Application for privacy orders which would have the effect of requiring the appeals in these cases, due to be heard by this Court in February 2025, to be held in private, and the publication of any information about the appeal to be restricted.

[2024]GCA083

IN THE COURT OF APPEAL OF GUERNSEY
(CIVIL DIVISION)
Court of Appeal Case No. 586/587/588/589

4th December 2024

Before:

Clare Montgomery KC President
Sir Timothy Le Cocq, Bailiff of Jersey
Michael Furness KC JA

Between:

ROBIN FULLER **First Appellant**

-and-

ADAM IAN HAYDEN TATTERSALL **Second Appellant**

-and-

PATRICK BARRY MORONEY **Third Appellant**

-v-

GUERNSEY FINANCIAL SERVICES COMMISSION **Respondent**

Montgomery P

1. This is the judgment of the Court. An application has been made for privacy orders which would have the effect of requiring the appeals in these cases, due to be heard by this Court in February 2025, to be held in private, and the publication of any information about the appeal to be restricted.

2. For the reasons we set out below, we refuse the application.

The Proceedings

3. The Appellants have been the subject of regulatory proceedings brought by the Respondent as a result of their links to companies connected with a fraudulent investment scheme referred to as the Providence Group. The Providence Group was a Ponzi scheme which finally collapsed in August 2016. The collapse led to an investigation carried out by the Respondent into the

Guernsey based corporate entities, their directors and managers, associated with the Providence Group, including the 3 Appellants.

4. On 4 March 2021, a Senior Decision Maker, Glen Davis (then QC now KC), (the SDM), appointed on behalf of the Respondent, rendered his Final Decision, finding that the Appellants did not meet the minimum criteria for licensing and imposing sanctions on them. On 14 August 2024, following an appeal hearing held in private, the Bailiff dismissed the appeals of the Appellants (save in respect of their appeals against sanctions). The Bailiff ordered that his judgment should not be published beyond the parties and their legal advisers.

5. Both the SDM and the Bailiff agreed (albeit by different routes and reasoning) that the Appellants did not meet the minimum criteria to hold a license in Guernsey.

6. The question of the appropriate sanction in the case of each of the Appellants has been remitted to the Respondent for reconsideration in accordance with the findings made by the Bailiff.

7. The appeals to this Court challenge, amongst other things, the findings made by the SDM and the Bailiff.

The Guernsey statutory regime

8. Section 11C of the Financial Services Commission (Bailiwick of Guernsey) Law 1987 (the FSC Law) dealt with the procedure that applied to this case at the time when it was before the SDM. It provided as follows:

> *"(1) Where the Commission is satisfied that a licensee, former licensee or relevant officer –*
>
> *(a) has contravened in a material particular a provision of, or mode under, the prescribed Laws, or*
>
> *(b) does not fulfil any of the minimum criteria for licensing specified in the regulatory Laws and applicable to him,*
>
> *it may, subject to the provisions of section 11E, publish a statement to that effect.*
>
> *(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, and*
>
> *(f) the action taken by the Commission under this section in other cases."*

9. Until the amendments to the Financial Services Commission's procedure contained in the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law 2020 (the FSB Law), that came into effect in November 2021, appeals under the FSC Law in relation to a decision to publish a Public Statement were held in private (see s 11H (7) of the FSC Law). The repeal of s 11H (7) by s 106 (9) of the FSB Law repealed the presumption in favour of privacy.

10. It is common ground between the parties that the default position in relation to such an appeal is now one of open justice. The Appellants contend that this principle is derived from customary or common law.

11. In our view, it is also the principle that emerges from the legislative history set out above. The legislative intent behind the repeal of s 11H(7) is clear; the ordinary principles of open justice should apply to the hearing of appeals, even in the area of financial service regulation, where there will inevitably be reputational consequences from publicity attendant upon any appeal.

12. Contrary to the Appellant's submissions, there are no grounds for treating the legislative history as giving rise to any legitimate expectation that GFSC cases underway before 2021 should continue to have the benefit of the now repealed privacy protections.

