

Appeal against GFSC's imposition of financial penalty and prohibition order on former CEO of investment management company on grounds of alleged errors of fact, errors of law, unreasonableness and disproportion. Scope and basis of investigation on appeal to the Royal Court discussed. Necessary findings for want of probity discussed. Appeal dismissed.

[2024]GRC079

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

Civil Action No 2474

**Before: Her Honour Hazel Marshall KC, Lieutenant-Bailiff
Sitting alone**

Between:

NICHOLAS WALTON HOFGREN

Appellant

-and-

**CHAIRMAN OF
THE GUERNSEY FINANCIAL SERVICES COMMISSION**

Respondent

Dates of hearing: 3, 4 and 5 April, 8 July 2024

Judgment handed down: 21 November 2024

Counsel for the Applicant: Advocate M Adkins

Counsel for the Respondent: Advocate J Hill

Legislation, and cases referred to:

Legislation

Protection of Investors (Bailiwick of Guernsey) Law 1987 s 38, Schedule 4

Financial Services Commission (Bailiwick of Guernsey) Law 1987 (as amended) s. 11C

Regulation of Fiduciaries, Administration Businesses, Company Directors etc (Bailiwick of Guernsey) Law 2000 Schedule 1

Financial Services Commission (Bailiwick of Guernsey) (Amendment) Law 2016

Protection of Investors (Bailiwick of Guernsey) Law 2020 Schedule 4

Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law 2020 ss 38, 106

Licencees (Conduct of Business) Rules 2016, Principle 10

Cases

Guernsey

Bordeaux Services (Guernsey) Limited v GFSC (Guernsey Royal Court Judgment 18/2016),
Merrien v Chairman of GFSC (Guernsey Royal Court Judgment 23/2016)
Chick v GFSC [2020] GRC 035 and [2020] GCA077
X, Y and Z v GFSC [2023] GRC032
Domaille v GFSC [2023] GRC017,
Robilliard v GFSC [2023] GCA035
GFSC v Domaille [2024] GCA 003

England and Wales

Ivey v Genting [2017] UKSC 67
Wingate v SRA [2018] EWCA Civ 366.

Texts referred to

Guernsey Financial Services Commission: *Finance Sector Code of Corporate Governance*

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J U D G M E N T

Introduction

1. This is an appeal brought by the Appellant, Nicholas Walton Hofgren (Mr “Hofgren”), against a Decision of the Guernsey Financial Services Commission (“**the Commission**”) made on 16 November 2022 through Dr Kirsty Hood KC as its appointed Senior Decision Maker (“**the SDM**”). The Decision is contained in a document headed “Final Notice” which has an Appendix of Reasons attached, but it is convenient to refer to it compositely as “**the Decision**” for clarity and brevity.
2. The Decision imposed sanctions on Mr Hofgren under the Commission’s powers contained in several formerly relevant laws but ultimately concentrated in the *Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law 2020* (“**the EP Law**”), which is the only Law to which reference need be made. It also imposed sanctions on GFG Limited (“**GFG**”), formerly a corporate licensed provider of investment management services but by then in liquidation, of which Mr Hofgren had been an Executive Director at all material times and since its inception, and of which he was and is the joint ultimate beneficial owner and controller together with a Mr Cheek.
3. The sanctions imposed on Mr Hofgren were based on various findings that he failed to meet aspects of the Minimum Criteria for Licensing set out in Paras 1, 2 and 5 of Schedule 4 to the Protection of Investors Law 2020 (“**the POI Law**”) and also similar provisions in the other relevant financial laws referred to above. Such Minimum Criteria for Licensing (“**MCL**”) are descriptive statements of the attributes of a person who is regarded as fit and proper to be granted a fiduciary or other licence or to hold certain senior roles in the conduct of financial services business in the Bailiwick. I do not need to list them here.
4. More specifically the SDM:
 - (i) made a Prohibition Order against Mr Hofgren pursuant to s 33 of the EP Law, prohibiting him from holding the position of Controller, Director, Partner, Manager, Money Laundering Reporting Officer and Money Laundering Compliance Officer in relation to a Guernsey entity for a period of 14 years;

- (ii) in tandem with the Prohibition Order and pursuant to s 32 of the EP Law made an Order disapplying the exemption under s 3 (1) (g) of the “*Regulation of Fiduciaries, Administration Businesses, Company Directors etc (Bailiwick of Guernsey) Law 2000*” (the “**Regulation of Fiduciaries Law**”) (which prohibits unlicensed individuals from holding more than six separate company directorships simultaneously) in respect of him for the same period; and
- (iii) determined to issue a Public Statement in respect of him pursuant to s 38 of the EP Law in the terms of a version annexed to the Decision (which is not before the Court).

Whilst she imposed no discretionary financial penalty upon Mr Hofgren pursuant to s. 39 of the EP Law, the Decision states that a penalty of £290,000 would have been imposed, but for his impecunious financial circumstances (I am not sure if he is formally bankrupt) and the fact that imposing a financial penalty upon him would dilute funds which might otherwise be available to his creditors.

- 5. Mr Hofgren now appeals to the Royal Court, pursuant to s 106 of the EP Law, against all the sanctions imposed upon him. He seeks to have the sanctions set aside in whole or in part, pursuant to s 106 (6) of the EP Law. There is no appeal against the sanctions imposed on GFG.
- 6. Advocate Adkins appeared for Mr Hofgren. Advocate Hill appeared for the Commission. I express my thanks to both of them for their courtesy and the clarity of their able submissions over this four day hearing.
- 7. In essence, Mr Hofgren’s case is that the Decision was unreasonable, and/or contained material errors of fact and of law, and/or imposed disproportionate sanctions upon him in comparison to other previous cases, and to those imposed on others who were also involved in the same alleged contraventions.

Legal framework

- 8. The right of appeal conferred on any person aggrieved by a decision of the Commission to impose any of the sanctions listed in s 106 (1) of the EP Law, (which include the kinds of sanctions imposed here) is set out in s 106 (3) of the EP Law. The grounds are that
 - “(a) *the decision was ultra vires or there was some other error of law*
 - “(b) *the decision was unreasonable*
 - “(c) *the decision was made in bad faith*
 - “(d) *there was a lack of proportionality, or*
 - “(e) *there was a material error as to the facts or as to the procedure.*”
- 9. Mr Hofgren invokes ground (a) as to error of law, ground (b), ground (d) and ground (e). I consider the specific grounds in more detail below.

Factual background

- 10. The important background facts, necessary to understand the context and grounds of appeal, are sufficiently summarised below. Except where indicated, this summary is taken from facts stated in the Decision Notice itself and therefore clearly accepted or found by the SDM (since it is to be emphasised that, this being an appeal process, both its starting

point and central focus is the Decision itself) or from further facts which otherwise appear to have been accepted by both parties.

11. GFG was incorporated on 4 March 2014 and was licensed by the Commission on 19 March 2013 under the *Protection of Investors (Bailiwick of Guernsey) Law 1987*. It was initially owned by the GFG Trust of which Mr Hofgren and two others were beneficiaries, but in March 2017, this was reduced to Mr Hofgren and one other (Mr Cheek). They have thus been its ultimate equal beneficial owners at all material times. In 2018 GFG Group Ltd was inserted between GFG and the GFG Trust, but this did not change the ultimate beneficial ownership.
12. Mr Hofgren is an American citizen and is not a Guernsey resident; he lives in London. He was an Executive Director of GFG from 4 March 2014 until he was actually removed (by an apparently legitimate process) by GFG's other directors on 9 October 2019. There were seven other directors and non-executive directors of GFG during various periods from its inception until after Mr Hofgren's departure and beyond. Six of these have apparently been issued with a private reprimand from the Commission for their respective parts in the matters which are the subject of the Commission's criticisms about the conduct of GFG's business. Mr Hofgren, by contrast, was made the subject of the more serious sanctions noted above, along also with GFG itself. The reason for this is that he was apparently considered to be the central and leading protagonist in the relevant matters and therefore justifiably sanctioned to a greater extent, and indeed a very much greater extent, than his some time co-directors.
13. GFG Funds PCC Ltd was a protected cell company formed at the same time as GFG (in fact on 14 March 2014). It was authorised by the Commission to carry on business as an Authorised Collective Investment Scheme (Class B) on 3 April 2014. It has been called "**the Scheme**" for convenience. It had three active cells, over time, conveniently known as FX Cell, Property Cell and Xenfin Cell:
 - FX Cell was approved on 5 September 2014 and was intended to carry out investment activities in foreign exchange, through two SPV companies.
 - Property Cell was approved on 29 January 2015 for the purpose of investing in real-estate backed loans through an SPV company.
 - Xenfin Cell was approved on 1 March 2017 and was formed to carry out investment activities in relation to securitised debts through a single SPV company.
14. GFG was investment manager to the Scheme and its underlying cells. The Scheme Promoter was Vega Swiss Asset Management UK LLP ("VSAM"). Mr Hofgren was an Executive Director of the Scheme from 14 March 2014 to 3 September 2019.
15. Rivage Management Ltd ("**Rivage**") was a company which was beneficially owned by Mr Hofgren. It entered into an agreement with GFG to provide advisory services on 5 June 2014. There were provisions in the agreement as to the calculation of fees for Rivage's services, but in practice an amount based on 50% of net income was paid over by GFG to Rivage in successive periods. The agreement was novated to GFG Group Ltd in 2019.
16. On 27 August 2015 (but backdated to 8 January 2015) GFG Ltd and the Scheme entered into an investment advisory agreement with Capitali Asset Management Ltd ("**Capitali**"), a company wholly-owned by a Mr Ali Ahmad, ("**Mr Ali Ahmad**") who was also its sole Director. This agreement was in respect of Property Cell and one of the SPVs owned by FX Cell. Capitali was appointed an advisor to GFG Ltd by a further agreement dated 23

June 2017 (but with a stated effective date of 23 June 2015) and this second agreement was novated to GFG Group Limited as at 30 April 2018. Capitali invoiced GFG for fees, equating to 50% of GFG's net profits, which thus went, effectively, to Mr Ali Ahmad.

17. The Decision notes that the fees thus paid to Rivage and Capitali significantly exceeded the directors' fees paid to the Directors of GFG and the Scheme, and that no distributions were made to Mr Hofgren or Mr Cheek as beneficiaries of the GFG Trust.
18. Louvre Trustees Limited ("**Louvre**") was originally the trustee of the GFG Trust, but was replaced on 7 December 2017 by Vistra Fund Services (Guernsey) Limited ("**Vistra**"), who were in turn replaced by Mr Hofgren himself on 7 October 2019, and thus immediately before his removal as a director of GFG. Louvre were also the initial Administrator to GFG and to the Scheme. They were replaced by Vistra as to the latter on 22 December 2017. Their appointments expressed their administrative services as being subject to the control of and review by the Board of Directors of GFG.

The subject events and their context

19. The FX Cell was set up with the objective of investing in foreign exchange, but in 2015, its Scheme particulars were amended to allow it to make investments secured by diamonds. In April 2016 it embarked on a transaction to lend money to a company incorporated in Dubai ("**DXD**") to enable it to purchase diamonds from another company ("**PEL**") owned by a Mr Ismail Ahmed ("**Mr Ismail**" – sometimes erroneously referred to in the Decision as Ismail Ahmad), on the basis that FX Cell would have security for its loan over the diamonds themselves. The SDM's findings as to Mr Hofgren's part in the conduct of this transaction found, in part the imposition of the sanctions which he challenges, having given rise to findings that Mr Hofgren there showed a lack of competence and soundness of judgment and were lacking in probity in a number of ways.
20. Some of FX Cell's assets were invested in debt securities, with one such instrument being Lombard 82 Euro Medium Term Notes ("**Lombard 82EMTNs**"). These were promoted by Cornhill Management SA which was also marketing co-ordinator of, and the main nominee investor in, FX Cell itself. Mr Hofgren's part in this transaction is also part of the findings against him which have led to the sanctions. The SDM found that they showed a lack of soundness of judgement on his part.
21. Property Cell was established to invest primarily in real estate developments owned by the Dolphin Group ("**Dolphin**") whose main underlying investor was a Mr Timblo. Shares in Property Cell were also held by Maltese QROPS schemes which included small "retail" investors. In August 2016, Property Cell, through its SPV, invested in Vordere plc, under a former name of Acorn ("**Vordere**"). On 30 September 2016 GFG entered into an agreement to act as corporate advisor to Vordere. On 15 November 2016 Mr Hofgren became a Director of Vordere. Property Cell and Xenfin Cell invested in real estate backed loans held in German limited partnerships established by Dolphin IG Ltd. They were intended to fund the development of properties in Germany with security over the real estate.
22. Several such loans were entered into by both Property Cell and Xenfin Cell but Dolphin got into financial difficulties and could not service the debt. In May 2019, transactions were entered into to replace the real estate security held by Property Cell and Xenfin Cell with shares in Vordere itself ("**the Vordere Transaction**"). The transfer took place without the required approvals from the UK Listing Authority for the relevant Vordere shares to be listed on the London Stock Exchange. Vordere shares were almost immediately suspended - on 5th July 2019 - and investors in Property Cell and Xenfin Cell were thus left holding illiquid (and relatively worthless) assets.

23. The SDM found Mr Hofgren's involvement in propounding the Vordere transaction to the Board of GFG, and his part, otherwise, in bringing about the transaction, to show lack of probity, soundness of judgement and competence in many ways, considered in more detail later, but in particular in his inappropriate handling of his conflict of interest (as a director of both Vordere and of GFG, which also stood to obtain fees), his precipitate handling of the transaction, and the contrast between his care with regard to putting in place effective security in respect of these investments (in which he and Mr Ali Ahmad and his brother had an indirect interest) with his lack of care as regards those of the Xenfin Cell (below) where they did not, suggesting that his business conduct displayed want of prudence and of integrity.
24. Xenfin Cell was created to have a similar strategy to Property Cell, and was used as a vehicle for investment into private ventures owned and controlled by Xenfin Capital Limited, which was also an investment advisor to Xenfin Cell. Xenfin Capital Ltd was owned by a Mr McInnes, an associate of Mr Timblo (above). Apart from the Dolphin/Vordere transactions (above) Xenfin invested in four particular loans to ventures controlled by Mr McInnes:
- The first were loans of £4Mn and £4.5Mn respectively made for the purchase of real estate in Florida limited partnerships associated with Mr McInnes, where the security documentation and guarantees were not registered, thus enabling later lenders to obtain priority. The loans remain unpaid.
 - The second was a loan of £1.2Mn made on 3 September 2018 to a company of which Mr McInnes was a significant controller, which loan was eventually recovered only in February 2021 but with default and legal costs outstanding.
 - The third was a loan of £700,000 made on 23 March 2017 to Laringle Ltd, a company of which Mr McInnes was a director and of which he had significant control, which was not repaid on 2 March 2018 and over which fixed and floating charge security documentation was never registered (although the loan was ultimately repaid in November 2019).
 - The fourth was an investment into property-backed loans to the Dolphin Group, which was replaced by shares in Vordere in the same way as with Property Cell.

The SDM found that Mr Hogren's part in setting up these loans demonstrated a lack of competence and soundness of judgment in a number of ways, in particular his failure to ensure that the security taken was effective.

The process leading to the Decision

25. In 2017, the Scheme came to the attention of the Commission with regard to some deficiencies in its internal controls highlighted by its auditors. However, a compliance consultant was appointed, and the Commission was assured that these matters had been dealt with and would not recur.
26. In May 2019, though, GFG, acting through certain Board members, sought a meeting with the Commission, which took place on 13 May 2019 apparently with regard to the Vordere Transaction in particular. The Commission was seemingly then reassured. However, matters subsequently coming to the Commission's attention prompted an investigation, including interviews of relevant persons, which took place in 2020 and 2021. A Draft Enforcement Report was produced on 27 October 2021. Mr Hofgren was much criticised in this, and he responded on 26 January 2022. He complains that, in an unreasonably and

unnecessarily high-handed way, he was presented with a huge quantity of documentation which he had never seen before, to deal with, in a short space of time.

27. Other present and former members of GFG’s Board had also been the subject of the enforcement investigation, but it was recommended that they be sanctioned only by private reprimands. Matters between them and the Commission were then resolved.
28. A Final Enforcement Report was completed on 4 April 2022 in which it was recommended that Mr Hofgren should pay a discretionary financial penalty of £350,000 and suffer a Prohibition Order for 20 years.
29. As Mr Hofgren and GFG did not accept the findings in the Final Enforcement Report, Dr Hood was appointed to consider the matter as the Commission’s Senior Decision Maker on 5 May 2022. She requested further information and then issued a “‘Minded To’ Notice” (“MTN”) on 31 July 2022. In this, she reduced the proposed penalties on Mr Hogren to a discretionary financial penalty of £300,000 and a Prohibition Order for 15 years. Mr Hofgren lodged written representations contesting this on 15 September 2022. The Commission’s Enforcement Division (the “ED”) lodged responsive submissions on 26 September 2022. Mr Hofgren’s lawyers also submitted a witness statement from a legal expert, a Dr Kotzur, with regard to German law and its implications for the Dolphin Group investments and the relevant security.
30. The SDM then held (she describes it as “chaired”) an “Oral Meeting” on 5 October 2022, during which both Mr Hofgren and the Enforcement Division made oral submissions to her. The Liquidators of GFG also attended, but were excluded during evidence as to Mr Hofgren’s financial means.
31. The SDM released her final Decision on 22 November 2022. It made some amendments from her MTN, but broadly followed it, except for slightly reducing the sanctions imposed on Mr Hofgren, namely from a £300,000 discretionary financial penalty to £290,000 (but not actually to be imposed, in the light of Mr Hofgren’s indigence) and a Prohibition Order effective for 14 years, rather than 15 years.
32. I do not think it necessary or helpful to recount details of the Decision, which is relatively succinct, at this point, beyond indicating its shape, as follows:

Section A

Paras. 1-13 of the SDM’s Reasons recite the key facts, particular subjects and the current position.

Section B

Paras. 14 – 16 give a summary of the Commission’s investigation and decision-making process, as far as it concerned the SDM.

Section C

Paras. 17 – 45 contain her analysis and findings, broken down under the following headings;

- 17 – 24: Regulatory framework. I am not concerned with this except to note that it contains a list of the factors comprising the MCL as originally laid down in *Protection of Investors (Bailiwick of Guernsey) Law 1987* Schedule 4 and re-enacted in the *Protection of Investors (Bailiwick of Guernsey) Law 2020*, and it

also recorded the existence and application of the *Licensees (Conduct of Business) Rules 2016* and the *Finance Sector Code of Corporate Governance*, issued by the Commission.

- 25 – 27: The role of Mr Hofgren
- 28 – 38: Whether Mr Hofgren fails to fulfil the MCL. This is further broken down into
 - 28 The DXD loan transaction
 - 29 The Lombard loan transaction
 - 30 The Xenfin Cell loans to McInnes entities
 - 31 The Xenfin/Property Cell loans and the Vordere Transaction
 - 32. (Unacceptable) reliance on Administrators as to “compliance”
 - 33 Misleading the Commission at 13 May 2019 meeting
 - 34 Misleading fellow directors at the 4 June Board Meeting
 - 35 Misleading the Commission as to income from GFG
 - 36 Putting reputation of Bailiwick at risk
 - 37 Failure to appreciate obligation to enable fellow directors to consider decisions in advance
 - 38 Not revealing to fellow directors the extent of involvement of Mr Ali Ahmad and allowing him too great control of GFG.
- 39 – 45: Whether GFG fails to fulfil the MCL. I am not directly concerned with this.

Section D

Paras. 46 – 72 consider the imposition of sanctions, including consideration of matters required to be considered by the EP Law, under the headings

- 46 Fit and Proper person
- 47-50 Prohibition Orders
- 51-72 Discretionary financial penalty/public statement. This is further broken down into the various matters directed to be considered with regard to imposing these by ss 38 and 39 of the EP Law, in paragraphs 54 – 71 with paragraph 72 giving her conclusions:

Para. 73 deals with the timing of the sanctions coming into effect.

Para. 74 recites her ultimate conclusion.

The appeal jurisdiction – preliminary observations

33. Since the Decision in this case was made, the Court of Appeal has allowed an appeal from my own decision in *Domaille v GFSC*, [2023] GRC017: see *GFSC v Domaille* [2024] GCA003. Whilst they reversed my decision in several respects, they did not reinstate the original decision of the SDM which they ruled was flawed in any event, but remitted the matter to the Commission for consideration by a different SDM.
34. I have naturally read the Court of Appeal's decision very carefully. Whilst it overturned my reasons on several grounds, most of these were points of law which do not arise in this case. One general point, however, as to which the Court of Appeal considered that I was in error, was my description of this court's general jurisdiction with regard to appeals under s. 106 of the EP Law, as the Court of Appeal interpreted my judgment. They considered that I had interpreted my jurisdiction too widely. They also interpreted what I had done as conducting a trial *de novo* of factual matters which it was the province of the Commission to determine. They then said that that was an error. They emphasised that the jurisdiction conferred by s.106 is that of an appeal by way of review, and is not a rehearing. By this is meant that the jurisdiction of the court is to review the decision of the tribunal appealed from, and to consider whether there is any material fault underlying that decision in terms of the statutorily prescribed grounds of appeal; it is not to embark on any fresh appraisal of the founding matters of fact giving rise to the decision and in effect (it is said) to re-take the decision. The Court of Appeal considered that that is what I had done, in practice.
35. They also emphasised that it is not the function of the Royal Court to conduct an appraisal of the process by which the Commission has arrived at the relevant decision; the Court's jurisdiction is to appraise the decision *itself* and examine whether or not the grounds for that decision there disclosed are sound or are flawed in a legally significant respect.
36. The Court of Appeal's decision is itself currently the subject of an application for permission to appeal to the Judicial Committee of the Privy Counsel. The position at present, though, is that the law is as stated by the Court of Appeal, and I am bound by this and must seek to apply their reasoning and judgment where that is relevant to the issues in this case. I will therefore consider any particular implications of the *Domaille* judgment where they arise.

(a) General approach

37. In the context of this case, the above decision led to some dispute between the parties as to the general approach which the Court should, or even must, adopt.

Appellant's submission

38. Advocate Adkins argued initially for the most restrictive approach, namely that the Court must review the Decision here having regard only to the facts and reasons which are expressly contained in the Decision itself, because (a) that was all that could be said to be clear in principle and (b) the Court could not examine how that expressed Decision had been arrived at. He submitted that it is implicit in the Court of Appeal's emphasis in *Domaille* on the appellate role of the Court being that of review, and not of re-hearing, that the Court can only review what is actually contained in the Decision, because it is the Decision which contains the actual decision and reasoning of the SDM as the delegated officer of the Commission; that is what the Court is empowered to review, and it is therefore the totality of what the Court is empowered to review.

39. He made this submission as a building block for his further submission that the terms of the SDM's Decision were actually incomplete and unclear and so the Decision itself could not stand. Subsequently, however, he was inclined to accept that reasons or findings would be "contained in the Decision" if they could be seen to be there by way of necessary implication. However, he submitted that it could extend no further and he stood by the proposition that this must be narrowly interpreted, requiring strictly necessary implication, and not merely possible implication.
40. As mentioned, the importance of the above approach is that it provides the building blocks for some of Advocate Adkins' later submissions. These were that the Decision, itself, was simply insufficiently clear on its face as to what findings the SDM had actually made in certain material respects, rendering it impossible to be sure what matters of misconduct she had actually relied upon as being breaches of the MCL. This was particularly so in relation to the SDM's stated findings of want of probity on Mr Hofgren's part, and this was very important, because of the seriousness of any such finding. A finding of want of probity, moreover, demanded that supportive findings of fact as to Mr Hofgren's knowledge or belief should be made, and Advocate Adkins submitted that such findings could not be found in the Decision. The Decision was, therefore, fundamentally flawed and could not stand.
41. Advocate Adkins submitted that Advocate Hill's only answer to this criticism lay in resorting to materials which were not mentioned in the Decision in order to support it, and this was simply impermissible. The Commission could not refer, on an appeal, to further pieces of evidence, outside the Decision which the SDM had not said she relied upon, in order to justify a finding or conclusion which was not evident in the Decision itself. He submitted that that was effectively what Advocate Hill was attempting to do in his arguments on behalf of the Commission.
42. The importance of all this was that Mr Hofgren was entitled to know, with clarity, exactly what had been found and held against him, because that is what he is entitled to appeal against. Resort to other materials not mentioned in the Decision showed only what the SDM's decision might have been, but did not disclose what it actually had been. To uphold the SDM's decision on that basis therefore contravened the principle, upheld by the Court of Appeal in *Domaille*, that the decision-making power was confided to the Commission. That was because it would amount to the Court's supplying its own views and decision on the evidence, rather than simply reviewing the SDM's decision - which *ex hypothesi* in that situation, was not actually known.

Commission's submission

43. Advocate Hill's first submission on behalf of the Commission was that, in practice, the SDM's findings, conclusions and reasons could be extracted, quite adequately, from the terms of her Decision itself and the materials referred to.
44. Elaborating, though, his proposition was, initially, (I think) that it was permissible for the Court to look not only at the Decision itself, but at any of the evidence which had been before the SDM and which could have supported and therefore justified it. In effect, he was submitting that the fact of the end decision justified the assumption that the SDM must have found materials which justified this, and that it was sufficient, therefore, if such materials could be identified on a roving enquiry. However, in the light of the Court's expressing scepticism at the apparent breadth of such a proposition in the light of the *Domaille* decision, which appeared to say that it was not appropriate for the Court to look back at how any such decision had been arrived at - presumably, therefore, whichever party wanted this - he went back to first principles.

45. He first submitted that there was no required formula, or “magic words” needed for the SDM to express any finding or conclusion which she had reached. Therefore, the question was simply: what findings and conclusions could she be seen to have reached, as a matter of the true meaning of her Decision expressed in the words she had chosen.
46. As to this, he submitted that it was not necessary for the SDM to refer to every piece of evidence which she might have taken into account in any eventual finding, judgment or decision, and that her findings or conclusions could be said to be “contained in” her Decision if they could be seen to be present by necessary implication from her actual words.
47. Second, he submitted that materials to which she referred in the many footnote references throughout her Decision could, and should, be taken to be actually incorporated into the Decision, and could clearly, therefore, be resorted to.
48. Beyond that, he pointed out further that the SDM had, in the Decision itself, listed the materials which had been supplied to her and had stated that she had “*carefully reviewed and had regard to*” those materials. He submitted that all these materials too could, therefore, be treated as effectively having been incorporated into the Decision itself and thus to be part of it.
49. Advocate Adkins objected that that last proposition was going too far. First, it effectively incorporated all the thousands of pages of materials which had been used or referred to at various stages in the enforcement proceedings without necessarily being part of any evidence actually accepted and relied on by the SDM, and thus it did exactly what was impermissible, in terms of effectively leading to a re-hearing of the matter - but this time only for the one-sided purpose of upholding the Commission’s position. Second, the statement that the SDM had “*had regard to*” all that material meant nothing of any relevance to ascertaining what her findings and conclusions had actually been based on, because the SDM had not specified how much “regard” or what type of “regard” she had had. She had just not said what part of any such materials she had accepted, or rejected, or found relevant or irrelevant – which brought one back once again, to the proposition that her Decision could only be found within the terms of the Decision, and its validity must stand or fall with regard to those terms.
50. Advocate Hill then modified his submission to being, in effect, that one could safely take a combination of the Decision itself with its footnotes, and the contents of the Final Enforcement Report of 4th April 2022 (being the central and main document individually mentioned by her as having been supplied to her, and actually being the Commission’s previous decision which had been referred to her when not accepted by the Appellants) as containing findings and matters which she must have taken into account. Advocate Adkins argued that this was subject to the same objection, namely going outside the SDM’s actual Decision itself.

