Application for leave to appeal to His Majesty in Council from the decision of the Court of Appeal given on 18 January 2024 and for a stay of execution of the Court of Appeal's order pending the resolution of any appeal.

[2024]GCA037

Civil Appeal No. 569

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

31 May 2024

Before: Jonathan Crow CVO, KC
David Perry, KC
Sir Adrian Fulford, PC

Between: **THE GUERNSEY FINANCIAL SERVICES COMMISSION**

Respondent

-and-

(1) IAN CHARLES DOMAILLE
(2) MARGARET HELEN HANNIS

Applicants

Decision on Application for Leave to Appeal

Perry JA

Introduction

1. This is the Court's decision in respect of an application for leave to appeal to the Judicial Committee of the Privy Council. The Applicants seek to challenge this Court's judgment by the same constitution [2024] GCA003] ("the Judgment") and associated Act of Court dated 18 January 2024. In addition to addressing each of the proposed grounds of appeal, we also consider an application for a stay of execution of the Court of Appeal's order pending the resolution of any appeal.

The Background

2. On 29 July 2022, a Senior Decision Maker, Mr John Russell Finch OBE ("the SDM"), who had been specifically appointed by the Guernsey Financial Services Commission ("the GFSC"), decided that three individuals, including the Applicants, Mr Domaille and Ms Harris, should be the subject of sanctions, principally financial penalties and Prohibition Orders, using powers contained in the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law 2020 ("the EP Law"). The Applicants appealed to the Royal Court pursuant to section 106 of the EP Law and on 18 April 2023, Her Honour Lieutenant Bailiff Marshall KC, sitting alone, allowed the appeal. The GFSC appealed the Royal Court judgment to the Court of Appeal, pursuant to section 107(i) of the EP Law. The Court of Appeal allowed the GFSC's appeal and remitted the matter to the GFSC for it to appoint another SDM (not Mr Finch OBE) for the decision on sanctions to be retaken in accordance with the terms of the Court of Appeal judgment.

The Application

3. The Applicants' contention is that the Court of Appeal was wrong to allow the GFSC's appeal and that the Lieutenant Bailiff's decision and corresponding Act of Court was entirely correct. In support of this contention the Applicants advance six grounds of appeal, including, in part, arguments of law that were not advanced at the hearings in either the Royal Court or this Court.

4. Neither of the parties asked for an oral hearing, and we did not consider it necessary to hold an oral hearing to determine the application for leave to appeal, but in reaching our decision we have considered carefully the detailed written submissions and accompanying material provided by the Applicants (the Skeleton Argument, dated 11 March 2024, and Rejoinder, dated 16 May 2024) and by the GFSC (dated 24 April 2024).

The Test

5. The tri-partite test for leave to appeal to the Judicial Committee of the Privy Council is well-known and uncontroversial. Leave to appeal will only be granted if the application raises an arguable point of law of general public importance that needs

to be determined at the present time. As this Court has recently emphasised, it will be slow to find that the third limb of the test is satisfied "*given the many competing claims on the time of the Privy Council, and the unique ability of its Appeal Panel to assess their relative importance and immediacy*": *JJW Hotels & Resort Holidays Inc v Benjamin Alexander Rhodes and others* [2022] GCA 102, at paragraph 8.

Ground 1

6. Ground 1 is that this Court erred in its interpretation and application of section 106 of the EP Law (and in particular its interpretation of the grounds on which an appeal may be brought which are listed in section 106(3)), and was wrong to conclude that the Lieutenant Bailiff exceeded the scope of the jurisdiction conferred on the Royal Court.

7. In support of their arguments, the Applicants seek to rely on the Royal Court's decision in *The Medical Specialist Group LLP v Guernsey Competition and Regulatory Authority* [2023] GRC 006 and the States' 2007 Policy Letter (which, it is submitted, shows the legislative intent behind section 106(3)), neither of which was cited by the parties at the hearings in the Royal Court or in this Court. The Applicants also advance a novel argument (at least in these proceedings) to the effect that the allegations brought against them should have been categorised as involving the determination of a criminal charge for the purposes of Article 6 of the European Convention on Human Rights, thus engaging the rights associated with a fair criminal process.

