basis that these are matters commonly known and ascertainable from published materials about the MSG's role in providing secondary healthcare. The factual background in the MSG's Cause has also been used in this context.

55. Although the core matters relate to the position once the 2012 Ordinance entered into force on 1 August 2012, there should, in my view, be some recognition of the way the MSG was created and its place in the provision of those secondary healthcare services. Paragraph 12 of the Cause refers to Billet d'État No. XIX of 1990. As that policy letter explains, the culmination of the process that had begun some decades earlier was being reached through these and related proposals. They were designed to support the principle that residents of Guernsey and Alderney should continue to have access to healthcare services without the imposition by the States of Guernsey of arbitrary financial or other constraints. It had been noted that such residents had become accustomed to a standard and speed of care that might in the United Kingdom be found more in the private sector than in the National Health Service ("NHS").

56. Whilst appreciating that this policy letter should now be regarded as an historic document, there are a number of passages in it that may still resonate with the community a generation or so later:

> "*35. The Island's doctors are already discussing the medical needs of the Island for the future and in particular the need for improvements to specialist services. If improvements are to be introduced by the private practitioners, then the doctors need to know that they have a reasonable period of stability and security whilst changes are introduced. In the present period of continuing*

uncertainty there is a real danger that those doctors who are able to find alternative employment elsewhere will leave the Island. With the changes now being introduced in the UK, there are many opportunities for young and well-qualified doctors to work in dynamic and developing health services. Guernsey offers only limited opportunities to professional staff and the Island must ensure that it provides a system which will continue to attract and retain well-qualified and able people. The present direct links between the Practices and the hospital, the access to hospital facilities, and the absence of barriers between general practice and specialist services, offer an alternative to the UK system which is attractive to doctors who want to provide continuity of care to their own individual patients. ...

42. Alongside the extended General Practitioner Service, it is proposed that the Specialists will no longer be members of the Group Practices but will form a Specialist Partnership. This will give opportunities to the Specialists to agree between them those areas in which they will further specialise, to share the workload and cover one another's absences. It will no longer be necessary for each Group Practice to employ a full range of Specialists and over a period of time the number of Specialists working in the Island will be reduced. They will share premises and equipment without the expensive duplication of manpower and resources which was inevitable when their services were spread amongst a number of Group Practices. The changed working methods will also permit the Specialists to schedule their hospital work in the most efficient and cost-effective manner to ensure full utilisation, for example, of theatre time instead of, as at present, a different team undertaking work for each Practice.

43. The Board believes that the proposed distinction between specialist practice and General Practice will make it possible for the Specialists to work closely together whilst still maintaining the close liaison with their General Practitioner colleagues which the UK is currently trying to achieve.

44. The Board also believes that the re-organisation will provide more job satisfaction to doctors with specialist qualifications and experience and should, in time, reduce the number of Specialists working in the Island while giving them the opportunity to develop further their expertise and knowledge. It will also enable the Board of Health to monitor more closely the use of its establishments and equipment with clearer lines of accountability under the specialist budget headings. ...

48. The Board has emphasised to the doctors that future support for the private practice system is linked to the introduction of improved, cost-effective methods of working, better medical manpower utilisation, the maintenance of high standards of clinical care and containment of fees. ...

57. ... The Board of Health considers that the number of doctors required and the way in which emergency cover is provided cannot be separated from the way in which medical care is to be provided in the future. If the States agree to the Board's proposal to retain the present arrangements, then the Board also seeks authority to determine in the most appropriate manner the number of doctors required in the Island and the way in which emergency cover is provided, bearing in mind the need for the most effective use of medical manpower and cost containment."

The recommendations from the Board of Health were approved and so became Resolutions, from which it is apparent that there was no political will then, or since, to introduce alternative

methods of providing general practice and specialist medical care. However, as is inevitable, there has to be quiet evolution in the provision of healthcare services to meets the needs and expectations of the community.

57. As a consequence, the specialists concerned formed the first partnership of the MSG with effect from 1 January 1992. Thereafter, the first SHC was entered into between the States of Guernsey and the MSG. It became effective from 1 January 1996. It has since been varied and replaced, with the most recent SHC having been signed on 3 March 2017, taking effect from 1 January 2018. The purpose of the SHC is to provide services to patients covered by the Specialist Health Insurance Scheme free at the point of delivery. For the purposes of the Decision, such eligible persons are referred to as "*Contract patients*" and the services from which they benefit are the "*Contract Services*".

58. As set out in the Decision:

> "*3.13 As part of the Contract Services, MSG is required to provide emergency care for patients requiring emergency specialist treatment. As a result, MSG consultants are expected to provide both emergency care provision and elective care provision, with consultants from each specialism on-call to deal with any such emergencies 24 hours a day, 365 days a year. …*
>
> *3.15 Whilst it is clear that the SHC gives the States of Guernsey a significant degree of oversight of the provision of the Contract Services and that the approach of each of the MSG and the States of Guernsey to their respective roles under the SHC is underpinned by a common set of principles, the roles of the States of Guernsey and of MSG are clearly distinct. In particular, the States of Guernsey is "solely responsible for commissioning the scope and description of the Secondary Healthcare Service under [the SHC] and for setting the Secondary Healthcare Budget" and is, in addition, solely responsible for commissioning other healthcare services that may interface with the services provided by MSG, including tertiary care, physiotherapy, off-island care, community services and other secondary healthcare not provided by MSG. The States of Guernsey is also responsible for the provision of certain healthcare services (referred to in the SHC as the "States Services"). By contrast, MSG is engaged by the States of Guernsey as a provider of secondary healthcare services (referred to in the SHC as the "MSG Services") only.*"

59. In its Cause, the MSG states that the obligation to provide year-round emergency care "*requires consultants to work unsocial hours and is generally higher risk and more challenging*" (para. 22). By comparison to the United Kingdom, where this type of work can be performed by junior doctors and often in larger departments, meaning that consultants are less likely to need to be involved, the arrangement under the SHC means that this is an additional element when it comes to recruiting new doctors to work at the MSG.

60. On behalf of the MSG, it is asserted (at para. 18, Cause) that the MSG now enjoys "*decreasing freedom to operate independently of the demands and directions of* " the States of Guernsey, exercised principally though the Committee *for* Health and Social Care ("HSC"). It is further said that "*in the area of recruitment, management and operation of staff … at various stages of the recruitment process, … the MSG is unable to progress without the HSC's input.*"

61. The terms of the SHC permit the consultants at the MSG to offer private elective secondary healthcare services, "*provided that this does not compromise or interfere with the provision of publicly funded healthcare services under the SHC*" (Decision, para. 3.16). A chart is reproduced beneath para. 3.18 in the Decision showing the variances between the different specialisms as to how much might be earned by the consultants across the 12 areas of medical

practice listed for private work (urologist, physician, paediatrician, orthopaedic surgeon, ophthalmologist, oncologist, obstetrician & gynaecologist, general surgeon, gastroenterologist, ENT surgeon, cardiologist and anaesthetist). The chart covers receipts over a six-year period. Orthopaedic and general surgeons and anaesthetists are at a higher level than everyone else, with paediatricians being the group with the lowest receipts. It is accepted that approximately 80% of the total revenues of the MSG derive from work undertaken pursuant to the SHC.

62. The MSG's Cause refers to the professional standards to which all of its consultants must have regard, as set by the British Medical Association ("the BMA"). Indeed, the Professional Practice Committee of the BMA, in a document entitled *Working in Private Practice – Overview* (updated 7 September 2020), advises all doctors to consider the implications of any terms that might be imposed in respect of undertaking private work, which can be regarded as an essential part of the flexibility and freedom built into contractual arrangements. At para. 28, it continues:

> "*In particular, the MSG's experience is that the ability to access private patient work is often a key factor which influences a doctor's willingness to come to work in Guernsey. This is so across most of the specialisms where private practice work is likely. While there are some areas where there is limited or no private practice work available either in the UK or the Bailiwick, these are therefore unaffected by any non-compete provision unless that situation should change in the future, but the provision remains relevant in the event that the position does change. The importance of developing a reputation for a specialism and the effect that has on the GP practices referring private patient work to a given consultant at the MSG is clearly set out in the evidence provided by the GP practices to the GCRA but which the Decision fails to address, let alone engage with.*"

63. The Decision makes passing reference to what was received from the three GP practices to which the GCRA had written requesting further information in December 2020 (para. 3.61). The responses received in July 2021, to which I will turn in greater detail later, were provided to the MSG in case it wished to comment, but the response sent on 27 August 2021 explained that the MSG did not "*wish to supplant, misrepresent or add an unintended gloss to the views of other experienced medical practitioners*", noting that each practice has "*provided detailed, clear and considered responses*", which would stand on their own (paragraphs 3.62 to 3.64, Decision).

64. The GCRA found that "*There is no provision in the SHC that requires MSG to impose non-compete restraints on its departing partners (or associates), either in its General Partnership Agreement / LLP Agreement or otherwise (e.g. in its contracts with its associates)*" (para. 3.36, Decision). It further found (at para. 3.37):

> "*The GCRA also notes that the SHC contains provisions designed to address a scenario where "tension arises between the amount of MSG Budget available and the scope and/or quality of MSG Services to be delivered". If this occurs, the States of Guernsey and MSG must use the [redacted] to achieve a solution. Such solution may take into account the factors set out in clause 7.6 of the SHC. These factors do not include or mandate the imposition of non-compete clauses or the use of privately generated income to cross-subsidise the provision of Contract Services under the SHC.*"

65. When the 2012 Ordinance entered into force, the GPA under which the MSG operated was found in a deed dated 24 December 2002 (as amended from time to time thereafter). In para. 3.24 of the Decision, the GCRA sets out a general summary of the provisions of the GPA:

> "*According to the terms of the General Partnership Agreement:*

(a) *The partners agreed to practise together in partnership (the **Practice**) as medical consultants within their own specialities in the Bailiwick of Guernsey (clause 1). The partners agreed to employ themselves diligently in the work of the Practice (clause 20).*

(b) *MSG's expenses were to be paid out of the receipts of the Practice, with any expenses which exceeded receipts to be borne by the partners in equal shares (clauses 4 and 17).*

(c) *The earnings of MSG partners were to be shared with each other according to equal shares (clauses 4 and 12), including earnings from medical appointments and other work carried out in the Bailiwick (clause 14).*

(d) *Fees arising from private work, however, were to be distributed so that the partner conducting the private work retained the option to retain the profits from that work (clause 13 and Appendix II). Until 7 April 2011, partners had the option either to retain 100% of their private practice earnings while also meeting 100% of their private practice overheads, or to retain 60% of their private practice earnings with the remaining 40% going to MSG. From 7 April 2011, only the latter option was permitted. Partners were not permitted to undertake private practice work which compromised or interfered with work carried out under the SHC.*

(e) *Each partner was obliged to join and maintain professional indemnity insurance with a Medical Defence Union approved by the Practice (clause 22).*

(f) *Partners could be required to retire in the event of a lengthy sickness (clause 26) or because of the reorganisation of medical provision in the Bailiwick of Guernsey (clause 36) or could retire voluntarily (clause 28). However, until 2010 it was not possible for a group of partners in the same specialism to retire at the same time (clause 28(ii)).*

(g) *Partners could also be removed from the partnership in the event of gross or persistent breach of the General Partnership Agreement or in the event of being removed from the medical register, and only by an 85% vote of the partnership (clause 21).*

(h) *If a partner removed under clause 21 intended to continue to practise in the Bailiwick of Guernsey, his or her shares would revert automatically to the remaining partners and no purchase price would be paid. Instead, the departing partner would receive a payment in respect of the value of their shares within three months of departure, such valuation to be made by two competent persons or, in the event that they could not agree, an umpire (clause 29(i)).*

(i) *If a partner removed under clause 21 did not intend to continue to practise in the Bailiwick of Guernsey and agreed to be bound by clause 35, the other partners would purchase the departing partner's shares for a purchase price calculated according to an agreed formula which took into account the net per-partner earnings of the partner and provided for the departing partner to receive 60% of their private practice earnings (clauses 29(ii) and 30 and Appendix III). That formula was the same formula to be applied in the event of departure because of retirement or death.*

> *(j) Disputes under the General Partnership Agreement were to be referred to an arbitrator (clause 39).*"

66. The non-compete provision in this GPA is found in clause 35 and is quoted in full at para. 3.26 of the Decision:

> "*If the share of any Partner in the Practice shall be purchased by the remaining Partners under any clause of this Agreement the outgoing Partner shall not at any time within five years thereafter directly or indirectly exercise or carry on or be concerned or interested in exercising or carrying on upon his own account or in partnership with or as assistant to any other person the Practice of Medical Practitioner in the Bailiwick of Guernsey except at the request of the Medical Specialist Group. If the outgoing Partner shall so practice or assist any other person in practicing within the limits aforesaid or in any way violate this provision he/she shall pay to the remaining Partners the sum of £1,000 for every week or part thereof during which he shall violate the provision as ascertained and liquidated damages and not by way of penalty. It is specifically acknowledged that this sum is a genuine pre-estimate of damage and is not fixed in terrorem. The aforesaid sum may be adjusted from time to time by the Partners to take into account inflation occurring since the date of this Agreement. The aforesaid is without prejudice to any other legal or equitable remedy which may be available to the remaining Partners for the purposes of restraining such violation.*"

Whilst reference is made in para. 3.27 to the definition of "*Medical Practitioner*" given in clause 41.1 of the GPA as "*any person whose name is inscribed on the Medical Register maintained by the General Medical Council*", there is no reference to the definition of "*specialty*" given in clause 41.3, which was stated to mean "*the Partners working in the following discrete areas: Anaesthesia, Medicine, Obstetrics & Gynaecology, Paediatrics, General Surgery, Orthopaedics, ENT, Urology, and Opthalmology.*" In other words, there were nine areas in which a consultant at the MSG would be grouped for the purposes of specialism.

67. There is one other provision not mentioned in the Decision to which I will refer. Clause 7 provided that "*A specialist shall only be invited to become a Partner in the practice if, it is decided by the Partners that he/she should be invited.*" Unlike for an amendment to the GPA, where an 85% majority vote was required by clause 5, for other decisions, such as one taken pursuant to clause 7, "*a decision of two thirds of the Partners shall be effective and shall bind the minority.*" Each Partner was afforded one vote and a form of proxy voting for any Partner absent was available.

