Application for an order pursuant to section 106 of the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020; Rule 50 of the Royal Court Rules, 2007 and to the extent it may be necessary any other statutory powers and/or the Court's inherent jurisdiction to suspend the operation of certain decisions pending the determination of the Appellants appeals.

[2023]GRC057

IN THE ROYAL COURT OF GUERNSEY
ON APPEAL FROM DECISIONS OF THE GUERNSEY
FINANCIAL SERVICES COMMISSION

Between:

(1) PAUL RANDALL PYBUS **First Appellant**

(2) ADJURE GLOBAL LIMITED (in liquidation)
Second Appellant

-and-

THE CHAIRMAN of THE GUERNSEY FINANCIAL SERVICES COMMISSION
Respondent

Judgment handed down: 24 October 2023

Before: Jessica E Roland, Deputy Bailiff

Counsel for the Applicants: Advocate J T Le Tissier
Counsel for the Respondent: Advocate J Hill

Legislation, texts and cases considered:

Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020
Royal Court Civil Rules, 2007

The White Book 2023 Edition, Vol 1

Bremer Vulkan Schiffbau & Maschinenfabrik v South India Shipping corp. Ltd (3) [1981] A.C 909
Bibby v Partap [1996] 1 WLR 931
Laughton v Main [2000-02] GLR 1
X v Registrar Of the Ecclesiastical Court of the Bailiwick of Guernsey [2003-04] GLR Note 24
Taylor v Lawrence [2003] QB 528
Angenent v Pring [2004] 24/2004
Bhanjee v Forstick (practice note) [2004] 1 WLR 88
YD v Secretary of State for the Home Department [2006] 1 WLR 1646
HFT International (Guernsey) Ltd v Equinox Finance Management (Guernsey) Limited 20 June 2006
Canivet Webber Financial Services Limited v Guernsey Financial Services Commission [2007-08] GLR 221
In the Matter of the Registrar-General of Electors [2007-08] GLR 304
Investec Trust (Guernsey) Limited et al v Glenalla Properties Limited et al (2014) 14 January 2014
A v R [2016] GLR 214
Re B [2016] UKSC 4 at [85]

In The Matter of Providence Investment Funds PCC And Providence Investment Management International Limited [2017] GLR 400
Kazzaz and Others v Standard Chartered and another [2022] GRC 071
Domaille, Clark and Hannis v GFSC [2023] GRC017

Introduction

1. This is an application by the First and Second Appellants dated 20 April 2023 ("the Application") seeking an order pursuant to section 106 of the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020 (the "Enforcement Law"); Rule 50 of the Royal Court Rules, 2007 (the "RCCR"); and to the extent it may be necessary any other statutory powers and/or the Court's inherent jurisdiction to suspend the operation of certain decisions pending the determination of the First and Second Appellants appeals or other orders. The Application is supported by the affidavit of the First Appellant dated 26 April 2023. The First Appellant is a director of the Second Appellant.

2. The decisions referred to in the Application are those contained within the decision of the Senior Decision Maker, Terence Mowschenson KC (the "SDM") dated 23 March 2023 (the "Decision") where the SDM on behalf of the Respondent imposed a financial penalty on the First and Second Appellants of £150,000 and £300,000 respectively pursuant to section 39 of the Enforcement Law; applied a prohibition order of 10 years pursuant to section 33 of the Enforcement Law against the First Appellant; under section 32 of the Enforcement Law dis-applied exemptions under The Regulations of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2020 in relation to the First Appellant for 10 years; and under section 38 of the Enforcement Law provided for the issue of a public statement concerning the First Appellant and the Second Appellant.

3. Section 106 (7) of the Enforcement Law provides that under section 106 (7) (f) the Royal Court may, upon such terms and conditions as the Royal Court thinks just, suspend or modify the operation of the decision in question imposing a financial penalty pending an appeal. Section 106 (7) (i) provides for the equivalent to effectively stay a public statement. However, there is no reference in this subsection to the Court having the ability to similarly deal with prohibition order or disapplication of the exemption order ("disapplication order"). The First and Second Appellants submit that, nevertheless, the Court does have the power to stay both of these sanctions.

4. The Application is opposed by the Respondent, however, whilst this Application is being considered the Respondent has agreed to not implement the sanctions.

5. The second part of the Application related to privacy. The Appellants did not proceed with this part of the application and the matter will be heard in public. It was acknowledged during the hearing by both parties that should any person not attached to the legal teams of the Appellants or the Respondent be present in the Court at any hearing, any reference to any of the Second Appellants' clients, entities administered by the Second Appellant or other similar or related third parties, who would have had an expectation that their affairs remain confidential (collectively "Third Parties") by which the Third Parties or their affairs could be identified, should be referred to in a manner which provides for their anonymity. I agreed with this protocol.

