

Appeal against GFSC’s imposition of sanction of public statement against Licensee company, now under totally different and innocent control. Whether decision unreasonable or disproportionate in the circumstances of the case. Whether terms of statement sufficiently accurate. Test for “unreasonableness” as ground of appeal discussed. Appeal allowed.

[2024]GRC080

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Civil Action No 2536

Between:

WEIGHBRIDGE TRUST LIMITED

Appellant

-and-

THE GUERNSEY FINANCIAL SERVICES COMMISSION

Respondent

Before:

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

Dates of hearing: 28th March, 1st and 2nd July, 2024

Judgment handed down: 21st November, 2024

Counsel for the Applicant: Advocate T W McGuffin

Counsel for the Respondent: Advocate J Hill

Legislation, and cases referred to:

Legislation

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

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

Cases

Guernsey

Bordeaux Services (Guernsey) Limited v GFSC (Guernsey Judgment 18/2016)

Y v GFSC (Guernsey Judgment 47/2018)
Domaille v GFSC [2023] GRC017,
Kelham v GFSC [2023] GRC021
X, Y and Z v GFSC [2023] GRC032
Robilliard v GFSC [2023] GCA035
GFSC v Domaille [2024] GCA003

England and Wales

Re BR (Proof of facts) [2015] EWHC 41

Texts

Guernsey Financial Services Commission: *Explanatory Note on General Approach to Enforcement and Enforcement Measures (November 2021)*

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J U D G M E N T

The Appeal

1. This is an appeal brought by the Appellant, Weighbridge Trust Limited (“WTL”), against a Decision Notice (“the Decision”) of the Guernsey Financial Services Commission (“the Commission”) made on 26th September 2023 through Mr Richard Jones KC as its appointed Senior Decision Maker (“the SDM”), to impose upon it, by way of sanction pursuant to s. 38 of the *Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law 2020* (“the EP Law”), the issuance of a public statement in the terms annexed to the Decision.
2. Advocate McGuffin appeared for the Appellant. 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 three day hearing.

Legal framework

(a) Power to issue of public statements

3. The Commission’s power to issue a public statement is one of the “*Other enforcement powers*” conferred on the Commission under Part III of the EP Law. It is contained in s. 38 of the EP Law which reads as follows:

“Public Statements

38 (1) Where in the opinion of the Commission a licensee, former licensee, relevant officer or other person –

(a) has contravened in a material particular –

(i) a provision of this Law, the Financial Services Commission Law or the prescribed Laws, or

(ii) any prohibition, restriction, condition, obligation, enforcement requirement, other requirement, duty, direction or arrangement imposed, issued or arising under any such provision, or

(b) does not fulfil any of the applicable minimum criteria for licensing,

it may publish, in such manner (including, without limitation, by being placed on the Commission's official website) and for such period as the Commission may determine, a statement to that effect.

The statement may contain such information in respect of any person named therein, and such ancillary, incidental and supplementary information, as the Commission may determine.”

4. It is common ground that this provision is a sanction, and the Commission may decide to impose it on the specified persons if the qualifying conditions are met. It is perhaps remarkable, and certainly illustrates the notable breadth of the Commission’s powers, that that power is apparently not even confined to persons who are or have been actual licensees of the Commission, whether individual or corporate, or individuals who work in a designated “*supervised role*” in financial services under the relevant laws, but appears to extend to any “*other*” person. The

final sentence gives the Commission the power to determine the terms in which any such public statement of its opinion are made.

5. Whilst the qualification for exercise of the power depends simply on the “*opinion*” of the Commission itself, this can arise in two distinct situations, one historic and one current. The first is that the person in question has (in the Commission’s opinion) committed some transgression of either the relevant laws or any of the rules and regulations laid down under them (mostly by the Commission) at some time in the past: see sub-paragraph (a). The second is that (again in the Commission’s opinion) the person currently fails to fulfil any of the Minimum Criteria for Licensing: see sub-paragraph (b).
6. S. 38 (2) lays down the matters which the Commission must take into account when exercising this power. It reads

“(2) In deciding whether or not to publish a statement under this section and, if so, the terms thereof the Commission must take into consideration the following factors –

(a) whether the contravention or non-fulfilment was brought to the attention of the Commission by the person concerned,

(b) the seriousness of the contravention or non-fulfilment,

(c) whether or not the contravention or non-fulfilment was inadvertent,

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

(e) the potential financial consequences to the person concerned, and to third parties including customers and creditors of that person, of publishing a statement,

(f) the action taken by the Commission under this section in other cases, and

(g) any other matter the Commission considers relevant.

Whilst subsections (a)-(f) are mandatory, the drafting of (g) effectively makes it permissive.

(b) Right of Appeal

7. The right of appeal is conferred by s. 106 (1) of the EP Law. This entitles

“A person (“A”) aggrieved by a decision of the Commission...”

falling under any one of 24 categories of decision thereafter listed, to appeal against it to the Royal Court. By s. 106(1)(l) a decision

“to publish a statement relating to A under section 38”

of the EP Law is such a decision. The phrase “*publish a statement*” is capable of applying generally (ie reading “*a*” as meaning “*any*”), but is also capable of connoting reference to “*a*” particular statement. In this meaning, it extends possible grievance to cover complaint about the terms of a proposed statement. This is reinforced by the fact that the words of s. 38 (2) (“*if so, the terms thereof*”) clearly bring the actual terms of a statement into the scope of the sanction which it may be sought to challenge.

8. In this appeal, the Appellant invokes both the narrower and wider aspects of the meaning of s. 106(1)(1). It complains that it is justifiably aggrieved by the Commission’s decision to issue any public statement relating to it, at all, in all the circumstances, but if that is not upheld, it also complains at the terms in which the Commission has decided to do so.
9. The second point to note is that the subject matter which confers *locus standi* to appeal is a statement which “*relates to*” the aggrieved complainant. Whilst the concept of “*relating to*” is very general and wide in its natural meaning, if that nexus is not established then there is no *locus standi* to appeal under this sub-section. It is thus said that there is no *locus* to make an appeal about the terms of a public statement which is made in respect of someone other than the complainant itself or himself. Again, the scope and effect of this proposition figures in this appeal. Linked to, and possibly reflecting, that proposition is also the issue whether a public statement made in respect of A can or should disclose or conceal the identity of any other person (“B”) who is not the actual subject of that particular statement of opinion, but to whom reference needs to be made as part of any necessary explanation of the sanctioned conduct.

(c) Grounds of appeal

10. The available grounds of any such statutory appeal are laid down by s. 106 (3) of the EP Law. They 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.”*

11. These grounds can potentially overlap. For example, ground (d) would be a particular cause of potential “*unreasonableness*” which is ground (b). I shall have to return to analysing these statutory grounds of appeal later.
12. WTL raises ten separately formulated grounds of appeal in its Cause, and as to each it invokes grounds (a) as to error of law, grounds (b) as to unreasonableness and grounds (d) as to lack of proportionality. In each case these complaints are applied, as appropriate, to the Commission’s general decision to issue a public statement relating to WTL at all, or to do so on the terms of the relevant public statement, which are themselves, in turn, challenged in several respects.

(d) Court's Powers

13. The Court's powers on any such appeal are contained in s. 106 (6) of the EP Law and read:-

“(6) On an appeal under this section the Royal Court may:-

(a) set the decision of the Commission aside and, if the Royal court considers it appropriate to do so, remit the matter to the Commission with such directions as the Royal Court thinks fit, or

(b) confirm the decision in whole or in part.”

Factual background

14. The important background facts, necessary to understand the 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, the starting point and central focus is the Decision itself) or from further facts which were accepted by the Commission in their response to WTL's Cause.

15. It is a welcome but unusual feature of this case that there is no contest by WTL to the actual findings of fact and judgments of misconduct by its one-time personnel which are made or relied on by the SDM in the Decision. All that historic misconduct is admitted.

16. The focus of the appeal concerns only whether, in the light of those admitted and accepted facts, but in the all circumstances at the time of the Decision (ie on 26 September 2023), the Commission (in effect, the SDM) was justified in deciding to issue a public statement *“to the effect”* of those findings but in respect of WTL itself, or, if so, whether it was justifiable for it to decide to so in the terms in which it did, or whether, in particular, it ought to have anonymised references to WTL in the proposed public statement, or otherwise should have couched it differently. The range of issues in this appeal is therefore reasonably narrow, but still gives rise to some difficult points.

Relevant persons

17. WTL was and is a fiduciary services business founded in 1978 by a Mr William Cairns. It was granted a full fiduciary licence in 2001 to provide a full range of trust and company services. Mr Cairns was an Executive Director from the outset until 9 October 2017, when he resigned as Chairman and Director. He departed from all involvement with conducting WTL's business in June 2018. He held a controlling shareholding in WTL of at least 90% from 1978 until May 2020, when a management buy-out of his shares took place.

18. Mrs Linda Dowding was an Executive Director of WTL from June 2006 to June 2016, after which she was Client Services Director (a senior, but non-board, role) until September 2017 when she left the company. She had started work for the company in 1978 as a secretary and had risen by promotion. She worked extremely

closely with Mr Cairns, as his PA. She held a minority shareholding from November 2004 to June 2019.

19. Mr Paul Conway was an Executive Director and Money Laundering Reporting Officer of WTL from January 2002 to April 2015, and a minority shareholder from November 2004 to August 2016.
20. Mr Du Preez Vermeulen was an Executive Director of WTL from 10 July 2014 to 12 March 2018, when he was demoted to a position as Client Services Manager, working under supervision. He had been Managing Director from 2 April 2015 to 1 September 2017.
21. Although there were several other directors of WTL during the time from 1978 onwards, including during the lengthy period of culpable conduct on the part of WTL as an entity which is described below, the above-named were the natural persons who were the eventual subjects of censure by the Commission. This was against the background that there was accepted to have been a “silo mentality” culture within WTL, under which not all apparently senior persons were fully aware of what was going on.
22. The SDM referred to these four persons, ie Mr Cairns, Mrs Dowding, Mr Conway and Mr Vermeulen, as the “Former Directors”, which was a defined term in the Decision. It is the conduct of those four Former Directors which was the basis for the sanctions which the Commission has subsequently imposed both on those individuals personally and upon WTL as the corporate Licensee. It is, of course, trite law that the executive actions of directors and authorised officers are, as a matter of law, the acts of “WTL” itself at that time, because those actions were effected on behalf of WTL, under its corporate identity and about its business.
23. In the Decision, the SDM describes the misconduct which had been found as a result of the Commission’s investigations, conducted by its Enforcement Division, (“**the ED**”). These investigations took four years from March 2018 to August 2022. He lists the misconduct under six headings. Each of those areas is then related to various paragraphs or provisions in the relevant Laws and the extensive rules, Regulations, Principles, Codes of Conduct, Guidance and Instructions issued by the Commission (I will refer to these compositely as “**the rules**” for brevity) and cited as being breaches of these provisions. The six headings are described as:-
 - *“The deliberate creation, on numerous occasions of misleading and/or incomplete company and trust records”;*
 - *“Serious and significant failings in relation to the fiduciary duties of WTL and [those] directors to observe the utmost good faith and act in the interest of the beneficiaries of trusts”;*
 - *“Failing to perform ongoing and effective monitoring of WTL’s business relationships and, or, to act with due skill care and diligence”;*
 - *“Failing to ensure proper books and records were kept”;*

- “Failing to establish and maintain an effective policy, for which responsibility must be taken by the Board, for the review of its compliance with the requirements of the Regulations”; and
- “Failing to adequately manage a conflict of interest.”

24. As can be seen, not all such matters of conduct involve the same type, or degree, of culpability or misconduct. The first heading plainly implies significant impropriety, though without specific focus. The second also does so, although it could extend also to incompetence. The last four are more apt to describe incompetence or lack of diligence. The degree of reprehensibility to be attributed to any such head of bad conduct must, therefore, depend on the actual facts and conduct going to comprise it. The mere number of different headings only shows the number of different aspects of regulatory misconduct which can be identified, not their relative seriousness.
25. The first heading in particular, but also the second, does not disclose the nature and extent of unlawful or disgraceful conduct which was behind the activities thus categorised. The Commission’s investigators in fact concluded that the purpose of the creation of such “*misleading and/or incomplete... records*” (the first heading), and the apparently cavalier approach to making or recording some trust transactions (the second heading), was to render active and dishonest assistance to some wealthy clients of WTL, four of whom were expressly identified and who were high profile businessmen and associates of Mr Cairns, to avoid being recorded as settlors or beneficiaries of the subject trusts, and thereby to evade tax, with such conduct going back to about 1990. The SDM recognised this in his decision (at §50) although not expressing it quite so bluntly and focusing more on the deceptive nature of the incomplete or inaccurate records than on their dishonest purpose. This culpable conduct was particularly egregious after the introduction of the CRS international asset reporting regime in about 2015, to which Guernsey was an early subscriber. Subsequent reports estimated that the income on which tax had been evaded with the help of those then in charge of WTL was in excess of £56 Mn; the SDM himself put it at £51 Mn: see §367 of the Decision.
26. Beginning in about 2017, though, WTL gained active newcomers to its Board. Mr Matthew Hemans, an experienced financial professional and previously a non-executive director from June 2016, (and appointed ironically, it would appear, for the purpose of preparing the company for control to be handed on to Mr Cairns’ son) was appointed as an Executive Director on 1 September 2017. He immediately assumed the role of Managing Director in place of Mr Vermeulen. Mrs Dowding left the company entirely in September 2017, Mr Conway having left in 2015.
27. It is stressed by WTL that it was Mr Hemans who “*raised the alarm*” with respect to the conduct of the former directors, on 14 September 2017, by submitting a Suspicious Activity Report, a fact which the SDM appears to accept (see §346 of the Decision). The Commission, though, does not wish to accept this description. It prefers to describe the situation as the Commission itself initiating investigations in March 2018 following its on-site visit in July 2017 which had revealed significant and continuing regulatory non-compliance, but not the kind of dishonest conduct which was later uncovered. The Commission characterises the acts of Mr Hemans as being merely required compliance with the regulatory obligation (in particular

that contained in Principle 10 of its Principles of Conduct of Finance Business) to self-report any contravening conduct to the Commission.

28. Whatever the correct, or even reasonable, view of the position, however, Mr Cairns then swiftly left the Board of WTL in October 2017, and there was a complete change of Board in March 2018. A total change of control of WTL then also took place in May 2020, when Mr Hemans and others effected a management buyout of Mr Cairns' shares, thus removing him entirely from the company.
29. In the meantime, commencing in August 2018, the WTL Board under the lead of Mr Hemans had engaged Deloitte to investigate the history of some of WTL's activities and the true source and destination of some of the funds it controlled. A series of reports which became known as the "Project Crossing" reports resulted. The first major such report was produced in April 2019. Relevantly for present purposes, Deloitte had investigated the activities of some 8 trusts set up and administered by WTL, with deficient or suspicious records. These included instances where settlors and beneficiaries appeared to have been disguised, with Mr Cairns purporting to be the sole client in certain cases when in fact wealthy individuals had either settled large sums into the trust in question, or taken large benefits from it, but without their being recorded as either settlors or beneficiaries, and/or where large "loans" had been made by the trust but subsequently just written off, and/or where major transactions had been effected without any apparent commercial rationale, such as the purchases of large value tranches of shares from companies owned by the (concealed) beneficiary of the relevant trust, without a valuation, and which were, again, later "written off" as worthless. In one such case, this effected the purposeful concealment of the purchase of shares in an Australian public company by its CEO.
30. These reports were handed to the Commission, who do accept that they used them in the course of their enforcement investigations between 2018 and 2022, but state that it (the ED) had not simply relied on them, but had sought to corroborate the Deloitte findings through its own enquiries. The contents of the Project Crossing reports did, though, provide materials for much of the Commission's investigations and ultimate findings of very serious misconduct, as contrasted with simply the poor record of regulatory compliance observed on its inspection in 2017, which was what triggered the Commission's own investigation. Whilst the ED appeared reluctant to acknowledge any significant assistance from the Project Crossing reports in their own Enforcement Reports, the SDM did expressly recognise this in the Decision.
31. It is important to record and to emphasise, because it is fundamental to this appeal, that none of the conduct which subsequently founded the Commission's own Enforcement Reports, recommendations, and proposed consequential sanctions post-dated the era of the new and current Board ("**the New Board**") from March 2018. Indeed, all such conduct was prior to the autumn of 2017, giving rise to the Commission's acceptance, according to its own stated policy, that the relevant sanctions imposed were based on the level of penalties in force before these were increased, on 13th November 2017. None of the current directors or controllers of WTL has been the subject of any Commission investigation, nor has the conduct of any of them been impugned in the slightest. Indeed, the New Board has undertaken a difficult, complex and still ongoing remediation process, to regularise the affairs of WTL and the entities which it has administered, with all this arising from, and

necessitated by, the conduct of the Former Directors. It is also acknowledged by the Commission that the New Board, which had been in control of WTL for over five years before the issue of the Decision, has been fully open and co-operative with it.

32. The matters just mentioned in [31] are all accepted by the Commission. Mr Hemans also states that the pursuit of remediation measures - which seem to be principally the correction of declarations of assets and income for taxation purposes, affecting various individuals - have come at considerable personal stress and cost and even threats to the personal safety of those conducting such processes at WTL, as its investigations have begun to implicate some very wealthy and powerful persons. As mentioned, the New Board estimated that the undeclared tax liabilities involved, but arising from before it took over, were in many £Mns.