68. I have referred to this mechanism for being inviting to join the partnership of the MSG because it is common ground that all incoming consultants are employed as associates. As noted in para. 3.38 of the Decision, "*the purpose of employing associates is to allow them to work for a short period of time in Guernsey and for MSG before deciding whether or not they wish to become partners in MSG.*" As is apparent from footnote 30 in the Decision, a good number of contracts for various associates were provided by the MSG to the GCRA, although the fact that these relate to "*those entered into by the current partners before they joined the partnership*" (para. 3.39) makes them of less relevance because the non-compete provision contained in each would not have been operative because none of these departed whilst still employed as an associate, which is the relevant time for a separate undertaking arising for the purposes of the 2012 Ordinance. However, para. 3.39(a) of the Decision records that the wording across these contracts reflected that used in clause 35 of the GPA, but with a shorter period:

> "*Upon the Employee's contract being determined under the terms of this Agreement, he/she shall not at any time within 18 months thereafter directly or indirectly exercise or carry on or be concerned or interested in exercising or carrying on upon his/her own account or in partnership with or as assistant to any other person or body the*

> *practice of medical practitioner in the Bailiwick of Guernsey. For the avoidance of doubt, the term 'Medical Practitioner' shall mean any person whose name is inscribed on the UK Medical Register.*"

69. The existence of the non-compete provisions was drawn to the GCRA's attention in an e-mail sent by a former Partner of the MSG on 1 December 2018. In accordance with the confidentiality protocol agreed for this appeal, this person is to be referred to as "Party A", although there are so many other facts contained within the Decision from which Party A's identity can be ascertained that this seems rather pointless. Paragraph 3.42 sets out that Party A was first employed at the MSG for 13 months before becoming a Partner. Paragraph 3.45 refers to Party A resigning from the MSG and subsequently establishing a new business based in Guernsey, to which the description "Party C" is to attach. Party A executed a Retirement and Settlement Agreement, which included an ongoing obligations clause (as set out in para. 3.43, Decision):

> "*For the avoidance of doubt, save as amended by this Agreement, those terms of the Partnership Agreement that apply on and after a Partner's retirement shall continue to apply to [Party A] including, without limitation, clauses 22 and 24 (Partner's duties) and clause 35 (Restriction on future practice) of the Partnership Agreement, and even if MSG converts to a limited liability partnership or other successor body in due course.*"

That last reference took effect because the arrangements at the MSG evolved with effect from 1 January 2018 when the LLP Agreement came into effect.

70. The evolution of the MSG from the GPA into the LLP Agreement has to be considered in the light of the SHC dated 3 March 2017. I will not rehearse the provisions of the SHC in detail, because it was exhibited in a confidential section of the evidence, but one of the factors described as an aim of it was "*to achieve a step change in how the Secondary Healthcare Services are provided to Service Users, their carers and families over the life of the Contract*". An obligation was imposed on the MSG to reconstitute itself into an entity with limited liability, upon which the parties agreed to novate the SHC to that new entity. Bearing in mind the mandate of HSC, there is a provision setting out the relationship between the States of Guernsey and the MSG as follows:

> "*MSG and the States are the joint providers of the Secondary Healthcare Service described in this Contract, those elements of the Secondary Healthcare Service in the case of the MSG being called the MSG Services and those elements in the case of the States being called the States Services. Both the States and MSG recognise that they are interdependent upon each other as providers of the delivery of the Secondary Healthcare Service and that their respective performance as providers may have a direct impact on the ability of the other Party to deliver, or on the quality of that other Party's delivery, under this Contract.*"

It is common ground that, if the States of Guernsey found that the SHC was no longer operative, it would either have to contract with one or more alternative providers of these secondary healthcare services or it would have to provide them itself.

71. There is also provision in the SHC setting out the objectives underpinning it:

> "*The following key Contract Objectives shall underpin both Parties' approach to the implementation and performance of this Contract:*
>
> *.1 to improve the Service User experience and clinical outcomes from the Secondary Healthcare Service;*

.2 *to reduce the amount of avoidable time Service Users spend in hospital;*

.3 *to provide effective leadership of, and participation in, multidisciplinary clinical delivery and governance;*

.4 *to provide flexible clinical delivery models based on the needs of the community;*

.5 *to support a move towards the provision of care closest to home;*

.6 *to undertake positive engagement in effective commissioning systems and processes, including the provision of all performance indicators for contract monitoring;*

.7 *to provide an improved value for money Secondary Healthcare Service, including cost efficiencies and cost reductions wherever possible; and*

.8 *to provide for a suitable core emergency service.*"

Accordingly:

"*Both Parties agree to use all reasonable and proper efforts in the implementation of this Contract and the performance of their obligations to promote and apply these Contract Objectives and shall develop and agree an operational plan setting out the way in which these Contract Objectives shall be implemented and realised.*"

72. The fact that the model for commissioning and providing these services was being reviewed was also made clear in another provision in the SHC:

"*The States and MSG recognise that the current model for the Secondary Healthcare Service is not financially sustainable and that the Transformation of Health and Social Care Services will result in significant changes to the way in which the Secondary Healthcare Services are delivered. In order to achieve change in the provision of Secondary Healthcare Services of the scope and scale anticipated by the Transformation of Health and Social Care Services, significant preparatory work needs to be undertaken including understanding the full detail of the Secondary Healthcare Services provision as at the Service Commencement Date.*"

73. There is provision within the SHC relating to private patient arrangements. Such a referral can only come from the Service User's general practitioner, a consultant at the MSG, a visiting consultant or an approved off-Island provider. Thereafter:

"*Upon receipt of a Referral to provide treatment as a private patient:*

.1 *both Parties as providers shall be contractually responsible to the Service User for the provision of private patient care (that involves the provision by the Parties of any facilities as part of that care);*

.2 *it is the responsibility of the Parties to ensure that the Service User is aware of the full financial implications for the Service User of the Parties' part in the provision of private patient care, including (but not limited to) the charges applying, the cost of follow up treatment, the charges for hospital and other ancillary treatment such as pathology, scans and physiotherapy, and the*

potential exposure for additional costs in the event of complications or unforeseen events; and

.3 the Parties must have obtained the Service User's informed consent to the treatment proceeding and to the financial and other terms upon which that treatment is being provided."

There is also provision that:

"*The States and MSG shall endeavour to agree where possible initiatives to:*

.1 promote the development of and encourage the growth of private patient care within the Princess Elizabeth Hospital facilities so as to reduce demand wherever appropriate on the publicly-funded service, and release resources, but not so as to compromise the standard or delivery of the public service; and

.2 provide a high standard of private patient care."

74. Under the terms of the SHC, the States of Guernsey agreed to appoint clinical directors whose roles would comprise the specialities of medical, surgical, women and children, and diagnostic and support services. These directors were to be appointed from amongst suitably qualified professionals within the MSG and/or the States and whose roles would be to take responsibility for leading and directing developments within those identified areas of expertise.

75. There is a section of the SHC that deals extensively with staff. One of the provisions in this section is relevant to the non-compete provisions that are the subject of the MSG's appeal:

"*Neither party must, in any contract of employment or other contractual document entered into by it, on or from the Service Commencement Date, with any medically qualified practitioner deployed in the provision of the Services, insert a restrictive covenant into that practitioner's contract or contractual document which prevents, or will have the effect of preventing, that medically qualified practitioner from taking up employment (or other arrangement) with the other Party, in the event of their leaving the employment of, or ceasing the provision of the Services for or on behalf of, that party. Each Party hereby consents, with effect from the Service Commencement Date, to the disapplication of any such restrictive covenant that is contained in any existing contract of employment for any of its Staff, in relation to the other Party (and, in the case of MSG, also in relation to MSGL), provided that the restrictive covenants contained in the MSG Partnership Agreement which bind each partner of MSG from time to time, shall continue to apply unless waived in writing by the other MSG partners (in accordance with the MSG Partnership Agreement).*"

76. The Decision records comparatively little about the LLP Agreement. At para. 3.31, it states:

"*The LLP Agreement provides that:*

(a) Each Partner's private practice within the Bailiwick of Guernsey must be conducted entirely through the LLP, which collects that income on the Partner's behalf (clause 43.1).

(b) 60% of the private practice income is remitted by the LLP to the Partner and the remaining 40% is retained by MSG (clause 43.2)."

At para. 3.32, the non-compete provision found in clause 81.1 is quoted:

> "*Save with the prior written approval of the Management Board, each Partner covenants with the LLP that he will not during the period of 24 months after his Retirement Date, either alone or in partnership with or as partner, member, officer, director, employee, consultant or agent of any other person or Undertaking or otherwise howsoever, directly or indirectly:*
>
> *(a) provide, supervise, manage, or have any other involvement with the provision of, medical services in the Bailiwick of Guernsey in the same specialism as that which he practised as a Partner, save as an employee of the States of Guernsey …*".

Amongst the defined terms found in Schedule 6, "*Retirement Date*" means "*the date on which a Partner ceases, for whatever reason, to be a Partner*" and "*Undertaking*" means "*a partnership, limited partnership, limited liability partnership, limited company or other body (corporate or otherwise)*". Sub-paragraph (b) of clause 81.1 contains a non-solicitation provision and, as noted in para. 3.34 of the Decision, clause 82.2 contains a liquidated damages provision, where £1,000 for every week or part of a week is used in respect of any breach of the undertakings contained in clause 81.1(a). This is, of course, the same amount as had been operating since 2002. Reference is also made in para. 3.34 to clause 79.5, which permits the MSG to withhold a reasonable estimate of the cost, damage or loss suffered or likely to be suffered as a result of a Former Partner being in breach of the LLP Agreement. (Quite why there is then any need to refer in this paragraph of the Decision to something that might have been thought about previously but did not result in any provision found in the LLP Agreement escapes me because I struggle to understand how this could have any relevance.)

77. The other matter from the LLP Agreement to which the Decision refers is in para. 3.35, commenting on clause 71.2: "*it is not possible for a group of partners to voluntarily retire at the same time without permission of the Management Board*". However, that is not what clause 71.2 provides. Of more relevance is clause 71.3, which refers to the general provision that "*not more than one Partner in each Directorate shall be entitled to serve notice of Retirement under clause 71.1 during any six month period*", where clause 71.1 provides that a partner can retire by giving six months' notice in writing. Clause 71.2 relates to a prohibition, unless agreed by the Partners on the recommendation of the Management Board, for more than two Partners to seek to retire during any 12 month period. The role of the Management Board in each instance is not as decision taker, but rather in putting a recommendation to the Partners for their decision (to be approved by a two-thirds majority vote).

78. The Decision comments on the differences between clause 81.1 in the LLP Agreement and clause 35 of the GPA in para. 3.33:

> "*Accordingly, the non-compete provision in the new LLP Agreement is different from that in the old General Partnership Agreement, in particular in that:*
>
> *(a) It lasts for two years from the actual retirement date, not five years from the purchase of shares (which may be three months after the actual retirement date).*
>
> *(b) It continues to include very broad language ("either alone or in partnership with or as partner, member, officer, director, employee, consultant or agent of any other person or Undertaking or otherwise howsoever, directly or indirectly") and uses language of "involvement with the provision of medical services" rather than referring to the status of Medical Practitioner.*
>
> *(c) It limits the relevant type of medical services to the specialism in which the partner in question worked while at MSG.*

(d) It provides an exemption for work as an employee of the States of Guernsey."

79. In respect of the non-compete provision in the LLP Agreement, the Decision makes no reference to clause 81.5, which provides:

> "*Whilst the covenants set out in clauses 81.1, 81.2 and 81.3 are considered to be fair and reasonable by all the Partners in protecting the legitimate business interests of the LLP and its Associated Firms from time to time, if any of such covenants are found to be void or unenforceable, and if by deleting part of the wording or substituting a shorter period of time or a more restrictive range of activities or a more limited class of persons for any periods of time or range of activities or class of persons set out in clause 81.1 it would not be void or unenforceable, then there shall be substituted such less extensive period or activity or class of person or such deletion shall be made as renders clause 81.1 valid and enforceable.*"

80. More generally, the Decision also makes no reference to a number of other provisions that put the non-compete provision into better context. Clause 4 of the LLP Agreement provides:

> "*The practice and business of the LLP shall be:*
>
> *(a) the provision of medical consultants to the States of Guernsey under the Secondary Healthcare Contract;*
>
> *(b) the provision by medical consultants of private healthcare to patients and other service users in the Bailiwick of Guernsey;*
>
> *(c) the provision of ancillary and support services in respect of the provision of medical consultants and private healthcare to patients and other service users in the Bailiwick of Guernsey; and*
>
> *(d) any other practice and business approved by Special Resolution from time to time.*"

Clause 43 then provides:

> "*43.1 Each Partner's private practice within the Bailiwick of Guernsey shall be conducted entirely through the LLP. Private practice outside the Bailiwick of Guernsey shall not be conducted through the LLP and must be approved by the Management Board in accordance with clause 58.1(e).*
>
> *43.2 Each Partner's Private Practice Income shall be collected by the LLP as agent of the relevant Partner and:*
>
> *(a) 60 per cent. of the relevant Partner's Private Practice Income shall be remitted by the LLP to the Partner; and*
>
> *(b) the remaining 40 per cent. shall be retained by the LLP as an agency fee and shall be treated as income of the LLP.*"

In relation to the second sentence of clause 43.1, clause 58.1 requires prior written approval from the Management Board, such approval not to be unreasonably withheld, to avoid what is otherwise a prohibition on a Partner providing medical advice or services to any person who is not formally engaged, directly or indirectly, as a patient or other service user, including as a

private patient, of the LLP or an Associated Firm, which refers to MSG Limited, any subsidiary of the LLP and any other Undertaking so designated.

81. There does not appear to be any definition in Schedule 6 to the LLP Agreement of specialism, where clause 81.1(a) limits the non-compete provision to acting "*in the same specialism as that which he practised as a Partner*". The term "*Directorate*" is, however, defined as meaning "*any of the Anaesthetics, Adult Medicine, Women and Child Health and Surgery directorates, and the Directorate of each Partner at the Conversion Date is set out against his name in schedule 1, under the column headed "Directorate"*". Interestingly, in that column in Schedule 1 (dealing with the Conversion Partners) headed "*Directorate*" there are more than four different types of entry and they do not correspond directly to the four Directorates as set out in that definition. The list covers Adult Medicine, ENT, Anaesthetics, Paediatrics, General Surgery, Opthalmology, Oncology, Obs & Gynae, Orthopaedics and Cardiology. These 10 areas might refer to specialisms where some of them become combined to relate to each of the four Directorates, where clause 22 deals with the election of Directorate Chairs by the Partners of the relevant Directorate, but it is not entirely clear. Party A is not listed in Schedule 1.

82. The consequences of incorporating the MSG as a LLP are spelt out in clause 2, where the "*Conversion Partners*" are each Partner who was a partner of the Predecessor Partnership, which is a reference to the partners under the GPA, and who became a member of the LLP on the Conversion Date, which was specified as 1 January 2018. The names of those persons were listed in Schedule 1. Accordingly, clause 2 provides:

> "*2.2 With effect from the Conversion Date and in accordance with the provisions of Part III of the LLP Law and the terms of this Agreement:*
>
> *(a) the property, interests, rights, privileges and debts and the undertaking of the Predecessor Partnership were transferred to the LLP;*
>
> *(b) the Conversion Partners became members of the LLP;*
>
> *(c) the Predecessor Partnership was dissolved; and*
>
> *(d) subject to clause 2.3, the Predecessor Firm Partnership Agreement and all other agreements and undertakings relating to the governance and partnership of the Predecessor Partnership ceased to apply.*
>
> *2.3 The Predecessor Firm Partnership Agreement and any other related agreements and undertakings shall continue to apply in respect of the Conversion Partners and, so far as may be relevant, the Predecessor Partners for the period to the day before the Conversion Date.*"

Further, clause 8.1 provides:

> "*All property held or created by the LLP, or occupied or employed by the LLP for the purposes of carrying on the Practice and which has been paid for by the LLP or has been contributed to the LLP by any Partner or has otherwise accrued to the LLP (including property held on trust by a Partner for the LLP from time to time), is owned by the LLP absolutely and the Partners have no individual rights in that property other than as specified in this Agreement.*"

83. As recorded in para. 3.39(b) of the Decision, contracts entered into with associates once the LLP Agreement had become effective reflect the changed restrictions on the Partners. Accordingly, there is a similar reference to providing services in the same speciality as that

practised as an Employee and there is a similar exemption if the associate had left to become an employee of the States of Guernsey.