6. Both parties filed written submissions which they augmented orally at a hearing on the 12 July 2023.

Summary of submissions

7. The Appellants submit that in relation to each of the sanctions, the first issue is whether or not the Royal Court has jurisdiction to suspend or modify the sanction. The second issue is, if there is jurisdiction, whether the Court should exercise its discretion to suspend the operation of the sanctions pending the outcome of the appeal. In the absence of a provision under section 106, the Appellants say that the Court has the ability to stay the prohibition & disapplication orders under rule 50(2)(c) of the RCCR. The RCCR are widely drafted because they are the rules that apply in relation to all the matters that are before the Court. Pursuant to this rule, the Court has the ability to "*stay the whole or part of any proceedings or judgment generally or until a specified date or event*." "*Proceedings*" are not defined in the RCCR, however the Appellants rely on the comments of LB Marshall in *Domaille, Clark and Hannis v GFSC [2023] GRC017* at paragraph 33 where she says:

> *"My function, as the appellate tribunal from the Decision of the SDM in this case, is not so much that of an appellate court, or a reviewing court, but is the last component step in a convention compliant process of adjudicating finally upon the disputed rights and obligations of the Appellants arising from the process of enforcement which has been exercised in respect of them by the Guernsey Financial Services Commission".*

8. Thus, an appeal from and decision of the Respondent should come under the definition of proceedings under the RCCR. "*Judgment*" is also not defined in the RCCR and should be interpreted broadly. The First Appellant also says that the Decision should be viewed as a judgment under the RCCR. The rule gives the Court the ability to stay matters not limited to a judgment or decision of the Royal Court. This argument is bolstered, he says, by the specific reference to "*any*" and "*generally*" when referring to proceedings. The Court has to have a broad discretion to deal with the variety of matters before it. Further, the First Appellant says that there is no statutory provision for the staying of a Magistrate's Court judgment by the Royal Court on appeal or a planning decision on appeal from the Planning Tribunal to the Royal Court but there is no question that the Court must be able to stay these decisions whilst an appeal was being heard (although Advocate Le Tissier acknowledged he had not been able to locate an example of where the latter had happened).

9. In addition, by rule 50(2)(p) of the RCCR the Court has the ability to "*take any step or make any other order for the purpose of managing the case during the just resolution of the case*." This is a sweeping up clause giving the Court power to take a wide range of steps which could include a stay. Staying a decision that is being appealed is a case management decision and not a substantive matter. The First Appellant says that both rules permit the Court to make an order staying the operation of the prohibition order and disapplication order pending the determination of the appeal. He argues that although the Respondent says that this cannot stretch to a stay of orders sought in this Application, he does so without authority. The First Appellant also emphasises the importance of the overriding objective of the RCCR which is "*to enable the Court to deal with cases justly*" and "*must seek to give effect to the overriding objective when it……interprets any rule*". He says this principle supports his argument that the Court can stay the decisions to deal with the case justly.

10. Further, or alternatively, if the Court was to find that the provisions of the RCCR do not empower it to stay the prohibition order or the disapplication order, the First Appellant says that the Court has the ability to stay the operation of these orders, under the Court's inherent jurisdiction.

11. The Royal Court is a superior court of unlimited first instance jurisdiction. The First Appellant relies on the case of *A v R [2016] GLR 214* in the judgment of Deputy Bailiff McMahon, as he was then, when he endorsed the Jersey Court of Appeal decision in *Mayo Associates v Cantrade Private Bank Switzerland (CI) Ltd [1998] JLR 173* quoting the following sections of that judgment:

> *"However, it emerges from even the most cursory scrutiny of these articles and the authorities that not only is there no agreement as to the aspects of the court's jurisdiction which may be properly called inherent, but also that there is no unifying*

principle from which the boundaries of inherent jurisdiction may be divined. Rather, there is an area demarcated by principle and, in addition, an assortment of powers exercised by the courts which have been described as forming part of inherent jurisdiction but which lack a common theme.

Unfortunately, determining the precise extent of the demarcated area is complicated by the absence of an authoritative statement of the unifying principle. However, it clearly forms part of procedural law and is derived from the need for a court to have and exercise powers to make it effective as a court. In his article, Sir Jack Jacob said (ibid., at 27):

> *"... [T]he essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner."*

These remarks were echoed by Lord Diplock in Bremer Vulkan Schiffbau & Maschinenfabrik v. South India Shipping Corp. Ltd (3), when he said ([1981] A.C. at 977):

> *"It would I think be conducive to legal clarity if the use of these two expressions [i.e., inherent power and inherent jurisdiction] were confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice."*

In our view, the vital clue to the nature of inherent jurisdiction in its procedural setting, and revealed in the two passages quoted, is necessity. The court has a particular procedural power because it has to have it to be a court in any meaningful sense. On this basis, the power to require the attendance of witnesses, whether to testify or to produce documents, the power to control abuse of the process of the court, the power to dismiss claims for want of prosecution, the power to issue practice directions, the power to decide who may or may not appear before the court, the power to correct errors in its own orders and many other powers may all be recognized as derived from a single pool, not of powers but of power drawn upon as necessity dictates."