Discussion and conclusion

51. At this stage in this judgment, I am dealing only with overarching question of the proper approach to the materials before the Court on this appeal as a matter of high level principle. It may well be necessary to come back to aspects of the above submissions later, in specific contexts. On a general basis, though, I observe the following.
52. Where exactly the Court of Appeal’s decision in *Domaille* had left the function of the Court, when invited on appeal to decide complaints as to findings of fact, inferences or deductions apparently underlying the decisions under appeal, was a matter which I admit to having found initially perplexing. It seemed to me that the Court of Appeal’s ruling, with its insistence on focusing on the actual Decision as a matter simply of review and its emphasis

that it was not the Court's function to consider how that decision had been arrived at, meant that the Court could only review the logic of the Decision itself, and it thus seemed to produce the result that if an Appellant contended that there were facts or matters not actually mentioned in the Decision, but which should have been there, and which would or could have changed it, it was prevented from doing so; the Court could only examine the Decision within its own confines and upon its own self-expressed logic, and the way in which that Decision had been arrived at was simply not justiciable – at any rate by way of appeal.

53. In the course of seeking to allay my uncertainty about where the Court of Appeal's judgment in *Domaille* had left this question of how far it was proper, on an appeal, to delve into the evidence supporting, or supposedly supporting, or even (presumably) contradicting, the decision complained of, Advocate Hill submitted that the answer was to be found in [94] of the *Domaille* judgment, where the Court of Appeal, in considering submissions about the intensity of the review of facts which was permissible, compared the approach which it held was the way in which I had dealt with the matter at first instance with the approach of the Deputy Bailiff in *X, Y and Z v GFSC* [2023] GRC032. It did so in the following terms:

"In the former, the Lieutenant-Bailiff examined the evidence in detail and reached her own independent findings of fact. In the latter, the Deputy Bailiff examined the evidence in as much detail but reached a conclusion as to whether the SDM was entitled to make the findings of fact that he did. The difference between the two approaches is not the intensity with which the evidence is scrutinised, but the actual nature of the assessment that is undertaken."

54. I have found this to be helpful. This paragraph does not directly state what one is entitled to look at but, rather, defines it by purpose. In emphasising this, it implicitly acknowledges (see [92] of that judgment) that the review process does not necessarily preclude a "detailed" review of evidence. From it, I take, therefore, that it is permissible to look at the evidence before the SDM, even if not referred to in the Decision, if that is required for the purpose of considering (in proper procedural terms relative to an appeal by way of review) a submission that some finding contained in the Decision was "wrong" for being unsupported by any evidence, or being contrary to the weight of the evidence. That is part of the normal appellate review process (noting that a factual decision which is reached without evidence or contrary to the weight of the evidence is itself reached in error of law). It is therefore permissible.
55. I also note, however, that the effect of such an adverse finding appears, therefore, to be basically only to invalidate the Decision. The Court's powers of intervention are contained in s. 106(6) of the EP Law, and it was the limitations on these powers, and the fact that they were statutory, which were stressed by the Court of Appeal as part of the reason for its ruling that any appeal is to be conducted by way of review and not re-hearing. The relevant powers are, under s 106(6)(a), to set aside the subject decision, but with a discretion - it is not obligatory to do so - to remit the decision to the Commission with such "directions" as it thinks fit, or, under s.106(6)(b) to confirm the decision in whole or in part.
56. Thus, despite the Royal Court's being the first wholly independent tribunal before which the determination of the Appellant's rights will have come, it does not have the power (which an appellate court would seem to have under the normal processes of appeal in the hierarchical structure of ordinary courts), to substitute its own judgment regarding the rights at issue in the action so long as it feels it can fairly do so in the light of all the facts and circumstances before it on the appeal. (Interestingly, though, if the Court chooses merely to set aside a decision without remitting it back to the Commission, as it is expressly

empowered to do under s 106(6)(a), this would seem able to achieve the result of substituting a judgment of the court to the effect that no such sanction was appropriate over the Commission's judgment that it was. In addition, the scope of the "directions" which the Court is empowered to give upon any such remission is *prima facie* unqualified. It does not appear to be confined to procedural matters, or mere "guidance" of principle, at any rate, not expressly.)

57. However, for present purposes I am concerned only with the point of principle that the appeal is by way of review and not re-hearing. The practical question for me is therefore how this principle should operate in practice, and I think the practical resolution lies in going back to first principles - ie remembering what the appeal is about, and considering what is procedurally required or permissible in order to examine any challenges made by an appellant upon an appeal by way of review.
58. As to what the appeal is about, it is specifically an appeal against the Commission's (now the SDM's) "decision(s)" to impose upon the Appellant the particular sanctions which she has set out, those being "decisions" of a type appearing in the list given in s 106(1) of the EP Law of "decisions" in respect of which there is a right of appeal.
59. The available grounds of appeal are then as stated in s 106(3)(a)-(e) of the EP Law. Some of these invoke matters 'external' to the content of the decision itself, such as (a) *ultra vires*, (c) bad faith, (d) disproportion, and (e) error of procedure. Others are 'internal', such as (a) error of law and (e) error of fact. "Unreasonableness" – ground (b) could be either, but its complexities are not material here. Here I am concerned with the approach to 'internal' grounds of appeal.
60. Viewed as a simple structure, the "decision" appealed against (namely the imposition of the sanction) is justified by the SDM's findings that the individual concerned has failed to fulfil one or more of the MCL. Such findings are evaluative judgements, which fall to be justified, in turn, by the SDM's findings of relevant facts, namely that the individual did, or did not, do particular things in particular circumstances. (This is a slight oversimplification, as such foundation "findings" can themselves comprise findings of primary fact, inferences, evaluations and conclusions, but it suffices for present purposes.) It is the combination of those foundation findings and the evaluative judgements derived from them which therefore comprise the reasons for the ultimate conclusion, and which must therefore be taken to be set out in the SDM's overall Decision as that is expressed.
61. It is incumbent on an SDM to give the reasons, in the above sense, for his or her ultimate determinations (ie findings and conclusions) in the Decision, because, if the appeal process is going to work satisfactorily, the reader, whether the individual criticised or the appellate court, has got to be able to understand why the SDM came to the determinations, and hence the actual "decisions", which s/he did. In giving reasons, an SDM implicitly states that s/he has been "satisfied" of the relevant findings by the evidence before him or her (see *Robilliard v GFSC* [2023] GCA035).
62. Whilst an SDM may decide to refer expressly to some particular matters of evidence, this does not mean that s/he is obliged to identify and explain, in a Decision, every piece of evidence put before him or her, or even to refer to every piece of evidence actually considered. It means, only, that the Decision must itself contain the significant findings which the SDM arrived at and considered to justify the ultimate decision to impose the sanction in question, so that those findings can be reviewed satisfactorily in response to an appeal.

63. The key matter about any approach to reviewing such Decision is therefore to identify the findings and conclusions which are actually contained in the Decision, since it is these which must stand scrutiny as supporting the SDM's judgement of failure to comply with the MCL and thus the justification for the sanction appealed against. I agree with Advocate Adkins in this respect.
64. If the question is then whether any such findings identified from the Decision as having been made were actually justified, that will require review of the evidence. Any evidence mentioned in the Decision can obviously be taken to have been considered by the SDM, but for the reason given above, it is also justifiable to have resort to evidence not mentioned in the Decision but clearly before the SDM, in order to determine whether the identified finding in question was open to the SDM. The matter is then at large. It will be proper to carry out an examination of the evidence in whatever detail either party – the Commission or the appellant – seeks to do in order to justify its, or his, contention that the particular finding was, or was not, open to the SDM. To that extent, therefore, I agree with Advocate Hill.
65. The important point from this laborious analysis, however, is that this is an exercise of reviewing evidence which is not mentioned in the Decision itself (but does not necessarily have to be) but which was available to the SDM, in order to see whether that evidence justifies an identified finding. What is not permissible, in my judgment, is for the Commission to invoke materials not mentioned in the Decision in order to introduce a finding of fact or suchlike which cannot be identified as being contained in the Decision, so as to support the ultimate conclusion by a different route, on the grounds that it “would have been” open to the SDM to make that further or other finding. It has to be shown that the SDM has actually made such finding (with the question being whether it is justified) rather than whether the SDM could have made such a finding, when it is not apparent that s/he did. This is because the Decision itself is, by definition, the Commission's Decision. The decision-making process is now finished. The Commission delegated the function of making this final Decision to its SDM. It is fixed with the Decision which its appointed officer has actually made on its behalf, and cannot change this to a different Decision, even one it may have contended for, by arguing that such a different Decision could have been made, and would have been justified.
66. It can be seen, therefore, that I do not agree entirely with either Advocate Adkins or Advocate Hill, because I do not think the simple question whether the Court can refer, on appeal, to materials “outside” the Decision itself admits of a binary answer. It depends on the purpose. The crucial point is to identify what are the actual findings “contained in” the Decision. Any dispute as to whether particular materials or evidence then can be referred to on appeal will fall to be decided on a fact-specific basis, according to whether the purpose of such reference is to support (or undermine) any such finding, or is outside that framework. Further consideration of any such point must therefore be conducted specifically, in context.
67. The question what findings are actually contained in the Decision is a matter of the true construction of the Decision. This depends on the terms of the Decision. The starting point is therefore what materials are mentioned in the Decision (and in what terms), as these can plainly be regarded as materials which gave rise to such findings.
68. As to this, I agree with Advocate Hill that “the Decision” in this sense can be taken to include, not only what is said in express words in the Decision, but also what is also contained in it by either incorporative reference or by necessary implication. In fact, I do not think Advocate Adkins dissents from the principle; it seems to me that the difference between the Advocates is, rather, as to the stringency of its application.

69. As to incorporation by reference, plainly, in my judgment, any document which is referred to as a footnote in the Decision can be treated as incorporated into it, and as identifying some evidence which the SDM considered to support the express statement (usually a finding of fact) to which it is a footnote.
70. As to incorporation by necessary implication, that will be fact-specific to the particular issue, and is easier to recognise in practice than to describe as a conceptual rule. All I need say here, therefore, is that I accept that, in considering any argument of “necessary implication” of any particular finding into the Decision the Court should, in my judgment, be alive to see if the implication is, indeed “necessary” for the purpose of identifying, elaborating or clarifying a finding which the SDM has actually made, as opposed to supplying an omission in her findings, and “implying” a finding which it does not appear was actually made at all. Such distinction is becoming too refined to define sensibly in abstract terms. I think that in practice it should be sufficiently clear in any particular instance.
71. As to Advocate Hill’s submission that the Court can safely look, at least, to the combined contents of the Decision and the Final Enforcement Report of 4 April 2022, I accept that submission to the extent that the reference is to factual evidence and supporting documents contained in that Report, as this was plainly considered and properly considered by the SDM.
72. However, the Final Enforcement Report contains a good deal of comment, opinion and conclusions drawn by the ED and emphatic urgings of their validity, often in forceful terms. These, though, are in the nature of submissions. The SDM may, or may not, have endorsed such submissions, but any such endorsement must be found in the Decision itself. However likely it may appear that the SDM has been disposed to accept the ED’s Final Enforcement Report – and, standing back, the whole SDM procedure which has been put in place by the Commission seems to be that this final stage of the matter passes a decision already arrived at by the Commission to a fresh person, but in the expectation of endorsement - the final operative decision which is the subject of the appeal is expressly that of the SDM, albeit made on behalf of the Commission. It must be treated as such and must stand or fall on its own terms.

(b) Clarity

73. A major part of Advocate Adkins’ general arguments focus on a complaint that the Decision lacks the required degree of clarity in its findings. He submits that any decision must be clearly expressed as to exactly what it is finding to have been a contravention or non-fulfilment of the MCL, or any particular requirement of the regulatory regime. The importance of this is the fundamental fairness that the appellant should be informed with sufficient clarity exactly what he is said to have done wrong. He submits that the Decision in this case simply does not achieve this, and in particular it does not do so in relation to the findings of want of probity made against Mr Hofgren, to which I will refer specifically later.
74. Advocate Hill submits that the above complaint is not justified and that the reasons given in the Decision are expressed with perfectly adequate clarity.
75. In practice, much of the above argument has been dealt with by my consideration of the arguments under “Approach” above and in particular just what can be taken to be contained in the Decision in any particular case. Having said that, though, I agree with Advocate Adkins’ point in principle, although in practice a finding of lack of clarity would probably

only go to requiring the SDM to give better reasons, rather than necessarily justify setting a Decision aside. It appears to me that that must be within the Court's powers under s 106 (6), as a matter of implicit appeal procedure.

76. Advocate Hill submitted that a failure to complain about lack of clarity on a previous occasion is strong evidence that an appellant actually did understand the basis for the decision, and therefore severely undermines any argument of lack of clarity. He points out that, in this regard, Para. 28 of the Decision (containing the SDM's findings about the DXD transaction), which is the main finding as to which lack of clarity is now asserted, was in virtually identical terms to Para. 27 of the MTN, but no complaint of lack of clarity was made in Mr Hofgren's Responses to the MTN.
77. I do not place any weight on the above point, because the question is whether the SDM's ultimate findings as finalised in her Decision were sufficiently clear on an independent, objective assessment.

(c) Approach to Probity

78. The SDM makes several express pronouncements that Mr Hofgren's conduct lacked probity: see Paras. 28, 31, 35, 38 and (to similar effect) 33.
79. Advocate Adkins criticises these findings for being unjustified in fact at all, but particularly for being flawed for not having made, or even purported to make, necessary foundational findings of fact. Again, referring to the *Domaille* case, Advocate Adkins submits that a finding of want of probity requires a finding as to a party's state of knowledge or belief and there are simply no such findings made in the Decision.
80. He submits that there must be both findings of fact as to what a party did (or did not) do, but also a finding as to what his relevant state of knowledge or belief was at the time, in order to justify a finding of lack of probity. This is because it is a judgment that the party's conduct, carried out in that state of knowledge or belief, fell short of the ethical standards to be expected of a person working in the relevant profession (see *Domaille* at [121], *Ivey v Genting* [2017] UKSC 67 and *Wingate v SRA* [2018] EWCA Civ 366.)
81. Advocate Adkins submits that there are no factual findings about Mr Hofgren's relevant knowledge made in the Decision. He invited particular examination of, Para. 28, regarding the DXD diamond transaction as an example. He submits that the fact that the Commission's skeleton argument, now suggests that such findings of knowledge can be inferred, is tantamount to an admission that no such findings were actually made. He submits also that there cannot be held to be any such sufficiently clear findings of want of probity because they are not clearly and separately made in the way the Decision is expressed. They are not differentiated from other adverse findings, as must be required, but are rolled up with them.
82. Advocate Hill, once again, rejects the assertion that relevant findings of knowledge are not sufficiently contained in or apparent from the Decision.
83. As regards the SDM's findings of want of probity, he submits that the legal requirement to have regard to a person's state of knowledge does not require the decision-maker to state, mechanistically, that s/he finds that the subject "*had the following knowledge at the relevant time...*". What is important is simply that the decision-maker does identify, and has had appropriate regard to, the person's knowledge.
84. Following on from this, he submits that a justifiable finding of want of probity is not confined to findings made in relation to particular instances of conduct, but can fairly be

found on the basis of a pattern of conduct generally exhibiting an unacceptable disregard for standards of the proper conduct of business, and even standards of the careful conduct of business. Thus, recklessness as to such matters could be fairly characterised as a want of probity in appropriate circumstances. The question in any particular case would be whether instances of what might be seen individually as misjudgements, incompetence or lack of care, etc, together cross the line into a more fundamental apparent disregard for the requirements of such standards. That can fairly be seen as a want of probity

85. It was therefore, he submitted, too narrow to review findings of want of probity only in regard to individual instances of conduct; such a finding could be perfectly well justified as an overarching, more impressionistic such finding, as to which a broader consideration was both necessary and justified. This was reinforced by the fact that it was an overall general finding of failure to fulfil the MCL as a whole which was the test for whether a sanction could and should be imposed.
86. He submitted that, viewed in that light, all the findings of want of probity expressed by the SDM were well justified and could be seen to be so on the evidence and findings which she invoked.

Discussion and conclusion

87. This point needs to be dealt later, in particular contexts. However, it is appropriate to make some general comments here.
88. First, in my judgment, some of the criticisms of the lack of clarity in the SDM's style do have some justification, indeed, I found this more and more in the course of writing this judgment. Whilst I accept Advocate Hill's point that there is no requirement to use any particular formula or "magic words" I do find that the Decision proceeds in a style which often suggests accusation or conclusion by insinuation rather than by clear finding. That is unfortunate. Stating that a matter is one of "*concern*" (Para. 28, Para. 30) without further elaboration as to what concern and how much concern, leaves it to the imagination of the reader to infer what the "*concern*" in the mind of the SDM actually is. Is it as to want of honesty? of probity? of (reasonably) sound judgement? of due skill? of diligence, or some other aspect of the range of virtues required by the MCL? Similarly, a statement that conduct "*seems*" to be at odds with other conduct, (Para. 28) is regrettably vague and coy, and has the flavour of euphemism. It is obvious, taking that Para. as an example, that the intention is to draw attention to a *prima facie* case of inconsistency. but what is the actual significance being found? "*Reflects poorly on....*" is also a roundabout phrase, although in context (eg Para. 35) it quite plainly means "shows a lack of....".
89. It is the duty of a decision-maker to be clear and if necessary blunt about the findings which he or she is actually making. It may not feel suitably courteous and respectful of personal feelings to be so blunt, but a Decision is not an exercise in etiquette, diplomacy or elegance of prose; it is a formal legal document in which circumlocutions or euphemisms or mere insinuations should be avoided if possible.
90. Having said that, the requirement is that the findings intended to be contained in the Decision should in the first place, either expressly or (though less helpfully) by necessary implication, be clear enough to enable the subject to understand them sufficiently to see what he is being criticised for and whether he does, or does not, have grounds for appeal. But I agree with Advocate Hill that that requirement does not necessarily mean that such findings are invalid and open to challenge unless they are stated in words of one syllable. The question is whether they have conveyed the SDM's findings and meanings sufficiently to enable the subject to understand the faults, deficiencies and contraventions which have led to the ultimate decision to sanction him, and to enable any Court charged with reviewing

such decision on appeal to assess whether such reasons, and therefore sanctions, are justified.

91. As to the sufficiency of clarity for this purpose I agree, therefore, with Advocate Hill that, whilst reasons and their basis in evidence must be clear, they do not necessarily have to be stated formulaically. Clarity is about adequacy of communication. If, overall, the meaning is sufficiently communicated then sufficient clarity has been achieved. Therefore, the SDM does not need to relate each instance of conduct mentioned to a particular characteristic in the MCL. To require that would be over-purist and also impractical. Broader expression is quite permissible, so long as objectively, it conveys the SDM's findings and reasons sufficiently. I say "objectively" because the Appellant is not entitled to be obstinately or pedantically obtuse.
92. The SDM's personal style within her Decision is very much to make a high level finding of her conclusion, coupled with a list of the matters which, by implication, she regards as justifying this, leaving the logical link to inference rather than expression. Sometimes she provides the examples before her conclusion, and sometimes after, and she may also lump conclusions together. In Paras. 28 and 30 she finds Mr Hofgren's conduct to disclose lack of probity, sound judgment, competence (etc) in a list of example respects which follow that statement. In paras 31 and 38 the list precedes the set of conclusions.
93. It is complained that it is crucial that she should identify these failings separately, in order that Mr Hofgren should be able to understand exactly in what respects his conduct is being criticised. However, I do not consider that this is necessarily required at such a detailed level, because the "*decision*" which is being appealed against is the overall "*decision*" to impose a sanction on Mr Hofgren, and that decision is made on the basis of the global assessment of a subject's conduct, measured against the MCL generally in the light of the failings/misconduct found and described. Any misconduct or failures relied on may consist of a set of separate incidents, either exhaustively, or given as examples, or relied on collectively.
94. I will return to this where material, but I need to say something more about a finding of want of probity, here, both because of its individual importance, and because of the particular criticism that the SDM has not made actual findings as to Mr Hofgren's knowledge.
95. The singular characteristic of a criticism of want of probity is that it connotes a moral failure which is not necessarily present in any failure of the other MCL characteristics. Such a finding is thus particularly reputationally damaging and more readily leads to the sanction of a Prohibition Order. If the latter is in issue, then it may be important to discern where and why an SDM found want of probity, as contrasted with other failings, although a sufficiently serious display of other failings can certainly also justify the imposition of a Prohibition Order.
96. I accept that a finding of want of probity does, as Advocate Adkins submits, require some actual finding of knowledge or belief of the subject (belief being simply a deduction or a consciously affirmed piece of knowledge) upon which judgment of the probity of particular actions taken, in that context, can be made. Sometimes, a specific investigation and conclusion as to knowledge may be necessary, because the relevant conduct itself is ambiguous as to such knowledge or belief. However, if the action in question discloses in itself an irrefutable state of knowledge, that finding does not need to be stated expressly. To illustrate: if the action in question is not raising an alarm in the face of adverse media, it is necessary to find that the subject actually knew of the adverse media (or consciously decided to avoid finding out about it) before a finding of want of probity could be made. If the action in question is that of seeking fellow directors' agreement to a course of action

only retrospectively, the subject knows that that consent has not been obtained beforehand and an express finding of such knowledge would be implicit, and unnecessary to any finding that doing this lacked probity. The act itself proves the knowledge.

97. I must also record that Advocate Adkins submits, in reliance on the *Domaille* case in the Court of Appeal that “*any error in relation to findings of probity is sufficient to require the remittal of Mr Hofgren’s case to the Commission*”. I do not think that Advocate Hill accepted that, and in any event, I reject it. That was a statement made in the context of the particular facts of the *Domaille* case, and I do not read it, in context, as being a particularly considered statement of general application. In my judgment, the effect of any error as to a finding of want of probity as to whether the Royal Court should exercise its power to set a decision aside and remit the case to the Commission will be specific to the case itself.

Overarching findings

98. Lastly it is convenient to refer, here, to two further, overarching points. The first is that an overall reading of the SDM’s reasons discloses two underlying themes, which she herself remarks on and clearly relies on. The first (Paras. 27 and 37) is that Mr Hofgren exhibited a general pattern of conduct in running GFG (as to which he accepted that he effectively operated as its CEO) as if he were entitled to do so alone, without advance notice to or discussion with his fellow directors, and that there was really no need for this, except where it was needed as a formal matter, for the observance of required company law procedures. The second (Para. 38) was that of his running GFG with constant and apparently deferential regard to the wishes and opinions of Mr Ali Ahmad. These specific findings are themselves challenged but if they are justifiable, they provide context. The reasonableness of the SDM’s specific findings, including those she chooses to designate as want of probity, are properly viewed in the context of such underlying themes if proven.
99. The second is that the SDM’s reasons are punctuated with findings that Mr Hofgren’s statements, submissions and responses at various times appear to exhibit inconsistencies and inaccuracies. Whether this amounts to a failure to fulfil any of the MCL of course depends on context. Carelessness or exaggeration in the course of gossip in the street, or the embellishment of a dinner party story, might well not be serious, but the same inaccuracies in the context of more formal business situations - running a business or dealing with the Commission - could well be; it would raise questions at least as to the subject’s proper regard for care.
100. Advocate Hill submitted, though, that frequent instances of such inaccuracies in a serious business context, might well be fairly judged to tip the matter over into lack of probity, for example, for displaying an underlying cavalier disregard for the importance of truth and accuracy in business dealings which amounted to a transgression of proper standards of professional ethics. I accept this proposition, but, once again, it is a matter to be assessed upon a particular set of facts.

The Grounds of appeal in more detail

101. The Cause (technically it is an Amended Cause but I will refer to it as “the Cause” for brevity) is a lengthy document, but cites three main grounds of appeal.

Ground 1 – Ultra vires

102. The first ground of appeal had been that the Decision was *ultra vires*. This was based on various technical arguments of the construction of the EP Law. That contention was not pursued before me and I need say no more about it.

Ground 2 – Unreasonable conclusions/errors

103. The second ground of appeal complains of various unreasonable conclusions of fact and/or errors law within the Decision. Advocate Adkins submits that each of the ten points there made is a point where the SDM has found facts unsupported by the evidence or where she has failed to apply the law correctly, in particular with regard to findings of want of probity. With regard to this last, as already adverted to, he submits that the Decision simply does not make any factual findings about Mr Hofgren’s knowledge or belief, which is an essential ingredient for any such finding, and that there is no sufficiently rigorous or proper assessment of Mr Hofgren’s probity. In more detail:

- Grounds 2(a) and (b) cite particular aspects of the SDM’s findings with regard to the DXD diamond transaction as unfair or unreasonable findings and criticisms of Mr Hofgren’s conduct, and complain that the finding of want of probity in this regard is both unsupported and unsustainable as mentioned.
- Ground 2(c), (d) and (e) complain of unreasonable criticisms of the Vorderer Transaction, and the unreasonable implication that this (or some aspect of it) was improper, and that the finding of want of probity made against Mr Hofgren in association with it is unsupported and unsustainable as mentioned.
- Ground 2(f) complains that the SDM’s finding as to Mr Hofgren’s culpably failing to manage his conflicts of interest was unreasonable, particularly in the context of the responsibilities of (a) the Scheme’s statutorily appointed Administrators and (b) his fellow directors of GFG.
- Grounds 2(g), (h) and (i) criticise as unfair and unsustainable findings by the SDM that Mr Hofgren misled the Commission and/or his fellow directors of GFG on various occasions, and avers that any associated finding of want of probity is unsupported and unsustainable as mentioned.
- Grounds 2(j) disputes the SDM’s findings as to Mr Hofgren’s involvement and relationship with Mr Ali Ahmad, both generally and in relation to specific matters. It challenges the reasonableness of such findings in fact and also objects that any associated finding of want of probity is unsupported and unsustainable as mentioned.

Grounds 3 – Lack of proportionality

104. The third ground of appeal complains of both unreasonableness and lack of proportionality in the sanctions imposed, and both as to those actually imposed and as to the statement of the financial sanction which the SDM would have imposed but for Mr Hofgren’s impecuniosity. (This last is brought in because of its attendant implications when publicised in the proposed public statement.) This ground is founded, first, on the assumed success of the challenges made to the various findings of fact and judgments of want of fitness and propriety under Ground 2. However, even if these are upheld, it is complained that those sanctions are still disproportionate in the light of

- (i) the Explanatory Note of the Commission on General Approach to Enforcement and Enforcement Measures (November 2021) (“the **Explanatory Note**”) regarding the appropriate severity of sanctions;
- (ii) previous sanctions imposed by the Commission in other cases; and
- (iii) the comparative leniency of the sanctions imposed on the other directors of GFG.

105. In the light of the Court of Appeal’s decision in *Domaille*, Advocate Adkins accepts that the appropriate disposal, if any of the above grounds of appeal were established, would be to remit the case to the Commission to remake the Decision (if it wishes) with appropriate guidance in the form of directions (see [34] and [55] above) as this Court cannot substitute its own decision for that of the Commission below.

Ground 2 Unreasonable conclusions/errors

106. I will consider each of the points made as Grounds of Appeal here in turn but with some introductory general points.
107. As mentioned, the Cause itself contains 10 sub-headings of grounds of appeal under the heading of “unreasonable conclusions or errors”. As this is the governing document on the appeal, it is convenient to consider these in the order in which they are there presented, so as to be methodical. This unfortunately produces a rather random ordering of such points as to their narrowness or their seriousness, but I have not been able to find a more logical sequential structure for the rest of this judgment.
108. I also observe that the challenges made in the Grounds of Appeal do not touch on many of the findings made in the Decision. They appear to be focused on those which go, or arguably go, to the probity or integrity of Mr Hofgren’s conduct, even though ranging through criticisms of minor specific findings (such as that on one occasion, Mr Hofgren misled his fellow directors as to the likely shipping costs of a parcel of diamonds held as loan security) to broad major findings (such as that Mr Hofgren’s conduct with regard to the involvement of Mr Ali Ahmad with the business of GFG was intrinsically improper or inappropriate in a financial services context). The effect is that, even if any such challenges are successful, findings that Mr Hofgren failed to meet the MCL through displayed lack of competence, soundness of judgment and adequate knowledge and understanding of his legal and professional obligations (etc) will still be left in place. Whilst, therefore, success in the appeal may weaken the basis of any decision as to sanctions, it will not eliminate it.