84. Following receipt of the e-mail from Party A, the GCRA decided in March 2019 that there were reasonable grounds to suspect that the non-compete provisions contravened section 5(1), as well as section 1(1), of the 2012 Ordinance. It opened an investigation and so informed Party A, Party A's co-founder of the new business, Party B, as well as Party C. The GCRA also requested information under its powers in section 23 of the Ordinance.

85. The Decision sets out the GCRA's awareness that the MSG and Parties, A, B and C had engaged in litigation that had been settled by March 2019 (para. 3.50), however, it did not consider that such a settlement was "*relevant to its investigation … because the purpose of the GCRA's competition law enforcement functions is to protect competition in the market (thereby ensuring that consumers ultimately have access to high quality goods and services at competitive prices) and not to protect individual competitors with that market.*" Further, the GCRA notes at para. 3.51 of the Decision that the terms on which that litigation was settled ("the Settlement Agreement") "*imposes obligations on [Party A] and, to that extent, it falls within the scope of application of the investigation*" and further that it required Party A to withdraw the complaint to the GCRA and purported to restrict the ability of Parties A and B to communicate with it. Accordingly, in late March 2019, the GCRA made further information requests to both Party A and Party B and invited them to attend for interview, subsequently telling Parties A and B that any responses should be kept confidential from the MSG notwithstanding the terms of the Settlement Agreement. Interviews took place in June 2019. In April 2019, the GCRA also made a further information request to the MSG and did so again in September 2019. In October 2019 the GCRA sent an information request to the States of Guernsey.

86. On 10 July 2020, pursuant to section 43(2) of the 2012 Ordinance, the GCRA provided to the MSG its notice in writing setting out its preliminary conclusions ("the Statement of Objections"). The MSG took the opportunity to make both written and oral representations thereon. A transcript of the oral representations was prepared and the MSG invited to comment on its accuracy. By November 2020, the MSG indicated it had nothing further to add to its written submissions. In December 2020, the GCRA sent further information requests to the MSG, the three GP practices and the States of Guernsey. That process concluded in early July 2021, although, as already explained, the GCRA offered the MSG the opportunity to comment on the responses from the GP practices, to which it replied in August 2021.

87. In the responses from the GP practices to the GCRA's enquiries, the answers given set out material that fell to be considered by it. In this context, I consider it is important to remember that the GCRA sought responses to a set of 19 questions, some of which had several parts.

88. In the earliest of the three responses received, some of this material includes:

> "*The level of knowledge each GP would have with MSG consultants will vary from speciality to speciality. Some GPs deal more with (say) Orthopaedics and will therefore have a better knowledge of consultants in this area that they might in Gynaecology. Knowledge and awareness of skills/specialisms is developed over time – a new consultant to the Island may present at one of our educational sessions or simply write introducing themselves. The MSG run educational sessions that our GPs are invited to, which has further helped to develop the positive and excellent working relationships our GPs have with our MSG colleagues. …*
>
> *The majority of patients who are referred off-island are insured, leaving all 'on contract' patients plus insured patients for whom it is deemed to be in their best interests to see a local consultant, being referred to the MSG. This will lead generally to greater working with and therefore a better working knowledge of MSG consultants.*

There are some variations within this. Some of our GP's have built up excellent working relationships with UK based consultants in areas such as cardiology, orthopaedics and neurology and will refer more patients privately into those areas rather than into the MSG. The reasons for this are multi-factorial and would include increased area of specialisation (e.g. ankle replacement surgery) or improved facilities (London Bridge Cardiology). …

The reality is that our GP's will know and have met the vast majority of Consultant specialists at the MSG and know them and their area of expertise and if referring privately will refer directly to a named MSG specialist. If the GP does not know the (named) Consultant, the referral would be sent in to the appropriate 'team' at the MSG having weighed up with the patient whether it is in their best interests to receive care at the MSG or off-island (e.g. Dear surgical colleagues, Dear consultant cardiologist etc.). …

In the event a Consultant left the MSG and retained all of the privileges previously granted to them by Guernsey's Health and Social Care Committee, theoretically they should be able to set up a 'Guernsey specialist secondary care practice'. In terms of 'barriers' to this aspiration, it is typical in Guernsey Healthcare Partnerships for restrictive covenants to be included in Partnership Agreements which will affect an individual's ability to Practice having left a Partnership. We have not had sight of the MSG Partnership Agreement, but understand that this may be the case. Outside of this, to our knowledge, there should be no restrictions to establishing a 'Guernsey specialist secondary care practice'."

89. In the next responses received, which were the most expansive, the answers given include:

"*Established GPs become quite familiar with MSG consultant's special interests and abilities within a year or two of the consultant arriving in Guernsey. New GPs, clearly, do not have this knowledge and will often ask their more experienced colleagues for advice on referrals.*

The chief channel for building up knowledge of the consultant's capabilities is feedback from contract patients after clinic visits or surgery, if a surgical speciality. Patients freely express their opinion as to whether they think the consultant has a pleasant manner, is a good communicator or a good surgeon. GPs, therefore, soon get a flavour of the specialist's personal and professional abilities. In addition, GPs will speak to consultants regarding emergency referrals or advice on patients. …

The volume of private work an MSG consultant practices does not affect at all how well the GPs know them or their work. Therefore this does not affect the likelihood or volume of private referrals to them. …

GPs would definitely have much more knowledge of the professional capabilities of the local MSG consultants because they will have weekly, if not daily, interaction with them throughout their professional careers. Additionally, all contract referrals off Island have to go through the MSG, due to HSC regulations. This was a wise move by HSC to prevent local GPs referring to the UK unnecessarily and causing increased expense to HSC. GP interactions with UK consultants, therefore, is infrequent. …

GPs generally do request a specific consultant, although there are specialities where we feel it is less important. For example, both ENT consultants are held in high regard and a procedure that could be done by either might be referred privately to the ENT department. …

I would estimate that 75% of patients either express at the time of seeing the GP who they wish to see privately, or will revert to the GP's secretary to indicate which specialist they wish to see, after speaking with family and friends.

I would estimate that the other 25% of patients simply ask our recommendation as to which specialist to see. Our decision is then determined by a clinician's special interest and reputation. ...

I am absolutely sure that the local population quickly learn about the local specialists and their special interests. Equally, good and bad reputations are forged relatively quickly in the public eye in Guernsey. ...

As mentioned, the MSG usually forwards a new consultant's CV and would describe their special interests. As mentioned in answer 1, it might take a year or two to fully appreciate a consultant's ability and establish a good reputation. I would expect most GPs to ask patients' experiences of a new consultant when they are reviewed in Primary Care and to gauge competency/manner etc. However, there are many interacting factors as to when, and how many, patients might be referred privately, including a particular GP's individual interactions with that specialist. ...

GPs in Guernsey refer most of their patients via the States contract scheme. It is, therefore, in the interest of patient welfare, important to maintain good relations with the MSG. Perhaps this is the right place to categorically point out that GPs have no commercial or financial gain from referring patients to any one particular specialist. This statement is made as we are aware that not only the general public, but even members of HSC recently were under the impression that Primary Care doctors receive some sort of financial payback for referring private patients. This is absolutely not the case either here or in the UK. Such behaviour would be frowned upon by the General Medical Council (GMC).

I am unaware of any particular barriers that an MSG consultant would experience in setting up an individual, separate practice. However, most GPs would query why a specialist would want to set up separately and lose the camaraderie of a group practice together with the financial inefficiency that comes with not sharing costs. Since the Harold Shipman case there has also been a significant shift away from 'lone practitioners' working in isolation – quality assurance, safety issues, governance and lack of involvement in MDT (multi-disciplinary team) meetings are significant concerns. There might also be concerns about individual's 'cherry picking' either easy or lucrative services, and not taking part in the less attractive and loss making endeavours that invariably occur in medical practice such as providing a share of emergency cover out of hours. We would have concerns about the likely fragmentation of local services, resulting in duplication of efforts and very likely an increase in unnecessary investigations for questionable clinical benefit but clear commercial gain. We suspect that this will result in higher costs to the Guernsey taxpayer and may impact on the MSG's and HSC's ability to recruit quality consultants in future – we believe these misgivings should be shared at the highest governmental level as it affects the whole provision of healthcare to the population and Guernsey's attractiveness to incomers.

a. It might take many years for trust to be established, and the bottom line, as always, is the competency and reputation of the specialist involved. Should both be good it is almost certain that such a venture would flourish. If they are not, then the expectation is that such a venture would not flourish. The practitioner's competence and reputation would be down to that individual

specialist and have nothing to do with the MSG. It would make an enormous difference, however, to referrals from Primary Care.

b. This would presumably have an impact on a surgeon – such access would be a decision between the specialist and HSC and nothing to do with Primary Care. However, I can see that several surgeons all wanting access to the PEH who are not members of the MSG will make HSC's job almost impossible."

90. In the final responses received, which were the most succinct, the answers include:

"*Our GP's are variably familiar with the MSG consultants.*

The older GPs will have worked closely with the older consultants in the past when GPs worked in the Emergency Department and met on a weekly basis in the PEH for lunchtime medical teachings.

New specialists sometimes come to our evening clinical meetings and explain their sub-specialist interests.

We quickly receive feedback from our patients after they have been seen by a specialist and measure their capabilities through reputation and patient satisfaction. We also assess individual specialists on how well they deal with our acute patients' referrals when they are on-call.

No, our patients are predominantly referred and seen on the States Contract by MSG Consultants.

Patient feedback on their experience/satisfaction with the individual specialist is paramount and independent of whether they are seen privately or on the States contract. …

Guernsey is a small island and good or bad reputations spread quickly. Many private patients are seen by UK specialists and, again, the reputations of these specialists are also shared with friends or family.

On a private referral basis it would, on average, take 12 months or more before an individual specialist is recommended by a GP but exceptionally it may be quicker."

91. The Decision is dated 16 September 2021.

The parties' contentions

92. On behalf of the MSG, Advocate Gray submits that some form of restraint is recognised as needed to protect legitimate business interests. Such contractual provisions are heavily used in Guernsey. On the basis that the principle of their use is acknowledged, the battleground rests on the terms actually used and how they affect a person who leaves the MSG when knowing its business inside out. The shorter period used in the LLP Agreement demonstrates that the MSG was aware that the 5-year period for partners in clause 35 of the GPA was by that time too long. The relationship of the MSG and the States of Guernsey is a unique one, where the MSG is not permitted to manage its own business with the same degree of autonomy that might exist in other sectors.

93. Advocate Gray further draws attention to the way in which the case being advanced by the GCRA when it provided its Statement of Objections also extended to abuse of a dominant

position, contrary to section 1(1) of the 2012 Ordinance, but that was removed before the Decision was taken. Accordingly, matters that might have been addressed if there had been a revised Statement of Objections, confined just to section 5(1), could not be addressed prior to mounting this appeal.

94. Her Skeleton Argument addressed the question of incentive through highlighting the evidence that had been given about how the recruitment process ran, suggesting that the GCRA's reliance on applicants not being informed of the terms of the non-compete provision until they were provided with a contract misunderstood the continuum of the process. The incentive element is that there would, in applicable cases, be an opportunity to develop a private practice, as would be the case if the applicant were instead to seek employment in the NHS. The precise detail of the terms restricting engaging in work in competition with the MSG for a leaver so as to enable that private practice to be developed would only arise once an applicant were selected for employment as an associate. Until the terms of the contract offered were accepted, there would be no obligations arising from the non-compete clause.

95. In relation to the GCRA's reasoning about cross-subsidisation, Advocate Gray submits that the way this is characterised demonstrates how the GCRA failed to understand the relationship in Guernsey between public and private work undertaken by the MSG, including the obligations imposed on the consultants who are employed or are partners having to undertake more emergency work than would inevitably be the case if they were operating within the NHS. As regards reputation and contacts, the MSG criticises the GCRA for failing to have proper or adequate regard to the evidence provided by the GP practices. Similarly, the GCRA is said to have failed to appreciate that there will always be some time taken to recruit a replacement when someone leaves the MSG and thereafter a period during which the new arrival will need to establish some reputation or the MSG would risk a person leaving without any non-compete clause operating obtaining an unfair advantage as a result of the reputation already enjoyed by that individual. Again, the Decision rests on there being no contrary evidence when the acknowledged existence of various forms of non-compete clause means that there has never been a time when evidence of a different effect, ie, the absence of such protection, can be ascertained. This also has an impact on the manner in which the GCRA is said to have misapplied the evidential burden.

96. On behalf of the GCRA, Advocate Ferbrache invited the Court to ignore para. 113 in his Skeleton Argument ("*MSG has not discharged the burden of proving that the restrictions are objectively justified, either in terms of their scope or in terms of their duration*"). The GCRA accepted that it had the overall legal burden to prove that there had been an infringement for the purposes of section 5(1) of the 2012 Ordinance. It was not being suggested that the States of Guernsey had required any non-compete provision to be retained or that it was considered necessary.

97. He suggested that the change of emphasis brought about in section 54 of the 2012 Ordinance by the 2021 Brexit Regulations made little difference in the present case. The parties had proceeded on the basis that they could find support for their positions by reference to decisions taken under European Union law, as well as by reference to decisions of bodies such as the CAT. Whilst the former are no longer obliged to be considered because the amendment in 2021 replaced "*must*" with "*may*", in the absence of any domestic authority, this being the first competition law appeal, decisions from elsewhere would inevitably be strongly persuasive.

98. Advocate Ferbrache submits that the nature of the infringement is relevant. The scheme of the legislation is that a provision that seeks to restrict competition, where there is no argument that the non-compete provisions have that characteristic, is harmful. Accordingly, there is a proper inference to be drawn from such a provision in an agreement, such as the LLP Agreement, as well as the associates' employment contracts, that the existence of that provision gives rise to something anti-competitive.

99. By way of background to the GCRA, Advocate Ferbrache suggests that the experience of the members of the GCRA and its staff means that it should be afforded a similar margin of discretion as is given by UK law to the equivalent body operating there (the Competition and Markets Authority ("CMA")). The GCRA reached the conclusion that the MSG's non-compete provisions have the object to preventing competition within markets in Guernsey for the provision of services. In doing so, it has had regard to EU case law, in particular as summarised in Case C-67/13 P *Groupement des Cartes Bancaires v Commission* EU:C:2014:2204:

> "*According to the case-law of the Court, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article [101(1) TFEU], regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.*"

This assessment is to be undertaken objectively and it matters not whether any party had any subjective intention to restrict competition. Reliance is also placed on *Carewatch Care Services v Focus Caring Services* [2014] EWHC 2313 (Ch), which is a decision to which I will return in some detail in due course.

100. Because the MSG has acknowledged that the norm is that agreements restricting competition are prohibited, the dispute between the parties turns on whether they can be objectively justified. Further, because the MSG declined to engage on the topic of whether the length of the non-compete provisions could properly be reduced, with one year being raised by the GCRA in the Statement of Objections, the GCRA had no evidential basis on which to consider exercising its powers under section 32(2) of the 2012 Ordinance to direct a modification to the LLP Agreement and the associates' contracts. That was the reason why the direction given to the MSG is to remove the non-compete provisions in their entirety.

101. Because the GCRA points out that the contest between the parties relates to whether the non-compete provisions are objectively necessary legitimate ancillary restraints, it points to the starting point being EU jurisprudence and not the domestic customary law on restraint of trade, which is expressly overridden by sections 54 and 58 of the 2012 Ordinance. Advocate Ferbrache submits that any post-termination restrictions must be strictly limited by reference to duration and scope, where the test is not that it is more difficult or less profitable to proceed without the restriction in question but rather than it is impossible without the clause in question operating. By reference to what Henderson J indicated in the *Carewatch* case, it is necessary to adopt a "*cautious, case-specific analysis*".