12. The First Appellant says that in this instance, the substantive relief being sought by the First Appellant is the setting aside of the Decision, which would include the setting aside of the prohibition order and disapplication order. The First Appellant says it would be a manifest injustice if there was no option other than for the First Appellant to be subjected to the effects of the orders whilst an appeal against the Decision which imposed that order took place. If the appeal is successful, the orders would be discharged. To have not been able to work if the orders had been improperly and unlawfully imposed upon him would be manifestly unjust. In such an instance, serious harm and loss would be suffered by the successful First Appellant and yet he would have no remedy available against the Respondent to seek compensation or other relief due to the statutory indemnity found at section 1 of the Financial Services Commission (Limitation of Liability) Ordinance, 1990 and section 127 of the Enforcement Law (unless there was bad faith which it is presumed there would not be). The First Appellant says this provides the required necessity for the exercise of the Court's inherent jurisdiction in suspending the effect of the prohibition order and the disapplication order, whilst the appeal is being determined. The First Appellant further relies on the example of the recent Royal Court case of *Domaille, Clark and Hannis v GFSC (ibid)* where prohibition orders were made against the three Appellants but were subsequentially quashed by the

Royal Court on appeal. This, he says, demonstrates that a successful appeal could lead to the setting aside of the prohibition orders but the impact in the meantime on the First Appellant would be severe. Thus, the ability of the stay the decisions by virtue of the Court's inherent jurisdiction would prevent this injustice.

13. The First Appellant cites numerous examples where the Court's inherent jurisdiction has been explicitly raised including: *Canivet Webber Financial Services Limited v Guernsey Financial Services Commission [2007-08] GLR 221* where the Court found that an inherent jurisdiction to extend the time to commence an appeal against a decision made under the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002 where there was no provision for such an extension of time within that Law; *X v Registrar Of the Ecclesiastical Court of the Bailiwick of Guernsey [2003-04] GLR Note 24* where the Bailiff Sir Richard Collas, as he was then, said *"Although rules of procedure, conduct or disclosure in relation to Ecclesiastical Court proceedings had never been laid down, the Royal Court clearly had an inherent jurisdiction to right an injustice by giving appropriate directions to the Ecclesiastical Court"*; and *Laughton v Main [2000-02] GLR 1* where Deputy Bailiff Day found that as a master of its own procedure the Court of Alderney had an inherent power to make orders in relation to interrogatories. The First Appellant says that the stay, which the First Appellant is asking the Court to exercise, is not a decision that gives rise to any substantive rights of the type identified in *Angenent v Pring [2004] 24/2004.*

14. The First Appellant says that the Royal Court undoubtedly has an inherent jurisdiction in relation to matters of procedure. Further, the Court has found that where it has an ability to make an order for relief, the Court has an inherent jurisdiction to make ancillary orders to ensure the remedy is effective, see *Jefcoate & Jefcoate v Spread Trustee Company Limited And Seven Others [2013 GLR 208]* where Bailiff Collas, as he was then, said at paragraph 34:

> *"I also respectfully adopt the reasoning of Eady, J. in Germany (5), ([2012] 2 Costs LR 271, at para. 28) that "where the power exists to grant a remedy there must be, inherent in that power, the power to make ancillary orders to make the remedy effective."".*

15. The First Appellant submits that the ability of the Court to suspend the implementation of a prohibition order, whilst it determines an appeal against the making of the prohibition order, is an example of an exercise of an inherent jurisdiction in a procedural context where it is necessary to do so to avoid injustice. The First Appellant says it would be absurd for the Court to have the substantive power to set aside a prohibition order on appeal, but not to be able to suspend that same order whilst the appeal took place. Thus, the Royal Court under its inherent jurisdiction has an ability to suspend the implementation of the prohibition order and the disapplication of the exemptions.

16. The First Appellant also relies on *Bibby v Partap [1996] 1 WLR 931* where the Privy Council found at paragraph 934B "*under English Law a court first instance which grants relief, where the interlocutory or final, has an inherent power to suspend ("stay") its order until an appeal or would be appeal to the Court of Appeal is disposed of. The Court of Appeal has a like jurisdiction*." He says that this decision is highly persuasive that the Royal Court would have an equivalent inherent jurisdiction to be able to stay a prohibition order until an appeal is disposed of. He also relies on *YD v Secretary of State for the Home Department [2006] 1 WLR 1646* where the Court of Appeal in England found that it had inherent jurisdiction to order a stay of the removal of a person from England, who had an out of time application to appeal against that decision, in circumstances where the statutory scheme contained no such provision.

17. The First Appellant says that an important distinction must be made between legislation which positively restricts the Court's jurisdiction and legislation, as is the case with the Enforcement Law, where it is silent. The First Appellant says, if it had been intended that there should be no ability for the Court to stay a prohibition order or a disapplication exemption then this should have been explicitly set out in the Law. In these circumstances, where the jurisdiction of the Court is not

prescribed by the Enforcement Law, the Court can, whether by the RCCR or by the use of its inherent jurisdiction, order a stay if it considered it the right step to take in the exercise of its discretion.

18. In relation to the second question, as to whether a stay should be granted in this case the First Appellant says the test to be adopted in relation to a stay of execution is that decided by the Court of Appeal in *Investec Trust (Guernsey) Limited et al v Glenalla Properties Limited et al 14 January 2014* starting at paragraph 42:

> *"Having considered the authorities which have been referred to, it is my opinion that there are truly two individual issues relating to the assessment of the prospects for an appeal. The first is what is the threshold which an applicant requires to satisfy before a court can be required to consider and balance the factors for and against the granting of a stay of execution. The second is whether weight can be attached to the strength or otherwise of the appeal in the weighing of that balance……*
>
> *……..This means in my opinion that the first question which a court should ask in the circumstances of an application for a stay such as the one before us is whether the applicant has grounds for an appeal which are not without any substance and which are in good faith.*
>
> *…… If the threshold is overcome, the court will then carry out the exercise which is described in the cases above and which is most conveniently summarised from the judgment of Clarke LJ in Hammond Suddards as being an assessment of "whether there is the risk of injustice to one or other or both parties if it grants or refuses a stay."*