Grounds 2 (a) and (b) - The DXD Loan

109. These two grounds focus on the lengthy Para. 28 of the Decision which extends over nearly two pages of close print and contains the SDM’s findings in relation to the origins and facts of the diamond-backed loan made by the FX Cell, mentioned at [19] above. It begins by noting Mr Hofgren’s acknowledgement and acceptance of some findings of fault on his part in relation to this - effectively, lack of experience, over-enthusiasm and naivety - but notes his assertion that he was nonetheless acting in what he believed was furthering the interests of the FX Cell. The SDM then concludes, however, that

“Mr Hofgren’s actions demonstrate a lack of competence and soundness of judgement, and were lacking in probity in a number of ways”

and the remainder of the paragraph contains a recital of the facts of the transactions and Mr Hofgren’s part in it, punctuated by the SDM’s comments, reactions and conclusions, clearly intended to illustrate, explain and support the above finding.

110. Whilst Mr Hofgren accepts the criticisms of lack of competence and soundness of judgement, he does not accept the finding of lack of probity. He makes some criticisms of individual findings in that regard. He also makes, although more prominently in Advocate Adkins’ skeleton argument and oral submissions than in the Cause itself, a general criticism of the above, firstly for lack of clarity as to which elements of the ensuing description of his conduct have been found to amount to want of probity and which have

not, and second that, on any basis, there are no findings at all as to Mr Hofgren's knowledge, against which any judgment of his want of probity has got to be made, thereby (it is submitted) vitiating the whole finding of want of probity in Para. 28, for error of law.

111. I take the assertions in the Cause in order.

Ground 2 (a): Finding of inconsistencies

112. Ground 2 (a) is the first specific complaint made under Ground 2. It is that the SDM made an unreasonable finding of inconsistency against Mr Hofgren, as to his having stated in interview that he and another director, Mr Gilligan, were satisfied from talking to third parties that Mr Ismail had connections in the diamond industry, whereas in his written submissions to the SDM, Mr Hofgren had stated that he was convinced by Mr Ismail himself. It is submitted that this finding is unreasonable because the statements were not inconsistent, and the SDM should have found that they were capable of both being simultaneously true.
113. The actual facts of the particular assertions made by Mr Hofgren are not disputed, and indeed, they are matters of record. The fact of express inconsistency is thus indisputable. At this level, therefore this ground of appeal would appear to fail.
114. It impliedly asserts, though, that the SDM should then have interpreted the various statements as not being inconsistent, as a matter of implication. That, however, was a finding for the SDM to make, or not make, having seen all the evidence in general. It is submitted the SDM "should" have found that "*Mr Hofgren was persuaded by both Ismail Ahmad and others*" (Para. 30 of the Cause, emphasis added), rather than making her implicit finding that his final statement was the true position. That amounts to a submission that the SDM should have believed one version of Mr Hofgren's evidence in preference to another version. Again, therefore, it is simply a complaint about the SDM's assessment of evidence, which she was entitled to make; it cannot be suggested that there was no evidence to support her finding, or that it was against the weight of the evidence produced.
115. However the kernel of the complaint is presumably not so much the finding of inconsistency itself, but the condemnatory significance with which the SDM endowed it.
116. Examining this somewhat different point, it is important to note that this finding is part of a larger overall matter. What the SDM actually said was

"PEL [Mr Ismail's company] appears to have been of little financial substance and there seems nothing to link that company, nor Mr Ismail Ahmad, to diamond trading. Concerningly, this therefore seems at odds with the letter written by Mr Hofgren to the Custodian in April 2016 wherein Mr Hofgren suggested that Mr Ismail Ahmad had proven to GFG Limited that he had extensive contacts in the mining and polishing sectors and that GFG Limited had contacted many parties in the sector who had confirmed the abilities and reliabilities of Mr Ismail Ahmad. ... Furthermore insofar as Mr Hofgren now seeks to argue that he was persuaded by Ismail Ahmad as to his connections with the diamond industry, this does appear at odds with his statements at interview that he had spoken with others who had worked with Mr Ismail Ahmad, that Mr Gilligan had spoken to others who knew of Mr Ismail Ahmad in the industry, that due diligence had been completed and that Mr Hofgren had formed an impression from his own observations of Mr Ismail Ahmad."

117. The first sentence reflects the Commission’s own reported investigations into Mr Ismail, which the SDM was entitled to accept; I am not sure that they were even seriously disputed. The letter referred to in the second sentence is not denied and could not be. The third sentence simply describes the subject inconsistency. Relevantly, Mr Gilligan had in fact denied, rather than confirmed, the comments attributed to him by Mr Hofgren, thus creating a conflict of evidence upon which the SDM was entitled to adjudicate if necessary.
118. It is apparent from all this that the SDM is here concerned not so much with any inconsistency in the detail of Mr Hofgren’s evidence, as with an evaluation of Mr Hofgren’s overall inconsistent conduct in professing his belief, at various times and to various other persons, that Mr Ismail’s diamond trading credentials were respectable and had been verified. That aspect does not appear to be in any way affected by the actual inconsistency finding complained of, as such.
119. The SDM investigated the surrounding facts of this inconsistency conspicuously carefully, and drew her own conclusions as to what had happened and thus as to the reliability, and hence the weight, of evidence from Mr Hofgren on the information presented to her. I cannot say her findings, express or implied, were without foundation, or were contrary to the weight of the evidence.
120. On any basis, therefore, this part of Ground 2 (a) fails.
121. Before leaving Grounds 2(a), on the topic of inconsistencies, though, I make a further general observation. There are various places in her Decision in which the SDM refers to inconsistencies in Mr Hofgren’s statements, in evidence, in interview and in responses at various times. In places, Mr Hofgren disputes the reasonableness of the finding of any actual inconsistency at all (eg as to the “Ismail reliance” point, above) and in other places he disputes that any inconsistency could bear the adverse weight as to his credibility with which the SDM seems to endow it (eg as to the “shipping costs estimates” point, below). In making such objections Mr Hofgren often, also, attacks the reliability of others whose statements were at odds with his interpretation.
122. Where such inconsistency is directly material, then the question which version the SDM holds to be correct will be based on her assessment of Mr Hofgren’s credibility in the context of all the other evidence, an assessment which she was perfectly entitled to make. There is, however, an additional point that even the findings of inconsistency themselves, if demonstrated, are a fact which goes to reliability, and which therefore might properly play a part in her overall judgment of Mr Hofgren’s conduct and personal characteristics, and thus be relevant to findings of his fulfilment of the MCL.

The “two stones” finding

123. Although it is not on the topic of inconsistencies, there is a further ground of appeal inserted into the Cause at Grounds 2 (a) by amendment. It is a challenge to the conclusion cited at [109] above that

“Mr Hofgren’s actions demonstrate a lack of competence and soundness of judgement, and were lacking in probity...”

124. This challenge is made on the basis that

“it was reached unfairly (on the basis of an amendment to the Minded To Notice, to suggest that stones had not been returned to a safe in Dubai, without warning Mr Hofgren of this change and which was in any event wrong) and without any findings as to Mr Hofgren’s state of mind. Accordingly, the

findings were reached after a procedurally unfair process and which failed to apply the law on findings probity. In order to reach any such finding the SDM was required to consider Mr Hofgren's actual state [sic] of mind as to his knowledge and belief as to facts, before considering his actions against objective standards of conduct. She failed to do so."

There are actually several complaints rolled up in the above challenge.

125. In the MTN, the SDM had stated "*The two stones were subsequently returned to the storage facility*". In the Final Notice she amended this to "*Two stones were subsequently returned to the storage facility.*", thus appearing to resile from a previous finding of fact that the actual stones removed were also returned.
126. In fact, the SDM's definitive conclusion was not reached on the basis of the change to the MTN which is complained of. The self-same conclusion, including a finding of want of probity, appeared in the text of the equivalent paragraph (there, Para 27.) in the MTN. This was not, therefore a finding of want of probity which suddenly materialised in the final Decision, without Mr Hofgren having a chance to contest that conclusion. This considerably reduces any force in the allegation of unfair process.
127. The amendment to the MTN related to an occasion in December 2017, when the parcel of diamonds then still held by the FX Cell as security for its loan were held in secure storage in Dubai. Mr Hofgren gave authority for a nominee of Mr Ali Ahmad, apparently his secretary, to remove two such stones for inspection and return, preparatory to Mr Ali Ahmad's possibly purchasing them. Subsequently, it was found that three of the stones in the parcel were simulants.
128. In fact, this appears to be no more than a necessary correction of expression to accord with the facts, rather than a changed finding in substance. The initial phraseology appears as an express factual finding that the very stones which were removed from the facility were returned. It is apparent from the detailed evidence contained in the Final Enforcement Report (which is referenced in the Decision) citing both evidential records and the findings based on these and the evidence at interview of a qualified gemmologist, Ms Daniella Gallienne, that the two stones which were returned were found - albeit some time later - not to be the same two stones as had earlier been allowed out of the storage facility (which were high value stones) but were simulants, one being cubic zirconia and the other a laboratory grown diamond. She also found that a third stone in the parcel was also a simulant, a cubic zirconia. The consequence of this was that the security for the diamond-backed loan had been depleted. (It was stated in the Decision that the DXD loan had not been fully repaid. Whether this was as to principal or only as to associated interest or costs may, I think, be disputed, but I do not think it material.) The unanswered question, therefore, was whether, and if so when, possibly, there could have been a substitution of the relevant two stones.
129. Mr Hofgren's submission had been that the (now) three simulant stones could well have been present in the parcel all the time, with them all having been wrongly graded originally. Clearly this argument would be more consistent with an apparent finding by the SDM that "*the*" two stones had been returned to the facility, on the occasion by which so much store was being set in recited criticisms of Mr Hofgren's conduct with regard to this loan.
130. However, the non-specific substitute finding simply of "two stones", denoting an uncertainty as to whether or not these were the originals, is clearly a finding of fact, and one which the SDM was entitled to make in evaluating all the evidence, for the purpose of making her final Decision. It is also clear (because she says so) that in doing so, she considered Mr Hofgren's theory, but found it "*unconvincing*".

131. I can therefore see no error of fact or law in the particular change of the expressed finding to which Mr Hofgren objects.
132. I also do not consider that the change of terminology between the MTN and the final Decision created any procedural unfairness on Mr Hofgren. It was obviously brought about by a reconsideration of both the terms of her proposed Decision in the MTN and the evidence, in the light of further submissions made in writing and at the Oral Meeting, and a final check of her written reasons, but all the actual evidence about the removal and return of the stones, and subsequent findings as to their genuineness had been raised and discussed previously, with Mr Hofgren having had ample opportunity to make his points. I find that this is not the case of a finding being made to which the subject has had no opportunity to respond, as envisaged by the Court of Appeal in *Domaille* at [89].
133. More importantly, though, the SDM does not actually purport to make any finding that Mr Hofgren was complicit in some substitution of the stones. She confines her conclusions to the incontrovertible findings as to the shortcomings of Mr Hofgren’s conduct as regards properly ensuring the security for the loan, and suchlike, and in not keeping his fellow board members fully and properly informed as to what was going on. The fact that she does not place weight on any argument that the two stones were substituted on the December 2017 occasion is shown by her express comment that “... *however it came about, the value of the security for the loan was therefore less than anticipated.*” (emphasis added). The fact that her conclusion, quoted above, is founded on those facts is also demonstrated from the fact that this conclusion reflects a submission by the ED in the Final Enforcement Report (at §85) that
- “Mr Hofgren’s conduct in facilitating the removal, by an unverified third-party, of a large portion of the collateral securing the loan from the Scheme, without the knowledge of any other directors, clearly demonstrates a lack of probity, competence and soundness of judgment”.*
134. Mr Hofgren objected to the term “unverified third-party” on the basis that the person concerned was Mr Ali Ahmad, who was not unverified. However, it was unnecessary for the SDM to decide this point, or whether it had any significance, for the purpose of making her actual finding, and in practice, the person who actually removed the stones was, by all accounts, not Mr Ali Ahmad himself but his secretary. The description “unverified” therefore has some justification, even if it might also be said, as Mr Hofgren frequently does, to amount to the Commission “talking up” its descriptive language to paint Mr Hofgren in the maximum bad light, as mentioned later.
135. With regard to more subtle aspects of the seriousness of the DXD diamond transaction incident, the Commission point out the absence of any corroborative evidence as to propriety about the diamond transactions from Mr Ali Ahmad, despite the fact that Mr Hofgren had promised this would be given.
136. Although here focused on the “two stones” point, this additional ground of appeal also cites the general complaint that there is no finding as to Mr Hofgren’s state of knowledge or belief, which is required to support any valid such finding: see [79] – [81], and *Domaille* in the Court of Appeal at [181]-[185]. However, as this is a more general point, it is convenient to consider it later: see [147] *et seq.*

Grounds 2 (b) Mr Hofren’s estimate of shipping costs

137. Also in relation to Para. 28, Advocate Adkins criticises as unfair, the SDM’s reliance on Mr Hofgren’s statement to the Boards of GFG and of the Scheme, made at a meeting in

May 2019, of the costs of shipping the diamonds from Dubai to the UK as an example of his supplying inaccurate information to the Board.

138. Although it is not cited in the Cause as a specific Ground of Appeal, Advocate Adkins also cites as unfair, and as general support for Mr Hofgren's complaints on appeal, the SDM's next finding, namely that Mr Hofgren stated to his fellow board members that he had to be present in person to access the storage vault in Dubai, when that was obviously not the case, as he had previously permitted others (this would seem to be, at least, Mr Ali Ahmad's secretary: see above) to do so.
139. Whilst challenging these two findings on their own merits, Advocate Adkins submits that they, like the finding with regard to Mr Ismail's diamond trading credentials, are examples of an unfair general approach by the Commission (the SDM) of trawling through documents and seeking out small matters which can be interpreted and used to portray Mr Hofgren in the most unfavourable light, and justify sanctions, when quite reasonable explanations are made (but simply dismissed), and when the matters are themselves trivial, and not worthy of sanction.
140. As to the shipping costs, Mr Hofgren is recorded as having stated to the Board in May 2019 that such costs were of the order of £30,000 when they were in fact found to be of the order of £8,000. Mr Hofgren's explanation is that this was an off-the-cuff answer when a question was posed to him, for which he had not researched, and it was (reasonably) derived from his recollection of earlier such costs of a similar transport. Advocate Adkins cites this as an example of the Commission's unfairly criticising a minor and insignificant mistake as a major and portentous matter, when it cannot fairly be seen as such.
141. As to the finding that it was misleading for Mr Hofgren to state that he was required to be present at the storage facility when the diamonds were accessed, Advocate Adkins points out that the meeting minutes relied on record this assertion as being made, in fact, by a fellow director, a Mr McGall, and not by him. He also submits that they do not, on examination assert that such belief by Mr McGall had been derived from Mr Hofgren.
142. Advocate Adkins also criticises the fact that the SDM simply mentions her above criticisms with the gloss that they are "*concerning*", or that they are examples of a type of conduct previously referred to generally, without, in each case, going on to state clearly what her findings are about the state of Mr Hofgren's knowledge, and its implications as justification for her finding of want of probity.
143. As to the misstatement of shipping costs, Advocate Hill points out that this statement was, on any basis inaccurate. It was cited by the SDM just as an example of Mr Hofgren's repeated provision to the Board of inaccurate information. He points out the further instances cited by the SDM (as to the time of completion of polishing the stones, and as to the involvement of a second polisher) as further examples of such inaccurate information. He submits that this makes the finding entirely reasonable.
144. As to the false information supplied about Mr Hofgren's need to be present at the storage vault, he points out that even if any such information were directly conveyed to the Board by another director (Mr McGall) that information could only have come from Mr Hofgren himself, but he submits that there was, in any event, ample other corroborating evidence that Mr Hofgren had made such an assertion. As an illustration of evidence clearly available to the SDM and supporting her decision, he also took me through Mr Hofgren's own response at interview, when questioned about this.

Discussion and conclusion

145. Looking at the misstatement as to shipping costs in isolation, I would indeed think that it was so incidental and trivial that it would be extreme to rely upon it as a ground for serious censure. It was only an estimate. However, I accept Advocate Hill's submission that it is not correct to look at it in isolation, but as part of very many examples of conduct which can and should properly be considered as a whole, in this regard.
146. The finding as to Mr Hofgren's himself misleading the Board as to the strict need for his personal presence at the vault is a finding of fact. Even if it were contrary to the documentary evidence, as Advocate Adkins submits, that is on a strict reading of such evidence, and it is not the only evidence. I note that there were positive statements from those who claimed to have observed such assertions. I also note Mr Hofgren's response to the point in the transcript of his interview which, I have to say, comes over as somewhat evasive. On the basis of all the evidence which was before the SDM and was properly available to be considered, I find that there was ample evidence to support that finding of fact.

Is a general finding of want of probity sustainable?

147. This, though, brings me finally to the more general point mentioned above, namely Advocate Adkins' criticism of the findings of the SDM generally (though here focused on those in Para. 28) for being unclear, laced with insinuation but not making express findings of impropriety against Mr Hofgren and in particular, (although added by amendment and thus rather appearing to be a second thought) generally failing to make any finding of fact as to his knowledge, sufficient to support any finding that his conduct lacked probity, even though such findings were purportedly expressly made by the SDM.
148. Starting with the "two stones" point Advocate Adkins points out that the amendment to the MTN, implies - but only by insinuation - that the two returned stones might have been substitutes. This in turn raises the further innuendo of criminal activity, but whilst the SDM states that she was not convinced by the explanation that the three stones were wrongly graded at the outset, she does not go so far as to find that these two stones were substituted when out of the secure storage and in the hands of Mr Ali Ahmad or his nominee. She simply injects the idea of a supposition that they might well have been. Advocate Atkins objects that such innuendo of improper conduct, which the SDM never goes so far as to find as a fact, is unfair and illegitimate in a Decision, at all. He cites use of terms such as "*it would appear that*" and "*it is concerning*", as obviously calculated to create question marks in the reader's mind, but never actually having the courage to make an express finding of guilt in fact. He submits that this therefore cannot be treated as a proper finding of improper conduct.
149. Advocate Adkins also criticises the comment that Mr Hofgren's permitting this removal of the stones was "*[p]articularly serious*" (emphasis added), with no finding as to why this epithet was regarded as justified. He criticises the fact that the SDM did not mention, but seemingly just ignored, Mr Hofgren's (reasonable) explanation given in his Response, that, as DXD were entitled to sell the stones to repay the FX Cell loan, it was perfectly reasonable for FX Cell to permit them to be inspected by a potential purchaser. The SDM did not explain why she dismissed this, but she ought to have, and ought to have said what knowledge she attributed to Mr Hofgren, if this were (as it apparently was) being found to be an example of lack of probity.
150. Advocate Adkins submits that if one combines the above with the lack of any clearly expressed finding as to Mr Hofgren's knowledge of relevant facts which would render any proven act of his lacking in probity, then the findings of want of probity (specifically, here, that contained in Para. 28) cannot stand. When the deficiencies attendant upon any finding of lack of probity are peeled out of Para. 28, all that is left, he submits, is findings

of fault due to lack of judgment, inexperience, etc, (which is admitted) leading to the FX Cell loan being under-secured, but that is all. It is not sufficiently supportive of a finding of want of probity. This is therefore an error of law.

151. Advocate Hill submits – and as a point of general application - that it is a wrong approach to dissect each finding in Para. 28, seek to knock it down individually, and then suggest that there is nothing left, which is what Advocate Adkins’ approach amounts to. He submits that one must view the SDM’s findings on an overall basis, not myopically close and individually.
152. He further submits that, in fact, the SDM did give sufficiently detailed reasons in her Decision to enable the ascertainment of her conclusions – these being that, overall, Mr Hofgren failed to comply with the MCL. The tenor of her conclusions, including obviously implicit findings as to any relevant state of knowledge of Mr Hofgren at the time, are quite sufficient to support her findings of want of probity, when properly examined.
153. He submits that the matters which Advocate Adkins seeks to stigmatise as innuendo are actually statements of findings of fact, and conclusions drawn from those facts themselves - but the important question is simply, what did the SDM find? what did she consequently decide and conclude? and was her conclusion justified? He submits that it amply was, both here and in other places in her Decision, on the basis of the materials which are in her Decision either expressly, by incorporation or by necessary implication (which I have discussed above).

Discussion and conclusion

154. I agree with Advocate Adkins that, if you simply read the findings set out in Para. 28 straight through, there is an undertone of suggested criminal or improper activity without express assertion. I also agree that there is never any express statement made in the Decision of any specific finding of Mr Hofgren’s knowledge of facts, still less any such finding linked directly to some consequent finding of want of probity. I also accept that this is an unfortunate shortcoming in the formulation of the Decision.
155. However, that is not an end to the matter because I also accept Advocate Hill’s submission that when looking at the validity of the SDM’s conclusion, one looks at the conduct which the SDM is finding, and on which she bases her conclusions, in the round.
156. The list of failings found by the SDM in this particular paragraph is threefold - lack of competence, lack of sound judgement and lack of probity - in a “*number of respects*” which she then lists. Literally, therefore, if the list of aspects of behaviour found by the SDM contains at least one individual matter which would support a finding of want of probity, then her overall broad finding is accurate. I do not think it matters, and I do not think it detracts from necessary clarity, that she may subsequently place any such finding in a basket with others, said then to support an overall umbrella finding.
157. Put notationally, if the SDM finds items of behaviour “a”, “b”, “c”, “d” and “e” (etc), and then says that, based on these findings, she finds the subject failed to fulfil characteristics “x”. “y” and “z” from the MCL, then provided at least one of “a”, “b”, “c”, “d” or “e”, (etc) discloses conduct which could be fairly viewed as a failure to fulfil characteristic “x”, or “y” or “z” respectively, the SDM’s finding cannot be faulted for inaccuracy, and the global finding fulfils the test for justifying sanction in terms of the EP Law.
158. I have also previously accepted above, and again in agreement with Advocate Hill’s submission, that a finding or reason can be present by necessary implication in the SDM’s

decision, and need not be express, if such finding or reason was obviously and necessarily made (rather than being one which could have been made but not necessarily was). It does not need to be express.

159. This is all a matter of impression. In the end, I am satisfied that the SDM's overall conclusions under Para. 28 do disclose facts sufficient to found a finding of want of probity, with or without the addition of findings of want of sound judgement or competence arising from the one set of circumstances described.
160. First, I have already held that it is justifiable and right to look at the relevant facts and findings relating to the matter in the round. Whilst it is necessary as a matter of practicality, to mention and discuss particular findings individually, their impact is properly assessed as a whole, and the whole may well have more weight than would the aggregate of individual parts.
161. Second, I have already agreed with Advocate Hill (see [96] above) that a finding of knowledge necessary and sufficient to support a finding of want of probity does not have to be made explicitly, but can be made implicitly. I have also agreed that any such finding can be readily inferred if implicit knowledge of any relevant facts is apparent from the nature of the very action itself. I find that to be the case here.
162. The SDM's findings in relation to the DXD Transaction are not that Mr Hofgren was engaged or complicit in the unlawful theft or depletion of the security for this loan. She quite clearly stops short of this and makes no such finding. What she does find is that is that the totality of Mr Hofgren's conduct in respect of such loan, citing all the aspects of what he actually did or did not do, (and he was obviously and necessarily aware of his own actions and their immediate context) disclosed a wholesale disregard for exercising the extreme skill and care which is obviously required in regard to dealings with this kind of security (diamonds being plainly of high value and eminently portable) as one aspect. As another aspect, it displayed lack of respect for the need to keep fellow directors properly and accurately informed as to the circumstances of this important security. These failings were acts and circumstances of which Mr Hofgren clearly had actual knowledge in order to do what he did. Overall she judged that it was fair to describe an overall assessment of his conduct in such circumstances as "*demonstrating that Mr Hofgren's actions were lacking in probity*". I do not see that this judgment can be faulted, in form or in substance.
163. The upshot is that I conclude, that none of the specific grounds of appeal advanced under Grounds 2 (a) and 2 (b) succeeds. The only matter upon which I might have been inclined to think that the SDM made an unreasonable finding would be the criticism of Mr Hofgren's assessment of shipping costs viewed in isolation, but that is a small point, and it does not undermine the bulk of the SDM's findings, including on lack of probity.
164. I reach this conclusion in respect of Grounds 2 (a) and (b) simply on looking at Para. 28 in its own terms. However, I add that the SDM made her findings with regard to this particular aspect of GFG's business in the context of the two thematic findings which she also makes, referred to at [98] above as to (i) Mr Hofgren's general attitude and approach to dealing with his fellow Board Members in relation to running the business of GFG, and (ii) his relationship with Mr Ali Ahmad, which are of general application. I have not considered the challenges to those findings just yet, as they arise later, but if such findings are justified, they inject a whole dimension redolent of lack of probity into consideration of this Para. 28 (and all other findings), which would reinforce the above conclusion.
165. Grounds 2 (a) and (b) therefore fail.

Ground 2 (c) Unreasonable criticism of the Vordere Transaction

166. This relates principally to Para. 31 of the Decision, as regards the substance of the matter. Para. 31 is another lengthy and rather complicated finding by the SDM, running to two pages of print.
167. It starts by noting the loans made by both Property Cell and Xenfin Cell to SPV's managed by Dolphin, mentioned above at [21] and [22], observing in passing that Mr Hofgren had noted problems with Dolphin previously, in 2017, and noting that, in contrast with a failure to ensure that effective security was taken in relation to the other loans made by Xenfin Cell, steps were taken to strengthen the security backing these loans.
168. The other Xenfin Loans are considered in Para. 30, of the Decision, where it is found that Mr Hofgren displayed lack of competence and poor judgment in failing to ensure that the real estate security was properly registered, thereby losing priority. These findings are not appealed against.
169. The SDM recites the evidence and involvement of Dr Kotzur as regards taking the security in this instance, in Germany, by the execution of "overarching" agreements (which would entitle the Cells to take control of the actual Dolphin properties by exercising call options) and that Mr Hofgren's advice to GFG's Board in September 2018 was that it was planned to sell those secured assets during 2018. (The call options were not in fact exercised until 12th June 2019.) She notes that, despite Mr Hofgren's acknowledged conflicts of interest (as a director of both Vordere and GFG) Mr Hofgren then took the lead in negotiations for Vordere to buy the Dolphin properties from Property Cell and Xenfin Cell in return for shares in Vordere, commenting that there was little evidence that the possibility of the Scheme's taking control of the security or selling the properties to a third party was considered. In May 2019, Mr Hofgren was co-author of a memorandum recommending to the Executive Committee of GFG the exchange of the security of the properties for shares in Vordere, prepared for a meeting on 30 May 2019, and opining that taking no action would be risky. The SDM notes Mr Hofgren's existing conflicts of interest by this stage and finds that he "*failed to manage* [these]" – by implication, therefore, properly.
170. As part of explaining the basis for the finding that Mr Hofgren failed to manage his conflicts of interest appropriately, she then refers to advice obtained from Advocates Carey Olsen by GFG, on 6 June 2019, and finds that it did not bear the favourable interpretation which Mr Hofgren seeks to place on it. This finding is challenged separately below, under Ground of Appeal 2 (e).
171. She recounts key points in the progress of the Vordere transaction, which Mr Hofgren had continued to recommend at a Scheme Board meeting on 4 June 2019, on the basis that the Cells would thereby obtain shares in an LSE listed company. The relevant Vordere shares which were to be issued were about to be listed.
172. She noted that at a Scheme Board Meeting on 13 June 2019 - this was after GFG's Board had approved the Vordere Transaction, on 7th June, with Mr Hofgren having recused himself from voting on the actual decision - Mr Hofgren said that the completion could not happen until after the Vordere prospectus had been authorised for listing.
173. At the next Board Meeting, on 2nd July, two days before the anticipated issue of the Vordere shares, he stated that it was now likely that the shares would be issued in an unlisted form. The SDM found, accepting a submission from the ED, that this meant that the Board was being presented with the situation "*at a very late stage*" in the transaction, but Mr Hofgren provided assurances to the Board in his minuted comments and the decision was made to proceed. She noted the application of a structuring fee being payable by Vordere to GFG, also in the form of Vordere shares, pursuant to an earlier agreement made in 2017,

and she noted that Mr Hofgren had thereafter signed the necessary documentation to complete the transaction on 4 July 2019.