102. The GCRA suggests that the grounds of appeal advanced by the MSG seek to re-run the objective necessity arguments that had been advanced to and rejected by the GCRA. The conclusions reached are, in any event, well within the bounds of those open to a reasonable authority in the GCRA's position. On the issue of incentive, the GCRA's finding that the protection arising from the non-compete provisions is only made known to a new recruit upon that person receiving a contract of employment supports the conclusion that it does not operate on a new recruit's mind and the finding that some of the work is "*non-contestable*" also supports the conclusion that non-compete provisions in the form used are not required to operate as a form of protection for such work. As regards cross-subsidisation, the GCRA stands by its findings and submits that it was permitted to reject the MSG's argument that there was any link to a wider public policy objective. This is because the MSG is a private undertaking so its anti-competitive action cannot be justified in that fashion and there has been no error of law. In relation to the length of the non-compete provisions, the GCRA notes that the MSG is not seeking to justify the five-year period under the GPA, which must, therefore, be accepted as

having infringed the 2012 Ordinance, and again stands by its findings that there is no objective justification by reference to reputation and contacts and the time it takes to recruit a replacement at the MSG when an associate or partner gives notice. Because any reputation is built up in the market relating to the performance of services under the SHC, where there is no dispute about the MSG being the only entity involved, it follows that there is no objective justification to protect private work.

Burdens

103. Although Advocate Ferbrache asked that para. 113 in his Skeleton Argument be ignored, that is not the only instance where it appears that the GCRA has referred to some burden of proof, as distinct from an evidential burden, resting on the MSG. At para. 27(i) of the Skeleton Argument there is an explicit reference to the MSG having to prove that the covenants on which it relies are objectively justified to the usual civil standard. The following paragraph refers to the conclusion of the GCRA "*that MSG has not discharged the burden of proving that the post-termination non-compete covenants are objectively justifiable*", meaning that they operate to restrict competition in Guernsey. In para. 83, there is a more accurate reference to the MSG bearing the evidential burden of justifying the restrictions as objectively necessary, but there is immediately a strange reference to the standard of proof being the normal civil standard. The issue is mentioned again in para. 88, where reference is made to the MSG having not discharged the burden of proving its arguments that the restrictions in its agreements are objectively necessary. However, para. 91 then quotes from para. 55 of the Cause, which refers to the evidential burden of proof lying on the MSG.

104. I am satisfied that a convenient summary of the law on this issue can be found in the CAT's decision in *The Racecourse Association v Office of Fair Trading* [2005] CAT 29. This case involved the notification of an agreement concerning the sale of certain media rights relating to horseracing in the United Kingdom ("the MRA"), under which there is a statutory process by which "*negative clearance*" can be obtained where it is asserted that there is no, or no appreciable, effect on competition in the relevant market or an individual exemption can be sought. However, the Office of Fair Trading objected to the notified agreement, concluding that one aspect infringed the prohibition found in the applicable legislative regime (a "Chapter I prohibition"). There is a section in the judgment dealing with the burden of proof and I will quote several paragraphs in order to set out the principles that in my view apply equally under the 2012 Ordinance:

> "*130. The principal legal basis on which the appellants founded their appeal is that the legal burden of proving that the MRA had as its effect an appreciable restriction of competition was on the OFT. Their stance is that they had to do no more than show how the OFT failed to prove that the MRA involved any infringement of the Chapter I prohibition.*
>
> *131. Subject to one qualification, there was no issue that the legal burden of proof of the alleged infringement of that prohibition lay with the OFT. We were referred to Article 2 of Regulation 1/2003 in relation to Article 81(1) of the EC Treaty and it was not suggested that a different principle applies to section 2 of the 1998 Act. To like effect, we were referred to Joined Cases 29/83 and 80/83 CRAM and Rheinzink v. Commission [1984] ECR 1679, paragraph 16ff; and Napp Pharmaceuticals Holdings Limited v. Director General of Fair Trading [2002] CAT 5, paragraph 110. In Napp, and in JJB Sports plc and Allsports Limited v Office of Fair Trading [2004] CAT 17 the Tribunal confirmed that the standard of proof is the civil standard of balance of probabilities, although the seriousness of an infringement of the Act, involving as it may the imposition of penalties, is a factor to be taken into account in considering the probabilities of an infringement having occurred (compare Re H and Others (Minors) [1996] AC 563, at 586, per Lord Nicholls of Birkenhead; and Secretary of State for the Home Department v. Rehman [2003] 1 AC 153, at paragraph 55, per Lord Hoffmann).*

> *Napp also confirmed that the OFT may only rely on inferences flowing naturally from a given set of facts in the absence of countervailing indications (paragraph 110).*
>
> *132. The OFT submitted, however, that this position is qualified in cases in which the decision-maker has to decide whether what appears to be a restriction of competition is justified by the particular circumstances of the case. It submitted that, in such cases, whilst the legal burden of proving the infringement of the Chapter I prohibition remains with the decision-maker (here the OFT), the evidential burden of demonstrating that the apparent restriction on competition is justified falls upon the undertaking advancing such assertion: he who asserts must prove. The OFT submitted that, to the extent that the appellants defended the prima facie anti-competitive effect of the MRA as being "necessary" to achieve a pro-competitive outcome, the evidential burden of showing it lay on them.*
>
> *133. We accept this. It cannot be for the OFT to set up and disprove a case founded on the "necessity" argument. If, as the appellants claimed, any apparently anti-competitive effect of the collective dealing between the Course and ATR was justified by the necessity of such dealing, it was for them to demonstrate it by evidence. Once that evidence was before the OFT, the overall legal burden will remain on the OFT to prove the infringement of the Chapter I prohibition that it was asserting. But unless the appellants first made out a necessity case on the facts, no such case would arise for consideration.*"

105. I am satisfied that the principles set out in this passage apply to the regime created by the 2012 Ordinance. This regime is modelled on both the provisions that operate as a matter of UK law and, in turn, those applicable in the EU. As a consequence, the GCRA has always had the legal burden of establishing its case that there has been an infringement of the prohibition found in section 5(1), whereas the MSG has had to discharge the evidential burden of raising material that offers evidence that the non-compete provisions in its agreement can be objectively justified, which the GCRA then has to address in discharging its burden. Further, I am satisfied that the MSG has met its burden by raising the evidence on which it seeks to rely for this purpose.

106. In para. 60 of its Cause, the MSG makes reference to an error of law in the GCRA rejecting its evidence:

> "*Against that background, the GCRA could only reasonably and properly reject the MSG's evidence on the basis of solid evidence and reasoning to the contrary. Instead, the GCRA wrongly maintains that the MSG has not produced any evidence to support its case (see paragraph 4.137): a claim which amounts to a plain and serious error of law given that the MSG's oral and written statements as to its experience and judgment of what is necessary to attract recruitment of doctors to MSG are themselves evidence, and indeed powerful evidence, as to the need for the restrictions at issue.*"

This may not expressly be a challenge to the misapplication of legal principle as to where the burden of proof falls, but I consider that this is the closest that the MSG's case gets to questioning whether the GCRA has fallen into error on this point. In para. 52 of the MSG's Skeleton Argument, it is simply alleged that the GCRA failed to appreciate or give proper weight to the evidence adduced by the MSG, which is not as fundamental as a challenge to the application of legal principles.

107. Whilst I take the view that it has been unfortunate that Advocate Ferbrache's Skeleton Argument appears to have over-stated the position (and that might indicate such an error of law), I have returned to what is set out in the Decision and noted that the short section on the burden of proof in respect of ancillary restraints accurately states the legal position:

> "*4.83 The GCRA bears the legal burden of proving that there has been an infringement of section 5(1) of the 2012 Ordinance. However, the evidential burden of demonstrating that the non-compete clauses are objectively justified falls on the party under investigation (in this case MSG).*
>
> *4.84 Therefore, in order to discharge the legal burden of proof, the GCRA must first demonstrate that there is a prima facie case to be answered under section 5(1) of the 2012 Ordinance and subsequently assess the evidence put forward by MSG as to why its conduct falls within the ancillary restraints doctrine (in respect of which MSG bears the evidential burden of proof) in order to determine whether the non-compete clauses are objectively justified.*"

As well as citing the ***Racecourse Association*** case, reliance is placed on ***Asda Stores Limited v Mastercard Incorporated*** [2017] EWHC 93 (Comm), which records the common ground between the parties as to where the burden of proof lay, but this adds nothing to what has already been set out.

108. The language used in para. 4.162, setting out the GCRA's conclusion that it finds that the "*MSG has not demonstrated that the non-compete clauses are objectively justifiable because, in their absence, the partnership would not be able to operate*", may again raise the spectre that the GCRA has approached this issue as if there were some legal burden of proof on the MSG (and a similar comment can be levelled at what is set out in para. 4.105), but I prefer to read the Decision as a whole and find that the GCRA had recognised that it continued to have that legal burden but that the MSG had the evidential burden of raising matters as to why there should have been a finding of objective justification. This conclusion could have been phrased more elegantly, especially where there are other examples of the Decision referring to the MSG's evidential burden, eg, in para. 4.140 (and also repeated in para. 4.151):

> "*Because MSG bears the evidential burden of proof, the GCRA is not required to put forward less restrictive alternative non-compete clauses, in terms of either scope or duration, that might be objectively necessary for the partnership to be able to operate.*"

109. For these reasons, and to the extent that it actually forms part of the MSG's case, although it is more marginal than it ought to be, I am not persuaded that the GCRA has erred in law in directing itself as to the burden of proof.

Discussion

110. Before turning to the grounds of appeal themselves, I will make a few general comments.

111. There is no issue with the evolution from the GPA to the LLP Agreement, being a switch from a general partnership to the limited liability partnership. No point was taken in relation thereto but reference has been made to the summary found in *Kerse & Khan on EU Antitrust Procedure* (6th ed), especially para. 7-008, which confirms, by reference to Joined Cases 29 & 30/83 ***Compagnie Royale Asturienne v Commission*** [1984] ECR 1679, that there can be liability for the anti-competitive behaviour of an entity's predecessor where, from an economic point of view, the two are identical. It is apparent that there was a transition from the GPA to the LLP Agreement and so, to the extent necessary, the Appellant LLP can be responsible for what took place before it was established at the start of 2018.

112. It is perhaps unfortunate that the MSG's appeal has not been structured in a manner that concentrates on a primary issue, or ground of appeal, and then offers a set of alternatives, where any of them might be the basis for setting aside the Decision. The approach taken strikes me as being closer to a general complaint that something has gone amiss, meaning that the Decision necessarily has to be set aside. By way of example, para. 2 of the MSG's Skeleton Argument

states that "*On a proper analysis of the GCRA's reasoning, it is fundamentally flawed*", the generality of which is not particularly helpful. Even the particulars given in relation to the four areas addressed in the Decision (incentive, cross-subsidisation, reputation and contacts, and time taken to recruit) do not have the level of detail that would be helpful as to which of the grounds of appeal in section 46(2) of the 2012 Ordinance is engaged. There has been little in the way of an attempt to correlate the submissions to the case pleaded in the Cause, which I have summarised above.

113. There has also been a huge amount of material to consider in this appeal. Accordingly, a plea that "*the GCRA falls into factual and legal error in its assessment of the evidence put forward*" by the MSG (para. 55, Cause) ought to have been developed into an understandable submission, or submissions, by reference to specific examples of such alleged errors, where each is capable of undermining the rationality of the Decision taken that there has been a contravention of section 5(1) of the 2012 Ordinance, which enables the GCRA to give the MSG a direction under section 32 and to impose a financial penalty under section 32(4). As the interim relief sought and obtained indicates, it is arguably the effect of the direction that is most damaging to the MSG. If there could be no contravention of section 5(1) found, it follows that the direction could not be given but, even if there might be scope for the GCRA to conclude that there had been a contravention of section 5(1), the manner in which the direction given is framed as an absolute requirement to remove the non-compete provisions from the LLP Agreement and from the contracts with its associates could still be subject to the right of appeal found in section 46(1)(l). I would have found a clearer pathway or set of pathways through the extensive materials put to the GCRA easier to navigate.

114. However, I have also found certain elements of the Decision itself difficult to penetrate. The findings in section 5 are commendably succinct, as are the terms of the directions given. The reasoning in section 4 strikes me as unduly academic in how it is explained and does not always correlate to the facts that are described in section 3. If only as an example, and by reference to what I have just noted, I do not understand why there needs to be multiple authorities cited relating to where the burden of proof lies and the existence of an evidential burden placed on the MSG. Indeed, when considering para. 45 of the ***Asda Stores*** case, which does no more than cite with approval the ***Racecourse Association*** case, I note that the following paragraph raises an issue that has not, in my view, been adequately addressed within the context of this appeal. The absence of any real discussion of a counterfactual has arguably made my task harder. The issue is touched upon in para. 4.76 of the Decision and aired at para. 52 of the MSG's Skeleton Argument, albeit in the context of alleging that there is an error as to the evidential burden, but none of this was sufficiently developed thereafter. I appreciate that the MSG explains that it is difficult to adduce evidence of a situation that has never existed, but there could, and should, have been a clearer attempt to explain what the position would be if the ancillary restraint were not to exist. I have, therefore, also endeavoured to consider that issue as best I can from the material before the Court and the submissions of the parties.

115. One of the issues that troubles me, but which has also not been developed in the MSG's case, is the way in which the GCRA sets out its conclusion that "*there would be a separate market for each medical specialism*" (para. 4.52, Decision), but without clarifying how many specialisms it has found exist. It seems to me that this is quite a fundamental point because clause 81.1(a) expressly prevents a person who was Partner acting "*in the same specialism as that which he practised*" when a Partner at the MSG. On the basis that such a non-compete provision only operates following departure, when the person leaving becomes the required second undertaking, I would have expected there to have been some actual analysis of the areas of specialism where this has arisen. The generality of the material in the Decision leaves open the question as to whether there are the 12 specialisms set out in the chart below para. 3.18 or the four Directorates under the LLP Agreement or the 10 areas listed for those transitioning from the GPA to the LLP Agreement. Further, where a leaver also stops being resident in Guernsey, it must follow that the non-compete provision cannot be operative because it is

accepted that it does not affect the person who at that point becomes the separate undertaking because of the jurisdictional limitations arising under the 2012 Ordinance. In other words, although the non-compete provision, whether derived from the LLP Agreement (or in the past under the GPA) or through the terms of an Associate's contract of employment theoretically amounts to something prima facie anti-competitive, the choice of the individual leaver to depart from Guernsey would mean that it has no impact. It strikes me as artificial to suggest that someone who moves away from Guernsey has been affected by something that did not operate when that person was part of the single undertaking that is the MSG. It is one of the reasons why I find the analysis in the Decision somewhat academic rather than rooted in what has actually happened. However, because the absence of the type of clarity to which I have just referred about what amounts to a specialism was not something relied on by the MSG, I will say nothing more on the topic.