19. The Appellants say that the appeal which they have commenced is not without substance even in the Notice of Appeal's current form. Counsel for the Appellants submitted that it is clear on the face of the Notice of Appeal that it will be revised and supplemented in due course. They further submit there is scope for considerable injustice to the Appellants if stays are not granted pending the determination of the appeal. A distinction must be made between the process leading up to the SDM decision and a statutory process. The Respondent's decision-making process is a mechanism created by the Respondent and not statute. However, even where there have been judgments made after a full statutory process, for example, by the Magistrate's Court, this does not stop a stay being ordered where there is a risk of injustice. If the financial penalties were enforced but then quashed on appeal, the Appellants would have the burden of having paid out considerable amounts of money for what could be a considerable period of time when they should not have been required to do so. Further, there would also be clear prejudice and injustice if the prohibition order, the disapplication order and a public statement were not suspended but the appeals were successful. The prohibition and disapplication orders would prevent the First Appellant who is a financial services professional from working and it is likely to reputationally irreparable even if subsequently the appeal cleared his name and the orders were revoked. Once the public statement has been made, even if the statement is on the basis that the underlying enforcement action is subject to appeal, the damage to the Appellants' reputation is already done. The world at large would be aware of the regulatory action and this would be picked up by other regulators and taken into account the screening entities. This is also very different from the *Arch Financial Products LLP et al v The Financial Services Authority* relied on by the Respondent. There was a statutory obligation to publish information about a decision or final notice under the regime which creates a presumption in favour of publication, subject to the ability to apply under the rules not to publish. The presumption can only be rebutted if cogent evidence of a disproportionate level of damage if publication is allowed is produced. This is not the situation under the Enforcement Law, where the decision to publish is one of the decisions the decision maker (in this case the SDM) has to make. Further, a public statement has not been made by the Respondent in a matter which is under appeal before in this jurisdiction, although the Appellants accept that this is a new regime under the Enforcement Law.

20. The Appellants submit that the prejudice to the First and Second Appellants should be set against the limited prejudice to the Respondent, if the stay was granted but the appeals were unsuccessful. If the appeal is successful, the sanction will come into force but at a later date once the enforcement procedure has concluded, and as the Second Appellant is in liquidation, this makes it even less likely that there will be any prejudice. In any event, the Respondent had not sought to adduce any evidence of prejudice to it or to another, nor is there any evidence that the Respondent, who is a regulator with its attendant obligations, has considered whether a stay should be in place pending the hearing of the appeal.

21. The Respondent says that Part VIII of the Enforcement Law contains the extent of the powers of the Royal Court to suspend or modify a decision made by the Respondent pursuant to the decision making process when a decision is appealed. Section 106 which sets out a list of those sanctions which are amendable to suspensions and modification by the Court and this includes provision for the decision to publish a public statement or to impose a financial penalty. However, the other sanctions which are available to the decision maker, including the imposition of a prohibition order and the disapplication exemption are not listed at section 106, and therefore, there is no power to suspend or modify the imposition of these sanctions. If the Appellants' submissions were correct, the distinctions made in section 106 (7) between the different sanctions would have no purpose. This shows a clear statutory intention about which matters that can be appealed and the powers to deal with ancillary or interlocutory matters relating to those appeals. It is insufficient to say that because the law does not say that the Court cannot stay a decision that, therefore, the Court can. This Court is seized of the matter by virtue of the Enforcement Law, and therefore, the Court must deal with the appeal on the statutory terms of that law. It is very different from, say, an appeal from the Magistrates Court, the power to appeal is found in section 18 of the Magistrate's Court (Guernsey) Law 2008 where at section 18 (1) the law provides that:

> *After the hearing and determination by the Magistrate's Court of a civil action there is a right of appeal to the Ordinary Court –*
> *……..*
> *in such manner and subject to such conditions as may be provided by rules made by Order of the Royal Court.*

Whereas, at section 106, it simply says "*may appeal to the Royal Court against the decision*" There is no importation of the rules of court whether under the RCCR or any other specific enactment. The framework of how to deal with the appeal is set out in subsection (7) with its ability to stay matters being limited by the provisions contained therein.

22. It is not for rules of Court to seek to trump or go behind statutory enactments. These are rules of procedure and cannot drive a coach and horses through express statutory provisions. The rules that the Appellants seeks to rely on are case management provisions for matters that are of the Royal Court's own making and procedure.

23. There is no other general or specific power within the Enforcement Law to suspend or modify decisions other than those listed in section 106(7). If there was one, this would make the limited scope of the Court's powers, which the legislature has deliberately drawn up under section 106 (7) redundant. The Respondent says the analysis of this statute makes clear that the intention of the legislature was to limit the Court's powers so that it could only suspend or modify those decisions listed in section 106 (7) and not any others. The Respondent says this is driven by public policy grounds. The protection of the public and negation of risk to the Bailiwick's reputation are far greater priorities than the limited impact on the person's individual circumstances in anticipation of an appeal.