The essence of the Appeal

33. Against this background and in the events which have happened, the ultimate decision of the SDM with regard to WTL has been, first, not to impose any financial penalty on WTL itself. This has been in view of the acknowledged exceptional circumstances comprising the removal of the miscreants and in particular Mr Cairns from any positions of executive power or control within WTL and (except for Mr Vermeulen, who works only under supervision) from any current connection with WTL, the total innocence of the New Board and current controllers of WTL, and the expensive, thorough and effective remediation measures undertaken and being continued by the New Board, whose own personal reputations are untarnished.
34. However, and despite strenuous representations on behalf of WTL the SDM nonetheless decided to issue a public statement of the Commission's (effectively his, therefore) findings as to WTL's historic conduct. As stated above, the trigger for any such act is the Commission (ie the SDM) forming an "opinion" that WTL's conduct has in the past contravened some provision of the relevant Laws or rules, with the decision actually to exercise that power then being a matter of discretionary judgment on the part of the Commission (ie here, therefore, the SDM). Obviously any such decision has to be made for the proper purposes for which that power exists, and to be made having regard to the mandatory considerations laid down in s. 38 (6) of the EP Law. WTL appeals against that ultimate decision, as set out in [12] above.
35. The cause of its grievance at this part of the Decision is that it says that the issuance of the public statement which names WTL, in the terms which have been proposed now (or more accurately at the date of the Decision), will inevitably, now, damage WTL's reputation, and consequently its business, unfairly, unreasonably and unnecessarily. It argues that, in all the circumstances,
- (i) it is an error of law/unreasonable/disproportionate to issue any public statement at all;

alternatively,

- (ii) it is an error of law/unreasonable/disproportionate in all the circumstances not to anonymise any public statement as to the identity of WTL;

and in addition or alternatively,

- (iii) it is an error of law/unreasonable/disproportionate for any such public statement not to record and identify both the real nature and extent of the conduct which was uncovered and which is being sanctioned, and to associate this with the actual perpetrators of that conduct so as to differentiate this to the general public, clearly and effectively, as a matter of impression, from the acts and conduct of the New Board, this being in the interests of truth, accuracy and transparency, as well as reasonableness and proportionality.

The course of the enforcement process

- 36. An outline of the enforcement process in this case is required for a necessary understanding of how the above situation (that is, the existence and the actual terms of the public statement itself) has come about. That is fundamental to some of the grounds of appeal. However, I emphasise that I bear in mind that this appeal is an appeal against the actual Decision of the Commission made by its SDM, and it is not a calling into question of any step, or interlocutory decision made in the enforcement process itself, to get there. What is in issue is whether the ultimate Decision itself, in relation to the particular public statement, is justified, or whether it is flawed in terms of grounds for appeal which the EP Law makes available to WTL.
- 37. The Commission had carried out on-site inspection visits to WTL both in 2011 and 2015. The 2015 visit identified failures in the conduct of WTL's business, but these concerned practical matters of conduct, such as shortcomings in carrying out required client due diligence, business risk assessments, periodic client reviews and monitoring and record keeping, and suchlike, rather than any of the disgraceful activities noted in [25] and [29] above.
- 38. The July 2017 visit identified that such practical failings persisted and were still significant. Moreover, the Commission considered that it had been misled by assurances that the deficiencies previously identified were being or had been remedied, when they had not been. This was viewed as disclosing such a culpable disregard for regulatory obligation as to make WTL a "repeat offender", and therefore to merit investigation for enforcement purposes, ie the imposition of sanctions. Consequently, WTL was referred to the ED. The ED decided to institute an investigation in March 2018.
- 39. Whilst the Commission issues an Explanatory Note, explaining its procedures and its approach to its "Investigation and Decision-Making Process", this is published as helpful "general rule" guidance and does not have the force of law. Indeed, the Commission reserves the right to depart from it if appropriate. It is not suggested that the various applicable editions of this Explanatory Note were not being followed in this case.

40. It has already been observed and is common ground that the Commission’s investigation took the Deloitte’s “Project Crossing” reports into account as well as its investigations of other failures of regulatory compliance, and that the initial investigative process was very lengthy, taking about four years.
41. The Draft Enforcement Report was dated 18 August 2022. It identified the four Former Directors as being culpably implicated in the serious financial misconduct (with Mr Cairns being the principal architect) which had by then been identified, as well as with the persistent wants of regulatory compliance. The ED’s findings were set out. As already noted, the conduct of these individuals was, in law, the conduct of WTL itself as the Licensee, and, under the EP Law, it could thus found enforcement action against WTL as well as against the individuals.
42. The ED’s recommendations as to sanctions in this Draft Report were as follows (for succinctness, I omit cumbersome references to the disapplication of the limit on acting as a director of more than 6 companies under s. 32 of the EP Law, which disapplication is always made in parallel with any Prohibition Order made under s. 33 of the EP Law):
- As to WTL, the imposition of a “*discretionary financial penalty*” (which I shall now call a “fine” for short) under s. 39 of the EP Law, of £45,500, and the issuance of a public statement relating to the Firm’s conduct pursuant to s. 38 of the EP Law. It was stated that this level of fine was proposed only because of the fact that the current Board had overseen and completed all the remediation required by the Commission, that the Directors other than Mr Vermeulen had left the company, and that Mr Vermeulen was no longer operating at Board level; otherwise, the recommended fine would have been £150,000. It was also suggested that the public statement would acknowledge the remediation undertaken by the New Board, although no actual text for any public statement was then proposed;
 - As to Mr Cairns, a fine of £190,000 (the maximum at the relevant time – see [31] above – being £200,000), the imposition of a Prohibition Order under s. 33 of the EP Law in relation to “*all [ie financial/fiduciary services] functions*” for 15 years, and the issuance of a public statement relating to his conduct;
 - As to Mrs Dowding, a fine of £60,000, a Prohibition Order in relation to all functions for 5 years and the issuance of a public statement relating to her conduct;
 - As to Mr Conway, a fine of £60,000, a Prohibition Order in respect of all functions for 5 years, and the issuance of a public statement relating to his conduct;
 - As to Mr Vermeulen, a fine of £50,000, a Prohibition Order in respect of acting as a director (only) for 3 years and the issuance of a public statement relating to his conduct.
43. Following the usual procedures, the subjects of the proposed sanctions were given the opportunity to make representations to the ED before it made its Enforcement

Report final. WTL itself was separately represented from the four individual Former Directors.

44. The ED then issued its Final Enforcement Report on 28th December 2022 (dated 19th December 2022). It is not necessary to refer to the terms of this. With one small exception, the sanctions proposed at the end of this Final Enforcement Report were identical to those proposed in the Draft Report, including the qualifications noted above in relation to WTL and the New Board. The exception was that as regards WTL the actual proposed fine was reduced to £30,000, but combined, now, with the assertion that, but for the mitigating factors noted with regard to the New Board, it would have been £190,000.
45. The body of the Final Enforcement Report again states, in relation to WTL, a proposal that the public statement “*would*” acknowledge the remediation work of the New Board. This gives the impression that the intended form of a public statement was not then in existence. However, it appears that a draft was prepared, in relation to all five respondents and sent out to them on 28th December 2022 when the Report was actually issued, as this fact has been mentioned and the form has subsequently been produced, between the two parts of this hearing. The draft contains a final paragraph which presumes that all five respondents will settle with the Commission - no doubt as a matter of encouragement.
46. If a Final Enforcement Report and its recommendations are not accepted by those who are the subject of it, the next step is for the matter to be referred to one of the Commission’s Senior Decision Makers. Such Senior Decision Makers are lawyers, members of a panel of largely English KCs, who are selected and appointed as such by the Commission. In so acting, they are officers of the Commission, acting under an Instrument of Delegation of the Commission’s powers. They make the final decision on the Commission’s behalf. In *Y v Guernsey Financial Services Commission* (Guernsey Judgement 47/2018) at [123], McMahon DB (as he then was) observed that this mechanism was doubtless devised with a view to the “human rights” principle that people are entitled to have decisions which affect their civil and criminal rights decided by an “independent and impartial” tribunal, and was

“... intended to introduce a regime as close as it can come without referring the decision to an external person by giving it a semblance of impartiality and independence”

He did simultaneously express confidence that there was a high degree of independence among such SDMs in reality, even if not under the formal structure of their appointments.

47. The SDM in this case was Mr Richard Jones KC. He was appointed on 2nd February 2023 but (he recorded in describing his appointment) only in respect of the possible imposition of sanctions against WTL, Mrs Dowding and Mr Conway.
48. The reason for this was that, virtually simultaneously with Mr Jones KC’s appointment, Mr Cairns and Mr Vermeulen elected to accept the terms of the Final Enforcement Report, and to settle with the Commission on that basis, thereby obtaining the 30% discount on both financial penalties and lengths of prohibition

orders which the Commission offers as an incentive to early settlement and a disincentive to contesting its findings. WTL, Mrs Dowding and Mr Conway had not done so.

49. The Commission referred the matter to Mr Jones KC on or about 2nd February 2023, as mentioned above. At that time the ED sent him what they regarded as the relevant materials. These appear to have been, principally, the Final Enforcement Report and appendices, the Exhibit Bundle of documents there referred to, transcriptions of interviews held during the investigation process and responses from the Respondents.
50. However, they also sent him, at that time, a proposed form of public statement, and this appears to have been the form mentioned above, referring, and previously sent, to all five (then) respondents on 28th December 2022. The Commission confirmed that this composite form of draft public statement was sent to the SDM, and as mentioned, it disclosed a copy of it between the two parts of this hearing.
51. After receiving the above materials, holding meetings, receiving further written representations, (most of which are not relevant for present purposes), and inviting and receiving further submissions from the parties in the light, in particular, of the first instance decisions of this Court in April 2023 in the cases of *Domaille v GFSC* [2023] GRC017 and *Kelham v Chairman of GFSC* [2023] GRC021, the SDM issued a “Minded To” Notice (the “MTN”) on 12th June 2023. This contained his proposed Decision, on behalf of the Commission, to issue sanctions against WTL, Mrs Dowding and Mr Conway. These sanctions were reduced from those which had been proposed by the ED as follows:
 - As to WTL, he proposed to impose no fine but simply to issue a public statement.
 - As to Mrs Dowding, he proposed to reduce the fine to £50,000, and the Prohibition Order to 3 years, together with the issuance of a public statement.
 - As to Mr Conway, he proposed to reduce the fine to £40,000, and the Prohibition Order to 3 years, together with the issuance of a public statement.
52. It is thus clear that the SDM had given weight to WTL’s submissions, made by letter from their Advocates, Babbé, to him in March 2023, about the unfairness of imposing a fine on WTL, given the remediation work that had been carried out by the New Board and the fact that such a fine would now affect only the New Board and WTL’s current owners/controllers. However, he had not acceded to WTL’s submissions that, by the same logic, it was inappropriate to issue a public statement in respect of WTL.
53. Attached to the MTN, at Appendix 3, was the SDM’s proposed form of public statement, at this “Minded To” stage. Importantly for present purposes, this draft was a single document of which the named subjects were WTL and all the four Former Directors. I will henceforth refer to it as “**the composite public statement**”. It gave a factual account which included a summary of the conduct

of all the four Former Directors (and thus WTL) which had been found, and based on which it was considered appropriate to express the Commission's "opinion" (under s. 38 of the EP Law), and it listed the relevant regulatory allegations against each of those persons, together with a recital of the proposed sanctions against each of them.

54. Comparison of this MTN draft with the version which the Commission had supplied to the SDM when giving initial instructions to him (see [50] above) shows that the SDM had effectively adopted that draft. The only amendments which the SDM had made were to remove the reference to the imposition of a financial penalty on WTL and to adjust the quantum of the sanctions imposed on Mr Conway and Mrs Dowding in accordance with his own decisions. All the rest of the material contained in the proposed public statement repeated exactly the text otherwise put forward by the ED, even including the "early settlement" paragraph.
55. WTL made written representation to the SDM dated 19th July 2023. For obvious reasons, these focused on the apparent proposal in the MTN to issue a public statement against WTL at all, but they also cited the terms of the proposed public statement as the grounds for not doing so. On 31st July 2023 (but mis-dated August) the ED submitted a written response to the SDM, supporting (quite unsurprisingly) the issue of a public statement in principle, and still, apparently, proposing the form of composite public statement now attached to the MTN.
56. The SDM called a meeting, which took place on 7th August 2023 at which WTL and the ED were both represented. In the course of this, competing submissions were made as to the arguments for and against the issue of a public statement regarding WTL.
57. WTL's contentions were made in the context of evidence there given by its three directors, as to the reputational harm and therefore commercial damage which would be suffered by WTL – and thus by extension, the innocent New Board, the present owners and controllers and the staff of WTL, either directly or by association – if a public statement were now to be issued naming WTL as was proposed.
58. It was objected, first, that the proposed public statement in the form annexed to the MTN did not, fairly, make it sufficiently clear as a matter of impression that the conduct giving rise to sanctions was the conduct of former directors, and that the New Board and current controllers were in no way involved.
59. The second objection was that the example descriptions of the sanctioned misconduct were in terms which were hugely incomplete as to what had actually been found to have happened, to the extent that they were effectively untrue; the draft did not give a fair and accurate account of the gravity of the misconduct of the individuals involved (in particular Mr Cairns) but even more, by not expressly mentioning the obvious implications of certain criticisms (eg, as to why records were incomplete or inaccurate) and by selecting only particular materials (eg describing aspects merely of regulatory failings) it misleadingly conveyed the impression that this misconduct had only been as to want of care, or regulatory compliance, (such as failing to carry out adequate due diligence, or obtain valuations, or keep up to date records, or failure to manage conflicts of interest)

rather than matters of impropriety as grave as setting up schemes to facilitate tax evasion and disguise the distribution or beneficial ownership of clients' assets. These latter misdeeds were just not mentioned.

60. The complaint was then that, unless such conduct was described fairly and squarely and associated with the particular individuals who committed it, so as to distinguish it and them from the conduct and reputation of those presently directing the business of WTL, then the proposed public statement was actually so misleading as to amount to untruth, and there could be no legitimate public interest in imposing such a public statement on WTL.
61. Following this meeting, on 11th August 2023, and clearly, having taken some account of WTL's arguments, the SDM gave directions, as follows:

“ In the event that I was minded to decide that a public statement should be issued in this case, then I instruct the Enforcement Division to amend the public statement that was appended to my Minded To Notice to reflect the representations made during the oral meeting in respect of further delineating the behaviour of the former directors and controllers of WTL from that of the current directors and controllers of WTL. Further, I instruct the Enforcement Division to amend the public statement so as to ensure its factual accuracy, in particular, for Example 3 to reflect that the conduct described extended beyond not obtaining the necessary photo identification.”

He directed the ED to provide an amended such draft by 21st August 2023, showing the changes made, and with a short covering letter of explanation if necessary, and he directed that Babbé, for WTL, should then review that proposal and, by 31st August 2023, make further representations on it to both the ED and himself, again with a short covering letter of explanation if necessary. (It is clear in context that by the word “delineating” the SDM meant “distinguishing” or “differentiating”, and his direction was understood in this way.)

62. The ED responded to the SDM's directions, on 21st August 2023, by the production of a revision of the composite public statement attached to the MTN. Importantly, however, this now excised all references to Mr Cairns and Mr Vermeulen by name, removing them as the subjects of the public statement completely, removing all the references to their positions and the timing of these, removing the listed examples of their personal conduct being sanctioned, referring to them only as an anonymous “Director A” and “Director B” where they had to be mentioned at all for being the subject of criticised conduct by others (namely as regards failure by WTL, seemingly, now, through Mr Conway or Mrs Dowding, properly to manage, according to the Commission's requirements, a potential conflict of interest between them), and making no mention of their, or anyone else (except Mrs Dowding and Mr Conway), incurring any sanction at all in respect of the conduct as to which WTL was being found to have been wanting.

63. I note the following points about the revised draft public statement:

- It named WTL right at the outset, defining it as “*the Licensee*”, which term was then used to refer to WTL throughout, without further qualification save as mentioned below.

- At the first reference to “*the Licensee*” in the introductory paragraphs of the statement, the previous words “*the Licensee and the Former Directors*” (which had thus previously referred to all five subjects, not distinguishing WTL from the miscreant directors at all but if anything equating them) were replaced by the words “*the Licensee (as operated by the previous board and controllers, Mr Conway and Mrs Dowding)*”.
 - In the last paragraph of the general introduction to the statement, and once again at its very end under “Mitigating Factors”, there were somewhat strengthened versions of acknowledgements that the New Board was not involved in the sanctioned conduct, had subsequently carried out full remediation of such conduct, and had fully co-operated with the Commission.
 - The text inserted additional time references to years in some places, thereby drawing some attention to the historic nature and timing of some matters.
 - The proposed text also enlarged the descriptions of the misconduct given in three of the “Examples” previously set out in the public statement - Nos 1 (as to lack of integrity), 3 (as to failure to perform fiduciary duty) and 5 (as to failure to monitor activities) - so as now to recite the apparent purpose of the deliberate misleadingness of records and the implementation of apparently inexplicable or colourable transactions as being that of the concealment of the true ownership of assets by the real clients, and (but only expressly with regard to Example 3), dishonest facilitation of the evasion of tax.
64. The covering letter explained that the amendments were intended to implement the SDM’s directions, but noted that the ED had “*also*” removed all references to Mr Cairns and Mr Vermeulen, on the grounds that “*following their settlement agreement, their names and specific conduct will appear on separate public statements*”.
65. By a reactive email on 22nd August 2023, Babbé queried with the Commission the rationale for issuing separate public statements for Mr Cairns and Mr Vermeulen but not for Mr Conway who had also, by that time, settled with the Commission (nor for Mrs Dowding) and also requested copies of the proposed public statements for Mr Cairns and Mr Vermeulen.
66. By email of 23rd August 2023, the Commission responded that Mr Cairns and Mr Vermeulen had entered into a “confidential” settlement agreement with the Commission, which included the terms of the public statement which would relate to them, and that these terms “*were and would remain confidential to those parties*”. It stated that a similar “confidential” agreement had been reached with Mr Conway, but on the basis that if the SDM were to issue a public statement in the remaining proceedings, Mr Conway would remain within that public statement. The Commission therefore stated that it “[*could*] *not*” provide copies of the settlement public statement in respect of Mr Cairns and Mr Vermeulen, “*most notably*” because of such confidentiality (though no other less “notable” reason was given).
67. The above exchange of emails does not appear to have been copied to the SDM.