174. However, the Vordere prospectus was not authorised, then or ever, and Vordere shares were suspended on 5th July 2019, with no approval for listing the additional shares. Thus, the investors in the Scheme Cells were left with illiquid assets, and unlikely ever to recover their cash investment in Property Cell/Xenfin Cell, but leaving Vordere with the property assets.
175. The SDM then dealt with and dismissed, an argument by Mr Hofgren that a major investor in Property Cell had brought about the failure of the prospectus, and thus the losses. She dismissed that as overlooking the required protection of other investors, in particular the Maltese QROPS investors in Property Cell.
176. She noted as “*concerning*” that discussions by Mr Hofgren in relation to Vordere (then named Acorn) in 2016, and shared with Mr Ali Ahmad at that time, seemed to envisage an outcome “*not dissimilar to what eventually occurred*”, though she does not explain her concern and she does not, unfortunately, explain what she has in mind as the relevant similarities. However, she does not go so far as to find that “*it*” (ie such unelaborated outcome, or some aspect of it) was “*deliberately brought about*” by Mr Hofgren. She instead finds that even if it were not so brought about, the end result left investors with illiquid assets, whilst the properties themselves came into the hands of Vordere, and also that GFG and Mr Ali Ahmad and his brother, benefited from consultancy fees payable by Vordere.
177. She then returns to the contrast which she drew at the beginning of this paragraph, between the carelessly casual attitude to obtaining effective registered security in respect of the other Scheme investments, and the carefully attentive manner of dealing with security over the Dolphin properties (she had already referred to the “*overarching agreements*”) in which GFG itself and therefore Mr Hofgren personally, had an interest. She found this to suggest (it is fair to read this word, in context, as meaning “*disclose*”) a failure to conduct business with prudence and integrity. She further found, in all the circumstances, a failure by Mr Hofgren to prioritise investors’ interests over his own, and a consequent demonstration of lack of probity, soundness of judgement and competence.

Appellant’s submissions

178. The Cause complains, principally, that the SDM’s findings in respect of the Vordere Transaction are unfair and unreasonable. It suggests that these focus on the losses to Scheme investors, and this is unreasonable because the SDM did not properly analyse the merits of the Vordere Transaction - implicitly it is submitted, I think, that she did not understand it. She therefore unreasonably applied hindsight and unfairly suggested that obtaining better security for investors – which was what was envisaged and intended by the Transaction – showed a lack of probity.
179. The Cause contains eight paragraphs (36 – 43) which explain the scheme of the transaction and its perceived merits in obtaining improved security for investors in the event of a Dolphin default. The transfer of the properties out of Dolphin was intended to prevent that security becoming “*entangled*” in litigation about Dolphin in Germany, and the transfer of their ownership to Vordere, was said to have several benefits and minimal risks (which I do not recite) but to be designed to enable investors to obtain gain from the secured property assets, even though the Scheme itself was not a property developer.
180. Advocate Adkins submits, therefore, that any suggestion from the Commission that the Vordere Transaction was inherently wrongful is incorrect. Mr Hofgren’s genuine belief

in the investment is demonstrated by the fact - even recognised by the SDM - that GFG was itself paid fees in Vordere shares.

181. He submits that any innuendo (and again only innuendo) that the Vordere Transaction was “*deliberately brought about*” is not even a clear accusation, but would in any event be unjust. A memorandum of June 2016 in which Mr Hofgren referred to obtaining “orphan” assets which could be developed by Vordere in return for shares was no more than recognition of a proposition of “good business sense”, namely obtaining distressed business assets in return for equity. There was nothing improper in this; it was just discussing business strategy. It could not rationally be suggested that Mr Hofgren deliberately brought about the collapse of Dolphin, if that were the meaning.
182. Whilst, at the end of the day, the Vordere Transaction did not turn out to provide the hoped for benefits for investors, he submitted that that is being wise with hindsight, and in any event it simply shows a lack of competence, at worst, rather than any want of probity. It is unfair to suggest it displays the latter; it is not improper, in itself, to set up an investment which ultimately fails; that is a feature of business. Again, at worst, it is incompetence and not want of probity or integrity.
183. He submits that the SDM’s final paragraph appears to criticise Mr Hofgren for seeking security for loans made by the Scheme, and even, by a footnote, to criticise him for obtaining a better result for investors in the Scheme than was obtained for other investors in Dolphin. That, he submits, is irrational.
184. Once again, he submits that, in any event, there is no finding, let alone a sufficient finding, of knowledge of relevant facts on Mr Hofgren’s part on which to base a proper finding of want of probity.
185. Lastly, as to the apparent finding in Para. 36 of the Decision that the Vordere/Dolphin Transaction put the reputation of the Bailiwick at significant risk, he submits that there is simply no evidence for this. I deal with this separately later.

Commission’s submissions

186. For the Commission, Advocate Hill submits that Advocate Adkins’ submissions principally address the commercial nature of the transactions and are thus wide of the real mark. The SDM’s findings are not that the Vordere Transaction was inherently wrongful, but rather that Mr Hofgren’s conduct of it was. He had obvious conflicts of interest, and his conduct connected to those conflicts was not proper. That, he submits is clear when Para. 31 is properly examined.
187. He submits that the essential findings were that (I paraphrase somewhat)
 - Mr Hofgren was both ultimate beneficial owner and director of GFG, and the Scheme, as well as being the CEO of Vordere;
 - He was also an indirect shareholder in Vordere through his ultimate ownership of GFG;
 - GFG received significant advisory income from Vordere and Mr Hofgren took the lead in providing that advice;
 - GFG also stood to receive significant structuring fees for introducing business to Vordere;

- There was evidence that Mr Hofgren had planned to carry out the transaction to benefit himself and his associates;
 - Mr Hofgen was closely involved in the recommendations that brought about the scheme, despite its “*highly speculative nature*”;
 - Mr Hofgren was closely involved in negotiations with Vordere relating to the transaction;
 - Mr Hofgren was plainly aware of his conflicts and “*at times even appeared to suggest that it was intentional*”.
188. Advocate Hill submits that carrying out the Vordere Transaction with the above features gave rise to, and amply justifies, the SDM’s findings, and all the above features appear from the evidence before her.
189. He further submits that the finding of want of probity related to the taking of the Vordere security was clearly made as a comparison with the earlier attitude to obtaining security; it was the difference in attitude which was the impropriety. He adds that this misapprehension of Mr Hofgren’s was addressed by the ED in answer to his responses to the MTN, but is nonetheless persisted in.

Discussion and conclusion

190. I have sympathy with Advocate Adkins criticisms that the SDM’s finding in Para. 31 are disparate and somewhat opaque. I have found it quite difficult to extract the reasoning behind them in places myself. It can be seen that there are several apparently different and separate aspects of criticism and failure to fulfil the MCL leveled at Mr Hofgren within the paragraph.
191. In places the SDM notes apparently important matters, but then does not fully spell out her conclusions or expressly relate those findings to them. For example she notes expressly that Mr Hofgren told the Board at the 13 June meeting that the transaction could not happen until the prospectus had been authorised but (a) she does not explain by whom (I take it, the UK Listing Authority) and more importantly (b) she does not subsequently relate this to the timetable of Mr Hofgren’s completing the transaction except by a very oblique reference to “*two days before the expected issue of Vordere shares*”. The significant facts rolled up behind these statements have to be either deduced by the reader or found in evidence not specifically referenced.
192. Advocate Hill submits (and I have accepted) that whether any particular finding is fairly regarded as contained in the SDM’s Decision is a matter of construction (and is therefore one of impression), but that where I can infer such finding, I am able to look back at the evidence before the SDM – and any other evidence or matter pointed to by Mr Hofgren of course – to see whether such finding is supportable on that evidence. I have approached the matter on that basis.
193. To clear away some initial minor points, I do have misgivings about the SDM’s apparently critical reference to
- “Indeed he appeared to suggest that this situation [viz. the conflict of interest presented by his roles in GFG and Vordere] had been deliberately brought about.”*
194. This is because, taken literally, such an admission would be bizarre, and the SDM does not spell out the basis of any criticism. It is, of course very common for individuals to hold

dual and even multiple directorships, very often for perfectly understandable and respectable reasons, such as the companies being in the same group, or for particular shareholder representation. This latter would even seem to have been the justification here. Such conflicts do of course, then, have to be managed appropriately. The document which was cited by the ED in support of this interpretation does not appear, objectively, to suggest any improper, or even questionable, reason for Mr Hofgren having taken up a directorship with Vordere, and I think it can only be interpreted, fairly, as meaning that the duality of directorships had been deliberately brought about, not the conflict of interest. The significance of this point is only background, but it lends some credence to Mr Hofgren's complaint that the Commission keeps seeking to cast his behaviour in an unfavourable light, and it means that I ought to review any such aspersions with care.

195. Two similar points arise from the matters which I quoted in my summary, in [187] above, of Advocate Hill's submissions as to the essential points in the SDM's findings. The second, with reference to the last bullet point, is a repetition of the unfair interpretation just mentioned. The first, the proposition that the Vordere Transaction was "*highly speculative in nature*" was an opinion expressed by the ED in its Final Report, rather than being, as it is presented in Advocate Hill's skeleton argument, a finding of a suggested admission by Mr Hofgren or a statement of the undeniable; it is not contained in Mr Hofgren's report of 14 September 2018 which the ED cited in describing the transaction, and Mr Hofgren's description there belies any suggestion that he considered the transaction to be highly speculative.
196. Returning to the essential matters within the SDM's findings, however, I agree with Advocate Hill that Advocate Adkins' submissions do, largely, tilt at collateral matters and fail to grasp the points which, on examination of the Decision and the materials supporting it, I am satisfied were the SDM's essential findings. These are twofold. They go first to Mr Hofgren's conduct and his direction (as it clearly was) of the actual Vordere Transaction and second, but a separate point, to the comparison of care and attention as to obtaining security for the Vordere Transaction and for other Scheme loan transactions, and what that says about Mr Hofgren's business morals.
197. Advocate Adkins' first argument was that the SDM was wrong to find (as he submitted she did) that the Vordere Transaction was inherently wrongful. I accept Advocate Hill's submission that she does not, on examination, make any such finding as to the Transaction itself. Her findings relate only to the conduct of Mr Hofgren in his capacities in relation to GFG, in bringing the Transaction about, and the fact that losses were suffered by investors. These latter findings would be relevant to her other findings that Scheme investors' affairs were poorly managed and that the reputation of the Bailiwick was potentially jeopardised, but she does not elevate such findings into any suggestion that the Transaction was intrinsically wrongful, which would really be tantamount to a finding of fraud.
198. I also agree with Advocate Hill that Advocate Adkins' complaint that the changes made to the taking of security for Scheme investors as part of the Vordere Transaction are unfairly criticised is, again, challenging a finding that was not made. She does not criticise the taking of the security. Her findings are very clearly and obviously aimed at the comparison of the attitude to taking security in the Vordere Transaction with the lax attitude to obtaining effective security in respect of the other Scheme loan transactions, already adverted to in the Decision. It is this comparison which she invokes in her finding of "*failure to carry on business with prudence and integrity*" in the antepenultimate sentence of Para. 31.
199. Her finding in the two final sentences of Para. 31, however, which is of "*lack of probity, soundness of judgement and competence*", is based on the conclusion in the previous

sentence that “*Mr Hofgren failed to prioritise the interests of investors over his own interests*”, which is a finding made “[i]n all the circumstances”. It is therefore inferentially drawn from the matters referred to, either expressly or by sufficiently necessary implication, in the whole of Para. 31 and any general background facts previously alluded to. The question is whether these sufficiently justify those conclusions, of fact and that characterisation.

200. I agree with Advocate Hill’s summation above (at [187]) of the factual matters which would go to the SDM’s eventual finding and conclusion and which therefore require to be shown, although with the obvious addition of (i) the criticisms of Mr Hofgren’s lack of proper handling of his conflicts of interest which is the whole basis of this finding, and (ii) the qualifications I made at [195] above, to his listed points. Subject to that, all of the points at [187] appear to me to be expressly alluded to, and are thus to be “found”, within the terms of the Decision, except for the assertion that

“There was evidence that [Mr Hofgren] planned to carry out the transactions so as to benefit himself and his associates”.

201. I have therefore looked at the evidential reference given for this which is two paragraphs (§§273 and 274) in the Final Enforcement Report. On examination, they are not just submissions or expressions of opinion, by the ED (although these are, of course, advanced) but they contain, in §273, lengthy quotations from an email authored by Mr Hofgren in 2016 and sent to Mr Ali Ahmad, setting out a plan to take over real property assets in return for shares, in a similar structure to the eventual Vordere Transaction.

202. The ED then opined at §274 that this evidenced the likelihood that

“Mr Hofgren and Mr Ali Ahmad had devised this scheme, which was to the clear benefit of themselves and their associates, in about 2016 and had used the remaining members of the Board of both GFG and the Scheme to achieve this goal, with no realistic alternative provided when the 30 May 2019 recommendation was put to them” (emphasis added).

203. It is, I find, quite clear that the SDM had this material in mind in Para. 31. Although she only refers to what is said in §274, she plainly endorses the submission that the plan was almost identical (“*not dissimilar*”) to that set out in §273, and this would also explain her otherwise delphic consideration of the proposition that the Vordere Transaction was “*deliberately brought about*” even though she declines to make such a specific finding expressly. She nonetheless refers to, and clearly accepts, the kinds of benefit gained by Mr Hofgren and Mr Ali Ahmad, which are referenced in §274. She also mentions the fact that there was “*little evidence*” of any meaningful consideration being given to the Scheme taking control of the properties or selling them to third parties, which is an expansion of the final allegation in §274.

204. Her findings and statements in her Decision, when considered against this background evidence, therefore do chime with her general finding that the Transaction was entered into, and in fact steered by Mr Hofgren towards his apparently favoured outcome, putting that as the priority, and doing so without apparent serious consideration of other alternatives (if the objective was simply gaining security for the investment), or whether some such alternative might have been more in the interests of investors. Whilst these are mentioned in his reports to the Board, particularly at the Board Meeting of 4th June 2019, it is only to give reasons for dismissing them.

205. I find that this, therefore, does logically justify the SDM’s conclusion of want of probity, specifically related to not prioritising investor’s interests over Mr Hofgren’s own. As

regards any factual finding of necessary knowledge to support this, once again, in my judgment, the fact that Mr Hofgren simply and inevitably knew what he was doing and knew that no such consideration had been given is implicit, and provides justification for such a finding.

206. Advocate Hill submitted that there was sufficient evidence not only to justify, but effectively to compel, the conclusion - which the ED apparently urged - that Mr Hofgren and Mr Ali had “hatched” a plan to take over Dolphin assets into Vordere as long ago as 2016, when Mr Hofgren became a director of Vordere, with agreements as to potential introductory fees from Vordere being the subject of agreements in 2017, and that this indicated, therefore, that this plan was being worked up to, all along, with the ultimate Vordere Transaction being the ultimate culmination of such plan, which Mr Hofgren and Mr Ali had determined to be implemented when the opportunity arose, and which was therefore pursued with no proper regard for the financial interests of the investors in the two Cells whose monies were to be used. The SDM does not appear to make any such extreme finding, but the less extreme conclusions which she does draw from the same evidence, are justified in themselves, and they are, in my judgment, sufficient to support the findings of want of probity, etc, actually made.
207. I have considered - because I have discerned traces of it - the possible argument on behalf of Mr Hofgren that he genuinely believed that the Vordere Transaction was actually in the best interests of the Scheme investors, even though it might also be in his own interests or those of Mr Ali Ahmad, and that consequently there was no conflict of interest in practice (he did not seek to suggest that he had no conflicts of interest in principle), because those interests were aligned, and this ameliorated the situation.
208. However, I do not think that that is any answer. The relevant interests were not, in fact, aligned because Mr Hofgren’s personal interests were of a different and more extensive nature from those of the Scheme investors, but in any event, the central point is that investors are entitled to expect that their interests are considered for their own merits alone, and dispassionately - certainly absent any informed consent on their part to any different situation.
209. The want of probity found here lies in not observing the principle of ensuring that investors’ interests are accorded consideration in priority over one’s own personal interests.
210. In the course of argument, Advocate Hill emphasised that the Commission’s guidance to operators in the finance industry are that conflicts of interest are to be avoided (first) and only managed, properly, (second) if they are unavoidable. He would not accept that if a course of action could reasonably be seen to be in the best interests of investors, but also to provide some collateral benefit to (say) a director, which did not conflict with the transaction still being in the best interests of investors, that fact would or could either remove the conflict of interest – because of the alignment – or, at the very least, hugely mitigate any criticism by the Commission that the director had not properly “managed” his conflict of interest through continuing to advocate for pursuit of that course of action. The vice, it seems, is in failing to observe the pure principle as to dealing with conflicts of interest. Consideration of the actual facts does not detract from this. I am not sure that I would accept this point, as it does seem to elevate principle over practical effect. However, on the facts of the present case I do not find it necessary to consider the implications of it, and the extent to which it might create problems for persons in apparently innocuous situations.
211. In the end, therefore, I find that the SDM, having considered all the evidence in relation to the Vordere/Dolphin transactions, and heard Mr Hofgren’s explanations and account of

his actions, has apparently concluded that the total picture illustrates that his mode of operation was inconsistent with the standards of probity, integrity and soundness of judgment generally, but here, in particular, prioritising clients' interests above his own, which standards are required of those operating in the Guernsey finance industry. I accept Advocate Hill's submission that if one chooses to secure investment funds through a vehicle which is regulated under Guernsey law, then one must comply with all the lawful requirements of the Commission, as regulator of such business, as to the manner in which one runs that business and deals with or deploys those investment funds, even if those requirements go beyond what might be sufficient as a matter of basic company law, or in the context of obtaining unregulated finance.

212. Ground 2 (c) of the Ground of Appeal therefore fails.

Ground (d) Reference to a "slow default"

213. This is a narrow challenge to a particular finding in Para. 31, regarding the Vordere Transaction, which is that it makes a finding (impliedly as a criticism) that the security of the overarching agreements in the Vordere/Dolphin matter had been put in place in anticipation of a "slow default" by Dolphin but that Mr Hofgren had told the Scheme Board in September 2018 that the plan was, actually, to enable the assets to be sold throughout 2018, which was not done.

214. It is argued that the finding is not clear, but that in any event it is unfair and unreasonable because they are not inconsistent assertions.

215. Advocate Hill submits that the point went to showing Mr Hofgren's control over the Vordere Transaction and his influence over the other directors of GFG, as is shown by the SDM's footnoted reference to the fact that an expectation of a "slow default" had not been the understanding of the other directors, specifically citing references in two interview transcripts.

216. It is thus another unfortunately opaque statement by the SDM, in Para. 31. Her statements expressed here, and taking into account the footnote, are plainly findings of primary fact, and appear to be legitimate as such, but what conclusion she actually draws from the particular facts, and what significance she is attaching to it, is not clear.

217. Whatever it was, though, it seems to me that it can be of no consequence in the overall scheme of things, and I do not propose to consider it further.

218. Ground 2 (d) therefore fails, but as a matter of technicality.

Ground 2 (e) Reliance on legal advice

219. This relates to another specific finding of the SDM in relation to the Vordere Transaction and Mr Hofgren's conflict of interest. Within Para. 31 of the Decision she notes that

"Advice regarding the conflicts of interest was eventually sought from Carey Olsen and was provided in draft form on 6 June 2019 (and in final form dated 8 July 2019. Carey Olsen stated that it agreed "with the proposal that at the very least he [Mr Hofgren] should recuse himself from the Vordere proposal decision" (emphasis added)."

220. She continued by noting that this advice post-dated a Board Meeting of 30 May 2019. She held that it did not indicate that the proposal was sufficient to manage the conflict of interest, and she noted that whilst Mr Hofgren may have recused himself from the actual decision regarding Vordere made at that meeting, he nevertheless had been heavily

involved before that meeting and had continued to opine to the Board on its merits. She continued, listing his involvements from the evidence, through to the result that the Scheme was left with potentially illiquid assets in the shape of Vordere shares from 5th July 2019.

221. The Cause recites general facts and asserts that it was wrong and unreasonable for the SDM to hold that Mr Hofgren was not entitled to rely on the Carey Olsen advice as being to the effect that, provided he recused himself from the actual decision made by GFG, that would suffice to manage his (accepted) conflict of interest from a compliance point of view; the seeking of legal advice in fact demonstrated Mr Hofgren's intentions to act properly and is thus contrary to the SDM's ultimate finding in this paragraph that Mr Hofgren failed to prioritise the interests of investors over his own interests and showed lack of probity, soundness of judgment and competence.
222. In his Skeleton Argument Advocate Adkins further pointed out that nothing in the Carey Olsen advice cautioned Mr Hofgren against discussing the Vordere proposal with the other directors, nor raised any concerns about his past involvement as (it was submitted) it would have been incumbent on Carey Olsen to do if this should have been of concern. He also criticised a suggested finding, at least by implication, that the Carey Olsen advice came "too late".
223. Advocate Adkins submits that the phrase "*at the very least*" in the Carey Olsen advice did not indicate that any further action other than recusal from the actual Vordere transaction was required, and Mr Hofgren was entitled to rely on that advice, from a reputable firm, to believe (as he did) that he was acting properly. It is unreasonable for the SDM to have held otherwise and this point hugely undermines her final criticisms of Mr Hofgren with regard to conflicts of interest.
224. Advocate Hill submits that the implied finding that the Carey Olsen advice came "too late" is justified in practice, because it only came after the Executive Committee meeting, which approved the Vordere Transaction for submission to the Board for formal approval on the basis of a memorandum of recommendation which Mr Hofgren had authored. Whilst the formal Board approval from which Mr Hofgren recused himself was voted on at a meeting on 7th June, following receipt of the draft Carey Olsen written advice, the substance of the SDM's criticism is therefore accurate. The damage had, as it were, been done.
225. He submits that the submission that by complying with Carey Olsen's "*at the very least*" advice, Mr Hofgren should be taken to have sufficiently complied, or at least to have reasonably believed that he had sufficiently complied, with his obligations as to managing conflicts of interest is opportunistically simplistic. First, it could not even be construed, in itself as advice that merely recusing himself from the eventual formal decision was all that was reasonably required; that is not what it says. Second, it certainly could not bear that interpretation in the context of other parts of the advice, to which he referred. Third, it could not be construed as giving a clean bill of health to Mr Hofgren's previous conduct or as to giving the message that there was "no problem" with the approach which he and board members took; its implications were quite at odds with this.
226. Fourth, the actual finding of want of probity in failing to prioritise clients' interests appropriately was actually made in relation to a *different* transaction, by contrasting the lack of care taken in relation to obtaining security in respect of other Scheme loans in which Mr Hofgren had no personal interest, with the attitude in this transaction, in which he did. (This has been discussed above under Grounds 2 (c).
227. Thus Advocate Hill came close to arguing that the Carey Olsen advice was really neither here nor there in the overall context, because the SDM's ultimate findings and decision did

not depend on whether Mr Hofgren could reasonably say he had relied on the Carey Olsen advice to inform his conduct, or not. They went to matters much more broad than the Carey Olsen advice. However, insofar as that was a factor of influence in her decision, her rejection of Mr Hofgren's submission that, in effect, it exonerated him, was fully justified on the whole of the evidence.

Discussion and conclusion

228. Once again, my function is simply to identify and review the SDM's findings on this matter, to see whether there was reasonable justification for them, in all the circumstances and having regard to the properly available evidence.
229. On that basis, I need say only that I accept and prefer the arguments of Advocate Hill. I consider that the conclusion of the SDM that the terms of the Carey Olsen advice were not enough to expunge the findings of want of probity by Mr Hofgren in relation to the Vordere Transaction which she actually makes is well founded, for all the reasons which he gives.
230. Ground 2(e) therefore fails.

Ground 2(f) The role of the administrators and other directors

231. Para. 32 of the Decision rejects Mr Hofgren's defence to findings adverse to him with regard to failure appropriately to manage the conflicts of interest inherent in his dual positions with both GFG and Vordere, namely that blame for this should be placed more appropriately on either the Scheme Administrators (Louvre or Vistra), or his "local" fellow directors, who should have advised him if he was doing anything wrong.
232. The Cause appears to accept that this would not absolve Mr Hofgren from criticism, and rejects any suggestion that he is simply trying to lay the blame on others rather than himself, but objects that the SDM's Decision unfairly fails to recognise, at all, the responsibilities of others and lays the whole blame on Mr Hofgren.
233. The SDM in Para. 32 accepted the ED's submission that even if there were any such responsibility on either the Scheme Administrators or the other directors, that did not absolve Mr Hofgren from his own personal duties to know the law and regulations under which his business was operating and to avoid or manage risks inherent in his own conflict of interests. She found that Mr Hofgren could not absolve himself of such responsibility, and that whilst arguing that directors were entitled to guidance from Scheme Administrators, Mr Hofgren did not suggest that he had ever sought any such advice from the Administrators, nor that he relied on any such advice.
234. For Mr Hofgren, Advocate Adkins submits that this finding is unreasonable and unfair with regard to the Administrators in particular. (The point regarding fellow directors was not pursued under this heading). He points out that their successive contracts each required them, although in different terms, to provide "compliance" services, including the provision of a Compliance Officer to ensure that all compliance requirements to which GFG was subject were met.

235. From this, he submits that Mr Hofgren would be entirely justified in expecting the Administrators to warn GFG if conflicts of interest were apparent and were not being properly managed, and *a fortiori* if it were correct that Mr Hofgren's recusing himself from decisions was not enough (bearing in mind advice received from Carey Olsen, discussed under Grounds 2 (e) above). They did not do so. He submits that the SDM unfairly appeared to treat this as wholly irrelevant and indeed did not even treat it as a mitigating factor, as he submits she at least should have done.
236. Advocate Hill simply upholds the SDM's finding and her approach. He submits, that Mr Hofgren could hardly claim absence of advice as regards properly managing such a very obvious conflict of interest – certainly very obvious, he submits) to an experienced financial business operator such as Mr Hofgren – when he had not even sought advice from the Administrators. He also points out that the *Licencees (Conduct of Business) Rules) 2016*, which is subordinate legislation issued by the Commission under its delegated powers, states expressly, in a Guidance Note at 3.2.4, that (I paraphrase) where compliance functions are outsourced to a third party, the Licensee remains responsible for compliance; a Licensee cannot contract out of its statutory and regulatory responsibilities.

Discussion and conclusion

237. At this point, I am considering only grounds of appeal going to the actual identified findings by the SDM with regard to failures of Mr Hofgren to fulfil the MCL. Arguments as to the seriousness of any such failing or matters in mitigation thereof, are properly considered in relation to Grounds 3 of the Grounds of Appeal.
238. The actual finding of fault in this respect, though, is virtually a matter of law. The SDM concluded that the existence of Administrators contracted to provide and ensure company law and regulatory compliance did not absolve a director from personal responsibility for such compliance in matters which affected him.
239. I can see no arguable fault in this finding at all, and indeed, at this level I am not sure that any such argument is seriously pursued. It seems to take no account of the rather obvious fact that the Administrators' contractual duties would be owed to the company, or possibly by extension to investors, rather than directly to the directors themselves. In any event, the question whether an Administrator has properly provided compliance advice according to its contract is a different question from whether there was such compliance in fact, which is the finding against Mr Hofgren. Even if an Administrator were found liable for breach of such a contractual term (and I am not in any way suggesting that that was the case here) that would not expunge any actual breach of compliance by the relevant entity or person.
240. I find, therefore, that Ground 2 (f) fails.

Ground 2 (g) Misleading the Commission on 13 May 2019

241. In Para. 33 of the Decision the SDM considers a charge against Mr Hofgen that he misled the Commission at a meeting of 13 May 2019 held between himself, other directors of GFG and officers of the Commission with regard to the proposed Vordere Transaction and how his conflict of interest in that regard, arising from his position as a director of Vordere was being dealt with.
242. Misleading the Commission is, not surprisingly, regarded as a particularly grave failing by a regulated individual, in particular because of the duty to be open and co-operative with the Commission without which the Commission would plainly be severely handicapped in performing its regulatory role. The Commission is zealous to uphold such duty.