24. The Respondent says that the RCCR does not give the power to intervene on the basis of case management where the legislature has limited the Court's powers under the legislation, and to do so, would exceed the Court's powers.

25. In relation to inherent jurisdiction, the Respondent says there is nothing contained in any of the points that the First Appellant argues on inherent jurisdiction which provide a legal justification for the Court to stay a prohibition order or disapplication of exemption order, in circumstances where the legislature has provided in statute that this type of sanction cannot be stayed. Unlike the examples provided by the First Appellant, this would not be facilitating the exercise of the Court's powers nor is it procedural in nature. Further, whilst inherent jurisdiction was relied on ***In the matter of the Registrar General of Electors [2007 -8]GLR 304***, the nature of the relief is very different in that case where there does not appear to have been a statute in existence where the legislature did not intend for the relief to be given.

26. If the Court is not with the Respondent that it has no jurisdiction to stay and/or in relation to those sanctions which have a specific provision in relation to the suspension or variation during the appeal process, the Respondent says it is not the test in ***Investec v Glenalla et al (ibid)*** but rather the application of section 106 (7) where it says:

> *the Royal Court may, upon the application of the appellant, and on such terms and conditions as the Royal Court thinks just, suspend or modify the operation of the decision in question pending the determination of the appeal.*

This is a statutory direction to the Royal Court.

27. In relation to prohibition order, the balance must fall to the maintenance of the prohibition order imposed by the SDM during the appeal process. In any balancing exercise the Court should take into account:

    (1) The SDM made a decision at the end of a statutory decision making process following the rules of natural justice.
    (2) The SDM made a decision after a detailed process, including hearing directly from the First Appellant over the course of two days and the Decision is over 76 pages long.
    (3) The probity finding was a finding of "*a serious lack of probity by a pattern of providing false and misleading information to the Commission through one of its regular supervision of [the First Appellant] and during [the Respondent's] investigation*."
    (4) Further, that probity findings were made in relation to conduct pertaining to different client entities. Both findings of a lack of probity were identified as very serious.
    (5) Findings were not isolated to lack of probity but included the First Appellant demonstrated a lack of competence, experience, sound judgment and diligence by virtue of his conduct relating to a number of clients. He was also found to have acted, despite his obvious conflict of interests, in circumstances where he actively stood to receive significant financial benefit by his acting.

28. The Respondent also says that in any event the First Appellant is still able to carry out regulated activities within the Bailiwick in relation to entities not in Guernsey, of which he is a Director. The Respondent further submits that no persuasive grounds have been provided by the Appellants as to why it is appropriate to suspend or modify the decision to impose a financial penalty or make a public statement. The public statements can be remedied by a subsequent public statement if the Appellants are successful on appeal or an order could be made requiring the modification of the contents to the public statement, so that it clearly states that it is subject to an ongoing appeal and the findings within it are provisional, pending the outcome of the appeal. This, the Respondent says, would provide sufficient protection to the Appellants' reputation.

Discussion

29. The Enforcement Law came into force in November 2021. Section 106 deals with appeals and sets outs under section 106 (1) the types of decision that can be appealed to the Royal Court. Under section 106 (7) there is a list of decisions which the Royal Court may suspend or modify pending the determination of the appeal but this list does not include prohibition orders or disapplication of exemption orders. It is accepted by both parties, that under the old regime both of these sanctions were subject to a right to apply to the Royal Court for the suspension or modification[1].

30. In the Billet d'Etat XV111 of 2015, the Policy letter issued on 24 August 2015 sets out at section 2.6:

> *"2.6.2 In discussions with industry representatives it was suggested to the GFSC that the misunderstandings around when supervisory issues become matters that require sanction could be clarified by the introduction of a separate law focussing on sanctions and other enforcement powers (referred to in this Policy Letter as the Enforcement Law). This would also ensure a consistent legislative approach to enforcement, as opposed to the differing enforcement provisions in the Supervisory Laws, and would be simpler to follow, enabling the GFSC to operate more effectively. The Supervisory Laws would apply to all persons carrying on supervised activities, whilst the Enforcement Law would apply to persons as and when they become subject to some form of sanction or enforcement power."*
>
> *"2.6.3 The principal effect of having the Supervisory Laws and an Enforcement Law would be that an individual or regulated entity that becomes subject to the Enforcement Law would be certain (for example, from the name of the law cited) that its relationship with the GFSC has changed, and would thus be able to react appropriately. The GFSC also proposes to modify its internal procedures to improve clarity as to when a matter moves from supervision to enforcement. All of these changes will provide industry with a better understanding of the status of their relationship with the GFSC."*

31. At section 7 of the Billet, there is further detail about the Enforcement law. At section 7.4.8-7.4.10 there is reference to prohibition orders but no reference to a limit on the powers of the court in dealing with them. Then at section 7.4.12 in a section entitled: "*Appeal processes in the enforcement context*" it states:

> *"Central to any enforcement process is the ability of those subject to its jurisdiction to be able to challenge sanctions imposed (for example) where there have been material errors of fact, procedure and law. Appropriate provisions should therefore be included in the Enforcement Law. Unless there is good reason to the contrary, the presumption should be that all appeals should be heard in public. This is consistent with the Bailiwick's human rights obligations."*

32. There does not appear to be any reference to the removal of a right to apply to suspend or modify the effect of a prohibition order pending an appeal although it had been and was frequently exercised under the previous regime. I also note in passing that on examination of the section 106 (7) the numbering of the sub-paragraphs has gone awry. Section 106 (7) (c) and (d) is identical to Section 106 (7) (j) and (k).