68. The Commission has later, at this hearing, described the original passing of the composite public statement to the SDM as having been a “mistake”.
69. On 29th August 2023, and thus two days before the deadline for WTL’s response, Babbé wrote to the ED raising several objections to the amendments now proposed by them. In brief summary, these were that-
- (i) the removal of Mr Cairns and Mr Vermeulen from the proposed public statement did not comply with the SDM’s direction;
 - (ii) the terms of the now proposed public statement, removing Mr Cairns and Mr Vermeulen entirely, not only failed properly to “delineate” (ie distinguish) those persons’ (Mr Cairns’ in particular) reprehensible conduct from the upright conduct of the current Board and Controllers, but actually prevented and obscured such a distinction from being made, particularly if, as appeared likely, the content of the separate statement with regard to Mr Cairns and Mr Vermeulen only described their conduct in the incomplete and less grave, but thereby inaccurate, terms which had been included in the original composite public statement;
 - (iii) the impression created by the version now proposed was so factually inaccurate as to remove any real or legitimate public interest in naming WTL in a public statement, at all;
 - (iv) if the Commission had, by entering into its agreement with Mr Cairns and Mr Vermeulen, disabled itself from making, within any public statement in relation to WTL, the required fair and proper distinction between their disgraceful and dilatory conduct and the conduct of the innocent current Board and controllers of WTL, then the Commission had illegitimately fettered its discretion, and consequently could not fairly issue a public statement against WTL, at all.
70. WTL copied its comments to the SDM, requesting an extension of time for submitting its response to the ED’s proposed draft public statement. The ED responded tersely on 29th August 2023 that they had made their position clear and would not be responding further, unless directed. The SDM extended WTL’s time for response until 4th September 2023.
71. On 4th September 2023, Babbé submitted WTL’s response providing a revised draft of a public statement, and giving reasons in its accompanying letter.
72. It was first submitted that the threshold of “public interest” was not reached because the ED’s proposed statement did not properly reflect the misconduct which had actually occurred and therefore could not assist the public; it did not provide transparency if the ED were asserting the dishonesty of Mr Cairns’ conduct as support for issuing a public statement against WTL only behind the scenes, but were simultaneously issuing a public statement against Mr Cairns which invoked only less culpable conduct such as not obtaining photo identification as grounds for sanctioning him.

73. It was submitted that the anonymisation of Mr Cairns, in particular, in the ED's now proposed form of public statement to be issued with regard to WTL, actually conveyed the impression that the disreputable conduct which was now inserted in the new form of public statement was that of some "*other director*", which was inaccurate and potentially unfair, all round - and even to other directors who had not been the subject of any enforcement action (see [21] above)]. It objected that the use of the unqualified term "*Licensee*" throughout the proposed public statement, rather than specifically referring to the identified "*Former Directors*" or to "*Mr Cairns*", failed to make the required fair and sufficient differentiation of the conduct of those persons from that of the new Board of WTL.
74. WTL therefore reiterated that no public statement relating to WTL should be issued at all, if a fair and accurate one could not be, but it nonetheless provided a suggested revised form of public statement if that were not accepted.
75. WTL's proposed statement restored references to Mr Cairns and Mr Vermeulen. It removed reference to WTL by name, and avoided this by anonymising it as "*the Licensee*" where necessary in the text, but referred to the "*Former Directors*" rather than to "*the Licensee*" as the authors of the sanctioned conduct where that was described. To give detail, it further expanded on the descriptions of the sanctioned conduct under the given examples (in particular Examples 1, 3 and 5), and did so at some length. Whilst most of the statements appear to be drawn from specific findings contained in the body of the MTN, it is not clear that they all do so (for example, a reference to Mr Cairns' use of subsidiary credit cards to facilitate loans being made to persons who were thereby concealed as trust beneficiaries).
76. Inevitably, and as usual, the ED decided that it could not leave WTL's response unanswered. The only material point for present purposes, though, is that, by its further response of 12th September 2023, the ED pointed out that at the 7th August meeting, Mr Normanton for the Commission had mentioned the intention, as to Mr Cairns and Mr Vermeulen, that "*following their settlement agreement their names and specific conduct will appear on separate public statements*". It was therefore denied that this was a new point.
77. There appears to have been no further communication.
78. On 26th September 2023 the SDM issued the Commission's Final Decision, including his decision to issue a public statement relating to and naming WTL, as well as Mrs Dowding and Mr Conway.
79. This eventual, definitive, public statement was now headed solely with the names of WTL, Mr Conway and Mrs Dowding and followed exactly the text of the proposed amended public statement put forward by the ED on 21st August 2023 except for three small changes. First, The SDM adjusted the dates and the order of the descriptions of the relevant sanctions on all parties appropriately, but this was simply formal. Materially, he then made two changes to the last paragraph of the introduction, to which I will refer, later, as the "**Emphasis Paragraph**".
- The first sentence had previously read

”It must be emphasised that the historic failings and activity detailed in this public statement occurred prior to the current board and controllers of the Licensee being appointed.”

To this he added:

“and references in this Public Statement to the Licensee (unless the context otherwise demands) are to the Licensee under the control and direction of the Former Directors which included a number of other individuals in addition to Mr Conway and Mrs Dowding.”

The phrase “Former Directors”, though, is not defined.

- In the following sentence where it was stated that

“The Commission acknowledges that a full remediation of the business has now taken place”

he inserted the words “difficult and extensive” before the word “full”.

Otherwise, he simply adopted the text of the ED’s proposal.

The SDM’s reasons

80. The SDM gave his reasons for so deciding in §§350-354 of the Decision. He said

“350 I turn to the potential consequences to WTL of the publishing of a public statement. Again, I have received very extensive submissions regarding those potential consequences which I fully take into account. Mr Hemans and two other directors gave evidence at the meeting held on 7 August and further submissions were made on behalf of WTL.

351 As with a financial penalty, the potential consequences include possible reputational damage which may lead to a loss of business and loss of staff, factors strongly pressed by WTL.

352 There is a strong public interest in ensuring that the public, including those in Guernsey and including those who dealt with WTL at the relevant time, should become aware of the issues in this case and of the consequences of regulatory enforcement. In my view it is very important to balance the public interest in making such a public statement against any serious adverse commercial consequences if the statement were made.

353 I bear in mind that one of the purposes of imposing a public statement is to highlight bad practice, and to promote high standards of conduct amongst licensees and those working in the finance industry. Lessons may therefore be learned and the public statement may serve as a deterrent to those business who may be committing similar contraventions. A public statement seeks to provide transparency of decision making in a way that maintains the reputation of the Bailiwick as a well-regulated finance centre.

354 *The draft public statement has been amended to reflect and emphasise the change of control and remediation. I do not consider this would be a disincentive to licensees or others undertaking difficult remediation work, indeed this is reflected in the public statement. A separate public statement is being made in respect of Mr Cairns and Mr Vermeulen. There are undoubted factors in supporting the making of a public statement, and I do not consider the consequences to WTL in the circumstances, as being significant. I am satisfied that the making of a public statement is an effective proportionate and reasonable sanction. I see no reason for any anonymity.”*

The Appeal

81. To reiterate, therefore, WTL, now under the ownership and control of the New Board, remains “aggrieved” by the SDM’s decision to impose upon it, as at 26 September 2023, the making of the proposed, or even any, public statement. It argues that the ultimate decision to do so, of which I have now traced the progress as a matter of background fact, was either made in error of law, or was unreasonable, or lacked proportionality. That is its general complaint, of which its ten separate grounds of appeal express different supporting aspects.

The appeal jurisdiction – general observations

82. 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.

83. 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 jurisdiction with regard to appeals under s.106 of the EP Law, as the Court of Appeal interpreted it from my judgment. It considered that I had interpreted my jurisdiction too widely. It also interpreted what I had done as conducting a trial *de novo* of factual matters which it was the exclusive province of the Commission to determine, which they said was in error. It emphasised that the jurisdiction conferred by s. 106 is 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 appealed against, 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 a fresh appraisal of the matters giving rise to the decision and in effect to re-take it. The Court of Appeal adjudged that that is what I had done, in practice. 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 are sound or are flawed in a legally significant respect.

84. The Court of Appeal’s decision is currently the subject of an application for permission to appeal to the Judicial Committee of the Privy Council. 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 material to the issues in this case.

85. I take the following from the Court of Appeal's judgment.

Test for "unreasonableness"

86. First, as regards the ambit of any appeal authorised under grounds (b) of s. 106 (3), ie "*that the decision was unreasonable*", I note that the Court of Appeal made no comment or criticism of the holding which I made in *Domaille* that the ground of appeal on the basis of "unreasonableness" in s. 106 (3)(b) connotes a threshold of "unreasonableness" which is lower than the threshold for "unreasonableness" required for success on judicial review - the latter being "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. 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 24 GLJ 76 and *Matheson v States Housing Authority* (1998) 26 GLJ 68. I described it in *Domaille* at [24]-[25] as follows

"24. 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.

25. Thus, on a scale of unreasonableness, the point at which a statutory right of appeal on the ground of unreasonableness should result in the appeal being allowed is lower than that of irrationality, perversity or illogicality. It occurs at the point where the appellate court considers that the decision is not simply a decision which it might well not have made itself, but strikes it as objectively "*unreasonable*" as a matter of impressionistic fact, even if it would balk at describing it as irrational or perverse. Whilst it may be a little difficult actually to define where this test differs from the alternative expression of "*Wednesbury unreasonableness*" - namely that it be outside the range of decisions which any reasonable decision-maker could have made - it is quite clear (and indeed Advocate Edwards for the Commission accepted in argument) that the statutory grounds of appeal do envisage that the test for unreasonableness as a matter of fact on an appeal under s. 106 (3) (b) of the EP Law must be lower than the test for a successful allegation of "*Wednesbury unreasonableness*" upon judicial review."

The Court of Appeal did not dissent from the above, or express any disapproval.

87. Furthermore, this widening of the basis for appeal beyond the limits imposed in the classic legal analysis of the scope of judicial review was recognised by the Deputy Bailiff (now the Bailiff) in *Y v Chairman of GFSC* (Guernsey Judgment 47/2018) where, at [121], he said that

“I am satisfied that the breadth of the potential grounds of appeal for example in s. 19 (4) of the Fiduciaries Law (quoted above) [in identical terms to s. 106 1 of the EP Law) extend further that [sic] what might be considered as classic judicial review”

(citing *Walters*, above), and he relied on the effect of this extension for continuing

“I regard the grounds of appeal as effectively conferring on the Court the ability to look at anything that an appellant wishes to raise about the decision-making process of the GFSC and the decision reached.”

There was no criticism of the above analysis, either, in the Court of Appeal’s judgment in *Domaille*.

88. Both Advocates agreed, at this hearing, that my approach to simple “unreasonableness” as a ground of appeal, as above, was left untouched by the Court of Appeal’s decision in *Domaille*, and they also agreed that the test for this “factual” unreasonableness was lower, and consequently more readily met, than the test for “legal” (or “*Wednesbury*”) unreasonableness.

89. The legislature’s distinct ground of appeal for simple, unvarnished “unreasonableness” is not only apparently deliberate, but would also seem to be rather important. “*Wednesbury*” unreasonableness describes unreasonableness which is the product of illogicality, irrationality or perverseness. It puts such a decision outside even the possibility of being a decision made in accordance with the legal power intended to be conferred. A decision-maker is just not authorised to make such a decision. Factual unreasonableness would no doubt include the above, but it is wider. It is perfectly possible to make an “unreasonable” decision or judgment without being illogical, irrational or perverse in terms of its ratiocination, because this can depend on the culture from which one starts. In prescribing a statutory right of appeal against a “*decision*” on the specific ground of its simple “unreasonableness” the Law appears to have intended that a decision which is internally logical and rational, and obviously not perverse in the eyes of the actual decision-maker, can nonetheless be successfully appealed for being an “unreasonable” decision, or outcome, by some objective general standard of reasonableness which the legislature is envisaging.

90. 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, this 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]. 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 flavour or influence.

91. As counsel agreed, therefore, the threshold test for “unreasonableness” within ground 106(3)(b) is still correctly viewed as not being as stringent as the test for unreasonableness in judicial review – illogicality, irrationality or perversity - which would be the equivalent test under ground (a) invoking error of law. However, identifying and applying such threshold (which is what I believed I was doing in *Domaille*, by considering the underlying facts to test my factual impression of the *unreasonableness* of the outcome) may be more problematic.
92. Seeking to define such a test more closely in the light of all the above, I note that it connotes the difference between an illegitimate, purely subjective, test (“I would have made a different decision”) and a properly objective test of factual (un)reasonableness (“I consider that the general view would be that this was an unreasonable decision”). In my judgment this latter is fairly equated to an assessment of whether an ordinary, intelligent, right-minded, properly educated and fully informed member of the public would be likely to consider the decision to be unreasonable in its outcome in all the circumstances. “*Properly educated and informed*” would include awareness of the Commission’s duties and function as financial services regulator, and of their importance, and “*right-minded*” would include having appropriate respect for these. I do not consider that such qualifying unreasonableness is necessarily synonymous with “*oppressive*” although that would certainly qualify. To take a simple paraphrase of the then Deputy Bailiff’s comment in *Merrien v Chairman of GFSC* Royal Court Judgment 23/2016 at [78], there considering “disproportionality” as to which similar principles must apply, the appropriate test would be

“would right thinking members of the public consider that something appears to have gone wrong with the administration of justice”

substituting the “*administration of the regulatory regime*” for the last three words. Quite how to assess and apply the above test I will have to look at more carefully, later.

93. I note that the Court of Appeal in *Domaille* was referred to, and itself cited passages from, the seminal case of *Bordeaux Services (Guernsey) Limited v GFSC* (Guernsey Judgment 18/2016), again, a decision of the then Deputy Bailiff. Whilst the Court of Appeal did not quote the following oft-cited and generally accepted passage at [30] in that judgment, it did not disapprove it:

“Ultimately what matters is whether the GFSC has achieved a fair balance. This can involve consideration of whether the Senior Decision Maker has given disproportionate weight to one or more of the considerations relevant to his Decision, and, if so, whether it is of such significance that the aspect of the Decision affected falls outside the range of reasonable responses that could follow in the circumstances of the case...”

94. This “fair balance” test is frequently cited and has the obvious ring of being fair and reasonable taking one thing with another. I therefore regard this citation as applicable, and thus to permit, and even emphasise, such a “fair balance” test in considering the question of what is within or outside any range of “*reasonable responses*” of ordinary people on the factual basis, as just discussed. That balance must, as a matter of principle, be objectively justifiable, and it can therefore be subject to review. However great the degree of proper respect which may rightly be accorded to the Commission’s own subjective decision as the authorised decision-maker under the relevant statutory powers, that cannot dictate that any such “fair balance” is achieved simply by the Commission’s own self-certificated assertion, and I do not understand the *Domaille* appeal judgment to be contrary to this.
95. Crucially though (and emphatically in all the circumstances, having regard to the Court of Appeal’s judgment in *Domaille*) I remind myself that the correct method for testing the matter and arriving at any such conclusion of factual unreasonableness, if appropriate, must be by reviewing the ultimate Decision in question (being that which is appealed against) against the background of submissions made and evidence produced, but, at the same time, it must not stray into any usurpation of the Commission’s own “*primary fact-finding function or expert, evaluative, regulatory decision-making function*” (see: *Domaille* at [80]). Where the dividing line is actually to be drawn in any instance, between illegitimately doing that, and legitimately exercising the Court’s power, deliberately conferred by the legislature, to set aside a Decision or any part of it on the grounds of simple “*unreasonableness*”, giving that power meaningful content, will hopefully turn out to be sufficiently clear in practice.

Inquisitorial process

96. A second matter is that I must also bear I mind that the process which I am concerned to review is most emphatically said to be inquisitorial and not adversarial. I think it is fair to observe, though, that this characterisation focuses on the formal description of the Commission’s procedures, as advanced by the theory of their own published Explanatory Note mentioned above at [39], rather than what seems to happen in reality. In particular, and at least by the time a matter gets before an SDM, the process certainly appears to assume the character of an adversarial contest between the subjects of the enforcement process on the one hand and the ED on the other. There are competing submissions, rebuttals and counter-submissions on both sides, all with the intent of influencing the decision of the SDM. The ED does not take a neutral, or detached stance leaving its Final Enforcement Report to stand on its own merits before the SDM, but vigorously defends the stance of “the Commission” to the SDM, and rebuts representations from the subjects of the proposed sanctions. That all looks most adversarial to me. Nevertheless, I must accept that the position at law is that the Court is reviewing an “inquisitorial” process.
97. The relevant effects of this characterisation for present purposes seem to me to be twofold.
98. First, there are really no applicable “rules” of procedure in any sense other than in the basic sense of a “duty to act fairly” which has become the modern synthesis of

previously formulated common law rules about fundamental justice (*nemo iudex in causa sua* and *audi alteram partem*) with regard to domestic tribunal decision-making.

99. Second, it also has the effect, (see *Robilliard v GFSC* [2023] GCA025) that the concept of the “burden of proof” has no place. The position is simply that the SDM will not make a relevant finding unless he is “satisfied” of the fact in question, albeit without being constrained by the rules of evidence in judicial proceedings. Whilst it is said that such “satisfaction” must effectively mean being satisfied “on the balance of probabilities” in all the circumstances of the case, that is therefore a proposition of logic rather than law.
100. The final result will in practice be only subtly different, if different at all. I do not read this disavowing of the concept of the burden of proof as meaning that findings of fact made by an SDM are simply unappealable – they are, after all the basis of the statutory “decisions” which are the focus of any appeal – but only as emphasising that for a successful appeal to overturn any such finding of fact (and thus overturn a decision for a material error of fact) it must effectively invoke the proposition that there was no evidence which could, objectively viewed, have justified the SDM’s asserted “satisfaction” as to such fact.

Public statements

101. As regards public statements, there is little authority with regard to these, probably because appeals are usually more concentrated on the direct sanctions of financial penalties and prohibition orders. The apparently routine public statement, following on from these, is usually a secondary matter which is likely to command less attention. This appeal is thus somewhat of an exception.
102. One starts, of course, from the position that all the powers which are conferred on the Commission are conferred for the general purpose of performing its functions as laid down in s. 2 of the *Financial Services Commission (Bailiwick of Guernsey) Law 1987* as amended (“**the FSC Law**”), and their use and operation is to be justified for being in furtherance of these. Many relate to formal operations such as regulating, licensing, reporting and advising but, materially for present purposes, the Commission’s general functions contained in s. 2 (2) commence with

“(a) to take such steps as the Commission considers necessary or expedient for the development and effective supervision of finance business in the Bailiwick....”

and at s. 2 (4), in the exercise of the Commission’s general functions, it is empowered to take into account any matter considered appropriate, but it is also directed that it

“...shall, in particular have regard to

“(a) the protection of the public against financial loss due to dishonesty, incompetence or malpractice by persons carrying on finance business; and

“(b) the protection and enhancement of the reputation of the Bailiwick as a financial centre.”