Direction

116. Although it may seem counter-intuitive to do so, I am going to move first to one aspect of the appeal that is covered by the challenge to the Decision but was not necessarily taken as discretely as it might have been on behalf of the MSG. Section 46(1)(l) of the 2012 Ordinance confers a right of appeal on an undertaking aggrieved by a direction given to it under section 32. Each paragraph confers on the person aggrieved a separate right of appeal, although a single appeal may combine more than one such challenge to a decision of the GCRA. The direction given in this case (at para. 5.4, Decision) is to remove the non-compete provisions from the MSG's current LLP Agreement and its contracts with its current associates. There was also a requirement to inform those who has left the MSG and were still subject to a non-compete provision that the provision is void and unenforceable. As an interim measure, pending the determination of this appeal, the effect of the direction given has been suspended.

117. As I have already noted, even if the finding of an infringement of section 5(1) of the 2012 Ordinance were to be upheld, moving directly to give the direction that has been given by the GCRA strikes me as going further than required, particularly in relation to the LLP Agreement. As such, I regard this blanket direction to remove the non-compete provisions as being a disproportionate response to any finding of infringement that exists. It follows that the appeal available under para. (l) of section 46(1) will be allowed and what I will proceed to explain in relation to the non-compete provision falls to be considered in the light of my overall decision that the appeal against the Decision must necessarily be allowed.

118. In reaching that conclusion, I have noted in particular the absence of any reference in the Decision to clause 81.5 of the LLP Agreement. This provision can be regarded as a form of "blue pencilling" agreed between the members of the MSG LLP and it means that, in particular, a restrictive covenant of a shorter period is envisaged were it to be found that the two-year period is excessive and so would be void and unenforceable. Whether this provision has been overlooked or ignored by the GCRA does not matter for this purpose. The GCRA has confined itself to the passage found in para. 4.140 of the Decision referring to the MSG bearing the evidential burden so that *"the GCRA is not required to put forward less restrictive alternative non-compete clauses, in terms of either scope or duration*". I am not persuaded that this is the correct approach. It is possible that the absence of any revision by the GCRA of its Statement of Objections has led to the position where there has been insufficient engagement between the parties as to what alternative duration could properly result in any contravention found no longer being a contravention.

119. The power for the GCRA to give a direction arises under section 32 of the 2012 Ordinance. Subsection (1) provides that, having found a contravention of section 5(1), the GCRA may give "*such directions as it considers appropriate to bring the contravention to an end*". Subsection (2) then further explains that "*A direction under this section may, in particular, require the undertaking to terminate, modify or withdraw from the agreement in question.*"

120. The first consideration for the GCRA, therefore, is what contravention it has found, because its power is to give a direction to bring that contravention to an end. The examples given in subsection (2) expressly refer to modifying the agreement. The modification that GCRA has chosen in this case is to direct the complete removal of the non-compete provision where it could have, especially in the light of clause 81.5, have given a direction that the period be reduced. Indeed, even within the Decision itself, there is a recognition by the GCRA that some form of non-compete provision would not be anti-competitive in respect of consultants leaving the MSG, and here I repeat para. 4.160:

> "*As such, the GCRA's assessment is that the second measure, that is the period between the departing specialist's final day at MSG and the starting date of their replacement, is the only reasonable basis on which the time required to "protect [the] work" could be assessed, if any such protection were indeed required. This measure more accurately reflects the length of time a departing specialist, having left MSG, would have to act in a manner that might arguably require restraint. The analysis suggests that in such a case, a restraint period of no more than about 6 months (the mean recruitment time) would be sufficient.*"

121. I find that there is an inconsistency on the face of the Decision between this analysis, which has not been explored further, and the giving of the direction under section 32 that forms part of this appeal. The GCRA has first found that the duration of the non-compete provisions in the LLP Agreement and in the contracts of employment of associates is excessive. It reaches that conclusion because it rejects each of the four bases that it analyses (incentive, cross-subsidisation, reputation and contacts, and time take to recruit). Its comment in para. 4.140 comes within the section setting out its reasoning on the third of those issues (reputation and contacts). Paragraph 4.160 features in the section of the Decision dealing with the fourth of those issues (time taken to recruit). The GCRA does not appear to have stepped back from its conclusion (para. 4.162) "*that MSG has not demonstrated that the non-compete clauses are objectively justifiable because, in their absence, the partnership would not be able to operate.*" Even if it is possible to regard the comment in para. 4.140 as being of wider applicability than just the issues raised relating to reputation and contacts, I take the view that there is a difference between the evidential burden attaching to the MSG when it relates to whether or not there can be a finding of an infringement and when the GCRA, having found such an infringement, moves on to consider how properly to address its finding. In such a situation, I am not persuaded that the MSG has any burden, but rather that the GCRA has to consider how to exercise the power conferred on it by section 32, having regard to what would be a proportionate response to the contravention found. The evidential burden referred to in para. 4.140 can only relate to raising a sufficient argument on objective justification and does not then also attach to how any direction should be formulated.

122. The effect of the direction given is that the non-compete provisions would have to be removed in their entirety. Where the GCRA has not reached a conclusion that no form of non-compete provision is permissible, I consider that the direction that flows from the finding of contravention had to go no further than was necessary, in the language of section 32, "*to bring the contravention to an end*". When the GCRA exercised its discretion to direct the removal of the non-compete provisions, particularly from the LLP Agreement, although this will also apply to the restraint provision in any contract of employment, it would be unreasonable and disproportionate for it to direct removal when some other form of modification, such as varying the provision so that it lasted only for a shorter period, is available to it. If the GCRA had not wanted to take that step without engaging further with the MSG, I think it could have found the contravention and then proceeded within a short time to a proposed direction by giving a new Statement of Objections or it could have waited until it received any comments on a refreshed Statement of Objections once it decided to narrow its ongoing investigation to just the alleged contravention of section 5(1).

123. In this regard, I consider that it is important to note what is set out in the Statement of Objections provided to the MSG dated 10 July 2020. The GCRA provided this document in order to comply with its obligation under section 43 of the 2012 Ordinance. Subsection (5) provides, for the avoidance of doubt, *inter alia* that a proposal by the GCRA to impose any direction under section 32 "*must set out the terms of the proposed … direction*". Accordingly, in the Statement of Objections, the section dealing with the proposed direction stated:

> "*5.2 The GCRA proposes to direct the MSG under section 32(1) of the Competition (Guernsey) Ordinance, 2012, to amend clause 81.1 of its current Limited Liability Partnership Agreement and the non-competition clauses in its current associates' contracts so that they:*
>
> *(a) Provide for a duration of the non-competition period of one year only; and*
>
> *(b) Ensure that the substantive scope reinstates a reference to practising with the status of a (registered) Medical Practitioner, rather than offering medical services generally.*
>
> *5.3 This proposal remains subject to receiving from the MSG any representations the MSG may wish to offer. On receipt of such representations, the GCRA may instead direct that these clauses be amended in a different way or may make no direction.*"

Accordingly, even if the MSG's representations that there should be no contravention found were rejected by the GCRA, the proposed decision regarding a direction then to be made offered only a change in duration and scope. The GCRA had not proposed that the non-compete provisions be removed in their entirety and I am not persuaded that the generality of the wording in para. 5.3 properly enables the GCRA to depart from the decision it had proposed taking to amend the clauses in a different way by directing their removal. I think there is a substantive difference between proposing an amendment to a continuing clause and switching to directing that the clauses be removed. If that is what the GCRA wished to do, it would have been fairer for it to give notice of its proposed direction and invite any further representations on that different course of action. However, because I am satisfied that the MSG's appeal against the direction has to be allowed as being an unreasonable exercise of the GCRA's powers and/or disproportionate in any event to the contravention found, I will not comment further on such procedural matters.

124. For these reasons, the MSG's appeal against the direction given to it is allowed. I will turn to the consequences of that conclusion in due course.

Finding of contravention

125. This brings me back to the main aspect of the Decision that the MSG is challenging, namely whether there could properly be a finding that clause 81.1 of the LLP Agreement and the corresponding provisions found in associates' contracts contravene section 5(1) of the 2012 Ordinance. This is the appeal pursuant to section 46(1)(e).

126. I have already set out the summary of the MSG's contentions, taken from para. 73 of its Cause. If I start from the premise that some level of protection when a consultant leaves the MSG from that consultant being able to set up in competition is justified, the principal issue will relate to the scope and duration of what is set out in the non-compete provision. The MSG seeks to justify the periods it has now adopted (and I will not comment on the longer period found in clause 35 of the GPA on the basis that it is now historic), whereas the GCRA has found them

to be excessively long. It is helpful to set out first the cases to which the Court's attention has been drawn that might assist.

127. The *Carewatch* case (*supra*) relates to franchise agreements. The first defendant, Focus Caring Services Limited, was a former franchisee against which injunctive or other relief was being sought. The plaintiff was the second largest provider of home care services in the United Kingdom, using a mix of directly owned corporate branches and outlets run by franchisees. There was a restrictive covenant in the franchise agreement, the periods of which referred to 12 months and 9 months and applied when a franchise agreement had been terminated, and which broadly precluded competing with the franchisor or with another franchisee of Carewatch.

128. Albeit in the context of explaining the underlying purpose at common law, at para. 128 of the judgment of Henderson J, he quotes what Dyson LJ had stated in para. 22 of *ChipsAway International Ltd v Kerr* [2009] EWCA Civ 320:

> "*… during the term of a franchise, goodwill is built up in the franchise territory with the use of a franchisor's name and branding. Such goodwill is a potentially valuable asset in the hands of the franchisee so long as he continues to trade in the franchise territory, and in the hands of a franchisor at the termination of a franchise agreement. A franchisor's interest in that goodwill is vulnerable to competition from a former franchisee who has knowledge of the area and experience of dealing with particular groups of customers. The commercial purpose of a post-termination covenant against competition is to prevent the franchisee for a period of time from continuing and competing in his former territory in the same line of business so as to enable the franchisor to exploit the goodwill that he has built up during the term, most obviously by recruiting another franchisee for the same area.*"

Henderson J proceeded to analyse the various covenants in issue against common law principles and concluded that each was fully valid and enforceable (para. 145). He then moved on to consider them against competition law principles.

129. Section 2 of the Competition Act 1998 contains a similar prohibition to that found in section 5 of the 2012 Ordinance. The root of these provisions is found in EU law (Article 101, TFEU). The GCRA has relied on para. 150 of the judgment for its conclusion that the non-compete provision is anti-competitive by object:

> "*It seems to me clear that the restrictive covenants prima facie fall within the scope of section 2(1) on the basis that they may affect trade within (at least) the territories of the agreements, and they have as their object the prevention or restriction of competition within those areas. That, after all, is the whole point of a covenant in restraint of trade. Following termination of the agreements, there would be scope for actual or potential competition between Carewatch (either through its branches, or through replacement franchisees) and Focus in the relevant territories, and the object of the covenants is to protect Carewatch's goodwill by preventing or limiting such competition for a period of twelve months. At first blush, therefore, the Chapter I prohibition would appear to apply.*"

His Lordship then proceeded to analyse the consequences of the decision in Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Ermgard Schillgalis* [1986] ECR I-353, which he chose to term as "the *Pronuptia* defence".

130. The *Pronuptia* case also concerned franchise agreements. Although that case only concerned one type of franchise agreement, being a distribution franchise, it has since been applied more broadly to other types of franchise, including service franchises, which was relevant in the *Carewatch* case. Indeed, in a Decision of the European Commission dated 14 November 1988

(*ServiceMaster* OJ 1988 L332/38), it was suggested that "*know-how is often more important in the [supply of services] than in the supply of goods because each service requires the execution of particular work and creates a close personal relationship between the provider of the service and the receiver of the service.*" Having referred to the conclusions in para. 27 of the judgment in *Pronuptia*, as Henderson J stated at para. 156:

> "*Pronuptia is therefore authority for the proposition that, at least in the context of a distribution franchise, provisions which are strictly necessary in order to protect the know-how and assistance provided by the franchisor, and to maintain the identity and reputation of the network, are not to be regarded as interfering with competition. It is clear from paragraph 16 that such provisions may include post-termination non-compete clauses of reasonable duration. By contrast, as the Court went on to explain, provisions which share markets between franchisor and franchisees, or which prevent them from engaging in price competition, do constitute restrictions of competition for the purposes of which is now Article 101(1).*"

131. Henderson J next turned to how Briggs J (as he then was) had addressed another franchise case in *Pirtek (UK) Limited v Joinplace Limited* [2010] EWHC 1641 (Ch), at para. 50:

> "*It is evident, in particular from paragraph 16 [of Pronuptia], that a post-termination restraint on competition may, but will not necessarily, fall outside the purview of section 2, and that this question will depend on whether the post-termination restraint is essential to prevent the risk that know-how and assistance provided by the franchisor to the franchisee will, after termination, be used to aid the franchisor's competitors. The test is in many aspects similar, but not identical, to that which the common law applies to the validity of a post-termination restraint on competition. It is in both cases a necessity test, but whereas the common law considers what is necessary to protect the franchisor's goodwill, Community law addresses that which is essential to protect the franchisor against his know-how and assistance being used by his competitors.*"

His Lordship further suggested that when considering the *Pronuptia* defence, it did not follow automatically that such a defence is bound to succeed, which was the approach seemingly taken by Harman J in *Kall-Kwik Printing (UK) v Bell* [1994] FSR 674, but that it was necessary to adopt "*a more cautious, case-specific analysis*" (para. 53). Henderson J also approved the test set out at para. 59 by Briggs J:

> "*Once it is established that, taken as a whole, the know-how and assistance provided by a franchisor to a franchisee and (in the present case) its principal is of an extent and type likely to turn that franchisee or principal into an effective competitor of the franchisor, it is in my judgment quite inappropriate then to conduct a minute assessment of the question whether a particular franchisee could somehow devise a similar and competing business after termination which might minimise the extent of the prior provision of know-how and assistance by way of contribution to his competitiveness.*"

132. Applying that test, Henderson J concluded (in para. 167) that the *Pronuptia* defence succeeded. His Lordship explained that "*The know-how and assistance provided by Carewatch to Focus and the Graces, viewed retrospectively as at the date of termination, was clearly of an extent and type likely to turn them into effective competitors of Carewatch*", before adding "*It was precisely in order to prevent conduct of that kind [setting up in competition] that the in-term and post-termination covenants against competition were included in the agreements.*"

133. Although the language relating to franchise agreements is not directly applicable to the non-compete provisions in issue in the present case, I am satisfied that it is appropriate for me to draw guidance from this decision (and the cases referred to therein), adjusting the terminology

as necessary. In particular, I consider that the approach from the ***Pirtek*** case can be adopted so that, in principle, a consultant leaving the MSG will have knowledge of its business, especially the relationship with other health professionals in Guernsey, that will be relevant when assessing how it might be utilised by such a leaver and to which the non-compete provision attaches. Further, although I am careful to have proper regard to section 58 of the 2012 Ordinance, the similar approach between any customary law analysis of the reasonableness of a restraint of trade provision in a contract and viewing it under the section 5(1) prohibition means that it is not wrong also to have regard to any customary law principles, if only to provide a sense-check to the consideration that is required under competition law principles. The effect of section 58 is not to oust completely consideration of a non-compete provision under general principles of customary law, but rather to supplement that and to confirm that competition law principles override in the event of any inconsistency between the conclusions that can be reached on each basis. Accordingly, I consider that para. 4.89 of the Decision over-states the position that "*the compatibility of the non-compete provisions with common/customary law are not relevant*". That is one of the reasons why, where there seems to have been an acknowledgement that some form of non-compete provision would be reasonable and permitted even in a competition law analysis, giving the blanket direction to remove those provisions is disproportionate to how to bring the contravention to an end.