33. Appendix 4 of the Decision contains the guidance note which was applicable at the time of the Decision, dated September 2022 (the "Guidance Note"). The Guidance Note sets out that:

> *"Under section 106(7) of the Enforcement Law, parties may apply to the Royal Court for a stay on the exercise of the decision pending the determination of the appeal. Where parties have not made an application for a stay, the sanctions will come into force in accordance with the*

[1] Inserted by the Regulation of Fiduciaries, Administration Business and Company Directors, etc. (Bailiwick of Guernsey) (Amendment) Law, 2003

decision. Where an application for a stay is unsuccessful, the sanctions will come into force in accordance with the decision."

34. Although it does not hold the force of law, nevertheless, it is notable that no reference is made to any sanction not being subject to the power of the Court to stay.

35. On further consideration of the statute in relation to appeals dealing with the disapplication of an exemption, it says at section 32 (6):

> *(6) A decision of the Commission to disapply an exemption does not, subject to the provisions of subsection (7), have effect until the end of the period within which, under section 106, an appeal can be brought against the disapplication or, if an appeal is brought within that period, until the appeal is determined.*
>
> *(7) Where the Commission is of the view that it is necessary or desirable to do so –*
>
> > *(a) in the interests of the public, or*
> > *(b) in the interests of the reputation of the Bailiwick as a finance centre,*
>
> *the Commission may apply to the appropriate Court for an order under this subsection directing that its decision to disapply an exemption should, without prejudice to any appeal in respect of the decision under section 106, have immediate effect; and the appropriate Court may make an order under this subsection on such terms and conditions as it thinks just.*
>
> *(8) An application by the Commission for an order under subsection (7) may, with the approval of the appropriate Court, and on such terms and conditions as the appropriate Court may direct, be made ex parte.*

36. The effect of this section is that the onus is on the Respondent to apply for the disapplication order to have effect regardless of an appeal rather than an application by the Appellant for a suspension of variation under section 106(7). No such application has been made, therefore, there is no need for me to exercise my discretion in relation to a stay in these circumstances.

37. The draconian effect of a prohibition order has been recognised by this Court on a number of occasions because of its direct impact on a person's ability to earn a living in the financial sector and professional ruin. The First Appellant is correct to distinguish between a positive ousting of the Court's jurisdiction and silence. There is a marked distinction between a clause which makes the subject matter of the clause non-justiciable in clear and unambiguous language, thus putting it outside the jurisdiction of the Court and where the legislation is silent. Further, I take into account that this is in circumstances where the Court had jurisdiction to deal with the stay of a prohibition order under the preceding legislation and the absence of any reference to the removal of this power being the intention of the legislation from the Billet. This leads me to conclude that contrary to the submissions of the Respondent, the intention of the legislature to oust the ability of the Court in relation to stays of prohibition order is not one that can be concluded from the omission of the reference to the prohibition orders under section 106 (7).

38. A stay pending the determination of an appeal is interim relief in circumstances where, as the First Appellant argues, there is no means of recompense for a successful appellant if the Respondent is found to have erred and the order is quashed. An appellant could suffer serious and irreparable harm by the order being in place whilst the appeal process takes place, even if they are ultimately successful.

39. In A v R the Deputy Bailiff, as he was then, cited Jacob, *The Inherent Jurisdiction of the Court*, 23 (1) *Current Legal Problems* 23, at 27–28 (1970):

". . . [T]he essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner."

The inherent jurisdiction of the Court enables the Court to fulfil its role and is part of procedural law and not part of substantive law.[2] This has been relied on frequently by this Court including in *HFT International (Guernsey) Ltd v Equinox Finance Management (Guernsey) Limited 20 June 2006*, where Deputy Bailiff Collas, as he was then, said :

"29. I was reminded of the judgment of the Guernsey Court of Appeal in Cherub Investments Limited -v- The Channel Islands Aero Club (Guernsey) Limited (1982) in which Mr Leonard Hoffmann QC (as he then was) sitting as a Judge of the Appeal Court confirmed that the: "Royal Court remains master of its own procedure and can allow departure from those rules when justice requires this to be done".

30. The rules to which he was referring were laid down in an Ordinance of 1851 but the same is equally true of the Royal Court Civil Rules 1989 which of course post-date that judgment."

40. It remains equally true under the RCCR. Further, it cannot be ignored that it is the ability to appeal to this Court, which in the various challenges to the system, has been viewed as ensuring that the enforcement process undertaken by the Respondent is a crucial step in ensuring that the process is fair. In the words of Sir Richard Collas at paragraph 46 of Chick:

I summarise his conclusion as saying that any defect in the process that exists at the GFSC level is cured by the independent and impartial right of appeal to the Royal Court and thus satisfies the requirements of Article 6.1. In accordance with the principle in Porter v Magill [2002] 2 AC 337 and other cases referred to by the Deputy Bailiff at paragraph 115, including Tehrani v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2001] IRLR 208: "it is clear that there is no requirement for everybody dealing with such matters to be an independent and impartial tribunal and, provided that there is a right of appeal to a court of full jurisdiction, it means not just that any breach of the ECHR is purged but it prevents such a breach from occurring in the first place".