These functions have been explained, by judicial interpretation in *Bordeaux Services (Guernsey) Limited v GFSC* (Guernsey Judgment 18/2016) at [28] as being, or at least including:

“...maintaining financial stability in the regulated sector, managing risk to the financial system and maintaining market confidence, ensuring fair and efficient and transparent markets, protecting financial services’ customers and countering financial crime and the financing of terrorism.”

103. I have noted only two authorities which contain helpful comments directed specifically towards the power to issue public statements. In *Y v Chairman of GFSC, Guernsey Judgment 47/2018*, the then Deputy Bailiff considered the proper scope of the power to issue public statements then conferred on the Commission by s. 11C of the *Financial Services Commission (Bailiwick of Guernsey) Law 1987* as amended (“**the FSC Law**”), which is effectively the precursor, couched in similar terms, of s. 38 of the EP Law. At [100] he noted the Policy Letter supporting the conferring of such power (Page 1494 of the Billet d’Etat of 2007) as an aid to the construction of the proper purpose for which such a public statement might be issued at all.

104. He noted that, in its Para. 19, a major concern of the Policy Letter was that

“care would need to be taken to balance the public interest in making the statement against any serious adverse commercial consequences which may impact on the licensee if the statement is made”,

but at the same time, the Letter very much welcomed the prospect that the possibility of the making of a public statement could have the beneficial effect of encouraging a cultural change within regulated persons, as the Commission notes in its skeleton argument in this case.

105. In Para. 20, in particular, the Letter noted that:

“20. The power to make public statements about failings by regulated persons and individuals can:

(a) focus the attention of regulated persons:

(b) clearly demonstrate to both the public and regulated persons that the Commission is aware of, and taking action in response to, problems at regulated persons;

(c) provide clear messages about the unacceptability of particular failings; and

(d) ensure that the Commission is seen to be active and effective”

but interestingly, it also envisaged that

“Clearly, except in the most extreme cases where it is necessary to prevent customers or the public from suffering loss, the Commission would need to discuss (although not necessarily agree) the contents of a public statement with the persons named in it before issuing it”.

106. The Deputy Bailiff noted that, whilst the Policy Letter had apparently envisaged that the power would only be used “*sparingly*” in the case of “*major contraventions ...where publication would be in the interests of the public or consumers*”, it appeared that, in practice, the power had now become used virtually as a matter of course. However, the terms of the power under s. 38 of the EP Law are in perfectly general terms, and do not purport to confine it in any way.
107. Indeed, the Commission points out, in its Skeleton Argument, that it had given notice, in the 2021 Edition of its Explanatory Note, that it will “*always*” seek to impose a public statement following the Enforcement Process citing “*accepted international practice*” as the justification for this.
108. I have to say that I have misgivings as to this being an unauthorised fettering of the discretionary power conferred on the Commission by s. 38 of the EP Law. It is not clear whether such justification was cited to the Deputy Bailiff in *Y v GFSC*, (above), which predated this Explanatory Note. Whether the adoption of such practice as routine for the reason perceived was therefore wholly legitimate in terms of the Commission’s powers under the EP Law and its predecessors does not seem ever to have been examined or questioned. Apparently, though, it has been accepted as such, and in actual practice the Commission appears nonetheless to have been prepared to contemplate not issuing a public statement on occasions, at least in relation to entities. Even so, it might be said that this practice has created a presumption in favour of issuing public statements which does not appear in the legislation, nor to have been its intention. However, as the point was not raised in this case, I say no more about it.
109. In *Y v GFSC*, the then Deputy Bailiff considered the basis of challenge to a decision to issue a public statement at all separately from challenge to the contents of a statement, if issued, and he also gave guidance on the latter. He could not, he said, explain his ruling by reference to the detail in that particular case, because his judgment was necessarily (at that time) anonymised, but he made some general observations. Pertinently, he said, at [107]

“107.....a public statement should be a factual notice for the benefit of persons reading it, in particular for the purpose of protecting them as consumers, and to explain sufficiently to ensure that others do not act in a similar fashion or, if they do, will potentially face similar consequences, ie as a deterrent. The public statement is not, though, a substitute for the SDM’s reasoning [and should not go into how the SDM’s decision was arrived at].....Had the legislature wanted the GFSC to be able to publish the full reasoning leading to the imposition of sanctions, the legislature could have made that provision but it has not done so and there must, in my view, be some constraints on the GFSC as to what can properly be included in a public statement.

“108 ... it would obviously be permissible to set out the sanctions as imposed and the Laws under which they were imposed. Any background section should be confined to the factual findings made ...it must be permissible ... to set out those that put into context the sanctions imposed [but] the public statement should be limited to what was actually found. ... the section heading “Findings” ... must relate to the basis on which the public statement is being made... I think the public statement must always have as its core an explanation of why the conclusion [there, that Y did not fulfil the minimum criteria for licensing] was actually reached. It is permissible to explain the aggravating and mitigating factors found and to set out how the considerations in section 11(2) [see here 38 (2) of the EP Law] have been addressed but always bearing in mind the entitlement of Y (or any other individual) to respect for any Article 8 ECHR rights engaged. In other words some facts do not have to be made public if to do so would result in an unwarranted interference with an individual’s private life.”

110. The above guidance is self-explanatory in its terms, although plainly written in relation to a public statement in which the Commission was found to have inserted too much, rather than too little, information. It can be seen how the above comments have come to shape the usual template pattern of public statements issued by the Commission, of which there are very many examples on its website.
111. The other relevant authority at this point is *X, Y and Z v GFSC* [2023] GRC032. At the end of a lengthy judgment, dealing with and dismissing, all three Appellants’ appeals against the primary sanctions imposed by the Commission, the (current) Deputy Bailiff needed to consider the content of the proposed public statement, as this was still applicable after her substantive decision. At [268] she said

“Whilst the public statement is not a substitute for the SDM’s reasoning, it is imperative that it is accurate”.

She then proceeded to correct two inaccurate statement as to the SDM’s findings, on relatively minor matters, one being, for example, that it was said that X had referred to a bank account as a “slush fund”, when the actual finding was that X should have been put on alert by the fact that, to his knowledge, it was Y who had referred to the account as a “slush fund”. This illustrates the great importance which is, quite rightly, attached to meticulous accuracy in the contents of a public statement.

Grounds of appeal

112. With the above general comments in mind, I now turn to the grounds of appeal, which I can set out here. Slightly summarised, and given my own shorthand label where convenient, they are as follows:

Ground 1:

[The SDM] erred in that his discretion under s. 38 (2) of the EP Law was improperly fettered or otherwise wrongfully impaired by earlier decisions of the GFSC to either impose public statements on the contravening directors of the Appellant, or

otherwise, the content of such public statements; (“**wrongful fettering of discretion**”);

Ground 2:

[The SDM] erred in failing to find “exceptional circumstances” with respect to the exercise of his discretion under s. 38(2) of the EP Law after finding exceptional circumstances to not impose a discretionary financial penalty on the Appellant under s. 39(6) of the EP Law where the prescribed statutory factors are the same (but for one irrelevant factor); (“**not finding exceptional circumstances**”).

Ground 3:

[The SDM] erred in failing properly to take into account other relevant cases including *Confiance*, or otherwise wrongly finding the conduct in this matter was more serious than in that case (or others) where the GFSC has subsequently accepted the conduct in *Confiance* was in fact more serious where no public statement was issued with respect to that licensee; (“**inconsistency with other cases**”).

Ground 4:

[The SDM] erred in failing to give proper or otherwise sufficient weight to the financial impact of consequences of a public statement on the Appellant its employees clients and staff and the reputations of the innocent current directors and controllers; (“**undervaluing adverse effects on Appellant and innocent third parties**”).

Ground 5:

[The SDM] erred in **failing appropriately to separate the conduct of the former directors and the Appellant.**

Ground 6:

[The SDM] erred in failing to give full or otherwise proper consideration to the comprehensive remediation process undertaken by the current directors and controllers and the impact of such; (**failing to give proper credit for full remediation**”).

Ground 7:

[The SDM] erred in failing to give any weight to the proposition, posed but not answered by the Enforcement Division of the GFSC, as to what further could the current directors and controllers have undertaken to avoid the imposition of a sanction in the circumstances; (“**failing to find everything possible had now been done**”).

Ground 8:

[The SDM] erred in giving improper weight to the asserted public interest of issuing the proposed public statement as opposed to, at least, the impact or consequences

of such on the Appellant, its employees, clients and staff and the reputations of the innocent current directors and controllers; (“**failing properly to balance public interest and interests of innocent third parties**”).

Ground 9:

[The SDM] erred in failing to give full or proper consideration as to whether the proposed public statement properly serves the asserted public interest, as such does not represent a fair or accurate factual summation of the underlying facts giving rise to the contravening conduct of the former directors of the Appellant and/or otherwise improperly or negatively reflects upon the Appellant (and by extension its current directors and controllers) in the circumstances; (“**failing to draft a properly accurate statement**”).

Ground 10:

[The SDM] erred in failing to consider that anonymisation of any proposed public statement with respect to the Appellant was appropriate in the circumstance or otherwise failed to provide full and proper reasons why anonymisation was not appropriate; (“**Failing to find anonymisation appropriate**”).

113. By way of overview, these ten grounds actually go to three broadly distinct contentions on the part of WTL. The first is the blunt one that it was wrong for the SDM to decide to issue a public statement, at all. Arguments in support of this contention provide the basis for all the grounds of appeal at grounds 1-4 and 6-9. The second is that the SDM was wrong not to conclude that the public statement should anonymise WTL (grounds 2 and 10). The third goes to the general contents of the public statement, challenging it as inaccurate (grounds 1, 5 and 9).

Observations

114. Many of these ten grounds overlap. Grounds 4, 8 and part of 9, for example, are different ways of putting the same complaint that the SDM’s decision has failed to arrive at the proper balance between the public interest and the interests of innocent parties, (and should have concluded, in effect, that the latter outweighed the former). Ground 5 and the remainder of Ground 9 both found on what is really one and the same allegation of impermissible inaccuracy in the public statement. Ground 1 is linked with this, being alleged to be part of the cause of such inaccuracy. Grounds 6 and 7 are different invocations of one and the same plea, namely that not enough credit had been accorded, in practical consequence, to the admitted comprehensive remediation processes undertaken by new directors and controllers of WTL and Ground 2 is the same point in generalised form.
115. It will therefore be convenient to deal with some of these grounds of appeal together, but also in a different order from the order in which they appear, so as to take a logical course. I consider this to be to take, first, the arguments that go to support the contention that it was wrong, in principle, to issue a public statement naming WTL at all, and then to progress to the arguments with regard to the necessary or appropriate contents of any such public statement if one is to be made, and lastly to consider whether any of these latter considerations may require re-visiting the former ones.

116. Taking this course, it is convenient to take Ground 1 of appeal at a later stage, and as indicated, to take first the grounds of appeal which go to the general issue of whether the SDM was wrong to decide that any public statement naming WTL as its subject should be issued, at all.

Ground 2: not finding “exceptional circumstances”

117. As formulated, this particular ground of appeal is really an argument of error of law. At §349 of the decision, the SDM held that he was persuaded, in the “exceptional circumstances” of this case, that it was appropriate to make no order for a financial penalty against WTL itself (and notably, in doing so, overruling, even, the “reduced penalty” recommendation of the ED). The circumstances on which he relied were recited at §§346-348. He there recorded, without demur, WTL’s submissions on this point, which included

- (i) the intervening change of Board and controllers,
- (ii) it having been Mr Hemans who raised the alarm about WTL’s disreputable activities,
- (iii) the total departure (a long time previously) of Mr Cairns, Mr Conway and Mrs Dowding from WTL and the demotion of Mr Vermeulen from the Board responsibility to a role under supervision,
- (iv) the substantial and comprehensive remediation work undertaken by the New Board, including commissioning the Project Crossing reports,
- (v) the potential reputational and operational damage of sanctions to the business,
- (vi) the innocence of the New Board, and
- (vii) the potential disincentivising of new directors and owners, if a business were still subject to (financial) penalty despite their extensive efforts.

As against these points, it was recorded that the Commission (in effect, of course, the ED) therefore did not seek a substantial financial penalty against WTL but would otherwise have recommended a penalty of £190,000. This was virtually the maximum possible for pre-November 2017 offences committed by either an entity or an individual, and was equal to the penalty proposed for Mr Cairns personally.

118. This decision was recorded in a section under the heading of “*The potential financial consequences to the person concerned, and to third parties including customers and creditors of that person of imposing a financial penalty/publishing a public statement*”, (emphasis added). This shows that the SDM was taking account of the identical terms of s. 39(6)(e) regarding financial penalties and s. 38(2)(e) regarding public statements.

119. Advocate McGuffin therefore submits that, if the terms of s. 39(6)(e) of the EP Law caused the SDM to consider it inappropriate to issue a financial penalty against WTL, because of the exceptional circumstances and the potential adverse financial and other consequences he mentions, the same logic must require that he should

find it inappropriate to issue a public statement against WTL, when the same exceptional circumstances applied and the same kind of adverse consequences were likely to ensue.

120. For the Commission, Advocate Hill submits that this is false logic. The purpose of imposing a financial penalty and the purpose of issuing a public statement are different. Consequently, it did not follow that the same decision was appropriate in each case and it was perfectly logical that a proper “taking into account” of the same factors in relation to each case might produce a different result. The SDM’s reasoning to this effect is unassailable.
121. On this point, which is actually quite narrow, I agree with Advocate Hill. This ground of appeal therefore fails. The highest this point can amount to is that it shows that the SDM did accord some weight to WTL’s submissions as to reputational impact and the disincentivising impact of penalties, as he accepted them, and did not dismiss them as illusory, when considering their impact on both types of sanction.

Grounds 3: Inconsistency with other cases

122. This is a complaint which again almost amounts to alleging an error of law. It is to the effect that there have been other cases in which the Commission has not issued a public statement against the relevant entity but only against the individual(s) who committed the relevant wrongdoing, and in which the level of misconduct attributable to the relevant legal entity is suggested to be comparable with, or even more serious than, that which the Commission had recorded against Mr Cairns and the other former directors. The Appellant relies in particular on *Confiance* and to a lesser extent *Bougourd*, Advocate McGuffin also mentions *Chick, Shaw, Sarre, Buzaneli* and *Ellis*.
123. Advocate McGuffin submits that by not taking the course of not issuing a public statement against WTL as the Licensee in this case, the SDM has been guilty of not properly applying the requirement under s. 38(2)(f) of the EP Law, to take into consideration “*the action taken by the Commission under this section in other cases*”. Although the SDM referred to several such cases in the Decision, it is submitted that he simply did not assess and take account of their implications correctly.
124. In the *Confiance* case, financial penalties were imposed and a single public statement was issued against five named directors in respect of extensive and persistent failings of regulatory compliance (inadequate anti-money laundering systems, client risk assessments, verification of sources of funds, conducting appropriate enhanced client due diligence, etc) but no public statement was made against *Confiance* itself. In *Bougourd*, the Commission made a public statement in respect of disreputable conduct (creating false business records) committed by a director/employee of a fiduciary services company, but did not name the entity concerned.
125. Advocate McGuffin argues that *Confiance* was dismissed by the SDM as being in respect of less serious conduct than in this case, but asserts that comments (though these are disputed) made subsequently to the Decision by Mr Simon Gaudion,

director of the ED, at a meeting between him and representatives of WTL, show that the conduct (it concerned links to the Mafia and giving rise to other litigation) was in fact more serious in *Confiance* than here, and was thus even (he submits) admitted by the Commission to be such. He submits that *Bougourd* was an instance of the Commission accepting that the reputation of a corporate entity should not be tarnished by the behaviour of what was described as a “rogue” employee, by making it the subject of a public statement against the entity, and he submits that this case is similar. The other cases are relied on to support his submission that not making a public statement against an entity itself was not exceptional, and that the SDM’s failure to accord WTL such benefit, in the exceptional circumstances of this case, was sufficiently far out of line, therefore, as to amount to an error of law or to unreasonableness.

126. Advocate Hill argues that the above contention is simply unfounded. On comparison, the other cases are perfectly reasonably regarded as less serious than the present, but also, the Court of Appeal in *Domaille*, at [178] – [179] confirmed that

“...comparisons with other cases in this context should be approached with a suitable degree of realism and flexibility ... making micro-comparisons ... is inappropriate where the imposition of appropriate sanctions relies on an overall assessment of the circumstances of the particular case ... comparisons can never be taken too far and the issue to be decided is the seriousness of the individual’s failings.”

He submits that the SDM’s evaluation of these cases is therefore, again, perfectly reasonable and unassailable, and if the real purpose of drawing attention to these cases is as support for an argument that WTL itself should be anonymised, that is misconceived, because the cases themselves do not provide any indication of the reasons for anonymity.

127. I again accept Advocate Hill’s argument. In my judgment the SDM’s review and consideration of the Commission’s actions in other cases is not to be faulted.

128. Advocate McGuffin’s invocation of an apparently informal remark made by a senior officer of the Commission, after the Decision, and made in some other context at a meeting, is nothing to the point, even if it were capable of bearing the meaning attributed to it (which is far from clear, and I understand that it is disputed in any event). The rightness and reasonableness of the Decision turns on the SDM’s own assessment of the evidence placed before him and there is no suggestion, rightly, that the Commission’s submissions to the SDM were somehow false or fraudulent.

129. It is also not even clear that Advocate McGuffin’s general argument as to apparent practice by the Commission is soundly founded in fact. For example, the *Sarre* case appears to be connected with Standard Chartered Trust (Guernsey) Limited, in respect of which entity a separate public statement was issued. (Indeed, Advocate Hill subsequently pointed out that, also, in *Shaw*, and *Ellis*, there actually were public statements made against the Licensee entity together with the named individual, and in *Busaneli* there were in fact no formal public statements made at all.)

130. However, all of that detailed argument is, in my judgment, quite irrelevant, because “micro-comparisons” of the cases are, indeed inappropriate. First, the relevant detail of the cases which may have led to any overall assessment, that it was not appropriate to issue a public statement naming the Licensee entity in that case, are simply not known. But more importantly, the directed consideration of this factor has the objective of promoting consistency. Therefore, it is really only if a sanction is obviously and egregiously outside an identifiable general pattern, or “tone”, of previous sanctioning practice that this argument can begin to be successfully invoked. That is simply is not the case here.
131. This ground of appeal therefore fails.