134. In a similar fashion to the Decision, having made a primary finding that the matters listed in para. 4.95, Decision amount to *prima facie* infringements of competition by object (although not all of them have resulted in a finding of contravention of section 5(1)), as Advocate Ferbrache pointed out, the finding of any contravention turns on this issue of whether the terms of the non-compete provisions can be shown by the GCRA, the MSG having met its evidential burden, not to be objectively justifiable. The test under the 2012 Ordinance for this purpose can be adapted from these franchise cases and involves considering whether it is essential for the MSG to protect itself against the prior provision of its know-how and assistance being used by a leaver who chooses to set up in competition. This is inevitably a fact-sensitive question, which involves consideration of what the GCRA explains in the Decision that it took into account and whether it has wrongly overlooked any particular aspect of the material it gathered. This will always need to be set against the summary I have already quoted from para. 4.100 of the Decision as to the approach the GCRA has taken to the arguments it considers have been raised by the MSG and its overall conclusion at para. 4.105 that "*the GCRA finds that MSG has not demonstrated, on the balance of probabilities, that the non-compete clauses are necessary for the operation of the partnership and thus objectively justified.*"

Material given insufficient weight

135. Before turning to each of the four areas that are analysed in more detail, more generally I take the view that the GCRA has placed insufficient weight on the information provided at its request by the GP practices. I further take the view that there needed to be a fuller understanding of how medical services are provided in Guernsey and what it is that a departing consultant from the MSG is likely to be able to undertake, whether immediately after leaving or after whatever period of time is appropriate. It is only going to be in an area of work that such a professional could perform that there would be scope for a non-compete provision being effective.

136. The Decision records at para. 3.61 that requests were made for further information to the three GP practices. Paragraph 4.115(b) notes that GPs are the main source of private referrals and indicated a preference amongst patients to be seen on-island, with para. 4.119 rehearsing the information provided in relation to those patients who would choose to be treated privately staying in Guernsey for that treatment, where any medical professional outside the MSG would struggle to meet the needs of those requiring surgery, given the constraints on accessing theatre facilities at the hospital. There is also reference to the information provided in para. 4.135(b), which deals with the reputational aspect, where the GCRA's conclusion is that the "*volume of private elective work undertaken by an MSG specialist does not affect how well GPs know them*

or their work and so does not affect the likelihood or volume of private referrals to them." There are no other obvious places in which the GCRA refers to the information it obtained from the GP practices. The reason given for seeking this information, as set out in para. 3.61, is that it was done "*in order to ascertain whether the representations made by MSG were supported by evidence*" and so I find it surprising that there is not a more detailed analysis of all the information that was then provided.

137. I have already summarised the responses the GCRA received through quoting some of the answers given. Included amongst those answers was a recognition that "*it is typical in Guernsey Healthcare Partnerships for restrictive covenants to be included in Partnership Agreements*". There was also an indication given that "*Established GPs become quite familiar with MSG consultant's special interests and abilities within a year or two of the consultant arriving in Guernsey*", with that period being one during which to "*establish a good reputation*". Similarly, "*it would, on average, take 12 months or more before an individual specialist is recommended by a GP but exceptionally it may be quicker*". These responses do not appear to have influenced the GCRA at all when dealing, in particular, with reputation and contacts and the impact on time taken to recruit.

138. These are aspects where what the GP practices set out supported what the MSG had included within its representations. This is raised in the Cause at para. 56 and I find that it has led to the Decision being unsustainable. In those circumstances, rather than ignoring, or glossing over, this information, I think the Decision needed properly to address the evidence that the GCRA had obtained and to explain why it did not regard this as relevant to its conclusions on objective justification. Because the GCRA has not satisfactorily addressed this evidence, I am persuaded in broad terms that the finding of a contravention lacks the rational basis expected under the *Wednesbury* reasonableness test.

139. I share the concerns that Advocate Gray expressed about the way in which the four aspects the Decision analyses are dealt with. I think they are more inter-related than the GCRA reasoning suggests they are. If each were to be looked at discretely, it would be possible for the MSG to succeed on its appeal through demonstrating that there was, for example, an unreasonable decision on the conclusions reached by the GCRA about incentive, even if its conclusions on the other aspects did not result in any finding of a ground of appeal in section 46(2) of the 2012 Ordinance. I consider it preferable to balance the various arguments that have been raised by the MSG as why the non-compete provisions should not be viewed as being anti-competitive, although I will look at why the GCRA has rejected each of the bases on which the MSG has sought to justify the provisions. In other words, rather than taking each reason for which the GCRA rejected the representations made by the MSG, there is a need to look at the general issue raised about the difficulties experienced when recruiting and how the non-compete provisions assist in that process and with retention thereafter (see, eg, para. 56 of the Cause, which identifies in a manner that I accept has some bearing on these issues other factors that all have to be borne in mind: "*the island life dynamic, the heavy 'on call' requirements, the need for emergency care cover for when 'on call', the absence of any junior doctor support, the lack of development and teaching opportunities, the relative isolation from fellow-specialists and the more general nature of the work required*").

Incentive

140. I doubt that there is anything particularly controversial in the assertion by the MSG that a new recruit will find it more attractive if there is a level of private work available, for which he or she will reap some additional benefit, as well as job satisfaction. I also agree with the submission that the GCRA in para. 4.111 of the Decision has misunderstood what the MSG meant by it being an incentive. There is a finding that "*Since the evidence demonstrates that incoming consultants are not made aware of the fact that their predecessor is subject to a non-compete clause, the existence of that non-compete clause cannot be a factor that incentivises*

them to join MSG". What I think this conclusion fails to acknowledge is that the non-compete clause only becomes operative when a new recruit accepts the terms on which employment with the MSG is being offered. Up until that point, there is no commitment on the part of either side. There will have been a response to an advertisement and an interview process. An offer of employment will have been made by the MSG on the basis of whatever has been discussed through the recruitment process. However, until the written contract of employment is finalised, which would contain the standard non-compete provision of an associate, there is no agreement that could, when the associate leaves the MSG, impact on him or her as a separate undertaking. As such, I take the view that the GCRA has focused too much on the absence of any indication given at an earlier stage in the recruitment process about the level of protection being afforded to a new employee in developing a private practice in Guernsey. On the basis that every associate is at consultant level and the common ground that the MSG always employs a new arrival as an associate rather than offering membership of the partnership from the very start, the relevance of incentive is, in my opinion, broader than the basis on which the GCRA has analysed it.

141. It is also relevant, in my view, to note the way in which the MSG contends that it is necessary to have regard to the position if there were no non-compete provision in place and how that would operate as a disincentive when it engages in a recruitment exercise. I accept that this involves considering the opposite to the position under which the MSG has always operated. However, I think it would be appropriate to infer from the information provided by the GP practices that the position even before the MSG was established meant that those within the general practices who undertook the work that evolved into the MSG would have been subject to restrictive covenants. In other words, a regime of restrictive covenants of an appropriate length will have operated for many years in Guernsey for doctors. As such, the requirement to remove the covenant entirely would create an open field where I accept the evidence that the MSG gave to the GCRA that this would make a move to Guernsey less attractive than it would be if it were known that there is the opportunity to develop a private practice during the time where there is a period during which protection from competition from a leaver is provided. The disincentive representations made are, therefore, as relevant as the incentive aspect and both should, in my view, have been balanced by the GCRA.

142. I further take the view that there really ought to have been more detailed consideration of the occasions on which vacancies have been created and then filled. This is because the finding of a contravention should have regard to realities and not just theory. From the material set out in the Decision, with particular reference to the table after para. 3.19, it is apparent that not all of the specialisms of MSG consultants will attract the same levels of private work. Accordingly, there will be a difference in emphasis between, for example, a paediatrician and a surgeon as to the relative importance of whatever private work may be available. Again, there appears to be nothing in the Decision that seeks to draw that distinction, possibly by reference to the number of persons who have left over a period of time (which can only run from when the 2012 Ordinance came into force, but might be some later date, if appropriate) and how quickly or otherwise the vacancy created was filled. Whilst this is clearly an issue associated as well with the time taken to recruit, the degree of relevance of the incentive that being able to include the offer of some element of private practice, where that matters, I think needs to be reviewed in more detail before reaching any conclusion. In that regard, it may have assisted if there had been some actual analysis of the length of time a departing consultant had already spent with the MSG before leaving and so how readily an incoming consultant would overcome the reputation already established. Again, if the person leaving was an associate, rather than a partner, it begs the question as to whether the levels of incentive for a new consultant joining would be greater or lower. There may be arguments in both directions, but these have not been dealt with by the GCRA. This omission affects the reasonableness of the Decision.

143. In para. 4.121, the GCRA concludes that there will always be certain elements of the private work that would be offered to an incoming consultant, arising from what it describes as the

"non-contestable" work for patients requiring surgery who wish to be treated on-island and so there was no objective justification for including the non-compete provisions because it was not required to secure that work for any consultant at the MSG. This is dealt with broadly as a rejection of the MSG's representations relating to how private work operates as an incentive and why some level of protection against a leaver choosing to remain in Guernsey is needed. However, as Advocate Gray noted, the non-compete provision has no effect in respect of this non-contestable work because it will be available to MSG consultants anyway. I accept that what needed to be considered was where there is work that might be undertaken by a leaver from the MSG, and so competition unless and to the extent that the non-compete provision operates, there should have been some attempt to quantify the impact (see, eg, para. 64 of the Cause). It can only reasonably be that degree of competition that would otherwise be available that would be anti-competitive through the non-compete provision operating and so the absence of quantification means that it is difficult to understand the extent of any contravention that needs to be addressed.

144. There is a similar issue relating to the conclusions of the GCRA about the market to which the non-compete provision attaches. The conclusion in para. 4.68 of the Decision is that "*there are separate emergency, public elective and private elective secondary healthcare markets for each specialism*". The geographic market for the first two of these was found to be Guernsey-wide. However, the "*geographic scope of each private elective secondary healthcare market is at least Guernsey-wide but may be wider, encompassing other geographic areas such as the UK*" (a conclusion that is also contained in para. 4.66). Quite how that conclusion fits in with the terms of section 5 of the 2012 Ordinance remains unexplained, where subsection (1) refers to "*the object or effect of preventing competition within any market in Guernsey*" and subsection (3) provides that subsection (1) applies "*only if the agreement is, or is intended to be, implemented in Guernsey*". I am, however, approaching the effect on the market as being confined to Guernsey and see no other reason to disagree with the GCRA's conclusions on the markets in which the non-compete provisions operate.

145. Subject to my earlier comment about there being no real clarity about how many specialisms there are for the purposes of the GCRA's conclusion on each medical specialism being a separate market for each of these purposes, this is a further reason why I find that the Decision treats every specialism the same. To an extent, that is understandable for the LLP Agreement, because the members are all covered by clause 81.1, but for any associate employed at the time of the Decision, there is no attempt to consider how much of an impact the private elective work actually has. Given the blanket finding that the non-compete provisions in these contracts contravenes section 5(1), I think there should have been specific consideration of the effect in each of the markets so covered that there is such a contravention, rather than the GCRA resorting to generalities.

Cross-subsidisation

146. The second issue the GCRA has set out relates to cross-subsidisation, which relates to compensating for the less attractive aspects of joining the MSG, in particular the provision of emergency secondary healthcare. This is an area where the GCRA has looked at the manner in which all new arrivals are employed as associates, where the salary offered and paid reflects what would be available in the United Kingdom. Any such employed associate has the option of remaining as an employee rather than seeking to join the partnership. Accordingly, at the recruitment level, there is already a package on offer that compensates for the unattractive elements associated with a job at the MSG. In any event, the terms of the SHC are such that the MSG could revert to the States of Guernsey if it experienced recruitment problems. There is no public policy reason supporting the objective justification of the anti-competitive effect of the non-compete provisions. For these reasons, the GCRA concluded (at para. 4.132) "*that MSG has failed to demonstrate that the non-compete clauses are objectively necessary to allow the partnership to operate on the cross-subsidisation ground it has put forward*". (I am treating

the reference to the failure of the MSG as if it means that the GCRA is not satisfied that this aspect is objectively justified, otherwise it is an instance where the burden on the GCRA may be poorly described.)

147. It again strikes me as difficult to comment on this issue in isolation. It is part of the overall picture being presented by the MSG as to why the non-compete provisions found in its contracts with the associates, and thereafter in the LLP Agreement, are regarded as essential to its business model and so objectively justified. On this particular aspect, I think it is important to have regard to the healthcare model that operates in Guernsey. Without placing the position of the MSG into context, looking at the terms of the non-compete provisions, particularly in the associates' employment contracts, because here I agree with Advocate Ferbrache that this issue focuses more on that aspect because it relates to how to attract the best candidates to employment, is rather a sterile exercise.

148. Although section 3 of the Decision sets the scene, I find it surprising that there is no acknowledgement on the part of the GCRA that, if the SHC with the MSG did not exist, the States of Guernsey would be obliged either to provide the services it contracts the MSG to perform on its behalf, or arrange for them to be performed by one or more contractors. The obligation exists and it is fundamental to the delivery of what is required by the community that there be satisfactory medical provision. Indeed, it is expressly within the operational functions part of the HSC's current mandate (and this broadly reflects the obligations applicable to its predecessors) that it includes "*Commissioning and delivery of various health and social care services including secondary healthcare and off island services*". As a consequence, huge reliance has to be placed by the States of Guernsey on the MSG and its performance of the terms of the SHC means it falls to be regarded as a public authority for the purposes of the Human Rights Law (and more widely). I take the view that Advocate Gray's submissions to the effect that these elements do not always appear to have been appreciated by the GCRA when considering the inter-relationship between the MSG and the States of Guernsey has some foundation. In very simple terms, the SHC refers to the MSG and the States of Guernsey working together and it provides that they "*are the joint providers of the Secondary Healthcare Service described in*" the SHC. Given that it is accepted that 80% or so of the work of the MSG is to deliver its obligations under the SHC, there should be an acknowledgement in considering whether or not the remainder of the work that the MSG consultants undertake can properly be described as anti-competitive if the non-compete provisions were to remain in place and, if so, the extent to which they need to be modified.

149. This brings me to the last of the reasons given by the GCRA for rejecting the cross-subsidisation issues raised by the MSG, namely the public policy angle. The GCRA relies on Case T-30/89 *Hilti AG v Commission* (12 December 1991, [1991] ECR II-1439) in support of its finding whereas the MSG submits that Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577 shows that these wider policy objectives can properly be taken into account.

150. The *Hilti* case concerned a challenge to the decision of the European Commission to find that the applicant had a dominant position in the market for nail guns and for the nails and cartridge strips for those guns which it had abused, resulting in a substantial financial penalty and an order that it put an end to its abuse. There were two companies with registered offices in the United Kingdom, Profix Distribution Limited and Bauco (UK) Limited, which manufactured nails that were compatible with Hilti's nail guns. They complained to the Commission that Hilti was refusing to supply cartridge strips without a corresponding number of Hilti nails, the effect of which is that they were being excluded from selling the nails they manufactured for use in the Hilti products because of Hilti tying in the supply of all its product parts and refusing to supply component parts, eg, the cartridge strips, for use by these competitors. The decision taken suggested that any concerns Hilti had about the safety, or dangerousness, of the products

of the other companies should have been raised with the competent authorities in the United Kingdom.