243. This is therefore probably one of the most serious findings in the Decision, at least in terms of its expression. The SDM concludes that this complaint justifies a finding that Mr Hofgren

“has engaged in business practices appearing to be deceitful or otherwise improper or which otherwise reflect discredit on his method of conducting business or his suitability to carry on business under the POI Law 2020” (see POI Law 2020 Schedule 4 para 1 (2)(c)(i) and (ii)).

244. Much argument has centred around the fact that the Commission’s internal minutes of that meeting state that Mr Hofgren said that he did not sit in on “discussions” (within GFG) relating to Vordere. GFG’s and the Scheme’s own Board Minutes showed that Mr Hofgren had, in fact, been expressing opinions and providing information with regard to aspects the Vordere Transaction within the GFG companies very extensively, so the Commission concluded that it had been misled at the 13 May 2019 meeting. Its minutes of that meeting had not, however, been circulated to Mr Hofgren or to GFG.

245. Mr Hofgren objected that what he had actually said at the 13 May meeting was that he did not sit in on, or participate in, “decisions” relating to Vordere, not “discussions”.

246. Further documents were therefore produced by the Commission, from which it appeared that:

- Their original manuscript note recorded “NH” as stating *“Anything Vordere not dealt with by NH”*;
- The first draft of the Commission’s minutes had translated this to his saying that he *“does not sit in on any matters regarding Vordere”*;
- The final version, corrected by other Commission attendees at the meeting, was amended to read that he *“does not sit in on any discussions regarding Vordere”*.

247. Mr Hofgren therefore stood by his complaint that this was an inaccurate minute, which had not been put to him, and that what he had told the Commission was accurate and not misleading; they had misled themselves.

248. The SDM’s finding, however, was that the precise accuracy of the Minutes, even if it was in question, was not crucial, because her conclusion on the totality of the evidence, was that

“when being asked regarding the conflict of interest presented by his Vordere role, Mr Hofgren gave the impression to the Commission that when Vordere was being considered he did not participate. In all of the circumstances I find that this was misleading.” (emphasis added.)

249. She then goes on to explain this holding by reference to the fact that even if Mr Hofgren had recused himself from the actual decision in May 2019, he had previously been heavily involved and *“continued to opine on matters at the meeting itself.”*

250. In answer to what will no doubt have been strenuous submissions on the point, she dismisses the argument that any misleadingness by Mr Hofgren would not have misled his fellow directors or others present at the 13 May 2019 meeting, who would therefore have corrected any such impression if it had reasonably been conveyed, suggesting, therefore, that it had not been. She does so on the basis that anyone else’s failure to correct the impression did not detract from Mr Hofgren’s own conduct in creating it.

251. The actual grounds of appeal stated in the Cause focus firmly on the claimed inaccuracy of the Commission's Minutes and thus as an argument that the SDM's finding was therefore based on an error of fact (ie, what Mr Hofgren had said) being held against Mr Hofgren.
252. Advocate Adkins' Skeleton Argument, and indeed his oral argument, continued in this vein stressing the evidential arguments in support of preferring the conclusion that Mr Hofgren had only made the more limited assertion, and submitting that if this supposed false statement were to be the basis for such a serious allegation as deceit, then the Commission should have made wider enquiries as to what he did say, rather than relying simply on the hearsay of their own internal account. It was also objected that this accusation was not put to Mr Hofgren at his later interview with the Commission.
253. Overall, it is therefore submitted that this finding was based on insufficient evidence and did not "discharge the burden of proof". I take this last to equate to a submission that the SDM could not reasonably have been satisfied of the matter.
254. A further point is made that this charge of deceit must therefore inevitably apply also to Mr Roger and Mr McGall, who were in attendance at the meeting but failed to correct the alleged (and obvious) "deceit". This goes to Mr Hofgren's complaints of disproportionality, however, and is appropriately considered later.
255. Advocate Hill submitted, in effect, that the dispute about what precise word Mr Hofgren may have used at the meeting was a red herring, not least because the SDM had expressly found that this was not crucial to her finding that Mr Hofgren had misled the Commission. Advocate Hill referred to the general context of the comments recorded in the Commission's Minutes. He then pointed out various Minutes of Board Meetings of GFG itself and of the Scheme, in March 2019 and in September 2018, and the records of comments and reports made by Mr Hofgren at these, showing his involvement with the Dolphin loan and associated Vordere Transaction, acknowledging his own conflict of interest but apparently regarding this as suitably managed.
256. He also referred to the *Licensees (Conduct of Business) Rules 2016*, and in particular Principle 10, which states
- "A licensee should deal with the Commission in an open and co-operative manner and keep the regulator promptly informed of anything concerning the firm which might reasonably be expected to be disclosed to it"*
257. Whilst this refers to a "Licensee", Advocate Hill, also took me through the interrelationship of the rules, regulations etc which would import the observance of this principle into the characteristics laid down in the MCL as regards individuals concerned in the conduct of regulated finance business. I accept that this would be imported into the proper conduct of such individuals, as a matter of common sense, in any event.
258. Advocate Hill's submission was therefore that, in the light of
- the Commission's Minutes,
 - the Commission's plain concern as to the extent and management of Mr Hofgren's obvious conflict of interest in any transactions involving both GFG and Vordere,
 - Mr Hofgren's knowledge of his actual involvement in such transactions,
 - the terms of his statement even if he had used the word "decision", and

- the omission of any further elaboration or expression of what he was actually doing,

the SDM's finding that he had conveyed a misleading impression to the Commission that he simply "did not participate", when such impression was misleading, was a finding that was perfectly open to her. Furthermore, in the light of the well-known and obvious professional obligation to inform the Commission of "*anything concerning [GFG] which might reasonably be expected to be disclosed to it*" a finding of improper conduct amounting to want of probity – or even deceit – was also perfectly open to her.

Discussion and conclusion

259. I find that Advocate Adkins' arguments do largely miss the point. The SDM did not find that Mr Hofgren used the word "discussions"; she found that whatever word he used he created a misleading impression as to the (non)extent of his involvement in GFG's dealings involving Vordere. In fact, it could be said that the very fact that the Commission ultimately recorded his statement in the terms in which it did demonstrated the impression he had created in the minds of those who were present, whatever language he had used.
260. It is not suggested that Mr Hofgren did actually disclose to the Commission the extent to which he had been participating in discussions, such that any false impression could not be fairly said to have been created by him, but to have been the Commission's misleading itself.
261. Mr Hofgren's argument that others could have been expected to correct any "misleading" impression of the scope of his involvement, if it had been fairly created, has some superficial force at first blush, but it is actually an argument about evidence. It is effectively a submission that the SDM's finding that Mr Hofgren misled the Commission is against the weight of the evidence. In my judgment, as an appellate tribunal, I cannot say that that finding is against the weight of the evidence, rather than simply being the SDM's legitimate evaluation of the weight of competing strands of evidence. This does not mean, of course, that the Commission can simply pronounce itself "misled" because it has not appreciated the importance or effect of information which has been reasonably conveyed to it, but simply that I do not consider that this particular matter justifies any such analysis.
262. In short, therefore, I prefer Advocate Hill's submissions and I accept that a finding of conduct by Mr Hofgren which was at least "improper" was not unjustified.
263. Ground 2 (g) therefore fails.

Ground 2 (h) Misleading other directors

264. In Para. 34 of the Decision the SDM upholds a charge of relatively narrow compass. This is that Mr Hofgren misled his fellow directors at a GFG Board Meeting on 4th June 2019, by confirming to them that a Mr Dan Healy (who was to be paid an introducer's fee as part of the Vordere/Dolphin transactions) was

"not employed or connected to Dolphin or GFGL in any way".

265. She then cites further factual matters as evidence of such connections, from which she concludes that “*it would appear that Mr Hofgren misled his fellow directors*”. (This oblique phrase obviously means “*I find that...*”).
266. Misleading one’s fellow directors would self-evidently be culpable in some degree, although the seriousness would be heavily dependent on the particular facts and circumstances. The significance of the point in this case would seem, from the general context of the discussions at the Board Meeting when this statement was made, to be that it would have deflected or prevented the Board from properly knowing or assessing whether Mr Healy had a conflict of interest, and gauging any impact of this.
267. The SDM also notes that Mr Healy became a director of Vordere in April 2020, although any supposed relevance of that to this particular criticism is not vouchsafed. Mr Hofgren points out that in any event this is after his involvement with GFG had ceased.
268. The original ground of appeal here was that “*the conclusion*” (sc. that Mr Hofgren misled his fellow directors) was based on factual errors. It was said that Mr Healy had only historical connections with Dolphin and GFG Ltd, and not current ones, and so Mr Hofgren’s statement was actually accurate. Neither the supposed relevance of Mr Healy’s subsequently becoming a director of Vordere, nor the relevance of any “connections” of Mr Healy with Dolphin or GFG to the Vordere Transaction which was under discussion, was explained.
269. By amendment a further ground of appeal was added, namely that insofar as Para. 34 contains an implicit suggestion of a lack of probity this would be unreasonable and/or an error of law because Para. 34 contains no proper finding as to Mr Hofgren’s state of mind or knowledge.
270. As to the original ground of appeal, Advocate Adkins submits that the complaint of being misleading is unfair because, at the relevant time Mr Hofgren genuinely understood that Mr Healy only had historic links, from before 2018, with Dolphin, and no longer worked for or had any connection with Dolphin at the time of the Board Meeting. His statement in respect of Dolphin was therefore correct. In relation to GFG, he submits that the only documents relied on are emails and discussions about a contract involving GFG (in which Mr Healy is named) taking place between Mr Hofgren, Mr Roger (as another director) and Mrs Clark (a member of the Administrator’s personnel), which date from a year earlier (May 2018). They were therefore historic. Moreover both Mr Roger and Mrs Clark were present at the June 2019 Board Meeting and did not correct Mr Hofgren’s statement, showing that they understood any concern to be only about current connections, and that therefore Mr Hofgren’s statement was not misleading. He dismisses historic emails as being irrelevant.
271. Advocate Hill submits, first, that the above does not deal with all the other evidence referred to and relied upon by the SDM, (she notes a Collas Crill letter of 31 October 2019 regarding Dolphin, and an undefined period when Mr Hofgren was director of a company owned by Mr Healy), and that in any event, the evidence which Mr Hofgren accepts, albeit dismissing it as historic, shows that the emphatic statement that Mr Healy was not connected to Dolphin or GFG “*in any way*” was not “*full and accurate*” as the SDM found.

Discussion/Conclusion

272. The SDM’s specific findings in this paragraph are (i) that Mr Hofgren’s actual recorded statement was “*not... a full and accurate statement*” and (ii) after citing her further materials, that “*it would therefore appear that Mr Hofgren misled his fellow directors*”.

Thus, it is the further materials which she relies on as belying the fullness and accuracy of Mr Hofgren's quoted statement.

273. Mr Hofgren's objection that this is unreasonable lies squarely in his proposition that all such "connections" were historic, (seemingly, to the extent of at least a year) and insofar as there were any residual traces of this (such as email addresses or contact list entries) they did not evidence current connections. He relies totally, therefore, on the proposition that there were no current connections and that the SDM could not, therefore, have reasonably found any as a fact.
274. I have not examined in detail all the other matters which the SDM relies on as supporting her finding that Mr Hofgren's actual statement was "*not full and accurate*". Advocate Hill's point that Advocate Adkins' submissions made on behalf of Mr Hofgren do not deal with all such materials, such that they may well disclose "connections" fairly viewed as current, may therefore have potential force, but it is not necessary for me to decide that. This is because, even assuming in Mr Hofgren's favour that all the materials referred to did only evidence historic connections of any active effect, the SDM's finding was not logically erroneous. Her first conclusion was that Mr Hofgren's recorded statement of "no" such employment or connection was not "*full and accurate*" (emphasis added). As she then referred to matters including ones which she could see were to some extent historic, she was plainly holding that the statement was not "full" because it did not disclose the historic connections which Mr Hofgren obviously, - and admittedly - knew about.
275. I am satisfied that such a finding was open to the SDM as a finding of fact. The statement attributed to Mr Hofgren is very emphatic. Even assuming it was reasonably intended and understood to relate to the present, anyone making such a statement in a focused context and knowing the facts which Mr Hofgren accepts he knew, would naturally, in my view, immediately qualify any such emphatic statement by saying "*He used to*", and probably giving some general details, even if he then further emphasised the present position (assuming he thought this to be correct) by saying "*but he no longer has.*" I think elaborating the situation in this way would be the only natural response to a focused question. The SDM's finding is, therefore, a perfectly possible one as a finding of fact.
276. However, I do have misgivings about the great significance and portentousness with which this particular statement seems to have been endowed by the SDM (no doubt in endorsement of an interpretation urged on her by the ED), because it was not made in answer to any such focused question, and has been taken entirely out of context.
277. Because of the surrounding factual intricacies of this particular point, I felt obliged to go back to the particular Board Meeting minutes in order to locate the statement itself, and the question to which it was a response. This is only paraphrased in the SDM's Decision, but as she was plainly invoking it, it is quite legitimate to look at it. The statement appears on page 5 of the seven page closely typed minutes of GFG's Board Meeting of 4th June 2019 at Para. 3.30, and comes after a long discussion of the merits, intricacies and implications of the Vordere/Dolphin Transaction which Mr Hofgren was presenting to the Board (I am aware that that is itself subject of criticism: see Ground 2 (c) above, but that is irrelevant to this particular point) and it is one of the very last points raised. The minute reads.

"3.30. DMG noted that as part of the Transaction VOR [ie Vordere] had agreed to pay a standard introducer/brokers fee to a Mr Dan Healy and asked NH to confirm his relationship with VOR. NH explained that Mr Healy had been involved since the start. NH confirmed that Mr Healy was not employed or connected to Dolphin or GFGL in any way and that it has been agreed he will receive this fee in VOR shares and that this

was fully disclosed in the prospectus as there is a requirement for VOR to disclose all material contracts and whom they were paying fees to for their services in brokering the transaction”

278. It is quite apparent from the above that the focus of the enquiry and confirmation was as regards Mr Healy’s connections with Vordere. Mr Hofgren’s comments about Mr Healy’s connections with Dolphin or with GFG is recorded as a collateral remark, rather than a solemn answer to a direct question from his fellow directors, (although that does not, necessarily, mean that there was not one at the time; this is only a minute.) Applied to a voluntarily supplied comment the proposition that general accuracy only, (rather than precisely detailed accuracy), is reasonable would seem to have some force – unless, of course, one were to conjecture that the voluntarily supplied remark was part of a deliberate plan to create an impression (but the possibility for such speculation just goes to show the difficulty and undesirability of reviewing a remark in isolation). It would also not appear that Mr Healy’s involvement in the matter was something of any central importance to the Board’s proper consideration of whether the proposed Vordere Transaction was in the interests of the body of its own investors.
279. However, returning to my function in this case, I am only able to review the SDM’s conclusions for fault; I am not aware of, and nor can I investigate, any other factors relating to the reasonableness of the SDM’s interpretation of Mr Hofgren’s statement, if it is a reasonably possible interpretation on the apparently available evidence. When examined individually by her, it was found to be intrinsically misleading for not being complete. Whilst this may appear to be imposing a rather high standard of meticulous accuracy for the situation, I cannot say that the SDM’s reasoning, albeit extracted on a laboriously painful analysis of her Decision, discloses any error of either fact or logic so as to vitiate her actual conclusion. That conclusion is expressly, but only, that Mr Hofgren misled his fellow directors in the statement which he actually made.
280. As a ground of appeal, therefore, that part of Ground 2 (h) must fail. The SDM’s finding was a possible one and discloses no error of fact. However, its importance to the matter plainly lies not so much in the merits of the finding itself, but in the weight which the SDM may have placed upon it in coming to her ultimate decision as to appropriate sanctions. This brings me to the further ground of appeal which was inserted by amendment.
281. That ground is an objection that it would be an error of law to consider Para. 34 to contain an implicit finding of want of probity, because such a finding was not made and it cannot be made in the absence of a finding of Mr Hofgren’s state of knowledge sufficient to support it - and there is none.
282. As to the finding itself, I have emphasised that, in its own terms, it is only a finding that Mr Hofgren misled his fellow directors in point of fact. The seriousness of any such finding is a different matter and dependent on both content and context. Clearly, knowingly misleading one’s fellow directors, certainly on important and serious issues, would be very serious, and would no doubt cast doubt upon the subject’s fitness to be directing a regulated finance business, ie it would denote a want of probity. But the range of possibilities which is consistent with a simple finding that Mr Hofgren “misled” his fellow directors in point of fact, is wide. They range from deliberate intention, through recklessness, casualness of attitude, or carelessness in narrow point of fact, to even innocent inadvertence, and all these require an identification of some mental element or attitude. The actual seriousness of any such misleadingness would also depend on the importance of the subject of the particular statement. All these factors would affect any appropriate finding regarding the appropriate judgment of a particular, identified misstatement of fact having been made.

283. Reading the SDM's paragraph, I do think it is fair to say that it gives the impression that in using the word "misled" she was thinking in terms of knowing misleadingness. The criticism seems to have that flavour, and she apparently regarded it as sufficiently important to devote a whole paragraph to it. However, she does not actually say so. Moreover, the fact that any such finding would give rise to a very obvious finding of want of probity, but that the SDM does not actually make one, might credibly suggest that she was not intending to do so by implication. I therefore cannot say that a purported finding of want of probity, or of intentional misleadingness is so necessarily implicit in what the SDM has actually written, that it renders either of these a finding which can be said to be "contained in" her Decision.
284. Unless and until her reasons might be elaborated to disclose any material and intended, but unfortunately unexpressed, additional aspects, I hold that her findings can, and must, be taken to be only what they clearly are, and this is merely a finding of simple misstatement.
285. This ground of appeal is therefore, in point of fact, appealing against a finding which has not been made, whether or not it could have been in the circumstances. I therefore cannot see that I can make any decision directly in relation to it. I remind myself that this is an appeal, not against individual findings by the SDM, but against her decision to impose the sanctions which she saw fit to impose. My powers are only to set aside or confirm any such decision. I do not have power, for example, to make a declaration as to the validity (or otherwise) of any particular finding, even if I could identify that it had been made.
286. It follows that any effect of what is the substance of this latter ground of appeal can only be taken into account at a later stage, namely if it appeared that the gravamen of this particular finding had influenced the ultimate decision on sanctions in a way which was incompatible with the only actual finding which I find was made. Any such assessment can only be made at a final stage of considering this appeal. It is therefore not appropriate to speculate on this or, indeed, what the appropriate course of action would be if that situation were to arise, until it is apparent that it does.
287. Ground 2 (h) therefore fails according to its own terms, but with the qualification that this point may give rise to further consideration later.

Ground 2 (i) Misleading answers in interview with the Commission

288. I have already commented on the importance which the Commission sets by observance of the principle that Licensees and individuals must be open and co-operative in their dealings with the Commission.
289. In Para. 35 of the Decision the SDM upholds a complaint that Mr Hofgren misled the Commission in interview, by creating the impression that he had gained little reward from his role at GFG Limited, when he had in fact received some £1.9Mn (gross) between 2014 and 2019 by way of 50% of GFG's net profits paid over to Rivage. She examines some facts, compares those with Mr Hofgren's statements in interview and makes an express finding that
- "Mr Hofgren created a misleading impression as to the extent to which he personally benefitted from GFG limited. This reflects poorly on his probity."*
290. She rejects a submission that, as the payments made to Rivage were clearly stated in GFG's accounts, and Mr Hofgren's ownership of that company was clearly acknowledged in GFG's conflicts register, he had no motive to misstate the position and there was no actual danger that the Commission would be misled. However, she does so by rejecting the

hypothesis that where further investigation would reveal a statement to be inaccurate “*this precludes a conclusion that a misstatement was made to the Commission*”.

291. On Mr Hofgren’s behalf it is objected that the SDM’s finding of want of probity (which endorses a submission to that effect by the Commission in the Final Enforcement Report at §349) inevitably finds implicitly that any such misleadingness was intentional. It is submitted that this is unfair and contrary to any reasonable reading of the transcript of his interview, and in particular reading, in context, his comments which are relied on as the disreputably misleading ones.

292. It is common ground that Mr Hofgren’s statements in interview were

“*GFG didn’t have any money to pay me, for years, many years*” and

“*as far as I recall I have never taken any directors’ fees or employment or anything from any structure*”.

293. Advocate Adkins submits that this must fairly be read in the light of the following facts.

- Mr Hofgren subsequently accepted, in written responses, that the first statement was an error and that the timescale before he received any money out of GFG after its incorporation, was in fact about 10 months;
- Mr Hofgren’s replies were prompted by a question as to “*what caused you to waive your director’s fees?*” (emphasis added). His response was, and can be seen to have been therefore focused on, actual director’s fees, not overall financial benefit; this is shown by his statement shortly after that he considered he should be “*incentivised*” by profits rather than by fees, showing that he was not meaning that he took nothing, but that he took benefit in a different way from director’s fees.
- His statement that he had not taken “*employment*” must similarly be viewed in that context (formal, direct payments), and the fact that he readily accepted and even volunteered, later in interview, that his remuneration taken through Rivage was “*effectively and in some round about way an employment contract*”, making the distinction that it enabled him to deduct expenses.
- He was completely open about the Rivage arrangement, agreeing with the Commission’s own suggestion that “*it was almost like a substitute director’s fee then*”.
- The amounts paid over to Rivage were stated for all to see in GFG’s accounts, (as were contractual payments made to Westly House International Limited, which was owned by a discretionary trust settled by Mr Hofgren) and all conflicts of interest disclosed from Mr Hofgren’s involvement with Rivage and with Westly were properly recorded in GFG’s conflicts register. Thus, not only was Mr Hofgren not concealing any such payments, but any attempt to “mislead” the Commission into thinking they had not existed would have been absurd.
- Mr Hofgren was actually totally “up front” in interview about revealing and discussing his financial benefits and arrangements, which is quite inconsistent with any intention to mislead or conceal, implicit in the SDM’s findings.

294. Advocate Adkins submits that the SDM’s decision just does not take account of any of the above factors, which show that there is no justification for making any finding of want of probity against Mr Hofgren – even in the vaguely expressed form of “*reflects poorly on*”

his probity". He also submits that this is another example of the Commission seeking to place the worst possible interpretation on events so as to cast Mr Hofgren in the worst possible light.

295. Advocate Hill defends this finding on two slightly different grounds. The first is simply the general one that Para. 35 contains a digest of the evidence, and thus the significant facts which the SDM can be taken to have found, and which she relies on to support her conclusion that Mr Hofgren's statements to the Commission "lacked probity". This factual foundation, as expressed, is perfectly adequate to justify her conclusion of misleadingness, and therefore satisfactory to support that finding. Any challenge is simply an illegitimate challenge to the SDM's evaluation of evidence rather than any erroneous finding of fact, and that is really an end to the matter.
296. He submits that the overstatement of the time when GFG "*did not have any money to pay me*" is so starkly overstated and without any good and innocent reason for this, that the only reasonable inference is that Mr Hofgren was actually lying.
297. He disputes the assertion that Mr Hofgren would have been answering the questions about director's fees at his interview in the belief that the Commission already knew about the Rivage arrangements, because, he submits, Rivage had not yet been mentioned, and only arose subsequently when Mr Hofgren referred to "*a Jersey operating company which I use*", and even then, he did not disclose the amounts he had received. It is therefore denied that he was "open", with the Commission, and submitted that he only gave information in response to questioning.
298. Advocate Hill's second line of argument is to invoke the formidable warning given to interviewees such as Mr Hofgren, under s 38 (2) (c) of the POI Law, to the effect that if they give false or misleading information to the Commission that will be a criminal offence. This is mentioned by the SDM in Para. 35.
299. He submits that, therefore, any answers given or impression created upon the Commission, must be viewed against the background that the interviewee had been warned of the huge gravity of the situation, and that false or misleading answers must not be given on pain of exposure to criminal penalty. This would require curtailing any natural personal tendency to be careless or extravagantly inaccurate of expression, such that that could not be read, benevolently, into the interpretation of any answers.
300. Indeed, it seemed to me that Advocate Hill went so far, in oral argument, as to say that any failure to curtail such tendencies, or not to be scrupulous as to the perfect accuracy of answers, would be itself a matter of want of probity, for revealing an unacceptable disregard for the obligations of s 38, (of which the interviewee would know, through having had his attention firmly drawn thereto) and of the duty to be honest and open with the Commission.

Discussion and conclusion

301. I start, of course, with the Decision itself. In essence, its finding is first, that Mr Hofgren's statements quoted did create a misleading impression, described as that he had "*gained little reward*" from GFG and, after citing the warning given at interview about misleading statements, she follows this by a list of the various ways in which that general picture was not accurate, mentioning the statement that "*as far as I know I've never taken any director's fees or employment or anything from any structure*" and contrasting this with the payment of 50% of GFG's net income to Rivage. The contrast is stark, and her implicit finding is that the creation of such a false impression was intentional. Her conclusion is that that conduct (ie the making of such misleading statements, not the taking of the

remuneration) was lacking in probity, for misleading the Commission. (Since the Commission was not misled, this finding is better seen as attempting to mislead the Commission, although I accept that this would be just as bad.)

302. I note that the SDM makes no finding that Mr Hofgren was deliberately lying in his statement that GFG had had no money to pay him for “*many years*” and as this was subsequently corrected, she would appear to be making her general finding of the creation of a misleading impression without going that far.
303. There are two questions here, the first is whether the statements can be fairly seen as creating the misleading impression. The second is whether this was intentional. For the avoidance of doubt, I do not accept Advocate Hill’s submission, if it was his intended submission, that the effect of the warning given under s 38(2)(c) of the POI Law could be to make the unintentional creation of a misleading impression at an interview a want of probity, simply because of the intrinsic misleadingness. In my judgment there would have to be something more.
304. I have stated the first question in the form above because, in my judgment, this must be an objective test, ie how would the statements reasonably be interpreted? This is always, I accept, in context, and including the context of the warning under s 38(2) (c) of the EP Law. But the mere fact that the Commission claims it was, or could have been, misled is not, in my judgment, sufficient on its own; it must be seen to have been objectively reasonable.
305. This highlights a point about how fair it is for the Commission to see itself as having been given a misleading impression in answers which are conditioned by its own questions. The Commission’s interviewers are no doubt well prepared and zealously alert to encountering attempts to mislead, or at least to portray conduct in a more innocent light than it deserves. However, this does not mean that any assertion of theirs that a supposedly misleading impression was created, still less deliberately created, must be assented to without examination. The impression may have been conveyed by innocent mistake. The Commission may even have been unreasonable as to what impression should fairly be gleaned. (The argument, although not the outcome, under Ground 2(g) above illustrates this). Answers cannot be fairly taken out of context when assessing their meaning, even if it becomes necessary to detach them from all their context for the purpose of writing a report.
306. Thus, if the Commission’s interviewer asks a question about director’s fees specifically, when he is really interested in total financial benefit, it seems to me that he can hardly claim to be misled if he gets an answer which deals with director’s fees specifically. At the very least, if he considers that an answer which deals with this might not convey the full picture, it must be up to him to redirect his question, rather than unfairly expecting the interviewee to supply information as to all other interests which the interviewer may also have. This is not justified by a simple obligation to be “honest and open”. An interviewee is necessarily responsive to the situation at interview. The duty of an interviewee, complying with the MCL, cannot go so far as to protect the Commission from drawing unwarranted inferences.
307. Against this background, I do find that Advocate Adkins’ points as to the unsatisfactoriness of any such finding by the SDM have some *prima facie* force.
308. The SDM’s stated reasons for finding such misleading impression to have been created refer only to points of evidence adverse to Mr Hofgren - namely, the fact of his substantial remuneration indirectly through Rivage and its not being instantly referred to in the context of the statements he gave and which she quotes. She does not appear to have considered

Mr Hofgren's principal defence, namely that the actual answers which he gave were reasonable because the question to him was specifically about directors' fees and also a comparison with Mr Cheek's position, and his answers were therefore directed at director's formal emoluments (fees and, by his own volunteered extension even, employment contracts). The question was not as to Mr Hofgren's overall receipt of financial rewards through GFG.