Ground 6: failing to give proper credit for full remediation; and

Ground 7: failing to give credit that everything possible had now been done.

132. These two grounds reflect the actual substance of the “exceptional circumstances” which were invoked on a general basis as a point of law under Ground 2. They are both expressions of the single argument that the New Board and controllers had done everything possible to remediate the past wrong-doing, both as to the disreputable conduct and the shortcomings in regulatory compliance, that they had achieved this, and that the Commission had actually accepted this. The submission is that, therefore, the only proper and fair consequential recognition of this must be that no public statement naming WTL should be issued.
133. I can immediately dismiss the formulation of this argument as it literally appears in Ground 7. This criticises the Commission for failing to answer the question: what more could WTL have done to avoid sanction? That, however, is a proposition of rhetoric rather than law, and is in any event misplaced. It is derived from comments which I made in the *Domaille* case in a totally different context, namely assessing the culpability of the conduct of a particular individual (not an entity) for regulatory fault, in the first place. It had nothing to do with the extent and effect of credit which ought reasonably to be given, when assessing any appropriate sanction, for subsequent remedial action, by anybody. Ground 7 also conflates Mr Hemans, who is not the subject of the sanction, with WTL which is a different legal person, and which is. It is wholly misconceived and I say no more about it.
134. The essence of this contention is therefore to be found in Ground 6. Ground 6 asserts, fairly and squarely, that the degree of credit which should be given to WTL for the acknowledged fully comprehensive remediation work which has now been done in its name and by a New Board is that it should be granted the benefit of there being no public statement made relating to it, at all. That is the essence of Advocate McGuffin’s submission.
135. Advocate Hill submits that as a matter of law, (ie s. 38(2) of the EP Law), remediation is only one consideration to be taken into account in the Commission’s decision whether or not to issue a public statement: see s. 38(2)(d). Other factors such as the seriousness of the defaults (s 38(2)(b) – here, they were serious) and whether or not they were inadvertent when committed (s 38(2)(c) – here, they were not inadvertent) are also to be taken into account. Once that is accepted, the question what weight or effect ought to be accorded to the achievement of

remediation becomes a matter of judgment, which is the province of the SDM. It is a matter of a balancing evaluation taking into account all relevant factors. As to this, the SDM's decision that, balancing all these, the issuing of a public statement was appropriate, was undoubtedly lawful and also cannot be said to be unreasonable or disproportionate.

136. I am considering here only the question whether it is reasonable to issue a public statement at all, and only on the narrow argument posed in Ground 6. This is effectively that the only reasonable result of an accepted achievement of full remediation of historic wrong-doing, certainly when carried out by a new board unconnected with the actual delinquents, is that no public statement should be issued in respect of the relevant entity.
137. That is simply not the law. Other factors (and obviously, in particular, the public interest in being informed about the actual case, which factor I have not yet turned to) may make it reasonable that a public statement should nonetheless be issued. The decision whether to do so then does, as Advocate Hill submits, become a matter of the Commission's discretionary judgment in the particular circumstances of the case, weighing in that decision all the factors dictated by s. 38(2). Therefore, as an independent ground, Ground 6 of the Grounds of Appeal fails.

Ground 4: undervaluing adverse effects on Appellant and innocent third parties, and

Ground 8: failing properly to balance public interest and interests of innocent third parties

138. These two grounds can be considered together. Whilst Ground 4 simply focuses on the asserted effects of the issuing of a public statement on WTL and its New Board and others, submitting that these interests have been undervalued, Ground 8 argues the mirror proposition, namely that the countervailing consideration of the public interest has been (relatively) overvalued. These grounds of appeal thus go, once again, to a challenge to the validity of an evaluative judgment of the SDM in his balancing of the two conflicting factors. Given that that is a discretionary decision, that is not a very promising start, since it will be necessary for WTL to show that it was either legally flawed, or not within the range of possible reasonableness and proportion according to the appropriate tests.
139. The term "public interest" does not actually appear in either s. 38 itself, or the general description of the Commission's functions in s. 2 of the FSC Law. It has, however, been conveniently used in this case as a description of what I might call the general "external" benefits of the exercise of the Commission's powers, as opposed to the "internal" effects, direct or indirect, on those immediately affected by the decision. It encompasses the matters noted in s. 2(4) of the FSC Law (see [102]) above, and embraces the matters there synthesised from Paragraph 20 of the supporting Policy Letters (see [105] above).
140. The SDM records, at §350, the extensive submissions and the evidence of Mr Hemans and two other directors given at the meeting of 7th August 2022 which he says he has "*fully taken into account*". He records (at §351) the gist of the potential adverse consequences described and strongly pressed by WTL. He then records

his summary of the competing public interest elements pressed by the Commission, at §352, and the importance of balancing these against any “*serious adverse commercial consequences*”. He implicitly accepts, therefore, that some such consequences arise, and implies that the issue is whether or not they are “serious”. At §353 he records his summary of the public interest elements advanced by the Commission. At §354 he records his views that the terms of the proposed public statement adequately acknowledge the remediation work which has been carried out by the new Board, but he rejects the “disincentivisation” argument that the very issuance of a public statement, after such work, would deter licensees or those in charge of them from undertaking such difficult work in the future. (Presumably, they would just walk away.) Having concluded, therefore, that there are “*undoubted*” public interest factors supporting the issuance of a public statement, he finally dismisses the countervailing argument as to the potential adverse effects on WTL, (and by extension its responsible and innocent New Board, controllers and its staff), with the simple comment that

“I do not consider the consequences to WTL in the circumstances, as being significant.”

and decides that the issuance of a public statement is an

“effective, proportionate and reasonable sanction”.

141. Advocate McGuffin’s first challenge is that such a dismissal of the consequences to WTL was not open to the SDM as a matter of law. The SDM acknowledged the evidence of WTL’s three directors, which was that such consequences (ie the consequences of reputational damage caused by naming WTL in a public statement and consequent commercial damage) were liable to be very grave – loss of business, loss of staff, damage to recruitment, damage to morale, etc – but, whilst purporting to acknowledge the importance of balancing any public interest against “*any serious adverse commercial consequences if the statement were made*” (§352), he simply did not do so. He just dismissed this latter superficially as not being “*significant*”. Advocate McGuffin contends that this was an error of law, because the only evidence before the SDM was the uncontested evidence of the directors that such consequences were far from insignificant. He submits that this was also in accord with common sense and with previous judicial acknowledgments of such consequences, and there was no other evidence to justify the SDM in rejecting such evidence.
142. In any event, Advocate McGuffin then goes on to question the real existence of any genuine “public interest” itself.
143. He submits that the SDM placed unwarranted weight on this “public interest” factor but did so as no more than a pronouncement of theoretical possibility, rather than focusing, as he should have done, on its possible real content in the circumstances of the case, in fact. He thus ignored
 - (i) the fact that the wrongdoing was entirely historic (more than six years previously) and entirely unconnected with the current WTL, now under the established governance of its New Board,

(ii) that matters of required financial disclosure to interested authorities had all been remediated, and

(iii) that there was no residual risk, either to the public from malpractice or to the reputation of the Bailiwick.

He submits that there is, therefore no actual “public interest” at all to be seen in the issuance of a public statement naming WTL, and so the Commission (the SDM) cannot claim to be “satisfied” that such issuance discharges any of the objectives of the Commission, such as described in *Bordeaux* at [28], and cited above, namely

“...maintaining financial stability in the regulated sector, managing risk to the financial system and maintaining market confidence, ensuring fair and efficient and transparent markets, protecting financial services’ customers and countering financial crime and the financing of terrorism.”

144. Advocate McGuffin submits further that the SDM placed too much - and misplaced - reliance on the suggested mitigating effect on any adverse consequences for WTL and its New Board and controllers, of positive statements made in the proposed WTL public statement about the conduct of the New Board.

145. He submits that evidence does not support this assumption; such positive statements did not save other entities which were named in public statements from financial struggle and decline. He points out that any impact of positive statements on readers would require, on any basis, that such readers read the full statement. However, in practice, he submitted, damage would be inflicted on WTL (etc) simply from its being recorded as a named sanctioned entity in a headline, because this bare fact would be disseminated globally by the Commission’s internet publicity machine, and would also be picked up in on-line searches, without the statement being read at all, let alone ensuring that it was comprehensively read. The counter-submission that the only relevant readers would be responsible persons in the finance industry who could be relied upon to read the whole statement, was mere assertion, deployed to trivialise this argument. However, the argument was based on human nature and obvious, practical risk.

146. Advocate McGuffin also submits that the SDM did not take proper account of the submission that the issuance of a public statement against WTL could be “weaponised” by the wealthy individuals who remain hostile to the remediation measures. (I have to say, though, and as Advocate Hill submitted, I do not regard that submission as having been coherently explained.)

147. In further submissions, Advocate McGuffin argues that the suggestion that the public statement in question fulfilled the function of

“transparency of decision-making in a way that maintains the reputation of the Bailiwick as a well-regulated finance centre”

(see §353 of the Decision) simply does not stand scrutiny. Such function, he argues, is not being fulfilled by the Commission’s issuing a public statement which names WTL and describes disgraceful misconduct committed in its name, but then anonymises, and entirely omits from that description, the identity of the actual

perpetrators of such misconduct, and Mr Cairns (in particular), whom the SDM found to have been the effective architect of all such misconduct: see §319 of the Decision. This is particularly so when the Commission proposes simultaneously to issue a separate public statement in relation specifically to Mr Cairns (and Mr Vermeulen), which will - although this is only presumed, since its actual terms have not been vouchsafed to either the SDM or to this Court - contain only the original, incomplete, and therefore inaccurate “watered down” versions of the conduct ostensibly there being sanctioned. These give the false appearance that Mr Cairns’ misconduct was solely only the regulatory type failings mentioned in the descriptive passages pertaining to him in the original composite public statement. He has taken advantage of this to “settle” with the Commission.

148. Advocate McGuffin submits that this means that the now determined WTL public statement simply cannot be regarded as sufficiently “accurate”, as is required of a public statement (see *X, Y and Z v GFSC* at [111] above), because the impression which it conveys, by its vague imprecision as to the actual perpetrators of the sanctioned conduct there set out, and by failing to dissociate those perpetrators beyond misapprehension from the present WTL, is incomplete and unfair. By not identifying the individuals involved, the public statement creates an impressionistic uncertainty about the involvement of other persons associated with WTL, even possibly currently associated. Even disregarding WTL itself, this would still be very unfair and prejudicial to innocent third parties, namely the New Board, controllers, employees and staff of WTL, who face being potentially tarnished by association. That cannot, he submits, reasonably be allowed to happen, within the intentions of the EP Law. He further submits that the text of the WTL public statement which has been endorsed by the SDM, describing the misconduct but containing only the recognition that this was committed by unidentified persons “*other*” than the current New Board but together with the actual naming of Mrs Dowding and Mr Conway, has insufficient practical effect to remove such inaccurate, and consequently unfair, impression.
149. In essence, Advocate McGuffin’s submission on this point is that the present WTL statement is inaccurate, and intrinsically and inevitably inaccurate, as regards the real truth. It cannot be issued for that reason alone, but this is fortified by the fact that its inaccuracy inflicts a grave injustice on innocent third parties, and the only means of avoiding such inaccuracy is not to issue it.
150. Advocate McGuffin also argues, in relation to these grounds, that matters such as, at least, the names, and previously held positions and timings of these, including of Mr Cairns and Mr Vermeulen are information which needs to be expressly given so as to make any public statement which now identifies WTL properly accurate. Another, although less satisfactory, possibility might be that WTL should itself be anonymised as an unidentified “Licensee” rather than named in the statement, in the same way as Mr Cairns and Mr Vermeulen are now accorded the benefit of anonymisation in the WTL public statement. However, these latter arguments relate to the content of a public statement, rather than the question of principle as to the issuance of one at all. They are carried further under Grounds 5 and 9, and also lead to the argument under Ground 1 (alleged wrongful fettering of discretion). I will therefore revert to them later, since I am here considering only the arguments

going to contention of broad principle, that a public statement which names WTL should not be issued at all.

151. Advocate Hill rejects all the above. He submits that the SDM was perfectly entitled to adjudge the evidence of potential adverse financial consequences to WTL (and by extension to those associated with it) to be insignificant, and on any basis to adjudge the self-evident (I think he would even go so far as to say) value of issuing a public statement as outweighing these.
152. He submits that judicial recognition of such detriment to individuals in other cases was simply as to the possibility of such consequences and not of their inevitability. The alleged consequences of public statements on other Licensees in other cases were speculation without actual evidence. The suggestion that uninformed persons might not read the full public statement and would jump to an erroneously censorious conclusion could not be relied on as a proper concern. The feared “weaponisation” of any public statement was not coherently explained.
153. Advocate Hill submitted that Advocate McGuffin’s arguments failed to recognise the fact that WTL is a separate legal person in its own right. It is legally distinct from its directors from time to time, and it is therefore not merely lawful, but quite proper and logical that the sanction of a public statement should be imposed upon “WTL” for its corporate conduct, regardless of when that had taken place. It was the conduct of WTL as such which was the subject of the proposed public statement, perfectly in accordance with the terms of s. 38 (1) of the EP Law. It was irrelevant to that fact by whose agency such acts had been perpetrated at the time. The terms of the proposed public statement were in themselves, therefore, perfectly accurate and therefore fair.
154. He also submitted that any sympathy for the “innocent” New Board and controllers of WTL, which was heavily stressed by Advocate McGuffin, should be tempered by the fact that their controlling interest was purchased from Mr Cairns in 2020 at a time when the Commission’s enforcement investigation was already in train and so, he submitted, the adverse consequences of WTL’s being implicated in this would be perfectly apparent and was therefore doubtless factored into the purchase price paid.
155. In summary, he submitted that the exercise required of the SDM was the evaluative one of considering whether there were sufficient grounds for issuing a public statement in all the circumstances including those noted in s. 38(2). The starting point for review of this was the SDM’s Decision. It was clear from the terms of this that he took all those factors into account (as he said he had) and had performed that evaluative exercise perfectly properly and reasonably on the materials before him. There was nothing to suggest that that evaluative exercise had produced a result so wide of the mark that the Court should, or even could, conclude that any decision to issue a public statement was unlawful, unreasonable or disproportionate.

Discussion

156. I am considering the arguments here only as to the question of issuing a public statement at all, since I have found it convenient to break down the various challenges raised by Advocate McGuffin in the way I have indicated above.

157. The essence of Advocate McGuffin’s argument is that the potential damage to the interests of innocent third parties is, and should have been seen by the SDM to be, an overwhelming factor in favour of not doing so in all the circumstances. His other points are really just support for that proposition. Aspects of his arguments go to what might be described as errors of law, and others simply to arguments of impressionistic reasonableness.
158. I start by reminding myself that I am merely reviewing the SDM’s Decision, in accordance with the statutory grounds of appeal, and not remaking that decision myself; I note Advocate Hill’s warnings to this effect.
159. I remind myself also that on any such review I can only upset the SDM’s particular decision on the basis of finding it to be outside a range of so-called “reasonable responses”, which can be in either the stark legal sense of “error of law” (similar to judicial review) or the more nuanced factual sense mandated by s. 106 (3) (b) as discussed above (see [86] – [89]). It would also be the case that on reviewing the merits of any particular determination in point of law, the Court is justified in intervening not solely on the basis that there was “no” evidence to support the relevant factual basis for the decision in an extreme literal sense, but also if it finds that the decision is against the weight of the evidence, ie it has given palpably disproportionate weight to some particular element of the evidence, with seeming significant effect on the consequential outcome. As to this latter, see the citations from *Bordeaux* [30] cited at [93] above.
160. I do not read the Court of Appeal’s judgment in *Domaille* as having overruled this last proposition, but I do note what I regard as a very uneasy co-existence of that proposition with the proposition that the Court must not usurp the decision-making function of the Commission. The dividing line between assessing the weight of the evidence founding another’s decision (permissible) and evaluating the evidence as if making the decision for oneself (impermissible) may be very difficult to draw in practice. Furthermore, the proposition that the Court must not usurp the suggested expert, evaluative, regulatory decision-making function of the Commission seems to be somewhat in conflict with even the express limited power which is conferred on the Court by s. 106 (6) (a) of the EP Law, (relied on for the above proposition) to set aside a decision of the Commission without remitting it to the Commission to take again. By doing so, the Court would inevitably be, in effect, making and substituting its own decision that no such sanction was appropriate for the Commission’s decision that it was. But the Court’s power to remit is stated in very plain terms which show it to be a discretionary power, and not obligatory.
161. As another preliminary point, I note that in *Domaille*, the Court of Appeal stated that the interests of “third parties” referred to in s. 39(6)(e) of the EP Law (in relation, therefore, to financial penalties, but using the same language as s. 38 (2)(e) in relation to public statements) was plainly to be construed as referring to “innocent” third parties; see [176]. In context, though, it is plain that the Court of Appeal was there distinguishing third parties who were totally unconnected with the matter (“innocent” third parties) on the one hand, from those who, although “third parties” in a narrow legal sense, were connected with the entity by having been involved in the sanctioned conduct (and were thus not “innocent” third parties). The Court of Appeal’s dictum was also making, and apparently rejecting, an entirely different point, about whether any indirect effect on individuals being

sanctioned, of financial sanctions being imposed on an entity concurrently, might reasonably need to be considered in their case. That point does not arise here. I therefore do not see those comments as affecting the general issue of the construction of s. 38(2) as to who are “*third parties*” whose interests are properly to be taken into consideration, which is what I am concerned with here.

