Appeal against the decision of the Deputy Bailiff regarding her dismissal of the Appeal of the Appellant against a decision of the Senior Decision Maker made on behalf of the GFSC

[2023]GCA035

IN THE COURT OF APPEAL (CIVIL DIVISION), GUERNSEY
ON APPEAL FROM THE ROYAL COURT

CIVIL DIVISION APPEAL No.567

22 August 2023

BEFORE:

George Bompas KC, President

Helen Mountfield KC

Jeremy Storey KC

Between: **JOHN ADAM ROBILLIARD**

Appellant

and

THE CHAIRMAN OF THE GUERNSEY FINANCIAL SERVICES COMMISSION

Respondent

Advocate A C Williams for the Appellant
Advocate C H Edwards for the Respondent

Bompas JA:

This is the judgment of the Court to which we have all contributed.

Introduction

1 The appeal in this case is against a decision of the Royal Court (the Deputy Bailiff, Jessica Roland, sitting alone) given on 5 October 2022 ("the Judgment"). After six days of hearing in December 2021 the Deputy Bailiff dismissed the appeal of the Appellant along with two

others against a decision of the Senior Decision Maker ("the SDM"), Richard Jones KC, made on behalf of the Guernsey Financial Services Commission ("the GFSC"). The SDM had been appointed on 20 August 2020 in the final stage of an investigation and enforcement process begun by the GFSC in 2019, and leading up to the issue by the GFSC of a final form Enforcement Report on 30 June 2020. Later in this judgment we go into greater detail about the enforcement process.

2 So far as relevant for this appeal, the SDM's decision was in a Decision dated 23 March 2021 ("the Decision"). In it, the SDM made findings that the Appellant, a director of a licensed fiduciary ("the Company"), had failed to fulfil the fit and proper requirements set out in various laws dealing with licensing of persons in the financial services sector ("the Regulatory Laws").[1] In summary, the SDM found that the Appellant had failed to act with probity, integrity, competence and soundness of judgment. As result of this the SDM's Decision found that a financial penalty of £40,000 should be imposed against the Appellant, along with the issuance of a public statement and a six-year prohibition of his holding various positions.

3 The decision of the Royal Court which is being appealed to this Court was on the Appellant's appeal under what is now section 106 of the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020 ("the Enforcement Law"). That section, replacing the equivalent provisions in the Regulatory Laws, provides for an appeal against an SDM's decision (see sub-section (3)) where:

> *"(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*."

4 Before us it has not been contended that the appeal to the Royal Court was in fact in the nature of a rehearing of the Decision, with the GFSC having to satisfy the Court as to the absence of any of the factors in (a) to (e) set out in the previous paragraphs. In other words, the Royal Court's task on the Appellant's appeal was a conventional appellate function of review, with it being for the Appellant to call into issue at least one of the factors.

[1] These laws are The Financial Services Commission (Bailiwick of Guernsey) Law, 1987; The Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002; The Protection of Investors (Bailiwick of Guernsey) Law, 1987; The Banking Supervision (Bailiwick of Guernsey) Law, 2002; Fiduciaries Law, the POI Law, the IMII Law, the Banking Law and the Insurance Business Law; and The Regulation of Fiduciaries, Administration Business and Company Directors etc (Bailiwick of Guernsey) Law, 2000.

5 The appeal against the Judgment to this Court is brought under section 107 of the Enforcement Law. With leave, an appeal may be brought to the Court of Appeal from the Royal Court's decision, such an appeal being on a question of law. In the present case the required leave was given by the Deputy Bailiff on 21 December 2022, and was founded on the first of the grounds of appeal below being considered to have a real prospect of success.

6 There are three grounds of appeal put forward by the Appellant.

6.1 The first ground concerns the laws under which enforcement action was taken by the GFSC culminating in the Decision. It is contended by the Appellant that the Deputy Bailiff was mistaken when upholding the SDM's conclusion, stated in the Decision in terms set out below, that the concept of "burden of proof" was not relevant. This statement had first been given by the SDM when he was about to hear oral representations made on the Appellant's behalf. The Appellant's submission is that this was incorrect; that the GFSC bears the burden of proof in enforcement proceedings; that in this regard the SDM misdirected himself; and that the Deputy Bailiff should have so found.