8. While we accept that the true scope of the Royal Court's functions and powers under section 106 of the EP Law is a matter of general public importance, we do not accept that the Applicants have properly addressed this Court's reasoning, nor have they demonstrated that the conclusions set out in the Judgment on this issue are arguably wrong.

9. We addressed the jurisdiction conferred on the Royal Court by section 106 of the EP Law at paragraphs 63 to 101 of the Judgment. The essence of our approach was summarised (at paragraph 50) where we observed "*that the Royal Court's function under section 106(1) is to hear an appeal by reference to all or any of the grounds listed in section 106(3), and to exercise the powers conferred by section106(6) – no more, no less. It is not the Royal Court's function to conduct a full, merits based trial de novo, or to assume the primary fact finding function or the expert, evaluative, regulatory decision-making function of the GFSC.*" We later went on to identify various respects in which the Royal Court's review departed from the powers conferred by section 106 (paragraphs 87 to 100 of the Judgment). In our view this interpretation of section 106(3) is consistent with the statutory scheme, ensures procedural fairness, provides a considerable safeguard for the individual and is sufficiently broad to ensure compliance with Article 6 of the ECHR. The Applicants' argument, while presented as an issue of law is, in reality, an argument concerning the extent to which on the facts of this particular case the Royal Court went beyond its jurisdictional remit. We concluded that it clearly did so and that this was made plain by the Lieutenant Bailiff's own explanation of her approach to the facts.

10. In relation to the fresh arguments advanced by the Applicants, we have considerable doubts that it would ever be appropriate to grant leave to appeal on the basis of material that was not deployed before the Court of Appeal, not least because the question whether the Applicants are entitled to rely on such material is a matter more appropriately decided by the Privy Council, if at all. Notwithstanding our reservations, we have considered the Applicants' additional arguments and there is nothing in the Royal Court's decision in *The Medical Specialist Group LLP*, the State's 2007 Policy Letter or the criminal limb of Article 6 argument that would cause us to alter our conclusions.

11. We refuse leave to appeal on Ground 1.

Ground 2

12. Ground 2 is that this Court was wrong to conclude that the absence of evidence of actual money laundering, financing terrorism or other harm should not be regarded as a mitigating factor when determining the appropriate sanction for breaches of the statutory financial services regime.

13. In relation to this ground we are not convinced that the Applicants have properly addressed our analysis of the legal significance (or otherwise) of the presence or absence of actual harm as a relevant mitigating factor (paragraphs 102 to 114 of the Judgment). Nor are we satisfied that the Applicants' argument raises an arguable point of law. The essence of the Judgment on this point was that, although evidence of actual harm could rightly be regarded as an aggravating factor, the absence of any such evidence (which might never come to light) cannot properly be regarded as a mitigating factor. What matters in each case is the gravity of the breach in its own terms. This was no more than a reflection of the risk-based approach to enforcement which has been a long-standing, uncontroversial and important component of the regulatory regime.

14. We refuse leave to appeal on Ground 2.

Ground 3

15. Ground 3 is that this Court was wrong to conclude that the Lieutenant Bailiff erred in her finding on probity and in relation to the prohibition order and in particular: (1) had misapplied the two-stage test in *Ivey v Genting Casinos UK Ltd (Trading as Crockfords Club)* [2017] UKSC 67 to determine a want of probity; (2) had misapplied the civil standard of proof to a finding of want of probity; (3) erred in limiting the basis for imposing a prohibition order; alternatively, the Applicants contend that the Royal Court's conclusions were in any event fully justified.

16. In relation to point (1), we noted that the Lieutenant Bailiff had given what was in effect a "*Ghosh*" direction (*R v Ghosh* [1982] QB 1053) and that this was an error of law (paragraphs 127 to 130 of the Judgment). In relation to point (2), we concluded

that the Lieutenant Bailiff had failed to apply the single and unvarying civil standard of proof (namely, the balance of probabilities) and that this too was an error of law (paragraphs 131 to 132 and 140 to 143 of the Judgment). In relation to point (3), we decided that the Lieutenant Bailiff had significantly and unlawfully limited the circumstances in which a Prohibition Order might properly be imposed (limited to findings of want of probity or incompetence to an egregious degree so as to justify the conclusion that such a penalty is reasonable and proportionate) (paragraphs 144 to 154 of the Judgment). This did not reflect the flexible nature of the power to make Prohibition Orders and the importance of their availability in furtherance of the regulatory objective of bringing about and maintaining high standards of conduct in persons involved in Guernsey's financial services sector (paragraphs 145 and 151 to 154 of the Judgment). We consider that the Applicants have raised no arguable point of law in relation to matters (1) to (3), and the alternative argument, that even if the Lieutenant Bailiff was wrong in her application of the law, the Royal Court was nonetheless entitled to reach its conclusions, is more properly to be regarded as an argument directed to the facts, and for this reason equally unarguable.