309. She refers to his receipt of 50% of GFG's net fees via Rivage in terms (*In fact, ...*) which suggest that this was only discovered despite what Mr Hofgren had said. However, Mr Hofgren did refer to this arrangement in interview, disclosing the general principle of the arrangements, even if not the actual amount.
310. Advocate Hill suggested in argument that "*you don't forget an amount as large as £1.9Mn*", but I do not think that that is fair, or would be sufficient to found a criticism that a misleading impression of "*little reward*" (the SDM's word) had been created by not instantly going on to mention such overall receipts.
311. The SDM's treatment of Mr Hofgren's answer to the accusation of want of probity (ie deliberate intention to mislead) is also unsatisfactory. His point was that finding any such intention would be contrary to common sense when the moneys he received through Rivage, and his interests in that company, were plainly and openly recorded and indeed alluded to by himself when asked. She treats it, though, as if it had only been raised to refute the charge of misleadingness, rather than its having relevance to the second question, ie the finding of deliberateness. She rightly states that this point "*would not preclude a conclusion that a misstatement had been made to the Commission*". This is so self-evident as to be trite. She does not, though, deal with the argument that it might preclude the conclusion that such a misstatement was deliberate, or at least cast severe doubt on this.
312. I noted above at ([297]) Advocate Hill's submission that Mr Hofgren's answers could not have been given on the assumption that the Commission knew about Rivage, because reference to Rivage only came out later. However, the quotations from the interview transcript referred to by Advocate Adkins as surrounding the criticised passages, do show the Commission's interviewer referring to Rivage as a company which Mr Hofgren had mentioned "*yesterday*" as being beneficially owned by him.
313. In the end, therefore, I have considerable misgivings as to whether the SDM actually can have taken Mr Hofgren's points fairly into account, in reaching this conclusion, rather than simply endorsing hostile views expressed by the Enforcement Division. I consequently have considerable misgivings as to whether this particular finding of want of probity is justified. I have considerable misgivings as to whether the charge of giving a misleading impression of "*little reward*" at his interview with the Commission is fairly made out, but even more, as to whether it could fairly be found that Mr Hofgren was (or "must have been") aware that his actual answers, of which this complaint is made, would be taken in a misleading sense, and still less whether there could properly be made, the implicit finding that his conduct in giving these answers was deliberate, or culpably "sharp", as would be necessary to support a finding of want of probity.
314. I conclude, therefore, that whether my above review of what I perceive to be shortcomings in the SDM's findings on this score comes under the rubric of lack of necessary clarity, or under the more blanket heading of error of fact, or even apparent error of law, this particular finding of want of probity cannot stand. It is, however only one finding in the context of the whole Decision and the particular decisions appealed against. What the consequence of this should be, must therefore be left until later, when the whole picture is considered.

315. Ground 2 (i) therefore succeeds to this extent.

Ground 2 (j) The involvement of Ali Ahmad

316. In Para. 38 of the Decision, the SDM contrasts Mr Hofgren's relationship with Mr Ali Ahmad and the extent of his involving Mr Ali Ahmad in GFG's/the Scheme's business, with his attitude to involving his formally appointed fellow directors, already discussed above. Whilst acknowledging the existence of the investment advisory agreements between Capitali and GFG (with a parallel in those with Rivage, Mr Hofgren's own service company) she observes that the fees paid to Capitali – effectively Mr Ali Ahmad – appear to have been geared solely to 50% of GFG's net profits and did not relate to any advice tendered, insofar as any such "advice" could even be identified.

317. She observed, and gave seven examples of, Mr Hofgren sharing information and discussing matters and proposals in depth with Mr Ali Ahmad before, and even to the exclusion of, consultation with his fellow directors, of Mr Hofgren's bringing in Mr Ali Ahmad to pre-approve documentation and other important matters of business conduct, as well as even minor matters such as the design of business cards. She finds that Mr Hofgren appeared to others to show him a remarkable degree of deference, even to the extent of giving the impression of taking instructions from him. She recorded the in-depth involvement of Mr Ali Ahmad in the operation of the DXD diamond-backed loan transaction, and Mr Hofgren's interplay with him in that, and instances of Mr Hofgren copying and blind copying Mr Ali Ahmad on very many aspects of business transactions. Ultimately, she concludes that

"The degree of control and involvement apparently exercised by Mr Ali Ahmad in respect of GFG Limited and the Scheme is not redolent with him simply being an advisor. An objective observer could have concluded that Mr Ali Ahmad had a significant role (albeit concealed) at GFG Limited. I consider that the way in which Mr Hofgren worked with Mr Ali Ahmad and afforded him greater input than Mr Hofgren's fellow Directors, was inappropriate and also reflects poorly on Mr Hofgren's probity and soundness of judgment."

318. For Mr Hofgren, Advocate Adkins objects that this holding is unreasonable. He submits that there is no evidence cited for the initial finding that Mr Hofgren appeared to seek Mr Ali Ahmad's instructions on matters.

319. He submits that the examples given of Mr Ali Ahmad's involvement are simply examples of Mr Hofgren seeking and receiving advice from Mr Ali Ahmad perfectly naturally and legitimately under the acknowledged set of advisory agreements noted in [16] above. He submits that the other directors of GFG were perfectly aware of these, as well as of the fee arrangements under them - in particular when the contracts were novated from GFG to GFG Group Limited - and of such fees being paid. He submits that there is no justification for the finding that the role of Mr Ali Ahmad was concealed. Mr Hofgren (reasonably) saw no need to pass all his communications with Mr Ali Ahmad on to other Board Members.

320. He submits that several of the things of which the SDM apparently makes much are simply over-egged as to their supposed significance, and extract supposed significance where none reasonably existed. Mr Hofgren's communicating with Mr Ali Ahmad through a company known as VSAM Consulting, which had nothing to do with either GFG or Capitali, was simply a matter of Mr Ali Ahmad using a different email address for convenience, in the course of giving his investment advice as mentioned. No adverse or questionable consequences are even suggested. He submits that Mr Ali Ahmad's involvement in the removal of the two diamonds from storage with Mr Hofgren's authority

was abundantly reasonable, as Mr Ali Ahmad was a potential purchaser of them (although this does rather gloss over the fact that these two stones were subsequently identified as simulants). He dismisses the minor matter of business cards as having no possible impact on Mr Hofgren's probity, or soundness of judgment.

321. Advocate Hill submits that the SDM's essential finding lies in the entire conclusion quoted above at [317], that there is ample evidence for this and that it fully justifies her finding of want of probity (which is the practical effect of the phrase "*reflects poorly on Mr Hofgren's probity*").
322. Whilst Mr Hofgren may refute, or play down individual pieces of the evidence cited in this context, it is the broad underlying scope of the SDM's findings which are the key matter. They support and justify the conclusion that Mr Ali Ahmad was more than a mere advisor, but was effectively allowed to become involved in GFG's business to the extent of exerting practical control over it, or much of it, but, crucially, without the directors (other than Mr Hofgren) becoming aware of this extended involvement. He submits that such a finding is ample justification for a finding against Mr Hofgren of want of probity and a want of soundness of judgement, in respect of the proper way to conduct a regulated finance business in Guernsey.

Discussion and conclusion

323. The first question is whether there was evidence to justify the findings of fact made by the SDM. In my judgment, there was such evidence, and Advocate Adkins' submissions amount only to a dispute as to the evaluation and balancing of evidence. That is a matter for the SDM, so long as her conclusions, in the light of all such evidence are ones at which she could reasonably arrive.
324. There was perfectly adequate evidence before her, entitling her to reach the conclusion which she did as to the nature and extent of Mr Ali Ahmad's involvement in the business of GFG, facilitated by Mr Hofgren. She did not ignore the Capitali Advisory Agreements, but considered, on the evidence, that Mr Ali Ahmad's involvement went, unnaturally, beyond what they would entail, in actual practice. There was also sufficient evidence before her as to the extent to which this was not fully disclosed to the Board, in the manner in which she found. Moreover, such evidence appears quite sufficiently, in my judgment, in the Decision itself; it is not even necessary to refer, to any real extent, to evidence elsewhere in order to support it. Advocate Adkins' submissions are really just that - submissions. They are matters of argument as to the interpretation and evaluation of evidence, and they do not actually invoke any other evidence which might undermine the essential findings of the SDM.
325. Mr Hofgren disputes that what he did was ever more than seeking advice from Mr Ali Ahmad, in accordance with perfectly legitimate business arrangements. In my judgment, the SDM's conclusion that the situation went beyond any such arm's length advisory relationship was one which she was perfectly entitled to draw, on the overall basis of the evidence before her. She was well able to conclude that Mr Hofgren's description of the situation was not, objectively, accurate.
326. As to the question of want of probity, her finding was, in effect, that Mr Hofgren had gone further than simply implementing an advisory relationship with Mr Ali Ahmad, but had actually enabled him, in practical terms, to become a shadow director of GFG. She also found (as again I consider she was quite entitled to do) that this role had not been made clear to the other directors. She held that this showed a want of probity.

327. In the context of Guernsey financial services businesses, which are required to be run consistently with the high standards expected by the Commission as regulator, and which require that those actually involved in directing such businesses should be scrutinized for their compliance with the MCL, I have no difficulty in concluding that it is justifiable to classify such conduct by Mr Hofgren as exhibiting a want of probity. He must be taken to be aware of the rules and regulations surrounding the direction of a financial services enterprise in Guernsey. The basic relationship with Mr Ali Ahmad, as found above, would in itself suffice, in my judgment, to found a breach of such requirements, but that breach is compounded by the fact that the depth of Mr Ali Ahmad's involvement was not openly revealed to the other directors. In fact, I would regard the description of it as being "concealed" to be justified, on the findings made.
328. As regards any necessary finding of knowledge of relevant facts by Mr Hofgren, required in order to justify a finding of want of probity, I am quite satisfied that this is made out for the reasons I gave in [96] above. The very acts carried out by Mr Hofgren – actively involving Mr Ali Ahmad in the way in which he did, but not making the extent of this fully clear to his fellow directors – in themselves show knowledge of the material facts which would render such conduct improper in the context of a regulated financial services business.
329. In conclusion, therefore, the SDM's finding on this matter is not to be faulted and thus Ground (2) (j) fails.

General point - Jeopardy to the reputation of the Bailiwick.

330. Whilst the above has dealt with the findings made as to Mr Hofgren's conduct, in relation to the business of GFG/the Scheme itself, a further basis on which there can be a failure to satisfy the Commission that a person is a "fit and proper" person to be permitted to engage, in a high level role (a "supervised role" under s 39 (1) of the POI Law) in the conduct of finance business in Guernsey is whether the Commission forms the view that the

"interests of the public or the reputation of the Bailiwick as a finance centre are, or are likely to be in any way jeopardised by"

the individual's holdings such position: see Schedule 4 Para. 1 (1(c) of the POI Law.

331. This more or less mirrors the provision in Schedule 1 (1) (c) of the Regulation of Fiduciaries Law requiring, as one of the MCL, that a licensed finance business should be carried on

"in a manner which will not tend to bring the Bailiwick into disrepute as an international finance centre".

332. The word "risk" does not seem actually to appear in the relevant laws, although it is an obvious paraphrase for being "likely to" or "tend[ing] to" which do. Whilst the phrase "likely to" in the POI Law might appear to suggest a more serious level of risk than a mere conceivable possibility, the following phrase "in any way" appears to widen the concept up again. "[N]ot tend to" in the Regulation of Fiduciaries Law is, again, potentially very wide.
333. In the context of a decision to impose sanctions, then, a finding that a person's past conduct has put the reputation of the Bailiwick as a finance centre at risk serves two functions. It can be either or both of conduct which may have an effect on the level of a sanction to be imposed, or evidence from which the Commission reasonably infers that allowing the

person in question to conduct finance business in Guernsey carries a risk of reputational damage to Guernsey in the future.

334. In relation to the DXD loan transaction, in Para.36 of the Decision, the SDM cited the “inherent” risk of money laundering and terrorist financing in relation to transactions associated with diamonds, and the fact that Mr Hofgren instigated the Scheme’s involvement in such a transaction despite GFG’s not having the necessary professional skill and expertise to handle this. After referring to aspects of the conduct of the transaction itself, she holds that getting so involved without the necessary skill and experience increased the risk of money laundering or terrorist financing, impliedly, therefore supporting her initial assertion that “*the reputation of the Bailiwick ...was [thereby] put at significant risk*”.
335. In relation to the Vordere Transaction, she relies solely on the fact that the collapse of Dolphin and its effect on investors had attracted media attention and that “*accordingly*” the impact of this on investors in Property Cell and Xenfin Cell put the reputation of the Bailiwick as an international finance centre at significant risk.
336. The Cause specifically contests this finding in relation to the Vordere Transaction under Ground 2 (c). I have not traced a specific contest in relation to DXD, but I think this finding was contested generally in argument, and I therefore deal with both aspects.
337. As to both aspects, the essence of Mr Hofgren’s argument was directed at the fact that it could not reasonably (Advocate Adkins submitted) be said that the matters cited had themselves caused, or even risked causing, any damage to the reputation of the Bailiwick.
338. In the DXD case, there was no media discussion of the circumstances at all. In the Vordere case, the only actual evidence adduced had been (i) a single English language article on the BBC discussing the collapse of the Dolphin Trust owing about £1.6 Bn, but which did not refer to Guernsey, to GFG, the Scheme, Mr Hofgren or Vordere, (ii) an obscure email noting a German language video (not in evidence) and a translation of a German article which again does not refer to any party associated with Guernsey, and a hearsay comment that Vordere was mentioned in a German TV programme with no negative references. It was objected, therefore, that the Commission had not explained how any of this could risk jeopardising, the reputation of the Bailiwick as a financial centre. Furthermore, any damage to anyone’s reputation was really attributable to the collapse of Dolphin, and Mr Hofgren was not responsible for that.

Discussion and conclusion

339. In my judgment, this point hardly admits of any argument, because the question whether any particular conduct put the reputation of the Bailiwick as a finance centre at risk, under either of the expressions used in the Laws, is laid down as a matter to be determined by the opinion of the Commission, and the Commission’s opinion is a matter of fact, albeit within the bounds of a reasonably objectively justified opinion at the extremities.
340. I do accept that the mere fact that an investment goes “bad” cannot reasonably be suggested *ipso facto* to run the risk of jeopardising the reputation of the Bailiwick. Finance businesses are still businesses. Risk is inherent in business (it is what brings reward) and if there is risk it is inevitable that sometimes that risk will mature. There must, therefore, be something more than just the fact that a risk of failure has matured. However, in any particular case serious enough to attract the attention of the Commission, it is obviously likely that some such additional matter of concern or criticism will be present, and whether this creates a reputational risk for Guernsey is then a matter for the Commission’s judgment.

341. To overturn any finding of the Commission's "opinion" will therefore require, in my judgment, that it be shown to be invalid in purely legal terms, ie error of law, on principles akin to those of judicial review (which I do not recite here).
342. I say this with some regret, because the consequent threshold is so high that it does not seem to admit of any practical objective check on the reasonableness of the Commission's professed opinion, which can then found such far-reaching consequences for individuals. In practice, therefore, the Commission is enabled to take as risk-averse a view of the reputation of the Bailiwick as it chooses, and with or without the benefit of hindsight. However, in my judgment, that is the clear effect of the Laws. How far any such opinion then justifies any sanctions actually imposed because of it, is, though, another matter, although it must be left to the establishment of one of the five grounds of appeal, on the facts of the particular case.
343. None of which is to say that I necessarily criticise the SDM's findings in this case. She cites Mr Hofgren's disregard for his lack of experience and of appropriate security measures in relation to the DXD transaction as showing a tendency towards conduct which would (or could) lead to an increased risk of money laundering or terrorist financing. I cannot say that that conclusion is a conclusion to which she could not reasonably come, although I do not see it as having much more than theoretical support.
344. I have more concerns over the citation of the Vordere Transaction. Her very brief logic is that since the position of investors after the collapse of Dolphin excited (some) media attention, "*accordingly*" the Bailiwick's reputation was put at risk by the impact of this collapse on the Scheme Cells. She does not explain her logic, and the bare proposition contained in her finding is very superficial. She appears to be finding that the mere fact that an investment in which Guernsey protected cell companies were invested collapsed would *ipso facto* put the reputation of Guernsey as a finance centre at risk. That surely cannot be right. This seems to be "risk" merely by association, or by the risk of unthinking or uninformed gossip, occasioned merely by the fact of Guernsey's name being mentioned (or even risking being mentioned) in the context of any financial accident or misadventure. Surely the reputation of the Bailiwick to which the legislation is adverting is the reputation of the Bailiwick for being the home of business properly conducted according to high and responsible standards, rather than through never being associated with any investment which might go wrong. She does not in any way link her finding of reputational risk to either Mr Hofgren or to his conduct, and nor does she explain why Guernsey's reputation should be damaged in any meaningful way. The assertion of risk therefore does seem to me very tenuous and I do question whether it has any real substance in practice.
345. However, I do not think that I can go so far as to say that the SDM's finding is illogical, irrational or perverse, even though I may think it insubstantial. This is because, as I have said, the actual validity of the finding in this regard rests on the opinion of the Commission, with which I can only interfere if satisfied that it is outside the bounds of reasonableness. I cannot go that far.
346. Realistically, though, it also appears to me that this actual finding plays very little part in the basis for the ultimate sanctions which the SDM imposed, and which sanctions are the actual subject of the appeal.

Overall conclusion on Grounds 2 and preliminary to Grounds 3

347. To sum up after my consideration of Grounds 2, I have concluded that the various challenges to the particular findings of the SDM all fail except in some very limited respects as indicated. However, as there has been a little success by the Appellant, the

question arises, as to what I should now do in the light of those findings, and, in particular, whether I can or should proceed to consider Grounds 3 at all.

348. Grounds 3, is summarised as “Lack of proportionality” and leads to the kernel of the appeal, being the challenge to the actual sanctions imposed by the SDM, and thus what the appeal is ultimately against. It will be recalled that the grounds for any such appeal are provided in s 106(3) of the EP Law. Lack of proportionality (s.106 (3)(d)) is really a sub-species of the more general ground of appeal of unreasonableness at s.106 (3)(b).
349. Plainly the SDM’s sanctions were imposed on the basis of her earlier expressed findings and conclusions which were challenged under Grounds 2. Therefore, I must first consider whether my findings in relation to Grounds 2 have disturbed the SDM’s findings so materially that her ultimate decisions as to sanctions clearly could not stand for being based on false foundations. In such case, following the *Domaille* decision in the Court of Appeal, the correct course could only be - if and so long as the Court considered it appropriate to do so (see s 106 (6) (a) of the EP Law) - to remit the matter to the Commission for the Decision to be re-taken in the appropriate respects.
350. I have concluded, however, that my findings against the Decision are so minor that they could only be regarded as *de minimis* in the context of the whole of the SDM’s findings contained in the Decision which do still stand.
351. I dismissed all the appeal points as to wrong or unreasonable findings of fact made under Ground 2, expect for holding
- (i) that endowing Mr Hofgren’s misstating the costs of transporting the DXD diamonds back to the UK with more significance than mere insignificant casualness was unwarranted (Ground 2 (b)) and
 - (ii) that finding that Mr Hofgren attempted to mislead the Commission in his answers at interview about the financial benefit he obtained from GFG (Ground 2 (i)) was unfair and unjustified and
 - (iii) that it would be wrong for the decision as to sanctions to have proceeded on the basis that Mr Hofgren culpably misled his fellow directors as to the lack of connection of Mr Healy with Dolphin or with GFG, (Ground 2 (h)) because that finding had not been made by the SDM.
352. However, I have upheld all the remaining findings of culpable conduct which were contested within Grounds 2. That leaves undisturbed the SDM’s general findings of, in particular, want of probity which were made in relation to these.
353. In addition (and a matter which the spotlight being on the matters above has tended to obscure), some very substantial findings are made against Mr Hofgren and are not appealed against. These relate to conduct which can broadly be classed as showing want of skill, care, diligence and sound judgement, and they leave *in situ* all such findings in relation to the DXD loan transaction, the Lombard 82 EMTNs Loans (as to which a finding of proceeding under a conflict of interest was also made and has not been appealed against), the Venetian Loans and the Vordere Transaction.
354. They also leave in place the SDM’s general adverse findings as to
- (i) Mr Hofgren’s approach to business in dealing with the Board of GFG (this is marginally touched by my finding in respect of Ground 2 (h), but is predicated on a more general appraisal of Mr Hofgren’s conduct in this regard) and

(ii) his unacceptable handling of the involvement of Mr Ali Ahmad, which I have positively upheld in my finding at Ground 2 (j).

355. In those circumstances, I do not consider that my actual findings above undermine the overall picture, or seriousness, of Mr Hofgren's conduct on which the SDM may have proceeded. I therefore judge that I can rightly proceed to consider Grounds 3 of Mr Hofgren's Appeal, on the basis that the sanctions imposed by the SDM would have been the same, even if she had made the two amendments to her findings which I have upheld under Grounds 2(a) and (i).
356. As to the position with regard to Ground 2 (h) (misleading fellow directors), I have not disturbed what I have held to be the actual finding made by the SDM, namely that there was a misleading statement made but that it was no more than that. The real question is therefore whether she proceeded on that basis, or whether she has in fact (but without expressing it) proceeded on the basis that the misleading statement was not just misleading but morally culpable. However, as the significance of this difference is, yet again, highly likely to be negligible against the overall background of the remaining established charges, I do not think it necessary, appropriate or proportionate, to remit the matter to the SDM to clarify her findings on this point. I consider it can be safely assumed that, even if she had made the more serious finding *sub silencio*, this made no actual difference to her eventual decision on appropriate sanctions in the overall general context.
357. Advocate Adkins accepted in argument that if there were a minor matter upon which he succeeded in relation to Grounds 2, I could potentially take the view that this did not affect proportionality in the whole scheme of things, submitting that the three big "planks" of his submissions on those grounds were the probity aspects of the DXD transaction, the Vordere Transaction and the general complaints of misleading the Commission and fellow directors. By inference, therefore, those were the ones which he regarded as potentially undermining the reasonableness of the overall sanctions. My findings under Grounds 2 have only touched on the last one, and then only in one particular respect.
358. I therefore proceed to consider Grounds 3 on its merits, although if it were to appear to me, in the context of doing so, that any of the above minor matters might have had a substantive effect on the SDM's decision, I will reconsider the position.
359. I do so, though, with the following observation. Underlying the whole of the SDM's findings is a clear general view that Mr Hofgren's attitude to dealing with other people's money (Scheme investors), and running a limited company engaged in investment management shows a lack of care and respect for the clients' interests and for the safeguarding effect of the collegiate running of such a business which is incompatible with the standards required of those engaged in finance business in Guernsey. Whether or not his actions would have been acceptable as a simple matter of company law - and plainly this is debatable, in particular, in relation to his handling of conflicts of interests - they are not acceptable in the context of the higher standards of proper, prudent and best practice required by the Commission of those working in such industry in Guernsey. The relevant shortcomings have been related to the MCL in Guernsey and to shortcomings in relation thereto, and they therefore properly attract sanctions. It is to the reasonableness of these that I now turn in considering Ground 3 of the Grounds of Appeal.

Ground 3 – Lack of proportionality

The sanction decision itself

360. In Para. 46 of the Decision, the SDM held that her findings justified the conclusion that Mr Hofgren failed to fulfil the MCL under the POI Law and was not a "fit and proper

person” in terms of the relevant Laws, including the POI Law. (As just mentioned, I am satisfied that these conclusions would be good, whatever the position on the three minor points I have discussed.) She then turned to consider the imposition of sanctions and whether, and if so what, sanctions that conclusion justified.

361. At Para. 48, she noted four factors as “aggravating” the position. She summarized these as being that Mr Hofgren had
- played a leading personally active role in GFG and the Scheme,
 - “brought about” conflicts of interest and not managed or mitigated them effectively,
 - accorded Mr Ali Ahmad, a non-director, greater input into GFG’s business than his fellow directors, and
 - created a significant risk of substantial loss to others.
362. The only mitigating factor she conceded was that he had submitted to interview by the Commission.
363. She found a consequent need to protect the public and decided that a Prohibition Order of 14 years’ duration (reduced from 15 years in her MTN) was proportionate. She rejected a mistakenly based argument that this was disproportionate for representing 75% of a 20 year maximum, because there was no such maximum. She does not explain her decision on the length of such Prohibition Order any more fully. It therefore does, simply, seem to have been a “tweak” of her previous position.
364. In Para. 51, she considered the imposition of a public statement and of a fine. She first held (and this approach was endorsed as correct by the Court of Appeal in the Domaille case) that she was able to and should impose a fine by reference to the increased level of such fines introduced by the *Financial Services Commission (Bailiwick of Guernsey) (Amendment) Law 2016* which increased the maximum fine on an individual from £200,000 to £400,000, and was brought into operation on 13 November 2017, whenever the relevant conduct had occurred (although in fact a good part of it had occurred in the following two years).
365. She then considered, in Para. 53 and subsequently, the various factors directed to be taken into account in deciding whether or not to issue a public statement, or impose a fine and the size of the latter, under ss 38 (2) and 39 (6)(a) – (g) of the EP Law. Her conclusions in relation to each such factor individually were that:
- (a) The matters of non-fulfilment had not been brought to the attention of the Commission (in particular, relying on her finding that at the 13 May 2019 Meeting Mr Hofgren had created a misleading impression on the Commission on any basis);
 - (b) Mr Hofgren’s non-fulfilment was “*very serious*”, summarising his overall conduct, and noting that this had been over a number of years, and there had been significant loss to scheme investors;
 - (c) Mr Hofgren’s conduct could not be said to have been inadvertent (rejecting a submission that Mr Hofgren’s own conduct must be classed as “inadvertent” if that of his fellow directors had been; she preferred the submissions of the ED that the evidence did not bear this comparison out, but in any event, she held that Mr Hofgren’s conduct towards his fellow directors could not be said to be “inadvertent”);

- (d) As regards efforts to rectify non-fulfilment and prevent recurrence, she commented only that Mr Hofgren remained an ultimate beneficial owner of GFG but otherwise no longer had any position thereat;
- (e) GFG apparently remained solvent, (although it is not clear whether this was before, or with provision made as to, any fine imposed upon it by the Commission) with no distributions having been made to its shareholders. After a lengthy review of evidence, and in particular Mr Hofgren's Statement of Means, she concluded it was inappropriate to impose any financial penalty on Mr Hofgren because he was apparently impecunious, with little possibility of paying his substantial debts, and imposing a penalty would be likely to dilute moneys available to his other creditors.
366. At Para. 66, she considered (f) the penalties imposed by the Commission in other cases, and she set out her conclusions in relation to these. As this is a specific ground of challenge to her decision, I consider these separately, below.
367. At Para. 69 she noted the aggregate moneys which Mr Hofgren had received from his various positions.
368. At Para. 70 she considered Mr Hofgren's arguments as to the relativity of the sanctions being imposed on him and those imposed on his fellow directors - in particular that these latter had been confined to mere private reprimands. As this is also a major and specific ground of challenge to the SDM's decision I consider it separately below.
369. At Para. 71, she referred to the schedule of bandings of penalties created by the Commission, concluding that several "Band 4" characteristics were present in Mr Hofgren's conduct. (Band 4 is the highest and most serious such Band, suggesting a penalty of up to £400,000 for individuals; Band 3 is up to £250,000.)
370. At Para. 72, she concluded that it was appropriate to issue a public statement relating to Mr Hofgren, and that it would have been appropriate to impose a fine of £290,000 on Mr Hofgren, but for his impecuniosity as mentioned above.

The Appeal Issues

371. This appeal challenges the proportionality of the sanctions imposed on three broad grounds. These are
- i. intrinsic disproportionality, (ie that the sanctions imposed are simply disproportionate to the seriousness, properly regarded, of the conduct being sanctioned);
 - ii. disproportionality having regard to sanctions imposed on other individuals in cases of similar misconduct;
 - iii. disproportionality having regard to the sanctions imposed on the other directors of GFG in respect of the same matter, ie the conduct of GFG's business.
372. The Cause first asserts (naturally) that in the light of the various factual errors and unreasonable conclusions challenged under Grounds 2, the basis for imposing any prohibition or disapplication order on Mr Hofgren, or for making any public statement regarding him falls away, in particular if the Royal Court concludes that he did not mislead the Commission (having regard to the seriousness of such misconduct). It can be seen that much of this ground of appeal has therefore been overtaken by my conclusions on Ground 2.