162. In fact, the direction in the Law, at s. 38(2)(e) is that regard must be had to the potential financial consequences of a sanction, even to the “*person concerned*” - who, being the subject of the sanction is therefore by definition, not “*innocent*” - as well as to “*third parties*”. “*Third parties*” can therefore mean nothing but “*other persons*”, even if they must also be “*innocent*” other persons to attract favourable consideration, as just identified above.
163. In this case, the situation falls squarely within s. 38(2)(e) whether it is viewed as WTL itself making the submission that regard should be had to the effects upon it, ie its business (it is, legally, the “*person concerned*”), or as WTL making such submission on behalf of its present directors, controllers, employees etc. They are, in this case, innocent third parties, being “*third parties*”, and being factually within the description of being “*innocent*”. I proceed on that basis. I observe that s. 38(2)(e) only requires consideration of adverse *financial* consequences to “*third parties*”, but that is the primary concern of Advocate McGuffin’s submission, even if such consequences are indirect.
164. Turning now to principle, first, I do not think it is justifiable to decide the matter of the reasonableness of issuing a public statement against an entity by adopting the rigid approach that:
- (i) the conduct in question was the conduct of that entity whenever and by whoever it was actually perpetrated,
 - (ii) the public statement is naming that separate legal entity and therefore
 - (iii) a change of responsible personnel at that entity is simply a legal irrelevance.
165. Insofar as that is Advocate Hill’s submission, I reject it. Of course, the separate personality of a corporation, and the distinction of legal personality between a corporation and the natural persons who in fact run it must be given due recognition. As the Court of Appeal in *Domaille* emphasised, that is merely to observe basic principles of company law. However, that is not the issue here. It certainly applies to responsibility, but reputation is different from responsibility and that is what is in issue here.
166. An individual person cannot get away from the fact that it was he or she who committed any proven acts of misconduct, and there is no real reason why his or her personal reputation should be protected from that fact and any consequences. An entity, however, is an artificial construct and its reputation is even a commercial asset (goodwill) enjoyed by the enterprise, but in which others (the business owners or associates) also have a personal, financial, and virtually proprietary, interest. The entity’s reputation (as contrasted with its responsibility) is different from that of a natural person because, whilst a leopard cannot change its spots, a company can change its board of directors. The fact that this has happened, and its controllers

have changed, thereby changing its character and deserved reputation, must be a reasonable consideration to some degree, when it comes to issuing a public statement which risks causing it current reputational damage, and indirect financial damage both to it and to innocent persons, even if that would not be a possible submission to make in the case of an individual.

167. I should add that any objection that the consequences of reputational damage to the name of the entity can always be avoided by a new board by conducting a re-branding exercise seems to me to be a quite unreasonable and unrealistic proposition. It trivialises the reality of the huge costs, both financial and in terms of trouble, diversionary effort and resources, required to effect any such a re-branding exercise, although I of course accept that these factors would be case-specific.
168. I also add that I entirely reject Advocate Hill’s contention that the submissions as to potential damage to their interests made on behalf of the New Board and controllers should be viewed without sympathy, because they will have acquired their controlling interest in WTL at a price which must be taken to reflect a reduced share value caused by WTL’s being, at the time, the known subject of the Commission’s enforcement process. That submission has no substance for the following reason. Whilst the share purchase price might fairly be assumed to have factored in any adverse effects of WTL’s being embroiled in a Commission enforcement process, that would be on the basis that the Commission would be acting lawfully and reasonably. If and insofar as any appeal succeeds in this case, it will have been because the Commission is held to have acted unlawfully or unreasonably. The Commission cannot be heard to argue, as support for its position, and against innocent share purchasers, that the consequences of its acting unlawfully or unreasonably must be assumed to have been taken into account in the commercial negotiations fixing a purchase price for the shares in WTL as the relevant entity.
169. Advocate McGuffin is therefore plainly right, that potential adverse financial consequences to directors, controllers, etc of WTL, even if indirect, must be taken into consideration as a matter of law, under s. 38 (2) (e). Indeed, even WTL’s own financial interests are to be taken into account, because the Law says so, even if WTL’s lack of “innocence” may mean that that can fairly be given less weight.
170. As to the countervailing consideration of the “public interest”, which has therefore to be found to be greater, in order to outweigh this, I also agree with Advocate McGuffin that it is necessary to look carefully at the real content of any such “public interest” rather than simply invoking it as a supposedly self-evident mantra. It seems to me to have four aspects, namely;
- i. the public interest (ie interest in the sense of public benefit rather than public curiosity) in obtaining information about the matter, to protect its own interests, therefore principally, but not entirely, consumer protection;
 - ii. the public interest in persons being educated as to bad practices – but also good practices – in the finance industry, principally, therefore, relevant to operators in the finance industry

- iii. the public interest in the consequences of bad practices being publicised (ie, deterrence), principally again, therefore, relevant to operators in the finance industry; and
- iv. the public interest in promoting confidence in the Commission and its operations, so as to protect and enhance the reputation of the Bailiwick as a financial centre (but I observe that this is not the same thing as simply raising the Commission’s profile; a public statement is not just a press release).

I can refer to these for short as being (i) information, (ii) education, (iii) deterrence and (iv) promoting confidence. Not all of them require that the actual culprit being sanctioned should be identified, even if the terms of s. 38(1) appear to envisage, implicitly, that that would be the norm. This may, of course, be because of the legislation’s apparent expectation that public statements would only be issued in more exceptional cases, which is not what has transpired.

171. Given the factors pointed out by Advocate McGuffin at [143] above, I therefore asked Advocate Hill what the public interest in now naming WTL, in all the circumstances of the case, was said to consist in. His response was that of bringing the relevant misconduct to the attention of those who were dealing with WTL at the relevant time. This was indeed mentioned by the SDM (see §352), directly citing para. 10 of the ED’s submissions of 31st July (wrongly dated August) 2023. When pressed, though, as to who might fall within any such category in actual practice, bearing in mind that the wrongdoing was not perpetrating malpractice on the general public, and that it was not disputed that all the interested authorities had been informed of the wrongdoing as part of the accepted remediation work, Advocate Hill suggested that it could be banks, or other institutions who had dealt with WTL and who might need or wish to review their own procedures or compliance requirements in the light of what they would thereby learn. This suggestion, though, does not appear in the SDM’s Decision itself, and I was not able to find any suggestion of this in the evidence and submissions recorded to have been made to him.
172. As to Advocate McGuffin’s submission that the SDM attached insufficient weight to the adverse consequences to innocent third parties, a submission which initially impressed me was that the SDM committed an error of law, because, in holding that such consequences would not be “significant”, he effectively rejected the uncontested evidence of the directors of WTL. However, on analysis I do not think that that submission actually has substance.
173. The SDM plainly recognised that there was a risk of such adverse consequences ensuing, because he effectively said so. He therefore did not dismiss the Directors’ evidence to that effect completely, but treated it as a matter of the weight of such a point. The Directors’ evidence that those consequences were likely to be “serious” was a matter of their opinion which the SDM was not obliged to accept, but in any event it went to the question whether such seriousness outweighed the seriousness of the countervailing elements of public interest in issuing such a statement, which elements he had also stated that he accepted to exist. This point is therefore not a challenge that the SDM wrongly failed to accept uncontested evidence, but rather, a challenge that he made a wrong judgment as to the relative weight of such

evidence balanced against other factors. That is a different matter. I conclude that there was no error of law or procedure in the SDM's Decision in this regard.

174. In saying this I take note of Advocate McGuffin's submission that a proper fact-finding exercise needs to

"take into account any inherent probability or improbability of an event have occurred as part of the natural process of reasoning"

(see *Re BR (Proof of facts)* [2015] EWFC 41 at [7]), and his submission that the SDM simply failed to apply that approach in his dismissive assessment of the prospects of serious adverse financial consequences for WTL. However, that citation related to a finding of primary fact, namely whether or not an event had occurred. That is a different exercise from that here, which is an evaluative assessment of a possible or likely effect.

175. At this point, the issue therefore resolves itself into the residual question whether the SDM's decision to issue a public statement naming WTL at all was factually unreasonable, or disproportionate, in all the circumstances. ie the ground of appeal afforded principally by s. 106(6)(b).

176. I would myself almost certainly have come to a different conclusion from the SDM. The suggested "public interest" of conveying information, by issuing, now (or even in 2023), a public statement naming WTL for "what went on" up to no later than six years ago strikes me as tenuous in the extreme. It is accepted that all the concerned authorities have been informed, and the delinquencies remedied. Proposing that there are still unknown, properly interested recipients of such information in the shape of banks who might be prompted to consider their compliance practices strikes me as fanciful and has the feel of defensive rationalisation. The elements of public interest, claimed to be "*powerful*", are listed by the SDM simply as automatically assumed generalities, rather than describing any identifiable specific content. The argument that it is in the public interest that the public in Guernsey and elsewhere should "*become aware of the issues in this case and understand what has been done to address them*" (to quote the ED's submissions to the SDM of 31 July (wrongly dated August) 2023, with emphasis added,) could of course arguably be directed at education, deterrence or – possibly most pertinently - promoting confidence, but it would seem still to be rather limited, and significantly double-edged, since it must reveal that the Commission did not, itself, discover very seriously improper conduct, going back for many years, during three inspections which it made. The enormity of simply dismissing the prospects of inflicting commercial damage on persons who are not merely innocent, but are accepted to have behaved in an exemplary manner, and giving rise to a burning sense of injustice in responsible individuals with some apparent objective justification, would strike me as considerable. One would also have thought that "*develop[ing] ... finance business*" in the Bailiwick as an addition to "*effective supervision*" (see s. 2(a) of the FSC Law which is effectively the Commission's charter) surely mandates an element of trying to nurture small and medium businesses, and would tell against inflicting commercial obstacles upon them if possible. Thus, with the public interest apparently rather thin and the private interests apparently rather meritorious, I perceive that I would readily have come to the conclusion that the latter outweighed the former in this instance, and it

was appropriate not to issue any public statement - certainly not one naming WTL as in the actual decision - on the particular facts of this case.

177. My views, however, are most emphatically not the test. Once it is established that the SDM, apparently, paid some regard to all the matters which he should have, and that there was some possible evidential support for the existence of the matters to which he says he paid regard, the ultimate evaluation of their relative balance is a matter for him, as the personification of the Commission - unless one of the statutory grounds of appeal can be established.
178. I therefore turn to consider the approach to factual reasonableness generally, and I judge it appropriate to do this by taking the *Walters* approach, summarised at [86] above.
179. First, therefore, and as already accepted, I certainly cannot say that the SDM's Decision to issue a public statement naming WTL was "Wednesbury" unreasonable (ie was illogical, irrational or perverse) so as to be capable of being upset for error of law. At the other end of the scale, I would have made a different decision myself, but that is not the test. There remains, however, the statutory ground of appeal of simple factual "unreasonableness" as to which the threshold qualification requires "something other" (implicitly "greater") than my own inclination to reach a different conclusion (see *Walters* above), but something less than "Wednesbury unreasonableness": see [91] above. I have concluded (see [92] above) that this is: unreasonableness in the eyes of the notional ordinary, intelligent, right-minded and sufficiently educated and informed member of the public. The question then is how to identify the position of that threshold on the spectrum and apply it in this case.
180. Even though I might like to think that I could myself be regarded as a representative such member of the public, I consider that I must reject the strength of my own inclination, however forceful, towards a different conclusion as a sufficient "something other". Treating that as the test would arguably fall straight into the error of my usurping the supposed "*expert evaluative, regulatory decision-making function*" of the Commission or its appointed SDM. A more objective test is necessary. Furthermore, I think it needs to be a rather more generalised test than envisaging an individual person.
181. I have postulated the hypothetical ordinary, intelligent, right-minded and properly educated/informed member of the public as the arbiter of the situation. In the context of the Guernsey jurisdiction, I find that the personification of these qualities would be the Jurats of the Royal Court. Would such persons think that something seemed to have gone very much awry with the administration of the regulatory system? I therefore conclude that, once the question of factual unreasonableness has been raised in my mind as a distinct possibility, the appropriate and correct test for assessing such factual unreasonableness is to pose the question:

If a panel of Jurats, instructed in accordance with the *Walters* judgment, were asked to decide whether or not the decision to impose the sanction of a public statement on WTL in all the circumstances of this case was unreasonable, am I confident that they would decide that it was?

My answer, in that case, would be a clear “Yes”.

182. For the avoidance of doubt, I wish to make clear the distinction in this test from the well-known test of “whether the decision was within the range of decisions which a reasonable decision-maker could have made” (emphasis added). That is the expression of the test at law, where the “decision-maker” (in this context) is the notional regulator. The appraisal there is whether the decision is irrational, illogical or perverse (or otherwise flawed in law) and is an extremely high threshold, not least because a regulator has already actually made the particular decision. That is the area where a court may not substitute its own decision. However, the ground of appeal expressly conferred by the Law, and which I am considering, is wider. The test for factual reasonableness under such grounds is not the test of the reasonableness of such “decision-maker” but the test in the eyes of the postulated hypothetical reasonable (etc) members of the public.
183. Assessing this as the anticipated decision of a panel of Guernsey’s Jurats both generalises that consideration objectively, and fits obviously and comfortably with the actual origins of the test for factual reasonableness as a statutory ground of appeal, as analysed in *Walters*, and as being a different, and lower level of “unreasonableness” from *Wednesbury* unreasonableness. That difference is acknowledged by counsel. This test also gives this ground of appeal some content.
184. I record that, in deciding the appropriateness of the above test, I considered whether it could be said that the test should be, not simply whether a panel of Jurats would be likely to arrive at such decision, but whether it should also have to be a unanimous decision. Jurats’ decisions are, of course, made by a majority.
185. However, I rejected this more stringent test, for two reasons. First, imposing such a threshold raises the bar to a height which it would be almost impossible, ever to surmount; it is tantamount to saying that the Court would have to be confident that any and every such ordinary, intelligent (etc) person would think the decision unreasonable, or, put another way, that no such person could think it reasonable. This would really be equivalent to the “irrational, illogical or perverse” test and it would define the ground of appeal under s. 106 (6) (b) of the EP Law pretty well out of existence. I do not think that that could be the intention of the legislature, bearing in mind, what I pointed out in [29] of my judgment in *Domaille* (and which I do not think the Court of Appeal criticised), namely that the concentration of such powerful enforcement functions - policing, investigating, prosecuting, adjudging and sentencing - in one single organisation such as the Commission, calls for the availability by way of appeal of some ultimate dispassionate oversight of the general factual reasonableness of any particular exercise of those powers by a genuinely independent and impartial tribunal.
186. Second, Jurats’ decisions are made by a majority. The test of being confident that a panel of Jurats would reach a collective decision, on their normal basis, that the decision under review was unreasonable follows neatly and comfortably from the formulation in the *Walters*’ decision itself. It is also simple. I can see no grounds to make any qualification or modification of it.
187. I have therefore concluded that the appropriate test is as I have formulated it, and applied it, above.

Primary decision

188. I find, therefore, that the Commission's (the SDM's) decision to impose a public statement on WTL was unreasonable, and I will set it aside under s. 106 (6) (a) of the EP Law.
189. Under s. 106 (6) (a) I have the power to remit the decision to the Commission for reconsideration. I consider that later.

Secondary decision, further and alternative reasons

190. The above is, of course, effective to dispose of the appeal at this point. However, in the event that I might be wrong about the above, or I may have exceeded or misinterpreted my jurisdiction to set aside the decision on the grounds simply of (factual) "unreasonableness", I will go on to consider the position on the basis that I could not hold that the Decision to issue a public statement at all was factually unreasonable in principle, under these Grounds 4 and 8. Any such decision, though, would still not have been an end of the matter for several reasons, including the following.
191. Where the decision of an authority (such as the Decision to issue a public statement naming WTL in this case) involves balancing a public interest in doing so against the interests of entirely innocent third parties in not doing so and preferring the former, but it is accepted that some damage to the latter will be caused, or even just that there is a recognisable risk that it will be caused, then, in my judgment, any and every ordinary, right-minded person's reaction to accepting the reasonableness of doing so will come with the qualification that, if one is going to do so, it is only right to take all steps reasonably possible to avoid, or at least minimise, the prospects of such damage. Failing to consider all means as to how this could be done (always consistently, of course, with not prejudicing the relevant public interest which is *ex hypothesi* being furthered) would then, therefore, be unreasonable, on any objective view. That, though, would be a matter which starts to relate to the content of any particular such public statement which was issued, which it is convenient to consider later.

Grounds 10: failing to find anonymisation appropriate

192. This ground does, in a way, go to the terms of any public statement (which I am now postulating could be issued in principle).
193. Its narrow basis is a complaint that the SDM failed to give reasons why anonymisation of WTL was not appropriate, but I find that to be misconceived.
194. S. 38 (1) of the EP Law mandates the making of a public statement by the Commission to the effect that, in its opinion, "*a licensee, former licensee, relevant officer or other person*" has committed one of the contraventions laid down in the section. The *prima facie* impression is that it is envisaged that any such statement will be specific to such a person by name, and this is underlined by the second part of the subsection which states:

“The statement may contain such information in respect of any person named therein...”

Thus, whilst anonymisation is not prohibited, it is clearly assumed to be usually inappropriate. To anonymise would thus be exceptional. There is no obligation on the SDM to give reasons for, or to justify, not taking an exceptional course where it would be up to the party inviting such a course to satisfy the SDM that it was appropriate to do so.

195. All that happened here, therefore, is that the SDM, having clearly (from the terms of his Decision) noted and taken into account the statutory requirements and the considerations urged in support of such a course by WTL, concluded that he was not so satisfied. The issue then becomes simply a challenge to that decision.
196. That decision is certainly not an error of law. On the evidence available, if I had held that it was not unreasonable to issue a public statement at all, the question of anonymising it would have failed for similar reasons. I would therefore have dismissed Ground 10 as a discrete and independent ground.
197. For completeness, though, I should make clear that I reject any submission that this issue bears any comparison with my ruling in *Domaille*, mentioned at [38] where I rejected an application by the Appellants in that case that their appeal should be held in private because of potential adverse reputational/financial consequences to themselves if it were conducted in open court. The public interest in that case was the fundamental public interest in open justice, requiring hearings to be in public in the absence of any prejudice to certain recognised private interests, damage to which would defeat the interests of justice. Open justice is not under consideration in this case, and there is no parallel.
198. Once again, though, my decision here with regard to the broad point of the reasonableness of (not) anonymising as a general, high level, point, would not be the end of the matter.

Ground 5: failing appropriately to separate [ie distinguish] the conduct of the former directors and the Appellant

Ground 9: failing to draft a properly accurate statement

Ground 1: wrongful fettering of discretion.