17. We refuse leave to appeal on Ground 3.

Ground 4

18. Ground 4 is that the Court of Appeal was wrong to conclude in respect of the First Applicant (Mr Domaille) that the Lieutenant Bailiff had erred in law: (1) in her approach to section 39(i) of the EP Law in having regard to historic fining powers and holding that an issue of retrospective penalisation arose; and (2) in her approach to the interaction between the penalties imposed on a director and a licensed entity (*Artemis Trustees Ltd*) where the First Applicant was a shareholder of the licensed entity in question. Alternatively, it is argued that any such error should have made no difference to the outcome in the circumstances of this case.

19. Among our conclusions on point (1) was that the assessment of whether a licensed entity or individual fulfils the minimum criteria for licensing is a current assessment and that no principle of retrospectivity arises. This is apparent from plain wording of

the EP Law (paragraph 164 of the Judgment). It follows that the Applicants' argument to the effect that the Court of Appeal's analysis offended against the presumption of retrospectivity (and, assuming that the criminal limb of Article 6 is engaged, Article 7 of the ECHR) fails to address the Court's reasoning. In relation to point (2), we concluded that the Lieutenant Bailiff's analysis was flawed in a number of material respects and held that it was appropriate to respect the concept of separate legal personality and to impose financial penalties on entities and individuals which properly represent their respective failings (paragraph 175 of the Judgment). We consider that the Applicants have raised no arguable point of law to undermine this analysis. Nor do we consider that if there were errors on the part of the Lieutenant Bailiff this should have made no difference to the outcome of the Appeal, which is, in any event, an argument directed to the facts.

20. We refuse leave to appeal on Ground 4.

Ground 5

21. Ground 5 is that even if the Lieutenant Bailiff erred in her approach, the Royal Court's conclusions were justified by reference to the facts (as "*per the Royal Court Judgment*") and/or in any event given that (among other things) the financial penalty imposed on Mr Domaille and/or the Prohibition Orders imposed on both Applicants were disproportionate and unreasonable.

22. In our view, the Applicants' argument on this ground is an argument on the facts and raises no arguable issue of law.

23. We refuse leave to appeal on Ground 5.

Ground 6

24. Ground 6 is that the GFSC's appeal to the Court of Appeal should in any event have been dismissed and, alternatively, the Court of Appeal erred in remitting the matter to the GFSC and not the Royal Court with such directions as were appropriate in the circumstances of its decision.

25. In our view this ground of appeal adds nothing to the earlier grounds and is another attempt to engage with the facts rather than the law. In relation to the disposal of the appeal, the Court of Appeal, was entitled in the exercise of its broad remedial powers, to remit the matter to the GFSC and for the decision on sanctions to be retaken in accordance with the terms of the Judgment.

26. We refuse leave to appeal on Ground 6.

Summary

27. For the reasons set out above, none of the proposed Grounds of Appeal satisfies the relevant test, and the application for leave to appeal to the Privy Council is dismissed.

Application For A Stay

28. The Applicants, in addition to seeking leave to appeal, have applied for a stay of execution of the Act of Court on the basis that, if the Judgment is successfully appealed, the remitted process before the newly appointed SDM would risk wasting time and resources. While we have refused leave to appeal, we see the force of this argument. In these circumstances, we consider that the appropriate course it to order a stay of execution pending the final determination of any timely application to the Privy Council for leave to appeal. We order that a stay of execution be granted for 28 days in the first instance (starting with the day this decision is published), and, if an application for leave to appeal is made to the Privy Council within that period, the stay is to remain in force until the application or any appeal is finally determined.

Conclusion

29. We refuse leave to appeal and grant a stay of execution of the judgment in the terms set out above.