373. Second, it asserts that even if the SDM’s factual conclusions were correct, the sanctions imposed are disproportionate and unreasonable in the three respects noted above, citing the Commission’s Explanatory Note as grounds for the complaint of intrinsic disproportionality.
374. The Commission’s Response simply upholds the SDM’s decisions as being within the range of reasonable decisions available to the SDM on the evidence before her.
375. Ultimately, the question is whether the sanctions imposed were disproportionate for any or all of the reasons now advanced, but these have to be considered sequentially, and I find it convenient to consider them in the following order:
- (a) Disproportion to decisions made in other cases**
376. At Para. 66 of the Decision the SDM considered six past cases, (i) Hansard Limited, (ii) Criteria Wealth Management Limited, (iii) Alan Michael Chick (*see Chick v GFSC* [2020]GRC 035 and [2020] GCA077), (iv) Bordeaux Services (Guernsey) Limited (*see Bordeaux Services (Guernsey) Limited v GFSC* (Guernsey Royal Court Judgment 18/2016)), (v) Marlborough Trust Co Ltd, and (vi) Guernsey Insurance Brokers Ltd (*see Merrien v Chairman of GFSC* (Guernsey Royal Court Judgment 23/2016)).
377. She considered the facts of each case and gave her assessment of the summary of the conduct of the individuals there concerned, other material circumstances, and the sanctions imposed by the Commission, and compared these with the conduct of Mr Hofgren (and GFG, as she was also, of course, considering this at the time) and the sanctions proposed in respect of Mr Hofgren and GFG, also noting whether the financial penalties imposed had been imposed under the old or the new level of financial sanction.
378. She concluded that in each case except *Merrien* the seriousness of Mr Hofgren’s conduct had been greater than that of the individuals under comparison, upon whom various lesser fines had been imposed. In the *Merrien* case, she noted only that a “substantial” penalty had been imposed. (The report indicates that the SDM had imposed a fine of £200,000 on Mr Merrien for serious personal misconduct including dishonesty, that being the maximum at the time, but had done so under several errors of law - including taking note of international financial authorities’ opinions that the Commission’s fining powers were inadequate, and looking to levels of fines imposed in other jurisdictions as a supposedly direct comparison - such that the case had had to be remitted for reconsideration. The eventual fine is not disclosed.)
379. She rejected the argument that it was appropriate to ask if Mr Hofgren’s conduct was proportionately as “bad” as the conduct of the individuals under comparison on a mathematical basis (eg to illustrate: if Mr Chick had been fined £50,000, could it be said that Mr Hofgren’s conduct was nearly six times as bad so as to merit a fine of £290,000?). She rejected that kind of approach completely, on the basis that most of the comparator decisions were made under the old lower fining regime, so that no such numerical comparison could be made.
380. She judged, therefore, that the penalties to be imposed were fair, reasonable and proportionate when compared to those imposed by the Commission in other cases.

Submissions

381. Advocate Adkins objects that the comparison above was perfunctory, and amounted to nothing more than a recital of past decisions with the conclusion that Mr Hofgren’s conduct was worse than those previous cases (although actually this last criticism is not correct:

see above). He argues that the SDM therefore did not engage with the question how much more serious was Mr Hofgren's conduct than the comparator cases, and submitted that, whilst accepting that "micro-comparisons" of cases were not appropriate (see *Domaille* in the Court of Appeal at [178]), she had ignored this mathematical cross-check which was available to her, and which would have suggested that the sanctions, both financial and as to prohibition, should be greatly reduced.

382. In particular, as to the financial sanction, he submitted that it was cavalier for the Commission to submit that fines imposed under the previous sanction levels could simply be ignored. The increase in fining powers should not lead to the conclusion that fines simply doubled over night; it had simply increased the spectrum of fines available (though Advocate Adkins did not explain what significant difference this was suggested to have). A mathematical cross-check was in any event useful and salutary. Mr Chick's £50,000 fine was 25% of the then current maximum, whilst Mr Hofgren's was nearly 75% of the current maximum; could it really be said that his actions were three times as bad as Mr Chick's?
383. For the Commission, Advocate Hill argues that the SDM's reasoning was not perfunctory, but was clearly considered, and she had stated enough to show that she had actually taken this factor into consideration. He cited *Bordeaux* (above) (at its para [99]) where the then Deputy Bailiff pointed out that fixing a financial penalty was not an arithmetic exercise and that the considerations were more subtle than a direct comparison of individual differences, but were appropriately taken on a generalised basis of whether the particular cases and penalties fell within a consistent span for the "sort" of case in question. He submitted that the SDM's penalties were proportionate, having regard to the findings which she had made.

Discussion and conclusion

384. The point of requiring regard to be had to penalties imposed by the Commission in other cases is obviously that of promoting consistency in the application of the sanctions of fines (s.39 of the EP Law) and the issuance of public statements (s. 38 of the EP Law) - strangely, it is not mandated in relation to prohibition orders or disapplication orders (ss 32 and 33 of the EP Law).
385. However, I readily accept Advocate Hill's argument that this consideration is intended to be a matter of generality and is not to be taken to the level of micro-comparisons with other cases. It may set a "tone", but it cannot do more than that.
386. The problem is that any such too detailed comparison gets into unhelpful and laborious territory. No two cases are the same, and there are always points of conduct or of circumstance which can be argued to make the comparator case "worse" or "better" than the subject case, and any such comparison then also starts to involve evaluating the relative "worseness" of different kinds of regulatory misdemeanor at a detailed level, which can often not even be reliably ascertained without further investigation. Such an exercise is not only collateral, but disproportionate and too intricate, and it loses sight of the real point.
387. This problem is even illustrated by Advocate Adkins' attempt to draw comparisons of degree with the quantum of the fine in the *Chick* case. Reference to the report at [2020] GRC 035 at [52] shows that the £50,000 fine on Mr Chick, levied under the former levels of fining power, was also assessed according to his perceived ability to pay. It is therefore impossible to correlate this with the proposed theoretical fine of £290,000 on Mr Hofgren in any meaningful way.

388. Also, it must be fair to say that the Commission's enforcement system does not really assist in creating any objective set of reliable comparative data with regard to relative penalties, because it tends to "bake in" decisions, without contest, through the policy of "incentivising" early settlement by offering discounts on the financial penalty (and, somewhat strangely, also the length of Prohibition Orders) for early settlement without resistance. An individual may well choose to accept a sanction rather than resist it despite being highly aggrieved at it, because of personal circumstances (financial circumstances, age, resilience, etc) which have nothing much to do with any recognition or acceptance of the proportionality of any sanction in the particular case. This also suggests that too close a comparison with the detail of other cases would not be reliable.
389. The real point, in my judgment, is simply that penalties should bear some reasonable, broadly acceptable, relationship to the relevant other penalties.
390. In any event, consistency does not require uniformity, or even uniformity with adjustments. The only requirement in ss 38 (2) and 39 (6) of the EP Law, is that the decision-maker should "*take into consideration*" such previous cases as a "*factor*" in the decision. The section does not direct anything further; it does not direct what weight or influence this factor should have in any particular decision. Other legitimate factors, indeed "*any other matter that the Commission considers relevant*", will also carry weight. Thus, as I have remarked elsewhere (in *Domaille*), this would no doubt allow the Commission to increase the severity of sanctions relative to previous decisions if, for example, it perceived that a particular form of regulatory transgression were becoming undesirably prevalent and wished to reinforce discouragement of it.
391. The SDM rejected such comparisons, apparently because most of the matters referred to her were under the old fining regime. This did, indeed, complicate, if not prevent, direct numerical comparisons, but the limited extent to which arithmetic comparisons are appropriate arises for many good reasons.
392. I therefore conclude that the SDM was quite entitled to reject Advocate Adkins' argument as to straight arithmetical comparisons, even if described as "cross-checks". This is because degrees of "badness" are impressionistic rather than accurately plottable on a graph. In any event, it may well be the case that there would not, intuitively, even be a straightline relationship between degrees of "badness" and the appropriate size of a financial penalty.
393. All this simply emphasises that the judgment of what is reasonable and proportionate to any given case, even taking into consideration sanctions imposed in other cases, is a judgment confided to the discretion of the Commission - here, the SDM. To succeed in upsetting her decisions on this ground Advocate Adkins would have to show, it seems to me, that the evidence suggested sufficiently clearly that she cannot have actually "considered" those cases at all. Once she has done so, the degree of importance which she accords to her impression is then, very much, a matter for her discretion.
394. The SDM did explain her reasons for regarding the majority of the comparator cases as being less bad than Mr Hofgren. In places she gives examples of why she does so, and these usually refer to the significant risk of loss to investors in this case. Having regard to the whole of the matters mentioned in the Decision, which include the unappealed findings of admitted want of skill, care, and diligence on Mr Hofgren's part, giving rise, for example, to security failing for want of registration, this adverse comparison can be well understood.
395. The Commission's obligation only being to "*take into consideration*" as a "*factor*" the results of other cases, I am satisfied that the SDM did so and I accept Advocate Hill's

arguments that her Decision expressly discloses this. I do not see that her ultimate conclusion shows that her professed assessment and reasons are simply paying lip service to this requirement. I therefore reject this specific ground of appeal.

(b) Disproportion to penalties imposed on fellow directors

396. There were apparently at least six other directors of GFG apart from Mr Hofgren, who were investigated by the ED. I know this from the cover of the Final Enforcement Report which was inserted into the Court Bundle at Tab C (1) (b), but which was a “tracked change” version from the Draft Enforcement Report, which had included six further names.
397. I also know, from an Events Time Line helpfully handed up to me at the hearing, that those six persons were other directors of GFG at various times after 31st January 2017, with Messrs A, B and C from among them being those still in place at the time of the removal of Mr Hofgren as a director in October 2019. Their periods of tenure were varied, and some were, at times Non-Executive as contrasted with Executive Directors. Two of them were appointed only in early/mid 2018.
398. The Final Enforcement Report itself, and the SDM’s appointment were made only in respect of Mr Hofgren and GFG. The other six directors “settled” with the Commission, apparently after the issue of the Draft Enforcement Report. It is Mr Hofgren’s understanding (and appears to be common ground) that the six other directors each received a private reprimand under s. 36 of the EP Law. This remains on a person’s record with the GFSC indefinitely, but the section also provides that

“(2) The Commission may not publish a private reprimand without the consent of ...the person in respect of whom it was issue.”.

(This is why I have anonymised the references to Directors A, B and C in this immediate context, even though I do not consider, and it was not suggested, that my mentioning their names in any judgment could actually contravene the section).

399. The marked contrast with the sanctions imposed on Mr Hofgren is obvious. The question is, was this justified?

The Decision

400. At Para. 70, the SDM perceives a thread running through Mr Hofgren’s Response to her MTN that wherever another director was involved in a particular instance of conduct as well as Mr Hofgren and received a private reprimand, then Mr Hofgren should receive no greater sanction. She then “notes” the Commission’s habit of applying a 30% discount to a financial or other penalty where settlement is achieved prior to the referral to an SDM, but immediately continues that she does not consider that the Commission’s decisions to issue private reprimands to other Directors binds her to propose the same sanction for Mr Hofgren in any particular case, a proposition which is self-evidently right, but which Advocate Adkins says was not his submission.
401. The SDM then states that she has considered all the facts and matters relevant to Mr Hofgren’s case and the application of the regulatory framework and states her conclusion that his conduct can be distinguished from that of other directors. She apparently did so to comply with *dicta* in the *Merrien* case (above), where the Bailiff held, at [78], that since any financial penalty had to be fair and proportionate

“...any explanation given for why the penalties in the Appellant’s case are so severe by comparison to those for Mr Wickens and GIBL would need to be clear and compelling”.

402. She also appears to have distinguished that case on the basis that all three parties, Mr Wickens, GIBL and Mr Merrien, had been the subject of the relevant Final Notice in that case, whereas in this case, the directors against whom the comparison was being made were not.
403. She explains the differentiation of Mr Hofgren’s position from the other directors’ as being by dint of
- his having held a leading role in GFG throughout the whole period of the Commission’s investigation, and being involved in a number of significant failings,
 - the consistent pattern of his taking decisions without prior reference to other directors (and the contrast of this with his involvement of Mr Ali Ahmad who was not a director),
 - the extent to which so many of the investments made by the cells of the Scheme were ones in respect of which a failing of was identified

and that Mr Hofgren was “at the heart of” each such failing.

404. She concluded by stressing that the totality of Mr Hofgren’s conduct had been taken into account in assessing the proposed sanctions, which, she was satisfied, were proportionate, (even) bearing in mind the sanctions previously imposed on the other directors.

The Cause

405. The Cause first challenges the SDM’s reasoning on the grounds that its invocation of the Commission’s 30% discount for early settlement policy makes no sense, but, if it is thereby suggested that the other directors received penalties even less than a private reprimand, that simply emphasises the disproportionate nature of the sanctions imposed on Mr Hofgren.
406. Second, it submits that any objective reader of the Final Notice and any associated public statement will conclude that the Commission found Mr Hofgren to be virtually solely responsible for the events within GFG, but this would be unfair and wrong. It argues that this is the case because
- The other directors accepted Mr Hofgren’s approach to his role without question. A cited example of Mr Hofgren’s alleged misconduct was that he asked a fellow director to sign a document in July 2016 without prior consultation, but it is argued that fault in such case must lie equally with the fellow director who signed it, (it is apparently presumed that this is one of the six directors);
 - Failures by the Board, which were relied on in considering the failings of GFG itself (which I have not recited) refer to the directors as a body with a collective responsibility, but the SDM’s approach to sanctions implies that she regarded all the other directors as virtually blameless;
 - The accusation of putting the reputation of the Bailiwick at risk through entering into either the DXD diamond transactions or the Vordere Transaction applies just as much to all the directors who approved it;

- Directors A and B were also well aware of the issues with both the inadequate loan securities, and were equally culpable in not following up that the security was properly taken;
 - They were also well aware of and involved in approving the Vordere transaction (including the ultimate taking of unlisted shares) and were also well aware of but did nothing about the conflicts of interest of which Mr Hofgren is accused;
 - They were also effectively complicit in any misleading of the Commission by Mr Hofgren at the 13 May Meeting, because they did not correct any suggested misleading impression.
407. The Cause asserts that the SDM wrongly interpreted Mr Hofgren's argument, which was not that he should receive identical sanctions to other directors, but rather that all sanctions imposed needed to be consistent with each other, and the disparity between the treatment of Mr Hofgren and the other directors renders his treatment disproportionate. The disparity is so great as to make the proposed sanction disproportionate even if Mr Hofgren's involvement was greater.
408. The Commission's Response simply upholds the Decision, pointing out that Mr Hofgren accepted that only certain aspects of his behaviour were the same or similar to that of the other directors, and asserting that the totality of Mr Hofgren's conduct has been taken into account in assessing appropriate sanctions for him, and the misconduct of the other directors is readily distinguishable from his.

Submissions

409. In argument, Advocate Adkins rested on the disparity of Mr Hofgren's treatment in comparison with his fellow directors, as his main point on disproportionality generally. He submitted that, on examining the SDM's decision, she had simply ignored the question of maintaining any proportionality between the sanctions imposed on the other directors (all private reprimands) and the sanctions imposed on Mr Hofgren. She effectively says that the sanctions imposed on the other directors are simply not a matter of concern for her, because she is concerned solely with Mr Hofgren (and GFG).
410. He submitted that the Decision, at Para. 70, never even attempts to analyse any relativity between the SDM's proposed sanctions and the sanctions imposed on the other directors. That was a basic flaw in her decision, and it was a fundamental one. She elevated her (correct) conclusion that the issue of private reprimands to the other directors did not bind her to do the same in relation to Mr Hofgren, into a conclusion that she was therefore able simply to disregard this factor completely. She therefore failed to apply any judgment of relativity or proportionality to a comparison of the penalties imposed, and concerned herself solely with justifying the basis in the case of Mr Hofgren.
411. Elaborating on this, Advocate Adkins first complained that the disparity of the treatment of Mr Hofgren and of Directors A and B as regards responsibility for any misleading of the Commission at the 13 May Meeting showed an unfair inclination of the Commission to blame Mr Hofgren for everything.
412. Indeed this was Advocate Adkins' central example of his argument on lack of consideration of proportionality. The Minutes of the meeting, he submitted, showed that Directors A and B had each given answers supporting the impression that Mr Hofgren's known conflicts of interest were properly managed, and they were therefore just as guilty of misleading the Commission - which Advocate Adkins submitted, both here and generally, must be the most serious of the regulatory contraventions which were being

levelled at Mr Hofgren. Thus, the sanction for Mr Hofgren and Directors A and B in this respect should be similar.

413. He repeats the points made in the Cause, about the similar culpability of the other Directors, in (for example) pursuing the DXD diamond transactions with insufficient skill and expertise. He points out that the failures of the Board of GFG are said, in Para. 52 of the Decision to have been “very serious”, yet only Mr Hofgren faces a long prohibition order and a public statement suggesting an intended fine of £290,000. He described this as Mr Hofgren getting sanctioned for what was really a “collective failing of the Board”, which was unfair and unreasonable.
414. He submits that the singling out of Mr Hofgren as acting with want of probity, but having, apparently, treated all the other directors as having acted inadvertently in their involvement in the very same matters, undermines the very basis for any finding that Mr Hofgren acted with want of probity. He objects that the SDM did not confront the point of inconsistency between her findings with regard to Mr Hofgren and the Commission’s findings (in which she implicitly concurred) in respect of such other directors, in particular as regards the statements made before and to the Commission at the 13 May 2019 meeting. He submits that the SDM misrepresented Mr Hofgren’s position, which was not that this must mean that the sanction against him must be limited to a private reprimand, but only that the self-same conduct by other directors could not, fairly, be simultaneously treated as relatively minor (in respect of them) but very serious (in respect of Mr Hofgren).
415. He further submits that, whilst Mr Hofgren was a director of GFG throughout the relevant period and the total number of allegations against him is greater than those against any other individual director, neither the length of his tenure nor the existence of other allegations, provides any relevant distinction when focusing on a single event and that contraventions which are relatively minor cannot fairly be aggregated to make a major contravention.
416. Advocate Adkins relies heavily on the *Merrien* case (above). In that case, the company, GIBL, was fined £8,000, and one director, in fact the owner of the company (a Mr Wickens), was fined £8,000 after a 20% discount, but Mr Merrien was proposed to be fined £200,000. Mr Merrien had been given effectively total control of one branch of the company’s business, in the course of which he had recklessly and dishonestly misbehaved, whilst Mr Wickens had run the other arm of the business, but as a director, had failed to exercise a proper degree of control over the total business. The Deputy Bailiff considered that whilst there were therefore reasons for distinguishing the positions of the two individuals and putting Mr Merrien’s case into a different band of seriousness from that of Mr Wickens and the Company, nonetheless

“the disparity of approach [was] so great that it brings into question whether the financial penalty imposed on the Appellant is disproportionate”.

417. This constituted a further reason (there had also been an error of law in calibrating the penalty) why the fine must be set aside.
418. Advocate Adkins argues that the justification given by the SDM for distinguishing Mr Hofgren and the other directors to such a great degree – his “leading role” and his involvement in a “number of significant failings” – does not justify, in comparison with the other directors, a fine which is £290,000 greater and a career ending prohibition order. (Mr Hofgren was aged 52 at the time of Decision). He stresses that this ground of appeal is not that Mr Hofgren should not be differentiated from the other directors, but that there had been no proper analysis of how far (and in relation to which contraventions) this differentiation might fairly go; again he argued that it could not be right to categorise Mr

Hofgren's conduct at the 13 May meeting (regarding misleading the Commission) as being "very serious" when the similar conduct of Directors A and B was treated as minor.

419. I suggested to Advocate Adkins that his submission was that, having only imposed private reprimands on other directors, the Commission was obliged to relate Mr Hofgren's penalty to that, even if it appeared that the other directors had "got off lightly", thereby possibly enabling Mr Hofgren to get off relatively lightly, as well. He did not shrink from this. He submitted that fairness was an overriding requirement and must mean that those involved in the same matter should be treated the same, proportionately. If this meant that the Commission were "stuck with" their earlier decision and the effects of it, then so be it.
420. Advocate Hill first reiterates the indisputable (and undisputed) proposition that if Mr Hofgren's conduct can reasonably be distinguished from that of the other directors then the Commission is not bound to impose the same penalty.
421. After citing the SDM's given reasons, summarised above, he submits that the key feature in this analysis (and one which Advocate Adkins' argument does not address) is that when it came to imposing any sanction, the SDM was concerned with an assessment of the totality of Mr Hofgren's conduct.
422. He submits – as, indeed, he did in generally refuting Advocate Adkins' arguments on this appeal – that it was not a permissible approach to try to chip away at the particular instances of censure of Mr Hofgren's conduct which were cited, to undermine them individually, and then to argue that "consequently" the whole of Mr Hofgren's conduct was to be regarded as not (therefore) serious. Thus, arguing comparisons with other directors in the case of individual events (such as the 13 May Meeting) would not necessarily, or even probably, displace the legitimate conclusion that Mr Hofgren's overall conduct was distinguishable from that of the other directors, and distinguishable by an order of magnitude.
423. He observes that it is also a mischaracterisation to assert that the sanctions imposed on the other directors were "findings of the SDM" as the other directors settled with the Commission before the SDM was even selected. Therefore, whilst the SDM was bound (as he submits she did) to consider proportionality in the context of the sanctions imposed on those other directors, she was not, even, bound to reach the same factual conclusions against Mr Hofgren as would have applied against the other directors, because those would have been based on the findings in the Draft Enforcement Report.
424. He submits that *Merrien* is to be distinguished, first, for the SDM's own reason, namely that that case was concerned with consistency between several persons who were the subjects of a single Commission Notice, which is not the case here, and second, because, unlike in *Merrien* the SDM had set out "clear and compelling reasons" why she considered it necessary to treat Mr Hofgren differently from the other directors.
425. In oral argument Advocate Hill really repeated the above, and his central point that the SDM's sanctions had been calculated with regard to her views of the seriousness of Mr Hofgren's conduct in total, and were justifiable (and could be seen to be so) on that basis. She had plainly considered the relationship of the sanctions which she considered appropriate to the sanctions previously imposed on the other directors, as a circumstance, and a material circumstance, to be taken into account because she said as much in the last sentence of Para. 70. She had explained her reasons, and they passed the test of being clear and compelling.
426. Advocate Hill suggested that Mr Hofgren's argument was more in the nature of an argument that the other directors had got off too lightly, than a well-founded argument that

he, himself, had been sanctioned too severely, bearing in mind what the findings against him actually were.

427. He also refuted any insinuation that Mr Hofgren was being scapegoated, or disproportionately sanctioned, because he was not a resident of Guernsey, and there was some kind of “sweetheart” deal in favour of the other directors because they were locals. He submitted that that was a “non-starter”, having regard to the cogent reasons for categorising Mr Hofgren’s conduct as “very serious”.

Discussion and conclusion

428. The disparity between the treatment of Mr Hofgren and the other directors is, indeed, very stark, and I have considered this point anxiously. I have found it particularly anxious because, in the light of the Domaille principles, I do not appear to be able to review the basis of the actual decisions made in respect of the other directors, that being no part of the subject matter of this appeal.
429. First, though, I dismiss the allegation of any kind of “sweetheart deal” for local residents being behind the position. It seems to me that that would actually amount to an argument of bad faith, which is a separate ground of appeal under s 106 (3) (c) of the EP Law, but no such ground has been raised. The SDM’s decision must stand or fall on its own terms and the facts surrounding it, but only if it were so extreme, or there were some other evidence, to suggest that some other extrinsic factor must have been at work could this kind of argument succeed. I can see none, despite the disparity of the sanctions between Mr Hofgren and the other directors which I have very much noted.
430. Second, I reject the emotive argument that there was a “collective failure of the Board” for which only Mr Hogren is being seriously sanctioned. The term “collective failure” is apt to describe a failure at Board level in a company but it does not necessarily pan down to equality of responsibility of all the directors. The other directors were sanctioned pursuant to their perceived part in any such collective failure.
431. Third, I do consider that the SDM’s distinction of the *Merrien* case on the basis that it referred only to proportionality between persons who were the subject of a single Commission Notice cannot be right in principle. The requirement for proportionality in this context must relate to proportionality of treatment between persons involved in the same conduct. Whether or not that is the subject of a single notice is not relevant to that. Of course, the principle then does not mean “parity”, but it does mean that there must be some objectively explicable, basis for any difference of treatment between persons with similar circumstances. Otherwise, the Commission would appear capricious. Having said that I would nonetheless accept Advocate Hill’s point that the SDM, as the ultimate decision maker in respect of those whose cases are referred to him/her, might conceivably come to different conclusions of fact from those previously reached by the ED, although it seems unlikely this may turn out to be so in practice.
432. The result appears to be that I must take the common ground of the private reprimands imposed on the other directors in this case as being a material circumstance in reviewing the proportionality of the sanctions imposed upon Mr Hofgren himself, but with my information as to those sanctions being only what can actually be properly cited as materials in this appeal.
433. This does create certain problems. The sanctions imposed on the other directors were apparently imposed on the basis of the findings in the Draft Enforcement Report. I have not been taken to that. The limits on my jurisdiction are to conduct this hearing as a review of the Commission’s (the SDM’s) Decision in this case, and I understand that to mean

that it is inappropriate for me to consider how that Decision was ever arrived at, except insofar as questions as to its own propriety or justification mandate looking back at supporting evidence on particular points contained in it, as discussed above. Being able to look at the basis for the sanctions imposed on the other directors would plainly have made the task of impartial evaluation of their relativity rather more straight forward and capable of being carried out with confidence than it is, but that is the position.

434. I know only three things. First, the SDM seemed to consider it relevant to refer to the Commission's incentivization policy as to reducing financial penalties and prohibition orders by 30% if the subject parties "settled" with the Commission before the matter went as far as an SDM (ie up to a time beyond the Final Enforcement Report. However, I simply do not understand what relevance that can be thought to have had, unless it be to a supposed perception that penalties will be relatively lighter if they are accepted earlier. Since that cannot apply to private reprimands, which I know was what was recommended as regards the other directors in the Draft Enforcement Report, that seems to be meaningless. However, I do not think that that necessarily casts doubt on the coherence of the actual Decision in this regard, I simply ignore it.
435. Second, it seems to be accepted by everyone that the other directors were treated as having acted "inadvertently" (a mitigating factor under ss 38 (2) (c) and 39 (6)(c) of the EP Law) whereas the SDM had found that Mr Hofgren had not done so, and specifically had not been inadvertent in acts in which his fellow directors were involved, such as misleading the Commission, in particular.
436. Third, I am aware from Mr Hofgren's arguments, and also from some of the description of GFG's conduct referred to in the Decision, that other directors were involved to different degrees in some of the matters complained of. This point is made, in particular, in relation to the way in which the Commission has apparently differentiated Directors A and B, two of those who were most recently also on the Board of GFG beside Mr Hofgren, and whom he regards as having been effectively complicit in any "misleading" of the Commission at the 13 May Meeting by acquiescing in any supposed misleading impression given that he (Mr Hofgren) did not participate in any way in considerations of the Vordere Transaction.
437. This is plainly a matter on which Mr Hofgren feels very strongly, but I have to say that it does seem to me to go more to the question of disparity of treatment between the other directors *inter se*, than to any argument of disparity of treatment between them as a group and Mr Hofgren individually. I do not think that Mr Hofgren can base any argument of disproportionality about his own treatment, on some kind of argument that because the Commission may have treated other directors equally favourably despite differing relative degrees of culpability between them, it is disproportionate for the Commission not to treat Mr Hofgren more favourably as a matter of relativity between sanctions imposed on him, for different conduct.
438. I accept Advocate Hill's submission that the question of the possible disproportion of the sanctions imposed on Mr Hofgren requires to be looked at on the basis of the totality of the conduct for which he is being sanctioned, and so that totality is what is to be compared, in any argument of disproportion, with the totality of the other directors' conduct. I also agree with Advocate Hill that most of Advocate Adkins' submissions actually focus on comparisons of specific matters and an argument straight from these that "therefore" the sanctions ought to be the same (or the ultimate sanction on Mr Hofgren at least not be very much greater) when this ignores the totality point. I also reject Advocate Adkins' submission that findings of innocent "inadvertence" against the co-directors precludes any findings of want of probity against Mr Hofgren in relation to his part in particular matters.