41. Whilst this referred to the process under the old regime, it is still equally applicable under the Enforcement Law. If the absence of an ability to stay the operation of decision by the Court may undermine the effectiveness of the disposal of the appeal and the substantive relief sought by that appeal then it must be within the Court's power to suspend the operation of an administrative decision pending an appeal being heard by the Court. This fulfils the obligation of necessity identified in *Mayo v Cantrade (ibid)*. I take into account the proviso that "*inherent jurisdiction should not be exercised in a manner which cuts across the statutory scheme*[3]*"* however, that is not the case here and therefore the exercise of the Court's inherent jurisdiction to stay the prohibition order in principle is within its inherent powers. Conceptually, the Royal Court could grant an injunction to stop the prohibition order in support of the appeal proceedings if it appeared just and convenient to do so as was granted in relation to publication of the prohibition orders in *Domaille, Clark and Hannis v GFSC (ibid)* first on an interim basis by me, continued by LB Marshall and substituted by undertakings. However, in an analogous way to the considerations in *YD v Home*

[2] Bremer Vulkan Schiffbau & Maschinenfabrik v. South India Shipping Corp. Ltd [1981] AC 909 at 977
[3] Re B [2016] UKSC 4 at [85]

Secretary [2006] 1 WLR 1646 injunctive relief is an inconvenient and expensive option where it is appropriate for the Court to declare that in the circumstances "*it has an inherent jurisdiction to protect its proceedings from being set at naught*" and require a prohibition order to be suspended pending the outcome of the appeal.

42. The alternative argument put forward by the First Appellant is that the Court can use its case management powers to stay the prohibition order. As I have found that the Court can rely on its inherent jurisdiction to suspend the prohibition order then it is not strictly necessary for me to consider this argument. However the Enforcement Law at section 106 (5) says in relation striking out for want of prosecution that in addition to the statutory power contained therein "*that the provisions of this subsection are without prejudice to the inherent powers of the Royal Court or to the provisions of rule 52(3) of the Royal Court Civil Rules, 2007*". Whilst this is a reference to the ability of the Court to strike out an appeal for want of prosecution and not its general case management powers nevertheless this is a direct reference to the application of the RCCR and the use of these rules to manage appeals from the enforcement proceedings by the Respondent. Further, the reference to the Royal Court in the Enforcement Law is to the Ordinary Court and the RCCR apply to the Ordinary Court in its appellate function[4]. However, I do not agree with the First Appellant that the Decision can be viewed as a "*judgment*". As the Guidance Note makes clear

> *The Commission is not a judicial body, and the enforcement decision making process is regulatory and administrative in nature. However, it does undertake quasi-judicial functions.*

43. I have also come to the conclusion that the reference to "*part of any proceedings"* and "*generally*" bears a narrower meaning than that argued by the First Appellant. It does not include the decision making process of the Respondent in the exercise of its enforcement powers. Likewise I do not consider that rule 52(2)(p) can restrain the Respondent from the operation of those powers.

44. Having come to the conclusion that it is within the Court's inherent jurisdiction to grant a stay of the prohibition order, it is necessary for me to consider what test which should be applied to the exercise of my discretion in relation to the sanctions other than the disapplication order.

45. In wording of section 106 (7) is drafted very widely and contains no restriction on the considerations that the Court should or should not take into account. There is no doubt that the exercise of the power must be approached judicially. Whilst this is a statutory appeal rather than a judicial review, there is a difference between the stay of execution of the judgment of the Court below and the stay of the implementation of the decision of an administrative body which is the case here. In the absence of our own rules on judicial review which might have been helpful, I consider that the test identified at paragraph 54.10.4 of the White Book is an appropriate one for me to apply here: "*there is also much to be said for treating question of stay [sic] as if it were an application for an interim injunction and applying the same procedure and principles that would apply to a claim for an injunction*". Therefore I consider that in the context of the Enforcement Law the test as to whether a stay (or suspension or variation) should be granted is first, that the appeal raises a serious issue to be tried; and if there is a serious issued to be tried for the Court then to consider where the balance of convenience lies including the wider public interest. In considering whether there is a serious issue to be tried the appellant will need to demonstrate a real prospect of succeeding at trial. In considering the balance of convenience, the availability of damages is not determinative of the grant of interim injunctions as damages are not available. The wider public interest includes permitting a public authority to continue to apply its policy, but that interest will need to be weighed against other relevant factors (see paragraph 54.3.6 of the White Book).

46. Having decided on the test I will consider it in the context of these proceedings. The Appellants' appeal is on a substantive basis that for a number of reasons that the Decision was wrong but also that the sanctions are unreasonable and lack proportionality. I have considered the substance and

[4] R92 RCCR

apparent strength of the appeal by the Appellants as set out in the Notice of Appeal without predetermining its merits and consider that the Appellants have shown that there are serious issues to be tried. I should acknowledge that the Respondent has not claimed that that the appeal is not arguable.