199. I therefore now move on to the final grounds of appeal which go to the Appellant’s being aggrieved at the contents of the statement itself, on the assumption that I had held that it cannot be said to be unreasonable to issue one in principle. The two particularly relevant grounds of appeal are Grounds 5 and 9 although points raised in relation to other grounds, and in particular Ground 1, have emerged in the course of the hearing and would come into play.
200. These grounds together argue aspects of WTL’s challenge to the terms of any public statement, naming WTL (if one were made) along with Mrs Dowding and Mr Conway, in the circumstances already set out, but completely excising any references to Mr Cairns and Mr Vermeulen as co-sanctionees, again in the

circumstances previously described. The three grounds are conveniently considered together but in the above order. In advancing them, Advocate McGuffin relies also on his arguments already recited above at paragraphs [147] to [150], but here focusing on the proposed public statement's suggested inaccuracy, rather than the alleged unreasonableness of even issuing one.

201. Ground 5 highlights WTL's complaint that the terms of the challenged public statement fail, particularly as regards that most serious of criticisms, ie impropriety, properly to "delineate" (ie differentiate) the conduct of the contravening former directors and in particular Mr Cairns, from that of "the Appellant" by which is meant, WTL under its new governance.
202. Ground 9 first asserts the "overvaluing" of the alleged public interest in issuing a public statement, but that argument has been considered under Ground 8 above and is only incidental here. The thrust of Ground 9 is actually a complaint of inaccuracy. Under Ground 9 (and also Ground 1) Advocate McGuffin submits that the terms of the public statement cannot be regarded as accurate when they attribute matters of dishonest misconduct to WTL by name as a Licensee, but then do not make clear attribution of this self-same misconduct to the actual "architect" and perpetrator of it, namely Mr Cairns, either in the public statement here nor, presumptively from the circumstances, in the public statement which is now apparently going to be made with regard to Mr Cairns.
203. Ground 1 enlarges on this submission, postulating a reason for this asserted inaccuracy. It suggests that the inaccuracy has arisen because the Commission has made a settlement agreement with Mr Cairns, entitling him to accept the terms of such latter public statement (from now on it will be convenient to call it "**the CV statement**"), and that therefore its attitude to the contents of the actual public statement here imposed (from now on, "**the WTL statement**") is constrained by this, and constrained in such a way that it has not been able to draft (and invite the SDM to endorse) a properly accurate WTL statement here, if one is going to be issued – and that the SDM has simply accepted this and not questioned that position.
204. Although all these grounds go to challenges to the terms of the WTL statement, it is convenient to deal with Grounds 5 and 9 first.

Appellant's submissions

205. Advocate McGuffin submits that naming WTL expressly as the entity/Licensee, whilst not identifying Mr Cairns, the actual architect and principal perpetrator of the dishonest conduct thereby being publicised and sanctioned by the Commission, so as unmistakably to distinguish this from WTL as the present entity/Licensee, is not just a matter of fairness, but also a matter of proper and sufficient factual accuracy, the "*imperative*" of which has been judicially endorsed (see [111] above).
206. His submits that the Commission's proposed course, namely to issue separately the CV statement which will, apparently, mention only aspects of Mr Cairns' conduct as drafted in the composite public statement, but simultaneously issuing the WTL statement, which recites the disreputable aspects of Mr Cairns' conduct as being conduct of "the Licensee" (previously defined as being WTL), but contains no relevant reference to Mr Cairns himself, is inaccurate and misleading because it is

incomplete. He submits that its present formulation, lacking that information, will lead the public to think that Mr Cairns' wrongdoing was confined to the matters mentioned in the CV statement, and was thus only matters amounting to lack of diligence, negligence or incompetence, as contained in the original draft composite public statement. That will encourage the inference that Mr Cairns was not involved in the serious misconduct simultaneously being attributed to WTL and will therefore lead to erroneous suspicions, or conclusions being formed about who actually was involved. This mystery or uncertainty thus created by such omission, can only be to the detriment of the current WTL and its New Board and controllers. Unless that erroneous impression is dispelled (which it is submitted the WTL statement just does not do) that statement cannot be said to be properly accurate, as is required.

Respondent's submissions

207. Advocate Hill rejects the whole of the above with a submission which is really very short. He submits that what is said in the WTL statement is factually accurate according to the findings made by the SDM (which factual findings are actually admitted by WTL in themselves), and that that is not only the beginning, but also the end, of the matter.
208. He notes that the manner in which any public statement is to be made, and its terms, are matters for the Commission under s. 38(1) of the EP Law. The Commission can therefore decide who are to be the subjects of any particular public statement it decides to make, and what is to be said about them. It can make separate such statements, if it thinks fit. It is not necessary to name Mr Cairns in a public statement which names WTL in order to achieve the objectives of a public statement made in relation to WTL. Not naming Mr Cairns does not render any such statement relating to WTL at all inaccurate.
209. He submits that the conduct now described in the WTL statement, which has been amended to include express description of the more serious matters of disgraceful conduct found (and accepted by WTL) was, in law, the conduct of the entity, WTL. It is therefore not "inaccurate" so to describe it. Moreover, he submits that it cannot be said that including descriptions of such conduct was unfair on WTL (or its Board and controllers) when such emendation was actually being urged by WTL itself, before the SDM.
210. WTL's submissions reveal, he submits, that WTL's complaint, and "aggrievedness", is not really about the terms of the WTL statement, but about the terms of the CV statement. That latter statement, however, is not before this Court. It is not the subject of this appeal, and it is in any event not a matter as to which WTL has any *locus standi* to appeal because WTL is not named in the CV statement.
211. (As to this last proposition, the CV statement is indeed not before the Court. Advocate Hill told the Court on instructions, however, that in the CV statement WTL is referred to only as "the Licensee".)
212. Effectively, Advocate Hill submits that the terms of the CV public statement are none of WTL's business. WTL can have no legitimate complaint of inaccuracy

about the terms of the WTL statement because they are not inaccurate, and that is an end of the matter.

Discussion

213. I deal first with some miscellaneous points, but I observe, generally, that questions of accuracy in a public statement have nothing to do with judgments of (un)reasonableness. Whether a statement is accurate or not is a matter of fact or mixed fact and law, and not a matter of evaluation, assessment or discretionary judgment. Ultimately, whether a public statement is sufficiently accurate is a matter of law.
214. Advocate Hill submitted that WTL actually seemed to have conceded that the present WTL statement is “*the factually accurate and comprehensive public statement*”. Advocate McGuffin denied this and I find Advocate Hill’s submission to be based on a misreading of WTL’s skeleton argument. In context, the version of the public statement being referred to by WTL in those words was the suggested version of the WTL public statement which WTL itself had submitted to the SDM, in response to the SDM’s request for suggested amendments to the composite public statement, which the Commission had previously represented to be the public statement proposed to be made in respect of WTL (but which it said it had done “by mistake”). Advocate Hill’s argument as to the self-evident accuracy of the subject WTL statement is therefore not advanced by this suggestion.
215. Second, Advocate Hill’s submission that the contents of the CV statement are irrelevant because WTL has no *locus standi* to challenge them in this court would seem to depend on whether a public statement made under s. 38 (1) of the EP Law can be said to “*relate*” (the verb used in s. 106 (1)(l) of the EP Law) only to the person who is the named subject of such public statement. This point is noted at [9] above. “Relate” is a word of very wide scope and whether a statement “relates” only to the actual named subjects of it may well be a point open to argument depending on the circumstances. I would not, therefore, simply accept that submission as self-evident. However, the point does not arise in this case, and I do not have to decide it. The CV statement is not the subject of this, or any, appeal to this Court. I have reached my conclusions solely on the basis of considering the WTL statement and from the “aggrieved” viewpoint of WTL itself in all the circumstances, although I do consider that the existence of the CV public statement is one of these circumstances.
216. It may be that this point (ie as to the scope of the word “relate[s]”) explains why the Commission thinks it necessary to anonymise in a public statement, not only the names or identifying features of clients, or trusts, or other companies who obviously ought to be anonymised for the reasonable privacy of their own affairs, but also other persons involved in the matter but not the actual subjects of the particular statement, in the way that they have anonymised Mr Cairns and Mr Vermeulen as “Director A” and “Director B” when referring to them in the WTL statement. Whether this approach is always justifiable, or required, may be a question arising peripherally in this case. However, even if it is a constraining factor, it does not seem to me that it can detract from the force in WTL’s submission that the terms of any public statement which is issued against it must be properly accurate in their own right.

217. Third, I also reject Advocate Hill’s submission that there cannot be said to be anything unfair in the more serious conduct being included in the WTL statement as now drafted because this was included at the urging of WTL. That is superficial, and also itself unfair. It is perfectly apparent that, at the time when WTL was pressing that request, it believed that a single public statement, naming all four individuals as well as WTL (if the latter were to be included at all) was going to be made. When the Commission later removed Mr Cairns and Mr Vermeulen from the proposed WTL public statement on their own initiative (on the grounds that a separate public statement was now going to be made relating to them, and it had been a “mistake” to send the draft composite public statement to the SDM in the first place), WTL immediately argued that this excision was not authorised by the SDM’s direction as to amendment – and in my judgment that argument had some force. However, after that, and whether erroneously or not, WTL’s own submissions were quite obviously made on the assumption that Messrs Cairns and Vermeulen were still going to be named, together with them and Mr Conway and Mrs Dowding, in a single composite public statement but which WTL was submitting had not told the whole story as regards all the subjects being sanctioned and must do so in order to be accurate.
218. It would therefore be disingenuous to suggest that WTL was submitting that the more serious misconduct needed to be mentioned against itself in the interests of accuracy independently of its submission that it needed to be attributed expressly to Mr Cairns (in particular), also in the interests of accuracy. The two went together. As Advocate McGuffin said at the hearing, it would have been absurd for WTL to submit that more serious misconduct ought to be mentioned in a public statement against itself, just for the sake of it.
219. Furthermore, WTL was apparently not given the opportunity to make comments on the accuracy or adequacy of the proposed WTL public statement on the assumption that it would not be naming Mr Cairns and Mr Vermeulen. The very final terms of the WTL statement were not “discussed” with WTL at all, as envisaged by the then Deputy Bailiff in *Y v GFSC*, (above). It has only been after the issuing of the Decision and thus, I think, only in this appeal, that WTL has had the opportunity to make arguments as to that particular aspect. Whilst this has not been singled out as a particular ground of appeal, it does, in my judgment, feed into the questions of reasonableness and so forth, which are raised.
220. Fourth though, it is far from surprising, and perfectly unexceptionable, that the SDM should have rejected the proposed version of the public statement which was advanced on behalf of WTL on 4th September 2023, as being the terms of a composite public statement which were necessary for proper accuracy. Those terms were not drafted in the style of a disciplined, unemotional and appropriately skeletal account of facts, such as is indicated by the guidance given in *Y v GFSC* (see [109] above). The style and template pattern of the Commission’s public statements recite merely the facts necessary for the public to gain a useful understanding of the bad practice being censured and the reasons behind the way in which the Commission has consequently thought fit to exercise its powers of sanction in such circumstances. WTL’s proposed draft was far more elaborate and vehement than would be appropriate. It went beyond what was fairly required,

descriptively. The tenor of the ED's draft descriptions and examples was clearly to be preferred.

221. Moreover, I do not understand Advocate McGuffin to contend that the actual description of the improper conduct set out in the ED's draft which has been adopted is, in itself, so abbreviated that it offends the principle of accuracy. His objections are aimed at other matters, and in particular the effects of "airbrushing" Mr Cairns and Mr Vermeulen (but Mr Cairns in particular) out of any statement made with regard to WTL.
222. Turning to more central matters, first, I do not accept Advocate Hill's blunt argument that the only question is whether the proposed public statement is literally factually accurate, as derived from findings made by the SDM, and that if it is, then that is all there is to it. It is well understood and is indeed obvious that a statement can be misleading (and thus inaccurate) by omission, even if literally accurate on examination. It can also be inaccurate by an impression impliedly created.
223. The point of any statement is to convey information, and indeed that is the very *raison d'être* of a public statement such as the present. Information can be conveyed expressly or by implication and can be conveyed, deliberately or inadvertently, as a matter of impression. In my judgment, therefore, Advocate McGuffin is right, that a public statement must be accurate in the impression or implication which it conveys, as well as literal fact, and an impression can be created by omission.
224. It follows that if the WTL statement conveys an erroneous impression, this is a flaw, as it would not be a reasonable decision to issue such a statement, and indeed this would be an error of law.
225. The first question is therefore: what is the accurate picture which the WTL statement ought to convey to the public in order to inform, educate, deter or promote confidence (to repeat the public interest functions identified at [170]) based on the actual facts of this case?
226. Standing back, and looking at the picture as it applies to WTL, (I am not here concerned with the picture as it applies to any individual, because that is not the subject of this appeal), what has happened, is that
 - (A) the Commission is sanctioning WTL for a situation created by the conduct of its business as effected by the four Former Directors (they being the natural persons found to deserve personal sanction) and in particular Mr Cairns (through his controlling position, a perception also demonstrated by the equalised level of their respectively recommended financial penalties), because that conduct is legally to be attributed to WTL, but
 - (B) because of the intervening exemplary conduct of an entirely new and innocent Board and controllers of WTL, and the detachment from WTL and its direction of the influence of the wrongdoers, the Commission (though actually the SDM) has decided to remit, entirely, the fine which would otherwise have been appropriate.

That, then, elaborated by any further necessary detail to enable what happened to be understood, is the basic picture which must be conveyed in a public statement regarding WTL to present a full and accurate picture.

227. This picture could, and more naturally would, be conveyed in a single public statement relating to all five subjects. There was only one investigation by the Commission, encompassing all the above and culminating in its conclusions relating to all five subjects then named. No fully accurate such single statement has ever been drafted in practice, but its properly accurate content would seem to lie in a combination of the original composite public statement and the further descriptive materials latterly inserted by the ED into the WTL statement.
228. However, the Commission has chosen to make not one but two public statements, and to excise Mr Cairns and Mr Vermeulen by name and almost entirely by any reference at all (save for the one collateral reference regarding managing conflicts of interest, as already noted, and where they are anonymised) from the terms of the WTL statement. WTL claims that this has made the content of the WTL statement inaccurate in a way which is contrary to the purpose of a public statement and as to which it is therefore reasonably entitled to object. The Commission claims that it does not.
229. Having carefully considered the terms of the WTL statement, I agree with WTL. I think the terms of this public statement distort its subject matter, and do so in a way which does prejudice the accuracy of what is presented to the public as being the summarised essence of the Commission's findings and functions related to WTL in this case.
230. As stated above, there has been only one investigation by the Commission, and its subject was the whole of WTL's relevant conduct, under the direction, management and implementation of its directors at the time, who, significantly and importantly included not only Mrs Dowding and Mr Conway but also Mr Vermeulen, and Mr Cairns (in particular). They were working together. The Commission's conclusions were that it was *prima facie* appropriate to sanction both WTL as an entity and also those four particular former directors as misbehaving individuals, but the reality is that it was/is the misconduct and shortcomings of those four individuals for which WTL was and is incurring sanction, through being fixed with their acts carried out on its behalf. The "fate" of WTL is thus inextricably linked with the conduct, and even the fate, of all four of them, including Mr Cairns and Mr Vermeulen.
231. The part played by them (Mr Cairns in particular) in bringing about the sanctioning of WTL which is to be publicised, and the way they have all been dealt with, is a fundamental part of the full picture of what has happened within WTL and "*what has been done to address this*" (to cite the ED's response to the SDM of 31 July (misdated August) 2023). In my judgment, not making this all fully apparent in any public statement naming WTL distorts the picture presented, and the WTL statement does not do so. It is thus potentially misleading, or at least confusing, to the public and does not fulfil the objectives for which the making of a public statement is authorised.

232. To elaborate: the first point is that, as it is drafted, the WTL statement gives prominence to Mrs Dowding and Mr Conway's part in the matter, even though they were not the most major players, simply by mentioning them by name. In consequence it minimises, and even disguises, any part played by "others", however significant. Unless one is already aware of the situation, it barely conveys the information that any "others" were actually involved in misconduct at all. That in itself is something of a distortion, but the second point which to my mind makes the public statement significantly inaccurate as regards WTL, is the omission of other fundamental facts. Not only does the WTL statement not mention, anywhere, the fact that there were (two) other directors directly implicated in the sanctioned misconduct on WTL's part which is there described, but it does not even mention the equally important fact that those (two) directors have, themselves, been sanctioned by the Commission. This fact is, in my judgment, fundamental to an accurate picture, and thus a proper understanding, of how the Commission has dealt with WTL itself.
233. This omission or distortion appears to me to be well comparable in character and importance to the inaccuracy ordered by the Deputy Bailiff to be corrected in *X, Y and Z v GFSC* (see [111] above), and in fact even more serious. Moreover, this is not simply seeking accuracy for the sake of purity. Part of any materials which are beneficially conveyed to the public must go to show the inter-relationship of penalties imposed by the Commission, and their differences in individual cases, having regard to individually applicable factors. I do not see how that can be accurately conveyed to the public unless the entire picture of what happened is conveyed, and this must include the fact that there were other sanctions also imposed in the whole situation. This is all the more so if those other sanctions were actually incurred by virtue of the very same conduct as that described in the subject public statement.
234. Advocate Hill advised that, in practice, both public statements would be issued at the same time. Both Advocates relied on this fact but for different reasons. Advocate Hill submitted that any suggested omission in the WTL statement would effectively be cured, because the public would clearly be likely to link the two statements. Advocate McGuffin invoked the point in support of his argument that such a linking would only exacerbate the unfairness and confusion created by the fact that the conduct in the CV statement was apparently going to be less blameworthy than that which was now more accurately described in the WTL statement, this being part of WTL's complaints in the appeal.
235. I have found above that there are inaccurate factors in the WTL statement, and in my judgment these cannot be said to be cured by the fact that the two public statements will be issued together and so the public might be expected to read both and link the two. A public statement is a free-standing document and it must, in my judgment, stand scrutiny on its own. It cannot do this by reference to another public statement unless, possibly, by express incorporation, but even that does not apply here.
236. The question with regard to the WTL statement would then become, how much reference to the facts of Mr Cairns' and Mr Vermeulen's conduct and the dealings

between them and the Commission, is required to make good that omission with regard to WTL. That, however, is not a matter for me to decide, because I am not the decision-maker.