439. Advocate Adkins' submission that any objective reader of the Final Notice and any associated public statement will unfairly conclude that the Commission found Mr Hofgren to be virtually solely responsible for the events within GFG, assumes, not only that that would be an unfair reading but also that that would be an unfair conclusion. However, it seems to me that that is, effectively, exactly the what the SDM has found, by what is, effectively, her endorsement of the conclusions submitted to her by the ED. Viewed in that way it becomes clear that the proportionality between Mr Hofgren's sanctions and those imposed on the other directors, is not necessarily unreasonable and certainly, in my assessment, is within the range of views which the SDM could reasonably form.
440. Indeed, the various individual matters relied upon by Mr Hofgren in support of his argument that there was unfair differential treatment do seem to me to be complaining more that the other directors were not sanctioned more heavily than they were, than whether he has personally been sanctioned too heavily. Second, his arguments overlook the finding that Mr Hofgren was himself, decisively, the leader and virtually the sole actor in the transactions and activities for which he has been sanctioned, and even brought about the contraventions for which the other directors have been sanctioned because of their less than sufficiently critical acceptance of his recommendations.
441. As I have said, I have found this an anxious point, because I agree that it is the totalities of the various parties' conduct which need to be compared, and I feel that I have a somewhat incomplete view of the totality of the other directors' conduct. I feel uncomfortable about this. It is not even clear to me that the SDM had such a complete view. However, that appears to be a consequence of the Commission's approach to "settling" with some parties before others, and compartmentalising such settlements.
442. The principle is that Mr Hofgren's conduct is appropriately sanctioned on the basis of its own content. I do not think that it is either required by the statute or appropriate in practice, to reduce the severity of a sanction which would actually be fully merited in its own terms, simply because some other individuals may appear to have been relatively leniently treated by the Commission for their own misconduct in and about the same matters. The importance is whether the Commission has made a properly supportable evaluation of the gravity of the subject's own conduct when fixing sanctions pertaining to him. If its assessment of the other individuals' conduct was also supportable, then there is no inconsistency. If its assessment of the other individuals' conduct was mistaken, but to their benefit, that does not provide a reason for giving the subject a lighter sanction which is not deserved.
443. In the end I feel that, on balance, I do have just about sufficient information to be able to review this aspect of the SDM's decision on the basis of whether there is evidence to support it, and whether her reasons for imposing the sanctions which she has done *even in the context of the lesser sanctions imposed upon the other directors* are sufficient to show that the consideration of proportionality was within the range of conclusions reasonably open to her.
444. Advocate Adkins submitted that the SDM's statement that she did not consider that the private reprimands issued to others bound her to do the same with Mr Hofgren shows that she approached matter on a false and wrong basis. She should have looked at the cases of Directors A and B and what had happened to them and tempered her view of what should happen to Mr Hofgren in the light of this, and she did not do so. I reject this as an interpretation of her approach. I think it is mere infelicitous expression. She was plainly aware of the private reprimands and I see no reason to think she did not take them into account.

445. To my mind, reading her Decision shows that she quite plainly thought that Mr Hofgren’s failings in conducting GFG’s business were of an order of magnitude different from that of the other directors. She also found that this was because Mr Hofgren had not kept them properly informed. She does not need to mention every single matter which she had in mind, but there are plainly others when the facts are examined. One obvious element of difference, for example, would be that it was the other directors at the time who had removed Mr Hofgren from the Board.
446. Whilst the Deputy Bailiff in *Merrien* said that the test for investigating a stark disparity was whether right thinking members of the public would conclude that “*something had gone wrong with the administration of justice*” when looking at the comparison between the several penalties imposed, it seems to me that the SDM did not think that there was any disparity, because of significant differences in their respective behaviour meaning that their respective culpabilities were very different. I conclude that that was a view to which she was entitled to reach on the evidence in the case, and that her decisions cannot be faulted on that ground.
447. Thus, I conclude that this aspect of Mr Hofgren’s Appeal Ground 3 is not made out as a ground of appeal on its own, although it is not to be ignored in the context of overall intrinsic disproportionality, to which I now turn.

(c) Intrinsic disproportionality

448. The third aspect of Ground 3 is the contention of intrinsic disproportionality of the sanctions imposed upon him on their own merits, ie, simply related to the seriousness of the conduct for which the sanctions have been imposed.
449. As I have previously remarked, although this Appeal Ground 3 is labeled “disproportionality”, which is a reference to s.106 (3) (d) of the EP law, “disproportionality” is really a sub-set of the more general ground of appeal mandated by s 106 (3) (b) of the EP Law that

“the decision was unreasonable”

with “disproportionate” focusing on some extrinsic, comparator factor whilst “unreasonable” has a more wide-ranging, impressionistic quality. Theoretically at least, Ground (b) is therefore potentially wider.

The law

450. As to the law, both counsel are agreed that the Court of Appeal in *Domaille* made no comment or criticism of my holding at first instance that the ground of appeal on the basis of “unreasonableness” in s. 106(3)(b) of the EP Law connotes a threshold of “unreasonableness” which is lower than the threshold for “unreasonableness” required for success on judicial review. This latter is “unreasonableness” as a matter of law, commonly known in legal shorthand as “*Wednesbury* unreasonableness”, and denoting a decision which is judged to be illogical, irrational or perverse.
451. That distinction was made, analysed and explained in terms relevant to this (Guernsey) jurisdiction, in the two cases of *Walters v States Housing Authority* [1997-9] GLR 15 and *Matheson v States Housing Authority* (1998) 26 GLJ 68. I explained it in *Domaille*; see GRC 2023 [22] to [25] where I gave the essence of the point as being that

“22. It was laid down in Walters that if the Bailiff were to conclude that the decision of the Housing Authority was “Wednesbury unreasonable”, that was a matter of law,

and therefore a matter for his decision, and he would withdraw the case from the Jurats and allow the appeal. However even if he did not do so, he could, and should, still refer the matter to the Jurats, with the direction to consider whether, on all the evidence, they concluded that the decision was “unreasonable” as a matter of fact, although directing them, that such unreasonableness would require something greater than simply that they would not, themselves, have reached the same conclusion.”

452. The Court of Appeal said in *Domaille* at [78] that

“whether a decision was reasonable, or proportionate, or involved an error of fact is a matter of judgment on which different, but equally rational opinions could be formed by different decision-makers on the basis of exactly the same material”,

However, that was not a finding laying down the content of reasonableness or proportionality, but was being stated as background introductory fact for drawing attention to the limited powers of practical intervention which were conferred on the Royal Court, and that these did not include holding a fresh trial of the facts: see the continuation at [79].

453. I therefore do not read this passage as affecting, the relevant test for mere factual “unreasonableness” in a decision of the Commission, in the *Walters/Matheson* sense discussed above, except possibly as a matter of influence. Both Counsel agreed that the Court of Appeal’s decision had not affected that point.

454. Thus, the threshold test for “unreasonableness” under s. 106(3)(b) is correctly viewed as not being as stringent as the test for unreasonableness on judicial review – illogicality, irrationality or perversity - which would be the equivalent test under ground (a), invoking error of law. In the result, on a scale of “unreasonableness”, the point of qualification under s 106(3) (b) of the EP Law is somewhere lower than that of “Wednesbury” unreasonableness, but higher than simply that the appellate tribunal would have come to a different conclusion itself. The requirement, as explained in the *Walters* case is for “something other” (by obvious implication, something “more”) than just that.

455. Advocate Hill therefore accepted expressly, that, if it so struck me, I was entitled to come to a conclusion that the SDM’s decision, even if it could not be described as irrational, illogical or apparently perverse, was nonetheless so “*extreme*” that it could and should be set aside on the grounds of unreasonableness under s 106(3)(b) of the EP Law. Such a finding of unreasonableness might also, plainly, be expressed in terms of disproportionality.

The issues

456. Owing to my findings broadly dismissing the grounds of appeal under Ground 2, the challenge of general disproportionality or unreasonableness of the ultimate decision as to sanctions must proceed on the basis of the actual findings made by the SDM, with only the inconsequential variations noted above at [351].

457. Advocate Adkins contests this aspect of proportionality on two broad grounds, being, first, objections that the SDM has not fairly and adequately taken account of the factors listed in s 39 (6) of the EP Law (relating to discretionary financial penalties) and, second, that she has unfairly categorized Mr Hofgren’s conduct within the bracket of the most serious “Band 4” in the Commission’s explanation of its approach to fining levels, contained in its Explanatory Note.

Factors to be taken into account

458. As to the former, he contested various aspects. He submitted that whilst it was indeed right that Mr Hofgren had not brought the contraventions to the attention of the Commission (see s 39(6) (a) of the EP Law) neither had any of the other directors. However, even taking this point at face value, I do not find it of any relevance here, as it goes more to the question of comparison with the sanctions imposed on other directors, already dealt with.
459. His criticism of the SDM's assessment of the seriousness of Mr Hofgren's conduct (s 39 (6) (b)) as "very serious" was based on his successfully challenging her finding that Mr Hofgren's conduct lacked probity and therefore falls away.
460. Regarding the question of inadvertence (s 39 (6) (c)), his criticism really repeats his arguments directed at the finding that Mr Hofgren's conduct was not inadvertent, whereas the other directors' conduct was so treated, and has been dealt with above.
461. He next argues that Mr Hofgren's no longer holding any position with GFG ought to have been treated as a mitigating factor, but, whilst noting it, the SDM does not appear to have done so. This is in relation to the consideration (see s 39 (6) (d)) of what efforts had been made to remedy the misconduct or prevent a recurrence. I simply do not understand this point, and I reject it. Mr Hofgren's not holding any position with GFG connotes no such effort on his part, but is merely a circumstance and one to which he has even, apparently, been involuntarily subjected; he can claim no credit for it.
462. Advocate Adkins makes no criticism of the SDM's findings about his impecuniosity, but his submission that her imposition of a public statement was unnecessary, and should be set aside, was based on the unsoundness of her findings of want of probity on Mr Hofgren's part, and therefore falls away with that point.
463. Advocate Adkins further submitted, in regard to mitigating factors, that Mr Hofgren had only been given credit for attending an interview with the Commission and submitted that he ought, additionally, to have been given credit for having actually sought advice around matters (particularly the Vordere Transaction) which the SDM had found to be contraventions, and also for the fact that Administrators with responsibility for compliance issues had not raised these problems.
464. As to the taking of advice, this has been discussed above in relation to Ground 2(e). The SDM plainly considered that any credit due in that regard was overwhelmed by the general way in which Mr Hofgren had nonetheless behaved. Whilst she does not mention this expressly, it does not seem to me that she needed to do so.
465. Since Mr Hofgren did not seek advice from the Administrators, the second point resolves into an attempt to throw blame on to other persons, but in any event, the SDM dealt with this point in Para. 32. The question is therefore whether such findings are ones she was entitled to make, and in my judgment she was, and she did so sufficiently clearly.
466. In summary, therefore I cannot see that there is any defect in the SDM's assessment of the factors which she ought to (and did) take into consideration as directed by s 39 (6) of the EP Law, which might have given rise to any disproportionality in the size of the penalty which she then imposed. I turn, therefore to the question simply of intrinsic disproportion, generally.

General

467. Advocate Adkins' further submissions are made on a very generalised basis. I do not overlook the fact that in this generalised overview, his criticisms are also made in the context that there has been a "zero" sanction, as regards both financial penalty and

prohibition orders, imposed on his fellow directors, as this is certainly one of the surrounding circumstances. I also note, though, that his submissions had been formulated in the context of his earlier, but unsuccessful, submission that there had been no properly made, or justifiable, finding of want of probity against Mr Hofgren, which I have rejected.

468. He submits, in general terms, that the financial penalty which would have been imposed on Mr Hofgren is far and away the highest ever imposed in the Bailiwick (apart from that of £280,000 initially imposed on Mr Domaille, but with that decision now having been remitted to the Commission). However, this is not a strong point, as the whole question depends on justification. Significantly greater penalties are also a not unlikely consequence of the increase in the Commission's fining powers now working its way through the system.
469. He then points out that the fine is almost 75% of the absolute maximum individual fine which could have been imposed. He suggests that even taking the "*most jaundiced*" view of Mr Hofgren's conduct, it could not fairly be viewed as approaching "*the worst of the worst*", as the size of the penalty would suggest. Whilst acknowledging issues of "probity" he points out that it is nowhere suggested that Mr Hofgren was guilty of dishonesty, that whilst investments might have been unwise, they were real - this was not a fraud - that there has been no financial crime, and no suggestion of actual money-laundering, only the asserted possibility of risk. In effect, his submission is that the sanctions are simply out of proportion to the findings made against Mr Hofgren – even taken at their worst.
470. Advocate Hill supports the SDM's ultimate decision on the level of sanctions as being perfectly fair and reasonable, when all aspects of Mr Hofgren's conduct are taken into account, as he submits the SDM plainly did. In particular he submits that her decision has been related, and properly related, to the scheme of "Bandings" for the imposition of fines, which is published by the Commission in its Explanatory Note (mentioned above). He observes that Advocate Adkins simply does not deal with this "attribution" point.
471. The relevant iteration of the Explanatory Note is the November 2021 version. This explains, at Para. 2.9.3, that the Commission will impose fines in accordance with the factors laid down in the legislation (see ss 39 of the EP Law) but also, as a matter of guidance, having regard to a tabulated Schedule of Bandings set out in conjunction with the Explanatory Note. This Schedule puts fining levels into four Bands. For individuals, these give ranges of fines as up to £25,000 (Band 1), up to £100,000 (Band 2), up to £250,000 (Band 3) and up to £400,000 – the maximum – (Band 4). Such fines are also explicitly (as the SDM observes several times in her footnotes), assessed with regard to the total emoluments which an individual has received during his or her connections with the relevant Licensee.
472. The table lists possible features of the conduct of the individual in question, largely derived from those noted at s 39 (6) of the EP Law and tabulates the degree of occurrence of each which would tend to bring that conduct under which Band. The features are, for example, bringing the contravention to the attention of the Commission, being open and co-operative with the Commission, the seriousness of the contravention and individual aspects of that, whether the contravention was or was not inadvertent, and what efforts at rectification, etc, have been made.
473. The instances of offending conduct range from None (Band 1) through a little (Band 2), through a moderate but significant amount (Band 3) to a great amount (Band 4). The Note emphasises that the Bands have no rigid rules of application for fixing financial penalties; they are a matter of guidance only, helping to indicate broadly where, on a spectrum, misconduct would be taken to fall, but for the purpose of then assessing an appropriate fine in overall general terms. It emphasises that the assessment will be on a

case-by-case basis. It also explains other factors which may be taken into consideration and notes that conduct is assessed against the MCL.

474. The putative fine of £290,000, suggested in the Decision, thus puts the penalty which would have been imposed on Mr Hofgren, but for his impecuniosity, firmly into Band 4, but towards the lower end. Advocate Hill submits that this is perfectly reasonable.
475. In Para. 71 The SDM identifies four aspects of Mr Hofgren's conduct which she regards as being within Band 4 in her Statement of Reasons. These were—
- systemic failings which are serious in nature,
 - a significant risk of loss to clients and some actual loss,
 - significant risk to the reputation of the Bailiwick and
 - not being open and co-operative with the Commission to the extent identified in her Statement of Reasons (which I accept I have reduced a little by my findings under Ground 2 (i)).
476. She actually reduces the proposed level of fine by £10,000 from the figure of £300,000 previously proposed in her MTN, although she does not explain why she does so.
477. Advocate Hill submits that in the light of all the above, it cannot be said that the SDM's ultimate decisions on sanctions are in any way disproportionate to the totality of Mr Hofgren's conduct. They have, clearly, been carefully and conscientiously reasoned, and are in accordance with the Commission's published guidance.

Discussion and conclusion

478. The sanctions imposed on Mr Hofgren are, on any basis, severe. The question is whether they were nonetheless reasonable and proportionate to the level of his deficient conduct and failures to fulfil the MCL, as found by the ED and apparently endorsed by the SDM.
479. Taking it on a broad basis, the SDM has found that Mr Hofgren was the central protagonist in a financial business scheme which used the Bailiwick's jurisdiction to set up an investment enterprise which Mr Hofgren then proceeded to run, as its effective sole Chief Executive, for a period of about five years, without due regard for, and observance of, the standards of proper competence, conscientious diligence, scrupulous probity and meticulous observance of the requirements of the Commission, as Regulator, as to the conduct of such a business, and with the more particular consequences of losses to investors, risks of financial crime and possible risk to the reputation of the Bailiwick, as the Commission found on its investigation. In addition, he effectively enabled Mr Ali Ahmad, an outsider, to operate as a shadow director of such an enterprise. I also note other adverse features, such as that the original concerns about GFG came to the fore because of misgivings expressed by its auditors, and the fact that Mr Hofgren was ultimately removed from the Board by his fellow directors. The findings underlying the above summary are all to be found in the Decision. Even without any finding of actual dishonesty, the totality of shortcomings in Mr Hofgren's conduct is notably far-reaching.
480. I had wondered if the inevitable focus here on transactions with which fault was found might create a distortion of the degree to which GFG's business was badly run, but there is no reference to any background or list of successful or unexceptionable other transactions to adjust any such perspective, as I would certainly have expected to see, if it were possible to cite them.

481. All in all, therefore, I cannot see that Mr Hofgren’s conduct does not justify the “very serious” label which it has been given in places.
482. Advocate Adkins submitted that the Vordere transaction was plainly regarded as the most serious by the Commission, such that if criticisms made respect of that are unreasonable, the reasonableness of the proposed sanctions must be called into question.
483. I do have some sympathy with the proposition that the Vordere Transaction itself was genuinely thought by Mr Hofgren and by the Board of GFG, in May/June 2019, to improve the position of the investors in the Property and Xenfin Cells as to security for their investment. I was also inclined, initially, to think that insufficient regard to this had been paid in the Commission’s consideration of this transaction. However, this overlooks several things. The first is that the Board was clearly being influenced to this conclusion by Mr Hofgren. The second is that GFG was only in the position of possibly needing to improve its security because Mr Hofgren had moved it towards these investments in the first place. The third is that the loans made do not appear to have been simple property development loans which turned sour, but were even entered into with the very prospect or possibility of taking advantage of their turning sour by taking the security into possession a consideration; this was a rather more speculative (high return but high risk) prospect than a simple property loan. The fourth is that this investment was being risked with investors’ money and, in some cases “retail” investors as contrasted with sophisticated ones. The fifth is that Mr Hofgren had significant collateral interests in pursuing this course for the prospective advisory or introductory fees this would gain him (and Mr Ali Ahmad). The sixth is that the risks were obviously exacerbated by the fact that the Vordere shares did not gain listing, a prospect which was not secured, making these assets totally illiquid, but the Vordere Transaction was executed nonetheless, and apparently at pace.
484. The first, second and sixth considerations may suggest that it is difficult to judge the advisability of the Vordere Transaction in itself, and it could also be said that, in any event, that advisability is a matter of business, rather than regulatory, judgment. But that is not the reason behind the SDM’s imposition of these severe sanctions on Mr Hofgren. The reason is, rather, that he was conducting regulated finance business, whilst being far from scrupulous to ensure that his personal interests were subordinated to the interests of his dependent investors – and this was aggravated by the losses which the consequent situation in fact caused to them.
485. As to the financial penalty itself, it would certainly have been helpful if the SDM had explained her reasons for the reduction, a notably minimal reduction, of £10,000 which she thought fit to make between her MTN and her final Decision. This is especially in the context that she was simultaneously deciding that it would not actually have to be paid. However, I can only review the decision which she actually mentioned ultimately, ie evaluating the extent of the misconduct in the figure of £290,000.
486. As to the matters which she regarded as falling within Band 4, I think Advocate Adkins suggested that there were no systemic regulatory failings found (Bands 3 and 4), whether “serious” in nature or otherwise. Whilst this is certainly a description of Band 3 and 4 conduct, the SDM only in fact refers to “systemic failings” and it seems to me that that description is reasonably merited as a description of serious systemic failings of corporate governance which took place, in the context of the Finance Sector Code of Governance.
487. I do think it might reasonably be objected that it would be an exaggeration to describe any risk to the reputation of the Bailiwick as “significant” (Band 3 or 4) as opposed to being merely a possibility, which would put it into Band 2. That, however, is a matter of judgment. I cannot displace it unless I take the view that it is outside the margin of

appreciation for a reasonable decision-maker on the point, and I do not think I can. It is, in any event, a relatively small point in the overall picture.

488. All in all, and even with taking the above points into account, I cannot see that it was outside the realms of reasonableness to categorise Mr Hofgren's conduct as coming up to the range indicated by Band 4. After that it has been placed in the lowest third. This is not "the worst of the worst" at all. There is space for more serious "worst" matters like outright dishonesty (although I do note that this might not have been possible to say in relation to the £350,000 fine originally recommended, internally, by the ED).
489. Looking simply at the figure of £290,000, whilst it may indeed be the highest fine the Commission has yet imposed in the Bailiwick in absolute terms, that is simply, in my judgment, a matter which suggests that careful review is appropriate; it is not necessarily an indication of likely unreasonableness *ipso facto*.
490. The total figure of £290,000 is about 15% of the total gross monies (£1.9Mn) received by Mr Hofgren from the enterprise over its approximate five years' existence. Scaling those receipts back for tax (say by 50%: £950,000) but scaling back up by, say, 20% (to allow for average inflation up to 2023: £1.14 Mn), brings this back to about 25% of Mr Hofgren's actual financial benefits over the period. Whilst I know that this comparison is quite unscientific, it is impressionistic. It does not seem disproportionate in itself in the light of the overall pervasive findings of misconduct.
491. The upshot is that I am, just about on balance, satisfied that the putative fine of £290,000 mentioned is not outside the range of reasonableness or proportion on the facts of this case - although as I recall again, it was finally fixed against the background that it was not actually going to be paid, and so I rather doubt if it should be taken as any reliable precedent for other cases.
492. I have had far more misgivings about the length of the Prohibition Order. The only qualifying condition for imposing one is the Commission's forming its opinion that the person is not a "fit and proper person" to hold a relevant role in finance sector business (s 33 (1) of the EP Law) thus bringing in a consideration of his/her fulfilment of the MCL. There are no particular factors mandated in the EP Law to be taken into account when fixing the duration of a Prohibition Order, which, expressly, may be indefinite: see s 33 (6) of the EP Law.
493. The appropriate length is therefore entirely within the discretion of the Commission but, and without, of course, suggesting that there are any rules which fetter the Commission's discretion, the reasonable objectives of any such Order would naturally have to be taken into account. These would seem to be matters such as protection of the public, punishment, deterrence, marking disapproval of particular conduct, and possibly time for rehabilitation. The reasonable length of any Prohibition Order would have to be assessed with such matters, and their objectives, in mind as well as the seriousness of the contravening conduct. I also note that it is always possible, at least in theory, for a person subject to a Prohibition Order to apply to have it lifted: see s 33 (5) of the EP Law
494. The term of the Prohibition Order in this case is lengthy – 14 years. When it was imposed a year ago, Mr Hofgren was apparently 52. The Prohibition Order is therefore effectively career-ending, at any rate as far as Guernsey is concerned, although I suspect that it may be the indirect rather than the direct effects of its imposition which are more important for Mr Hofgren.
495. I do find that a Prohibition Order set at 14 years is severe. I would probably not have been surprised to see a Prohibition Order of 8 – 10 years, in the context of the wide-ranging

failings of which Mr Hofgren has been found guilty, and, in particular, the underlying fact that the Commission has effectively found – and I have held, with justification – that Mr Hofgren’s general approach to how it is appropriate to conduct finance business *in a regulated financial business environment* does not fit with the standards and procedures expected and required by the Regulator of such business in Guernsey.

496. However, whilst the length of the Prohibition Order is somewhat longer than my intuitive expectations I certainly cannot say that it strikes me as so “extreme” that I begin to think it might be properly set aside for unreasonableness or disproportionality. I have certainly asked myself what more in actual, practical terms might be thought to be being achieved by the imposition of a 14 year term rather than say an 8 – 10 year term, especially having regard to the requirement to be proportionate. However, the obvious answer would seem to lie in marking the unacceptability of Mr Hofgren’s perceived general attitude to running a regulated investment business in Guernsey. It might have been helpful if the SDM had provided some reasoning for her fixing of the penalty, rather than apparently simply “tweaking” the ED’s recommendation slightly, but I cannot say that her decision, which is necessarily an impressionistic judgment, is so surprising that I consider it may be outside the range of reasonableness.
497. Testing this point by reference to the *Walters* test, which I referred to above, first, I certainly cannot say that it is outside the range of decisions which I consider that a reasonable decision-maker (ie, a reasonable financial business regulator) could have come to. It is therefore not unreasonable in law, and there is no error of law. Moving to the second *Walters* stage, I ask myself whether I consider that the reasonable ordinary person would be likely to conclude that it was an unreasonable decision in fact? I consider that the exemplar of such a reasonable, intelligent, right-thinking, sufficiently educated and informed, but ordinary person would be a Guernsey Jurat. I can therefore pose this question as being whether I would be confident that a panel of Jurats would conclude that a Prohibition Order of this length was unreasonable. Although I am certainly somewhat troubled by the length of the Prohibition Order, the answer is that, on balance, I do not think so. I therefore conclude that I cannot say that the Prohibition Order is unreasonable in fact nor, by parity of reasoning, is it disproportionate.
498. Finally, in the context of unreasonableness/disproportionality I have noted and taken into account Mr Hofgren’s complaint that the Commission has consistently appeared to try to talk up the seriousness of any particular instance of his conduct so as to paint him in the worst possible light.
499. I do accept that if there were a seriously consistent pattern of such over-censoriousness, it could give rise to a suspicion that any penalties consequently imposed might have been whipped up into being more extreme than was really merited, and therefore to be disproportionate. One would like to hope, of course, that such rhetoric would not influence the ultimate decision of an SDM.
500. That point, however, goes only to the need to carefully examine the justifiability of the sanctions themselves in the context of the grounds of appeal, to see if they feel so harsh that any such over-egging of the sanction might be what has gone on. I have already done this, though and I have not seen any evidence of some pre-disposition to find fault with Mr Hofgren being a factor in this case. I would also comment that Mr Hofgren does seem very ready to perceive himself as being badly treated, as appears from his complaints that others (the Administrators; his fellow directors) should bear responsibility for his own compliance failures, and his suggestion that he has been scapegoated because of his not being a local resident. I am afraid I attribute this rather, to Mr Hofgren’s failure to grasp that he cannot be accorded any more lenient treatment in being held to account for his own behaviour because of the fact that he is not a local resident. I have no doubt that the

Commission has judged Mr Hofgren in exactly the same way as it would anyone else, in similar circumstances.

501. This aspect of Ground 3 of the Grounds of Appeal therefore fails, and Ground 3 therefore fails in its entirety.

Final Conclusion and Disposal

502. Having considered, therefore, all Mr Hofgren's grounds of appeal, I conclude that none of them succeeds, at any rate sufficiently to justify that the sanctions imposed upon him in this case should be set aside. The Appeal is therefore dismissed.
503. I will make an order dismissing the appeal with Mr Hofgren to pay the Commission's costs on the recoverable basis, unless either party informs the court, within 7 days of the formal handing down of this judgment, that he or it wishes to contend for some different order, in which case I will give directions.
504. There was a separate ground of appeal as to the public statement. The proposed public statement was not referred to in the course of the hearing. I do not see that there can be any objection to the actual issuing of a public statement in principle. There may, however, be issues as to the appropriateness or accuracy of its terms, although I doubt whether anything which I have said in this judgment could affect that aspect.
505. I will therefore give a liberty to apply in any Order, to enable either party to apply to the court either in respect of the public statement or any other matter which arises.

Hazel Marshall KC
Lieutenant Bailiff

21 November 2024