13. It was also argued that there is a discretion in the court, by virtue of the transitional provisions in s 140 (3) of the FSB Law, to continue to order privacy in these appeals. However, s 140(3) provides only that *"anything in the process of being done on the commencement of this Law … may be continued to be done after the commencement of this Law …"*. In our judgment, these appeals cannot be described as being *"in the process of being done"* as at November 2021. The appeals are free standing processes that were started in September 2024.

The principles to be applied

14. Accordingly, we start from the assumption that all matters before the courts of Guernsey should normally take place in open court, see the much cited judgment of Lieutenant Bailiff Day in *IFS Investments Ltd v Manor Park (Guernsey) Ltd* [2003-04] GLR 77, in which it was emphasised (at para 21) that *"the principle of open justice … is and always has been a fundamental principle of our administration of justice"*. That statement is as applicable in 2024 as it was 20 years ago.

15. The parties have found common ground in their citation of *Alpha Development Limited v Barclays Wealth Trustees (Guernsey) Limited*, unreported Royal Court 4 March 2015, at para 22:

> *"(a) There is a general presumption that all aspects of a case are to be held in public;*
> *(b) In exceptional circumstances, that presumption can be rebutted where it can be demonstrated that justice would be frustrated otherwise;*
> *(c) The test to apply is one of strict necessity;*
> *(d) The burden of establishing that the test applies lies on the applicant;*
> *(e) The Court expects the applicant to adduce clear and cogent evidence in support of such an application;*
> *(f) If that test applies, derogating from the general presumption follows as a matter of principle. Equally, if the test does not apply, the application must be refused.*
> *There is no question of exercising a discretion;*
> *(g) Any limitations on the ordinary rule of open justice granted by the Court will, therefore, be the minimum required to preserve the confidentiality of the information involved so as to secure the proper administration of justice."*

16. Thus, the agreed test for determining whether this appeal hearing should take place in private is one of strict necessity in the interests of justice, see *In the Matter of the L Trusts* [2020] GCA 061. There is no question of balance. This is a binary question. Either a hearing in private is necessary, or it is not.

17. Furthermore, even if there were any question of balance, the focus would not be on the supposed absence of prejudice to the Respondent. It is a central principle of Guernsey law that the courts should sit in public so that the proceedings can be observed by members of the public and reported on by the media. Transparency improves the quality of justice, enhances public understanding of the process, and bolsters public confidence in the justice system in the Bailiwick. The counterweight to any privacy plea is the wider interest of society in open justice, not the interests of the financial services sector.

18. The importance of the principle of open justice was explained by Lord Dyson JSC in *Al Rawi v Security Service* [2012] 1 AC 531 at p 572, para 11: *"The open justice principle is not a mere procedural rule. It is a fundamental common law principle. In Scott v Scott [1913] AC 417, Lord Shaw of Dunfermline (p 476) criticised the decision of the lower court to hold a hearing in camera as constituting 'a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security'. Viscount Haldane LC (p 438) said that any judge faced with a demand to depart from the central rule must treat the question 'as one of principle, and as turning, not on convenience, but on necessity'."*

19. The fact that the Respondent agreed to suspend publication of its decision, and consented to the hearing before the Bailiff taking place in private is of little weight in deciding whether this Court should sit in private, since it adds nothing to the case for necessity.

20. The privacy decision made by the Bailiff is of equally little weight. We are obliged to consider the case for necessity on the basis of the evidence before this Court. There is no justification for framing the argument as if the Court of Appeal has to find a material change in circumstances before it could order an open court hearing. It is for the party seeking to derogate from the principle of open justice to produce clear and cogent evidence in support of the derogation. It is the duty of the Court of Appeal not merely to review the decision of the Bailiff, but to come to its own independent conclusions on the material placed before it.

21. The case for necessity advanced by the Appellants is that the publication of the proceedings on appeal would have severe reputational and financial consequences for them. The First and Second Appellants point to a significant deterioration in their financial circumstances since the investigation into the Providence Group started. They state that they have been unable to work in regulated financial services in Guernsey and have had very restricted earnings as a result. The Third Appellant has had the benefit of employment as an accountant but is nonetheless concerned about the impact on his employment and status by publication of the proceedings.