151. When considering the claim of objective justification, the Court concluded that it was not available to Hilti (see paragraphs 115 to 119). In effect, the Court upheld the Commission's view that this was properly a matter for the domestic authorities, to which Hilti should have aired its concerns. It stated that in those circumstances "*it is clearly not the task of an undertaking in a dominant position to take steps on its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous or at least as inferior in quality to its own products*" (para. 118). The Court further added (para. 119):

> "*It must further be held in this connection that the effectiveness of the Community rules on competition would be jeopardized if the interpretation by an undertaking of the laws of the various Member States regarding product liability were to take precedence over those rules. Hilti's arguments based on its alleged duty of care cannot therefore be upheld.*"

152. The ***Wouters*** case was a reference to the European Court for a preliminary ruling in proceedings brought by members of the Bar of the Netherlands arising from decisions in Amsterdam and Rotterdam to prohibit them from being in full partnership with accountants. It was argued in support of the prohibition that it was justified by the overriding reasons relating to the public interest and so was not disproportionately restrictive. It was found that the Bar of the Netherlands should be regarded as an association of undertakings, so that Article 85(1) of the Treaty (a predecessor to Article 101(1), TFEU) was engaged. The Court concluded that the prohibition adopted, despite effects restrictive of competition that were inherent in it, was necessary for the proper practice of the legal profession as organised in the Netherlands. Advocate Gray relies, in particular, on para. 97 of the Court's judgment:

> "*... not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95 Reisebüro Broede [1996] ECR I-6511, paragraph 38). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.*"

153. In response, Advocate Ferbrache submits that ***Wouters*** is not in point because the Bar of the Netherlands was performing a regulatory function, whereas the MSG has no such role. As set out in the Decision, the ***Hilti*** case is applicable because the Court rejected the argument that the attempt to raise safety concerns, being treated as a public policy reason for the anti-competitive practice is more akin to the MSG's argument that it is entitled to protect its business for a period of time from unwanted competition. In doing so, he accepted that the States of Guernsey is required to provide secondary healthcare and has chosen to satisfy that obligation through the SHC.

154. I do not agree that the ***Hilti*** case offers the complete answer to this question that the Decision suggests it does. As the ***Wouters*** case explains, the overall context is important. Placing the position of the MSG into the context of how healthcare services are provided in Guernsey demonstrates why there could be some element of public policy involved in deciding whether

or not section 5(1) has been contravened. As I have just noted, the effect of the SHC is that, at least for the purpose of providing those services it is obliged to provide under it, the MSG as an entity is a public authority. This is because it shares the responsibility for delivering those services to the community with the States of Guernsey acting through the HSC, which is self-evidently a public authority. Provision of emergency services is one aspect of this. Whilst the private practice element of the MSG's undertaking may well not be covered by its status as a public authority, the inter-relationship between the doctors who are performing the important function of providing secondary healthcare as required by the SHC in my view supports the argument that was advanced by the MSG that the non-compete provision inserted into a newly arrived associate's contract and rolled into the LLP Agreement for those who become partners has to be considered within this wider context of offering a package to new arrivals that gives those for whom private practice is a component part of what they expect sufficient time in which to establish themselves. As the responses from the GP practices indicated, referrals are unlikely, save in exceptional cases, very quickly after a new associate arrives here. As such, in order to secure the best personnel from whom to provide the contracted services under the SHC, there appears to me to be some public policy aspect for the benefit of the well-being of the community that the MSG should aspire to attract the best doctors available. If one considers what the position would be if the SHC did not exist, and these secondary healthcare services had to be provided directly by the States of Guernsey, the expectations of the community strike me as being no different: they would want to know that the doctors offering that healthcare were the best available on the terms offered.

155. I do not, though, regard the public policy argument as being one that of itself means that the Decision has to be found to be unreasonable. I think that it is an aspect where greater credence should have been given by the GCRA to the representations, when viewed in the round, made by the MSG. The GCRA's outright rejection of any possibility of a public policy argument being capable of being mounted is where, in my view, it fell into error. Instead, the GCRA should have recognised that the SHC imposes obligations on the MSG to perform those functions that would otherwise have to be provided by the States of Guernsey or through an alternative contractor and that, particularly because about 80% of the MSG's work relates to fulfilling the SHC, the non-compete provisions have to be considered within that context. It is the link between those public authority elements and the related private practice opportunities to which the MSG's materials have referred that had to be balanced and the effect of the non-compete provisions put into that wider context that needed to be assessed rather than rejected outright. Put simply, on the basis that the GCRA ought to have recognised that some form of non-compete provision was justifiable, the public policy argument becomes a factor in deciding what length and scope are most appropriate. This is because those aspects of the work that the consultants at the MSG are obliged to undertake, eg, absence of junior doctors and needing to be available to cover emergency call-outs, become factors in looking at the appropriateness of the non-compete provisions. It involves balancing all aspects and the so-called cross-subsidisation element is just one of them.

156. I will gloss over clause 7.6 of the SHC on the basis that this mechanism for reviewing the approach to recruiting new consultants is a topic that was not aired in any great detail at the hearing and the SHC has been treated as a confidential document, although this issue is expressly pleaded at para. 66 of the Cause. All I will add to what I have mentioned about public policy is that I doubt either party to the SHC would relish needing to make use of this provision where there are other means, such as a reasonable non-compete provision, through which there would be no need to resort to this provision. It should, in my view, be regarded as a last resort and the GCRA should not have placed as much weight on it as it appears to have done.

157. Although not directly related to this particular issue, whilst commenting briefly on the SHC, I can mention another submission made on behalf of the GCRA relating to there being no provision in that contract requiring the MSG to maintain any form of non-compete provision. That is an accurate statement to make. There was an obligation, for example, on the MSG to

convert itself into a limited liability partnership but there was nothing explicit about the requirement to have any non-compete provision. However, I think it is relevant to recognise that the States of Guernsey must have been aware that the MSG made use of non-compete provisions because it is part of the SHC that such a provision would not apply if the doctor leaving the MSG went to work for the States and vice versa. By insisting on this freedom of movement for doctors without restriction, I think I can properly infer that the States of Guernsey was aware that there were non-compete provisions otherwise there would have been no need for such a provision to feature in the SHC. Further, I take the view that I can also infer that, when considering the terms of the non-compete provisions to which its advisers must have had regard before drafting the SHC, the States of Guernsey did not find them objectionable because, if that had been the view taken, this ought also to have been addressed in the SHC. This does not mean that the GCRA could not have found that the non-compete provisions contravened the 2012 Ordinance, but it becomes a further factor that I believe was not fully taken into account by it when reaching the conclusions it has.

Reputation and contacts

158. Moving to the third issue analysed in the Decision (reputation and contacts), I will start by repeating the comment that I believe that the GCRA has given insufficient weight to the responses received from the GP practices. Having asked them questions about how reputations are established and the impact that regular contact has on referrals to the MSG or to someone in particular at the MSG, I find it surprising that those responses do not feature at all prominently when the GCRA reaches its findings. It seems to me that it is not the case (as stated at para. 4.136, Decision) that reputation derives solely from work performed under the SHC, even allowing for the reference to "*wholly or largely*" in para. 4.135. That is not what the responses from the GP practices indicate (also referred to in para. 4.135(a)) and I think it is common sense that a consultant's reputation can be impacted by the way they deal with private patients referred to them. If any given doctor offers exemplary service, it is likely that this will soon enhance that doctor's reputation and the level of referrals may increase as a result. Similarly, where anyone at the MSG slips below the expected standards, the GPs will become aware of that and the particular doctor's reputation and level of referrals will probably be affected. This is no more than human nature within the context of something of importance to everyone. Accordingly, I am not persuaded that reputation can be said to be driven solely by work undertaken under the SHC.

159. The real question, if it is accepted that there will be a time after arrival when a new associate will have to establish his or her reputation, as evidenced from the GP responses, is going to be the length of time appropriate to afford some protection from competition. This is no different from the reasonableness under the customary law of the duration and scope of a non-compete provision, although the focus differs, as explained in the ***Pirtek*** case. I take the view that the GCRA has chosen not to consider this because it has fallen into error when it requires the MSG to raise with it what an alternative reasonable period would be. As such, there has been no proper analysis of whether the 18-month and two-year restrictions are reasonable, save to the extent that the GCRA has found that neither is. This is a more general topic to which I will turn in due course. Although the five-year period taken from the GPA is also mentioned in para. 4.138, the MSG has recognised that this was too long, hence the change in the LLP Agreement, and so there was no need for the MSG to produce any evidence seeking to support that period.

160. I take the view that there is a sense of unreality in the reasoning contained in this section of the Decision. It starts from what appears to be the GCRA's finding that there are separate markets that can be viewed distinctly, where I am not persuaded that the whole of the MSG's undertaking can be sub-divided in such a complete fashion. The references in paragraphs 4.137 and 4.138 to the MSG having produced no evidence for the objective justification of its non-compete provisions strikes me as over-stating the position. There is a difference between satisfying the evidential burden resting on the MSG and the GCRA accepting that a provision

is objectively justified. The GCRA should not, in my view, have set out that there was no evidence produced when there clearly was material put forward by the MSG on which it bases it assertion that there is justification for some level of non-compete provision. The best that the GCRA could do in this regard would be to reject the evidence advanced as not persuading it in relation to the findings it makes. In many respects, the comment in para. 4.140 building on the statement that there had been no evidence produced compounds the position because, as I have already set out, I take the view that there is a distinction between how the MSG discharges the evidential burden on it and what happens once the GCRA makes a finding that section 5(1) has been contravened. Further, as that paragraph also states, the GCRA undertook "*an assessment of the evidence available*" which rather points towards there being some evidence, albeit not sufficient to satisfy the GCRA, on this issue.

161. The statistical analysis of the data that is referred to in the Decision results in the conclusion (at para. 4.146) that "*there is no discernible period during which the earnings of an incoming consultant are significantly lower than those of an outgoing consultant that could be attributed to a period of "bedding in"*". The submission of Advocate Gray is that this is understandable because it demonstrates the comparison between the period when the non-compete provisions are operating. What really needed to be considered for a meaningful comparison would be what level of private work there might be if the departing, or outgoing, consultant were free to engage in unrestricted competition (as would be the case under the terms of the GCRA's direction), however difficult that would be in the absence of data. It would, I suspect, involve considering what level of the work that could be performed by such a competitor would be lost to that competitor who had built a local reputation and enjoyed good levels of contact already as a result of having worked at and with the MSG. In these circumstances, I am not persuaded that the comparison that has been undertaken in the Decision necessarily supports the conclusion that has been reached because what underpins it is a comparison of the historical position with the non-compete provisions in place.

162. Once again, rather than taking each of these arguments separately, as is the approach of the GCRA in the Decision, a more holistic assessment may have been needed as well, balancing any aspect where there are arguments in favour of some form of non-compete provision. As a result, although I am critical of what is contained in the Decision when viewed in isolation in this manner, I doubt that the reputation and contacts aspects on its own is the strongest of the arguments that the MSG has to support the objective justification case it seeks to make. If one considers what the position might be if an eminent doctor were to set up and seek to undertake private work in Guernsey without first working at the MSG, thereby not being subjected to any restriction flowing from such employment and possibly partnership, engaging in self-promotion with the three GPs practices, one wonders how quickly a sufficient reputation could be established to make such a business viable. Through comparing such a doctor's position with one already enjoying an established reputation and with existing contacts with the GPs, it would then be possible to understand better the extent to which someone leaving the MSG enjoys any advantage over such a complete incomer.

Time to recruit

163. The final matter analysed in the Decision is the time it takes the MSG to recruit a replacement consultant. As the GCRA notes, sometimes a retirement is planned and so there will be longer notice given enabling a replacement to be found than would be the case if the minimum period for resigning of six months were given (paragraphs 4.157 and 4.158). For this reason, the GCRA concludes that the better period to which to have regard is the time between departure and the arrival of the replacement consultant. As set out in para. 4.155, the average time taken to recruit is 6.2 months, with the quickest being an immediate replacement and the longest being 20 months. Accordingly, at the end of para. 4.160 the GCRA states that its "*analysis suggests that in such a case, a restraint period of no more than about 6 months (the mean recruitment time) would be sufficient.*"

164. I agree with the submissions of Advocate Gray in relation to that conclusion. What it does is to approach the period for which some protection is required as ending when the replacement consultant arrives. There is no time allowed for the new arrival to start to build any reputation. Whilst that is consistent with the GCRA's finding that no time is required to establish any reputation and foster contacts (see, eg, para. 4.149), this ignores the evidence of the GPs that a year or two after arrival might be needed for them to become familiar with the new consultant's special interests and abilities. By isolating each of these arguments and not stepping back and considering them collectively, I think the GCRA has fallen into error, as set out in para. 73, Cause. Whilst the average recruitment time is in itself a period when restraint appears to be justified, it would arguably extend for a further period to cover those initial times whilst GPs assess the new arrival. In my view, the GCRA has fallen into error here first in not recognising that its conclusion in para. 4.160 supports the MSG's contention that a direction to remove in their entirety the non-compete provisions is wrong, but also in disregarding completely any need for some level of protection for an appropriate time thereafter.

165. This section of the GCRA's reasoning refers to the material provided by the MSG about those specialists who left during the years 2015 to 2021 inclusive (as explained in para. 4.153, Decision). The number of consultants who left over those six years was 21. Interestingly, the reason given for departure in respect of nine of those 21 is that the doctor was retiring. I take the view that I can properly infer in respect of those who were entering retirement that, although under the terms of the 2012 Ordinance they became separate undertakings at that point for the purposes of the non-compete provisions to which they were then subject (being a mix of clause 35 of the GPA and clause 81.3 of the LLP Agreement, depending on the date of departure), these nine would have been unlikely to have been setting up in competition with the MSG here in Guernsey. In other words, they would not, as retirees, have been actively seeking to compete anyway. Of the remaining 12 leavers from the MSG, nine are recorded as having resigned. Although it is not clear from the spreadsheet on which this information is recorded, I think I can also infer from the fact that the names of four of those recruited as replacement consultants feature among those who resigned their posts quite quickly that these four would have been leaving the MSG before they had the chance to enter either of the partnerships, and so remained throughout as associates. Accordingly, the shorter period of 18 months would apply to such persons. If that is correct, the GCRA's analysis of their positions may well have resulted in the GCRA recognising that they found they did not wish to continue working in Guernsey. Further, for each of the consultants leaving the MSG, it would be helpful to know if their resignations arose following the consultant in question having obtained a job to go to outside of Guernsey, in which case their planned departure from the Island would, it seems, render inoperative the terms of the non-compete provision engaged. In short, therefore, the analysis undertaken by the GCRA to average out the times between a consultant's last day and the first day of the replacement consultant, further recognising that in a couple of instances there is no replacement shown, might in any event be said to be misleading because it is not comparing like with like.

166. The consequence, therefore, of the content of this part of the Decision is that I am not persuaded that it supports the basis on which the GCRA has purported to reject the material that it had obtained. I agree with the comment at para. 4.159 of the Decision that any form of protection from a non-compete provision is only required from the time when the consultant concerned leaves the MSG. This is obvious because, until that date, the individual is not a separate undertaking. The period for which protection, if justified, would run would need to be long enough to cover at least the standard length of the recruitment period. I doubt that the MSG would be arguing that the longest gap would need to be covered, thereby accepting that there might be occasions when the replacement to be recruited would not be in post whenever the period of the non-compete provision ended. Although the average period is just over six months, there has been no analysis of those cases in which the operation of the non-compete provision, ie, those who were not retiring, might affect that average. In any event, I take the view that Advocate Gray is correct to point out that, in addition to whatever period is appropriate, there should be added a further period to reflect the time it takes for a new arrival to win the confidence of the GPs. Accordingly, I consider that the findings of the GCRA in

relation to the time taken to recruit are unreasonable and/or based on a material error as to the facts.