237. The picture and impression conveyed by any suggested form of properly extended text would have to be examined. Consideration would have to be given as to whether a properly accurate description of what has happened in relation to WTL does actually make it necessary to refer to Mr Cairns and Mr Vermeulen by name, or whether, perhaps an anonymised identification and description of them as “Director A” and “Director B” would suffice. This would be in conjunction with deciding what actual matters pertaining to them and their actions, derived (of course) from the SDM’s findings, is required to explain WTL’s presumptive sanction within the WTL statement.
238. But all this would have to be considered in context, which brings me to a point which has troubled me throughout this appeal. This is the question of the proper place and treatment of the separated CV statement.
239. It is acknowledged that the terms of the CV statement were never put before the SDM, and, indeed they were never put before this Court. During the hearing, I found this uncomfortable and artificial. Intuitively, I found it difficult to see how the SDM could comfortably make a decision as to the appropriate terms of the WTL statement without seeing the terms of the concomitant public statement which was going to be issued in relation to Mr Cairns and Mr Vermeulen.
240. The Commission plainly did not wish to disclose this document. Advocate Hill submitted that it was simply irrelevant because it was not the subject of this appeal, and had been agreed as part of the “confidential” early settlement agreement with Mr Cairns and Mr Vermeulen, who were therefore third parties as regards the present proceedings. I considered that it would not be within my jurisdiction, as an appellate court merely with power of review, to order that it should be produced.
241. However, Advocate Hill nonetheless told the Court, presumably judging this to be in the Commission’s interests at the hearing, that the document did, indeed, simply extract the matters referable to Mr Cairns and Mr Vermeulen from the original composite public statement. He also stated that the CV statement did not name WTL but referred to it only as “the Licensee”. But disclosing these facts in itself does rather go to show that the terms of the CV statement do have some relevance to the questions in this appeal.
242. Advocate McGuffin had to make his submissions, therefore, on the basis of the above presumptions as to the contents of the CV statement. I do not see how this can be correct. First, I have already noted that the conduct which would be founding the CV statement was the very same conduct as would found at least part of any sanction or censorious statement made against WTL; it was not a wholly independent matter. Advocate Hill’s “irrelevance” argument may be maintainable with regard to separate statements relating to different natural persons and their conduct, since these will inevitably be different facts. It does not have that force when what is being considered is what is being said of an individual and what is

being said of an entity on whose behalf the individual was acting, where the subject matter is the self-same conduct.

243. Second, on any footing the CV statement is context to the question of the appropriate contents of a public statement regarding WTL. I do not see how the SDM could make a complete assessment of the apparent accuracy of the WTL public statement without also seeing the actual CV public statement - how it had been composed, what it said and the impression it conveyed in fact - if only to reassure himself that all was harmonious. It may be that seeing it would turn out to make no difference to his decision, but that is not the point. It might do. It is therefore not immaterial.
244. Third there is the consideration that in making the Decision - and this must include the terms of an appropriate public statement, which is part of any such Decision – the SDM effectively is the Commission. He should therefore have all the Commission’s relevant knowledge available for his consideration and this includes the terms of any other public statement relating to the matter which the Commission is going to issue.
245. In the circumstances, therefore, I find that the SDM has not taken into account a matter – namely the actual terms and contents of the CV statement – which might possibly have an effect on the appropriate terms of the WTL statement, and which therefore ought to have been taken into account.
246. The above two points are flaws going to the contents of the WTL statement pertaining to WTL’s conduct being sanctioned, but there is a third issue, which arises from my holdings at [191] and [231-2] above, which goes further. This is the question of adequately distinguishing, or distancing, the conduct of the guilty former directors of WTL from that of the New Board and controllers, which is the focus of Ground 5 of the Grounds of Appeal. It is also an aspect of the general grounds of appeal at Ground 9.
247. That issue does pertain, in part to the content of the WTL statement, ie to the accuracy and sufficiency of the information being given to the public regarding the financial penalty which would have been imposed on WTL, the fact that this has been remitted in its entirety, and the Commission’s (the SDM’s) reasons for this course. The two latter factors in particular appear to be quite exceptional. But the fact that there are some circumstances, such as that if directors and controllers, particularly new directors and controllers, do in fact comprehensively implement a remediation programme to the Commission’s satisfaction, it is possible that the Commission will feel able to give credit for this by imposing no financial penalty on the relevant entity itself, is surely one which the public ought to know about if a public statement is being issued. The demands of public interest, as well as simple principle, therefore must require that they, and this latter point, be conveyed with accuracy if the “WTL affair” is to be publicised at all.
248. There is actually no mention in the text of the WTL statement of the quantum of the financial penalty which would have been imposed (or perhaps more accurately, was recommended to be imposed, since the SDM did not determine the quantum of that penalty as he did not need to) and the fact that this potential financial penalty has

actually been completely waived. This last fact itself is not expressly stated but is left as only a matter to be deduced by any person not already familiar with the facts of the case. However, it must be a matter of importance to enabling the public to be properly informed, educated, and given confidence in the Commission (even if deterrence is not relevant).

249. But the second and more far-reaching aspect of this point, is that of the adequacy of steps taken in the WTL statement to make clear that the sanctioned conduct is solely that of former directors so as to distance it sufficiently emphatically from any criticism of WTL's New Board and controllers. This is a factor which, to be to proper effect, must demand a real degree of prominence, in order to give a balanced impression in the context of the inevitably lengthy, and somewhat ponderous, account of the sanctionable conduct of those former directors which the statement is publicising as having been committed "by WTL". This requirement of sufficiently prominent impression must also be judged against the background that it has been recognised by the SDM, that any association of "WTL" with misconduct creates a risk of adverse financial effects on the interests of innocent third parties, as already noted.
250. I have previously held (see [191]) above that in such a case the reasonableness of issuing a public statement goes hand in hand with a requirement that all reasonably possible steps should be taken to avoid, or at least minimise, such "collateral" damage, consistently (of course) with not prejudicing any applicable public interest. Indeed, the risk of prejudice being to the interests of entirely innocent persons would suggest that even implementing minor steps which might further such minimisation ought to be viewed as worthwhile.
251. The SDM did, of his own volition, make the small amendments to the terms of the public statement drafted by the ED; I noted those at [70] above. However, there is no indication that the SDM did so through applying the general test or principle which I have mentioned above. I conclude that he therefore did not consider the point as rigorously as he could or should have done, and in not adopting such an approach it can be said that he failed to take into account a matter which he should have taken into account. That is an error of law.
252. This particular consideration goes to matters both of expression and also presentation of the public statement. To explain what I mean (since I am emphatically not to be taken as substituting my own decision, but only as suggesting illustrative "guidance") the SDM inserted a general note in the Emphasis Paragraph that
- "...references in this public Statement to the Licensee (except where the context otherwise demands) are to the Licensee under the control and direction of the Former Directors which included a number of other individuals in addition to Mr Conway and Mrs Dowding".*
253. I have already noted the unsatisfactoriness, as to accuracy and impression, of the vague reference to "others" and the distorting impressionistic impact of naming Mrs Dowding and Mr Conway but not giving the weight of any kind of personal identity to the relevant "others." Moreover, the reference to "Former Directors" is in

itself wrong and unsatisfactory, because it suggests that this must be a defined term in the statement, when in fact it is not. This in itself creates a confusing impression. Use of that phrase does, however, suggest a means by which emphasis on the “distancing” point could be improved, namely by actually defining such persons in an appropriate way, and then referring (as WTL itself suggested in its own proposed draft statement) to “*the Former Directors*” or to “*a Former Director on behalf of the Licensee*” rather than just “*the Licensee*” in subsequent descriptions of the matters of misconduct, thus keeping the distancing point firmly within the attention of those reading it, including any more casual or impressionable such readers, as pointedly as possible. This might not win prizes for literary elegance, but that is not the function of a public statement.

254. Similarly, the style of the Commission’s public statements does not preclude the use of a bold font. It might be thought useful and appropriate, in all the exceptional circumstances of this particular case, to put the Emphasis Paragraph itself into bold font, so as to increase its impact. Yet other possibilities might also come to mind. I emphasise that the above comments are intended as illustrative suggestions, only.
255. I therefore conclude that insofar as the above matters are raised by Grounds 5 and Grounds 9 of the Grounds of appeal, they succeed. The consequence is that if I were wrong in my primary reason for allowing this appeal, and I should therefore approach the appeal on the basis that I could not say that the issue of a public statement was unreasonable in principle, I would nonetheless allow the appeal on these grounds also, which therefore constitute alternative reasons for my decision.
256. Having regard to my powers under s. 106 (6) (a) of the EP Law, having set aside the SDM’s decision to issue the actual WTL statement, I would then have had to consider whether to exercise my power to remit the matter to the SDM (I do not think there would be any reason to direct a different SDM) to reconsider the terms of the public statement.
257. If I were to do so, I would direct that he consider how its terms should be amended to convey the necessary accuracy as described above, and how they might be amended to improve as greatly as possible, (consistently with any identifiable public interest) the emphatic “delineation” (ie the distinguishing) of the conduct for which WTL is being stated to be sanctioned by the issue of this public statement naming it, from any connection with its New Board and/or its controllers.
258. I think it plain that in such a situation, WTL should be given the opportunity to comment on the question of appropriate amendment of the statement (although, of course, the SDM would not be bound to accept any comments it may make). Furthermore, and as already mentioned, in order to be able to satisfy himself completely that the terms of an appropriate public statement do present a fully accurate picture, the SDM should be shown the actual form of the proposed CV public statement, so that he can assess its effect as context with knowledge of those primary facts, rather than supposition or guesswork.
259. I also observe that the application of the approach which I have indicated – namely that of taking all steps reasonably possible to avoid or minimise the risk of damage to the interests of innocent third parties – together with the need to review the terms

of the public statement with strict attention to proper accuracy, might even cause the SDM to feel it appropriate to revisit the question of anonymisation, as this would not appear to be a matter which he considered with the above principle in mind.

260. I am satisfied that the above guidance could be given as part of my power to give “directions” in tandem with making an appropriate remission to the Commission. The Court of Appeal took a similar approach in *Domaille*.
261. However, once again, that is not quite the end of this matter.

Ground 1 in particular

262. The only submission on the merits of the appeal which I have still not considered is Ground 1, ie the question of the “confidential” settlement agreement between the Commission and Messrs Cairns and Vermeulen, and its effect on the matter. I can now deal with this quite briefly.

263. Ground 1 reads, in full, that

“[The SDM] erred in that his discretion under s. 38 (2) of the EP Law was improperly fettered or otherwise wrongfully impaired by earlier decisions of the GFSC to either impose public statements on the contravening directors of the Appellant, or otherwise, the content of such public statements.”

This ground is not easy to follow as drafted. It alleges only the cause of any complaint (the earlier decisions/statements) and does not identify the deleterious effect that any such fettering of discretion is alleged to have had on the actual terms of the WTL statement, which is what would provide an operative ground of appeal. I have already addressed the complaints made about the terms of the WTL statement in my consideration of Grounds 5 and 9. Ground 1 is simply another reason why they may have come about. As such it adds nothing.

264. In his skeleton argument, (at §79) Advocate McGuffin enlarged the argument into an allegation of “bias”, an invocation of customary law and a breach of Article 6 of the European Convention on Human Rights. These grounds were not easy to understand, were not seriously argued and again, without identifying any specific consequences for the terms of the WTL statement they again add nothing.
265. What did emerge more clearly at the hearing, however, was an argument that the SDM’s discretion as to the terms of the WTL statement had been improperly fettered or constrained by the terms of the settlement agreement which the Commission had made with Mr Cairns and Mr Vermeulen, and which the Commission was refusing to disclose because it was “confidential”.
266. In practice, the terms of such settlement agreement could not have operated as a direct fetter on the SDM’s discretion, because he was not shown it. It could, however, have indirectly affected that discretion, since it was known to the ED, who drafted the WTL statement and who put that draft forward to the SDM, in the hope,

and obviously even the expectation, that he would approve it – as, in substance, he did.

267. Taking this point (benevolently) as the true meaning of Grounds 1, it would be subject to dismissal at this juncture on the same grounds as above, namely the reason for any impairment of the SDM’s discretion is not the point, as I do not think I am allowed to investigate this. The point is whether it had any unacceptable effect on the terms of the WTL statement, and in practice, that has been considered under Grounds 5 and 9 and so it adds nothing here.
268. However, I still do not think that the point stops there, because, in the same way as applies to the CV statement itself, it can fairly be said that the terms of the settlement agreement are context which the SDM ought to have been able to see, and ought to have been able to take into account in the making of his Decision, even if in the end, they did not affect his conclusions. In that regard, once again, he did not take into account a material matter which he should have done (or have been able to do). However, this aspect is complicated by the fact that the Commission maintain that this settlement agreement is “confidential”.
269. In those circumstances, I conclude that the correct course would have been
- i. for me to remit the Decision about the terms of the WTL statement back to the SDM for reconsideration as outlined in [257 et seq], and for him to undertake this exercise without sight of the terms of the actual settlement agreement which the Commission may have made with Mr Cairns and Mr Vermeulen, but his assuming that it imposed no restrictions upon him in undertaking that exercise, then
 - ii. once the terms of the public statement on that basis were decided, the ED should have the opportunity to object to any terms of it if of the view that including them would amount to a breach by the Commission of any binding terms of the CV settlement agreement.

If any such objection were made the SDM would then have to decide what it was appropriate to do about it; it is not appropriate to speculate here. It is even possible that he might then consider that it was thus not possible that a sufficiently complete and accurate version of the WTL statement which was permissible for publication could actually be devised. If so, the original decision (being here assumed) that a public statement could or should be issued at all might have to be revisited.

270. However, all the above elaborateness only arises on the assumption that I would remit the decision to issue this public statement relating to WTL back to the Commission, and this is a decision which I have not yet made.

Final Conclusions

271. I can now set out my final conclusions and my reasons, discussed above, in summary.
272. My central conclusion is that the Appeal is allowed.

273. My first and primary reason for this is that I find that the Commission's (the SDM's) decision to impose the sanction of a public statement on WTL in the particular circumstances of this case was itself unreasonable within the meaning of s. 106 (3) (b) of the EP Law. The appeal therefore succeeds on that ground, and I will set that decision aside under s. 106(6) (a) of the EP Law.
274. However, even if that were wrong, that does not dispose of the matter in favour of the Commission, because the decision which is the subject of the appeal is the Commission's (its SDM's) decision to issue this particular public statement.
275. I find that the decision to issue the particular public statement is not only unreasonable within the meaning of s. 106 (3) (b) of the EP Law on the general basis already mentioned, but is also unreasonable in that its precise terms and presentation do not take into account the duty which I have found must exist, and has not apparently been applied, to minimise in terms of its content and presentation, as far as possible (always consistently with sufficient furtherance of any proper public interest in the issuance of a public statement), the risk of thereby causing financial damage to meritorious innocent third parties. The decision to issue the statement in its particular terms is therefore unreasonable under s. 106 (3) (b) because it has not done this, and is also thereby flawed for error of law under s. 106 (3)(a). The appeal therefore succeeds on both these alternative grounds as well, and I set the decision aside under s. 106 (6) (a) on both those grounds.
276. Further and in any event, I also find that the particular public statement is flawed for error of law in not being properly accurate in its contents. Issuing it in its particular terms does not therefore fulfil the public interest as a matter of law. The appeal therefore succeeds on this further separate ground also, and I set the decision aside under ss. 106 (3) (a) and 106 (6) (a) on this ground as well.
277. I then consider my power under s. 106 (6) (a) of the EP Law to remit the decision to the Commission to be taken again (if it wishes to), and to do so with or without "directions". The section says that I "may" do so if I think it appropriate. I have therefore carefully considered whether I think it appropriate to exercise that power. I do not.
278. As regards my first and primary reason for my substantive decision, that is a binary judgment and there is consequently no room for any other compliant decision to be made.
279. As to my alternative but equally operative reasons, I decline to exercise my discretionary power because I simply do not think it just to do so.
280. The Commission has already had several opportunities to compose a sufficiently reasonable and accurate public statement for issue under s. 38. The Appellant, and no doubt its New Board and controllers, have already had to expend considerable time, trouble and expense in resisting what I have held to be the Commission's non-compliant efforts. If I were to remit the decision to the Commission to try yet again, it would have to be with the rather involved guidance which I have indicated, in order possibly to achieve some compliant result. I consider that any conceivable public benefit in doing so is quite disproportionate to the amount of expense, trouble and just plain stress, to WTL and those who would have to be involved in its behalf

which it would involve. This would then actually be the sixth round of “determinations” (commencing with the draft Enforcement Report) with which WTL and those running it will have been faced, and had to deal, in the course of this disciplinary matter. The “playing field” between the Commission and the Appellant, in terms of resources, and the effects upon each of them, is far from level. There is also, I consider, a general public interest in bringing this protracted affair to an end. In all those circumstances I do not think it appropriate to exercise my discretion so as to enable it to carry on for negligible public gain.

281. I am not obliged to do so; my power under s. 106 (6) (a) is entirely discretionary. I will therefore simply set the decision to issue the public statement relating to WTL aside.

Miscellaneous

282. I have set aside the decision to issue a public statement relating to WTL. The decision to issue a public statement against Mr Conway and Mrs Dowding is not under appeal, and is therefore not directly affected. How it can be appropriately implemented consistently with the setting aside of any public statement relating to WTL made in the same document is a consequential matter on which I was not addressed, and make no comment. Whilst WTL is obviously not directly concerned with the ultimate effect, it may be concerned with the manner in which necessary changes are implemented. I think it is therefore appropriate to give liberty to apply in this regard.

283. Second, I would not want it to be thought that my decision above implies any major criticism of the SDM in this case, at all. His reasoned Decision struck me as being clear, thorough and conscientious, and his decision with regard to not imposing any financial penalty on WTL itself displayed conspicuous fairness and independence of thought.

Disposal

284. In conclusion, therefore

1. The Appeal succeeds for the reasons ultimately appearing above in paras. [179]-[181] and [229]- [233] et seq.
2. I will set aside the Commission’s decision to issue a public statement relating to Weighbridge Trust Limited.
3. I will order the Commission to pay WTL’s costs of and incidental to this appeal on the recoverable basis, unless either party wishes to contend for a different order and so notifies the court within 7 days of the date of this judgment when finally handed down; and
4. I will give liberty to apply in regard to any matter arising.

Hazel Marshall KC
Lieutenant Bailiff

21st November 2024