22. Each of the Appellants claim that irreparable damage would be caused to them by any publication of the appeal process. However, none of the Appellants have explained how any damaging effects would be caused by the fair and accurate reporting of the appeal processes, particularly in the event that that their appeals result in vindication and the dismissal of any adverse findings in their cases.

23. The Appellants accept the force of the reasoning in the Upper Tribunal decision in *Angela Burns v Financial Conduct Authority* [2015] 5 WLUK 21. They agree that they need to establish a significant likelihood of the destruction or severe damage to their livelihoods caused by a prospective public hearing. We are not satisfied that this has been established. The damage and disruption to livelihood that is described in the evidence is focussed on past damage or on the possibility of future destruction and damage if the appeals should fail.

24. None of the Appellants have provided any cogent evidence that the reporting of the hearing of appeal and its outcome is likely on its own to cause the destruction or near destruction of their livelihoods. There is, for example, no evidence that the Third Appellant would lose his job or his professional accreditation whilst his appeal is pending. There is similarly no evidence that the work that the First and Second Appellants have secured would be lost whilst their liability remains in dispute.

25. As the Lieutenant Bailiff observed in *Domaille and Clarke v GFSC* [2023] GRC 017 at para 38, there should rarely be any need to restrain the publication of proceedings on appeal even in the case of a contested decision by the GFSC which has reputational or financial consequences. If the appeal fails, any adverse publicity will not have been unjustified, and if it succeeds then the Appellants will be in a position to explain that the GFSC's Decision has been held to be wrong.

26. This rationale was explained in England and Wales by Lord Woolf in *R v Legal Aid Board, ex parte Kaim Todner (a firm)* [1999] QB 966 at p 978 at para 6. In general, parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation. The protection to which they are entitled is normally provided by a judgment delivered in public which will refute unfounded allegations. Any other approach would result in wholly unacceptable inroads on the general rule.

27. Parties are not entitled to protection from ill-informed reactions from third parties, arising solely from the fact of publicity being given to their appealing against GFSC decisions or sanctions. The risk of such comments cannot be said to defeat the interests of justice, and certainly not to a sufficient extent as to override the general and salutary principle of open justice.

28. There is a significant public interest in any contested hearing in relation to regulatory proceedings involving public bodies, being held in public. The public is entitled to know what regulatory actions have been taken in relation to matters of public concern, and the adequacy of the conduct of the GFSC.

29. This is particularly the case where, as the Appellants' evidence acknowledges, the Providence Group fraud is a matter of public concern (see for example para 7 of the First Appellant's 2nd affidavit). Public scrutiny of the appeal will, in our view, help maintain the public's confidence in the administration of justice and make inaccurate and uninformed comment about proceedings less likely.

30. The public hearing of the appeal will also enhance equality of information about the circumstances of the Appellants and will encourage transparency and public debate in relation to the financial services sector in Guernsey.

31. In the present case we are satisfied that no compelling case for privacy has been made out, and that it is in the public interest that the Court sits in public on these appeals and publishes its judgment.

32. There is no appeal against the decision of the Royal Court to proceed in private and there is no application to lift the existing privacy order in relation to judgment of the Royal Court. It is not, therefore, necessary for us to consider the position of any other participants in the hearing before the Royal Court.

33. However, to the extent that a discussion of the merits of the decision of the Royal Court will take place in open court in the Court of Appeal, that discussion and the relevant parts of that decision will come into the public domain and will be reportable, subject always to the

obligation on the news media and commentators to produce accurate, fair and contemporaneous reports of proceedings.

34. Insofar as any matter to be raised in the course of the hearing of the Appeal has any particular claim to confidentiality or sensitivity, that must be the subject of an application before the hearing. If such an issue arises we make it clear that the Court would be minded to allow the media or their representatives, to make representations and legal submissions in that event. In principle, any proposed restriction on public access to a court should be made on notice to the media unless the interests of justice preclude notice being given.