Objective justification generally and remitting

167. Having commented on each of the four bases covered in the Decision, including where I consider that the GCRA's analysis resulting in its findings has been unreasonable and/or results in some material error as to the facts, I am surprised that the Decision did not also seek to assess these matters more broadly in the round. The contravention of section 5(1) of the 2012 Ordinance found starts from the premise that the non-compete provisions "*have the object of preventing competition within markets in Guernsey for the provision of services*" (para. 5.1), which the GCRA further finds were not objectively justified. It seems to me implicit in the analysis undertaken, especially by reference to the Statement of Objections pursuant to section 43(2), that the GCRA needed to focus on the duration and scope of these provisions and could, had it been so minded, have concluded that either were too long or wide (or that both were). Without taking that step back and deciding the extent of the contravention, (noting here the way in which such a step was taken when considering the Penalty Decision), instead the GCRA has simply found an outright contravention and directed that the non-compete provisions must be removed in their entirety from the agreements in question. I have already explained why I consider that the appeal against that direction must be allowed and it would only be if I were to find that the duration and scope of the non-compete provisions must be viewed as uncontroversial that I could also allow the MSG's appeal relating to the finding of a contravention without proceeding to remit the matter. It is in this regard where I would have found it helpful for the Decision to have attempted to view all these matters collectively as well as individually.

168. My difficulty arises from the submission made on behalf of the MSG by Advocate Gray that the Appellant would prefer it if the matter were not to be remitted. Whilst I appreciate that being subjected to this investigation, then disagreeing with the GCRA's conclusions, thereby finding itself having to appeal, has been onerous, the MSG has not persuaded me that its decision to move to a two-year non-compete clause in the LLP Agreement can necessarily be objectively justified as it stands. I do not understand why the duration of the non-compete provision in the associates' employment contracts runs for a shorter period, save to the extent that every associate is a new arrival in Guernsey and so will not have built up any relationships until having worked here for a while. That is consistent with the views offered by the GPs, but in itself the additional six months has not been adequately explained. It seems that those who see a future in Guernsey may well be offered the chance of partnership and so stop being employees and become members of the partnership at the MSG. Whilst it necessarily follows that such a person will have established a more prominent profile on-Island, I do not understand why, if such a doctor left the MSG, the period for which the non-compete clause should operate needs to be extended by six months, simply as a result of becoming a partner. Because there has been no analysis by the GCRA of these potential differences, I do not feel able to conclude that these matters can be left as they are without giving the opportunity to the GCRA, should it wish to do so, to investigate further. This is why, when allowing the MSG's appeal, the matter will also need to be remitted in accordance with section 46(5)(a) of the 2012 Ordinance.

169. I take the view that this is the only option available to me. The successful appeal against the direction means that the GCRA must have the opportunity to substitute a different direction, assuming that it maintains that there is a contravention of section 5(1) of the 2012 Ordinance. The only circumstance in which remitting the matter would not be appropriate would be if there had been a full analysis of all the matters that the GCRA needed to consider, which I have found there has not been, but from which I could be satisfied that the terms of the non-compete provisions do not amount to any contravention at all. The length of the non-compete provision in an associate's contract of employment has remained unchanged throughout, yet the MSG did not take the opportunity to equalise the duration in the LLP Agreement. I am left wondering

(principally because it has not been assessed in this manner by the GCRA) why a consultant who chooses to stay as an associate should be subjected to a shorter period of restraint from a consultant who accepts an invitation to join the partnership where both may have been in Guernsey for similar periods of time. Both consultants will presumably have established similar reputations over that time. The process of recruiting a replacement for such a departing consultant would be along the same lines, in both cases being at associate level. Unless and until those differences are addressed, I cannot conclude that the two operative periods take these agreements outside the terms of section 5(1).

170. In any event, although I have found that the GCRA's reasoning cannot be sustained, I am also unable to conclude that the GCRA would not be able to make a finding that the proper length of restraint should be under 18 months (or, if some difference in clause 81.1 of the LLP Agreement can be explained satisfactorily, two years). I have noted that the Statement of Objections had referred to a period of 12 months. Accordingly, but without commenting thereon, the GCRA should have the opportunity of re-visiting all the facts and its reasons where it might decide that that remains the appropriate period or it might, the light of this judgment, conclude that a longer period is more appropriate as capable of being justified. As the regulator, whatever the effect on the MSG, I am persuaded that the GCRA should not be precluded from having the chance to issue a fresh Statement of Objections if it is minded to do so.

171. I have also given consideration as to whether there should be any directions given to the GCRA. I have decided that there does not need to be. The content of this judgment will explain the areas where the GCRA might properly have gone further in its analysis and considered the actual impact that such non-compete provisions have that would amount to a contravention of section 5(1) of the 2012 Ordinance. In particular, I take the view that the GCRA should have attempted to draw the strands together from its analysis of the different bases on which the MSG has explained why some form of non-compete provision is required for its business and borne that in mind in relation to the direction following on from whatever contravention might be found.

172. In doing so, I think it would be helpful for the GCRA to look at what happens when each consultant leaves the MSG in order to understand better the reasons for departing. Any employee or member who leaves to take up employment elsewhere, and for whom the private practice opportunities are important, ie, recognising that the same approach does not necessarily apply across all the specialisms covered, would not, other than in the most theoretical sense, become the separate undertaking to which any non-compete provision would become applicable. However, the issue would remain as to whether a non-compete clause of any given duration operates as a disincentive to establishing some competing business in Guernsey. (This is a counter-factual assessment that arguably needs greater prominence.) Accordingly, if (by way of an example) it were felt that only a shorter period of protection through a non-compete provision were capable of being justified, one might ask whether a person to whom such a provision would apply might leave with a view to coming back in that other capacity, or even be prepared to wait here in Guernsey, before being free to undertake such work in competition with the MSG.

173. If I had needed to do so, I would have been minded to find that the decision in respect of the five-year duration in clause 35 in the GPA could not be challenged on this appeal. However, by moving away from that length of clause to a shorter period in the LLP Agreement, the MSG has effectively taken steps already to address an overly long period of protection. I am conscious that the Decision makes reference from time to time to the position of Party A (eg, para. 4.33 refers to a series of contracts, including those with Party A, that could be found to contravene section 5(1)), but these matters are not then taken to a finding of any actual contravention in respect of the MSG's dealings with Party A. In those circumstances, I do not consider that I need to say anything further about the MSG's relationship with Party A. As

such, the five-year period has already been addressed by the MSG, which is why I treat any contravention based thereon as little more than historic.

174. In summary, therefore, I have reached the conclusion that the MSG's appeal under section 46(1)(e) of the 2012 Ordinance should also be allowed because the MSG has satisfied me that some of the reasons the GCRA has given in the Decision for its finding that there has been a contravention of section 5(1) are unreasonable and/or based on material errors as to the facts. In reaching that conclusion, I am not going so far as to find that the terms of the non-compete provisions could not be found to contravene section 5(1), at least on the basis that the GCRA might conclude that the duration is longer than it should be (and it is possible that the scope of each provision might also be found to amount to a contravention). In many respects, my conclusion on the appeal against the direction needs to be read in the light of how I view the appeal against the finding of the contravention. It is the reasoning leading to the finding of the contravention that forms the basis of my decision to allow the appeal on both bases and not that the GCRA could not, come what may, find that there has been any contravention.

The Penalty Decision

175. I have already noted that the GCRA acknowledged that, whatever the outcome of the MSG's appeal against the Decision, it had to concede that the Penalty Decision could not be sustained and so needs to be remitted for further consideration. It was also common ground that, in the event that I concluded that the appeal against the Decision succeeded, it necessarily followed that the appeal against the Penalty Decision would also fall to be allowed.

176. In these circumstances, I will also allow the MSG's appeal against the Penalty Decision. In accordance with section 46(2), it follows that the Penalty Decision is set aside. For similar reasons to those in respect of the Decision, I will also remit the matter to the GCRA for it to consider, if it still finds a contravention, whether there should also be the imposition of a financial penalty.

177. I have given further careful consideration as to whether there should also be any directions to the GCRA on the Penalty Decision being remitted. Given its concession, I could simply say nothing further about the Penalty Decision. However, given that this is the first such appeal under the 2012 Ordinance, I will make some very brief comments in the hope that they are helpful to both parties.

178. I have already quoted section 34 of the 2012 Ordinance, which sets out the factors that the GCRA is obliged to take into account when deciding whether or not to impose a financial penalty and, if so, the amount thereof. I take the view that this list of factors is exhaustive (adopting similar reasoning to how I expressed the approach to a similar list of factors to which the Guernsey Financial Services Commission needed to have regard when imposing a discretionary financial penalty – see, eg, the ***Bordeaux Services*** case to which I have already referred). Although para. (f) refers to penalties imposed by the GCRA in other cases, this is inapplicable here where there has been none previously (despite para. 3.5, Penalty Decision referring to this factor).

179. Without deciding the issue, I consider that para. 3.14(c), where the GCRA concludes that it is not required to "*specify whether it considers the infringement to be intentional or negligent or, by extension, reckless*" may be incorrect. The wording in section 34(1)(c) is that the GCRA must take into account "*whether or not the contravention was intentional, negligent or reckless*", which I think it sufficiently different to the language used elsewhere that I believe those words must be given their ordinary meaning. There is clearly a difference between whether the contravention in question was committed intentionally, negligently or recklessly and the inclusion of the words "*or not*" support my view that it is incumbent upon the GCRA to set out which of these states of mind it finds or even whether none of them is found.

180. Paragraph 4.1(a) states that the "*breach was intentional, or at least negligent or reckless*". However, there appears to be no consideration of the basis on which the MSG sought to argue that there was objective justification for what would otherwise be anti-competitive. There is, therefore, a distinction between introducing the provisions into the various agreements, which has to be viewed as deliberate, and the belief that they were justified. As such, the contravention (which is what matters) might not be found to have been intentional, but either reckless or negligent. This is touched upon in para. 4.3(d), Penalty Decision, but the GCRA then rejects this representation on the basis that the MSG had sought to enforce the terms of clause 35 in the GPA against Party A in the proceedings that were subsequently compromised. In para. 4.3(e), the GCRA states that "*the circumstances giving rise to the breach of competition law were plainly foreseeable*" (emphasis added), but that relates to the position under the GPA and there is, in my view, no automatic read-across to the position as it became under the LLP Agreement. The provisions in the associates' employment contracts are not even addressed here. By para. 4.3(f), reference is made to "*a very substantial risk that its conduct had the object of restricting competition*", which is not the same as a finding that the contravention was intentional. Further, whereas the Decision recognises that the MSG took legal advice, the Penalty Decision suggests that there was no evidence that "*the terms and scopes of the clauses in question were objectively justified*", which strikes me as contrary to that earlier acknowledgement of what the MSG had done. At para. 4.34, the GCRA expressly notes that it "*has not made a definitive finding of intentional infringement*" as the reason for not increasing the basic penalty, whereas I take the view that it was required by the terms of section 34(1)(c) to reach a firm conclusion on this question.

181. In para. 4.1(b), Penalty Decision, the GCRA states that it regards the MSG's breach as being serious. Whilst in para. 4.6(b) there is reference to its finding that this was a restriction by object, which is picked up in para. 4.15 as by its nature harming competition, the GCRA does not also explain that the MSG had recognised from the outset that a non-compete provision has the potential to be anti-competitive unless it is justified. When coupled with what the GCRA should, in my view, have recognised as being an arguable case for objective justification, because non-compete provisions are prevalent amongst professionals, the level of seriousness is in any event acknowledged by the GCRA as being of a different scale to some of the more serious types of contravention. The MSG's arguments about objective justification also underpin why this was not a contravention that had been brought to the GCRA's attention. Again, this is an aspect where I consider it relevant to recall that there is no separate undertaking outside the MSG until a consultant leaves. The alleged contravention was raised with the GCRA by Party A, once Party A became that separate undertaking. This was in the particular context of the five-year restriction found in the GPA. Insofar as the MSG accepted that such a duration could not be defended, the steps it took when required to become a limited liability partnership by the States of Guernsey could be said to show that the MSG made some effort to rectify what would otherwise be a contravention. I believe that the way the GCRA has approached these matters could be explained in greater detail.

182. By reference to section 34(1)(e) of the 2012 Ordinance, the GCRA accurately refers to this paragraph in para. 4.5(d), Penalty Decision, but when it deals with its findings in para. 4.6(d), I cannot see any reference to the second part of what it is required to consider, being the "*third parties including customers and creditors of that undertaking … of imposing a penalty*". Although this is a small point, in my view it would be better if the GCRA did what it is required by the statute to do and at least made reference to the possible effect that this would have on those using the services of the MSG, whether under the terms of the SHC or privately.

183. The GCRA has found two aggravating factors from which it concluded it was appropriate to increase the basic penalty by 10%. Both reasons relate to how the MSG dealt with the proceedings commenced by Party A. Again without offering any final view on these issues, I simply express my surprise at the position adopted by the GCRA. The action brought by Party A was a private law matter between the two parties. Such matters are always capable of being

resolved without any adjudication, as happened here. The fact that the GCRA had commenced its investigation and needed to take steps in relation to that investigation is really a matter for how to reach the end of that investigation and decide what the outcome will be. The 10% increase in the penalty was very approximately £140,000. I would be surprised if that reflects any increased costs to the GCRA in issuing notices under section 27 of the 2012 Ordinance. As such, the way in which it has found that these matters aggravated the situation seems to me to be arguably disproportionate, especially where, having mentioned the agreements with Party A in the body of the Decision there is then no finding in relation thereto.

184. I will not make any specific comments on the calculation of turnover that has been undertaken by the GCRA. As I have already mentioned, the terms of the LLP Agreement or of any associate's contract of employment only give rise to a potential infringement when such a consultant becomes the required second undertaking on departure. How applicable this is when a consultant retires is one of those areas that might need further consideration. How, if at all, these issues impact on the calculation of turnover is a separate question anyway. At para. 4.50, the GCRA concludes that it did "*not consider that this is a case of imposing an excessive penalty on a business which has merely made an error of judgment*", but the level of penalty looks, at first blush, to be significant, even allowing for the ways in which the GCRA states that it has sought to treat the MSG proportionately, and the manner in which it has exercised the discretion open to it under section 32(4) will, if this process is to be performed again, need to show that it has followed the requirements in section 34(1) fairly.

185. I emphasise that the preceding paragraphs are not offered in the form of directions to the GCRA on the Penalty Decision being set aside and remitted to it, but rather as what I hope will be helpful guidance to both parties relating to some of the issues that would have arisen had the Penalty Decision appeal needed to be determined.

Conclusion

186. For the reasons I have given, the appeals against the Decision and the Penalty Decision are allowed. I am satisfied that the MSG has established that the GCRA has reached a Decision that is unreasonable and/or based on material errors as to the facts. In particular, I have found that the direction for the removal of the non-compete provisions goes further than is needed to address whatever level of contravention of section 5(1) of the 2012 Ordinance could properly be found and so amounts to a disproportionate exercise of the GCRA's powers under section 32.

187. I expect that the costs of these proceedings will follow the event and so will make such an order that the Respondent pays the Appellant's costs on the recoverable basis unless that outcome is not agreed between the parties, in which case either party is at liberty to pursue a different order by bringing the action back before the Interlocutory Court on a mutually convenient date or to liaise with the Greffe to seek a specific hearing for this purpose.