47. In considering where the balance of convenience lies and in seeking to arrive at a just result in all the circumstances, I have considered all the factors that both the Appellants and the Respondent have urged that I should. I have included within my considerations the public interest in the performance of the responsibilities and duties which the Respondent has been tasked with by the legislature under the Enforcement Law. The SDM's decision comes at the end of a lengthy decision-making process. Underpinning the enforcement process, are the objectives that the legislature has provided that the Respondent must have regard to i.e. protecting the public and the reputation of the Bailiwick's reputation as a finance centre and reducing risks to the financial system in the Bailiwick.

48. When considering the issuing of a public statement it is recognised in the Decision that it might have a detrimental effect on the reputation of those involved. However, it also notes that "*one of the purposes of imposing a public statement is to highlight bad practices and promote high standards of conduct among licensees and those working in the finance industry. Lessons may therefore be learned, and the public statement may also serve as a deterrent to those businesses who may be committing similar contraventions. A public statement also seeks to provide transparency of decision making in a way that maintains the reputation of the Bailiwick as a well-regulated finance centre*." These statements thus serve a very important function. However, I agree with the Appellants that the effect of the public statement before the appeal has been considered, is likely to be highly prejudicial to the Appellants where the outcome might be to clear the names of either or both Appellants or to change the substance of the statement. Further the association of one appellant with the other given the size and nature of the business means that a public statements about one will have a knock on effect on the other. Counsel for the Respondent submitted that the statement could be tempered by making it clear in the statement that the Decision is under appeal or if the appeal is successful a further statement could be issued however I do not consider that either of these options will adequately counteract the effect of the public statement. Before the appeal is decided it is my view that the balance of convenience tips in the Appellants' favour to suspend the publishing of a public statement in relation to both Appellants pending the outcome of the appeal.

49. In relation to the financial penalties it is submitted by the Appellants that not suspending these would be real injustice in relation to both Appellants whilst the appeal is pending. The First Appellant says in his affidavit that the impact on him and his family life of paying the £150,000 would be catastrophic and that he does not have the available funds to pay the penalty. There is no evidence filed by the Respondent to counter this although I have also taken account that there is some limited information contained in the Decision where the SDM weighed up the financial consequences on the Appellants and as well as on third parties when deciding on the size of the penalty. Due to the nature of the matter, this is not a situation where the Respondent will suffer financial loss from the inability to recover the penalties. Although there is clearly a public interest in the imposition of significant penalties after the enforcement process has found serious failings, these findings are being appealed. The effect of the appeal could be that the level of penalty is reduced, the penalty is set aside in its entirety or it is upheld. In these circumstances, I consider that on balance the prejudice to the First Appellant if he is required to pay the penalty is such that there is a risk of injustice if the penalty is not suspended pending appeal. Although the First Appellant's affidavit refers to the knock on effect on the First Appellant on sanctions against the Second Appellant it does not identify any real prejudice to the First or Second Appellant by the payment of the penalty by the Second Appellant. I recognise that the Second Appellant is in liquidation and the reasons why are explained in the First Appellant's affidavit. No argument was made on the efficacy or otherwise of the enforcement of a penalty on a company in liquidation and I do not consider enforcement is part of my considerations for the stay. Even if the appeal is ultimately successful,

I am not persuaded that weighing up all the factors there is a risk of injustice on the imposition of the penalty against the Second Appellant. There is no issue that the Respondent will not repay the penalty if the appeal is successful. Therefore, I do not consider that the balance of convenience falls in favour of suspending the penalty for the Second Appellant.

50. With regard to the prohibition order against the First Appellant, I am very mindful that the purpose of a prohibition order is to protect the public and is intended to provide protection for the financial reputation of the Island where an individual has been found to fail to meet the minimum criterial for licencing. Further that in this case the findings include *"a serious lack of probity by a pattern of providing false and misleading information to the Commission during both its regular supervision of [the Second Appellant] and during [the Respondent's] investigation*" in relation to a number of client entities. The SDM also found that the First Appellant demonstrated a lack of competence, experience, sound judgment and diligence. He was found to have acted despite obvious conflicts of interest in circumstances where he stood to receive significant financial benefits as a consequence. There is no doubt these are serious findings by the SDM and the effect of a stay would mean that until the appeal is decided the First Appellant will be able to continue to hold the positions identified in the prohibition order where it may turn out that the findings are well founded, that the Decision is perfectly lawful and the sanction a proportionate and reasonable one for the SDM to impose. Nevertheless, the First Appellant has shown that if the prohibition order is imposed prior to the outcome of the appeal, the harm to the First Appellant (even if he has roles in entities outside of Guernsey which will not be caught by the prohibition order directly) has a real risk of being irreparable such that even if the appeal is successful it will be a pyrrhic victory due to the damage that will have been caused in the interim. Therefore, the balance of convenience is in favour of a stay being granted until the appeal.

Conclusion

51. For all these reasons I find that the financial penalty imposed of £150,000, the prohibition order and the issue of the public statement which were imposed by the Decision against the First Appellant are suspended until the determination of the appeal. In the absence of an application under section 32 (7) by the Respondent by operation of law the disapplication order does not have effect until the appeal is determined. The public statement imposed by the Decision against the Second Appellant is suspended until the determination of the appeal, however, the application for a suspension of the financial penalty of £300,000 is rejected.

52. If the parties are not able to agree orders in relation to costs, they are invited to list this matter for directions in the Interlocutory Court.