6.2 The second ground is a challenge to the fairness of the procedure during the GFSC's enforcement investigation and process. Here the contention is that the GFSC failed to provide the Appellant with all relevant material; that in due course the SDM arrived at a decision without a reasonable investigation having been undertaken; and flowing from this it is said that in her judgment the Deputy Bailiff made an error of law or failed to see that the SDM reached an unreasonable decision.

6.3 The third ground is the Deputy Bailiff was mistaken in accepting that the SDM had (a) correctly applied the tests to be met in arriving at his conclusions of want of probity on the part of the Appellant, and (b) correctly determined and applied the test to be met for want of integrity. As a specific aspect of this, it is said that the state of mind of the Appellant had not been considered by the SDM within the Decision, the SDM being said not to have given full and proper reasons for his conclusions.

7 The background to the Decision was an investigation into the Company, a Guernsey company which had been incorporated in 1997, and in 2002 had been granted a full fiduciary licence by the GFSC. The primary activities of the Company were the management and administration of trusts and companies, and the provision of individual corporate directors and secretaries, of registered office services and nominee services. According to the summary of facts in the Decision, the Company had around 120 clients/relationships and £154 million of assets under management. It operated a system whereby each director was considered a relationship manager for certain clients, while each director would sit on a board of client entities, either in a personal capacity or as a director of the Company.

8 The Appellant became an executive director of the Company on 22 February 2016 and ceased to hold that position on 16 November 2017. He had been on a period of gardening leave before that, from early October 2017, but had apparently been dealing with client matters until 26 October 2017. At the end of November 2017 (according to the GFSC and also according to the Decision), or perhaps a couple of months earlier (according to the Appellant's Skeleton Argument and also a statement made by him) the Company was sold to a purchaser. Later, in 2018, the purchaser expressed concern to the GFSC. This led to the service of a notice by the GFSC on the Company under section 23 of the Regulation of Fiduciaries, Administration Businesses, Company Directors, etc (Bailiwick of Guernsey) Law 2000 ("the Fiduciaries Law") seeking the production of material. There was then a reference to the GFSC's Enforcement Division and later two further Section 23 Notices were issued. The Enforcement Division reached a preliminary decision that the Appellant's actions had been dishonest, wanted probity and lacked integrity, and an SDM was appointed by the GFSC to reach a final decision on these matters and appropriate consequences. After his enquiry, the SDM reached the same conclusion.

9 The SDM's conclusions concerning the Appellant's want of probity, integrity, competence and soundness of judgment arose out of two sets of dealings with clients, or potential clients, which had involved the Appellant. However, only the first of these gave rise to a want of probity conclusion (see para 333 of the SDM's Decision). For both there was a conclusion of want of integrity, along with want of competence and soundness of judgment and lack of knowledge and understanding of his legal and professional obligations.

9.1 The first, which we refer to as "the M&T Relationship matter", surrounded two companies formed by the Company, initially for an original beneficial owner ("L"). Thereafter, under instructions from L's son ("D") there were arrangements for making another individual ("H") stand as beneficial owner in the place of L. These two companies we refer to as "M" and "T" respectively. In this case there was a property transaction proposed to be carried out through T. The purpose of swapping, or seeming to swap, the beneficial owner was to obscure L's connection, or through that D's connection with M and T, H seemingly becoming the beneficial owner. It was concluded by the SDM that this was a façade, suggested and organised by the Appellant, to put up a front for L and D.

9.2 The second, which we refer to as "the TT matter", involved the formation of a company ("TT") and the evolution of an investment structure, in circumstances where there was a high risk individual ("R") involved, or whose possible involvement was obvious from connections with another individual ("S"), and where the Appellant failed to decline R outright as an acceptable client or thereafter to do what was appropriate to understand what was happening when there were indications that R might still be involved, and the structure evolved with increasing complexity.

10 The decision-making process in this case (reached in accordance with the process described in the GFSC's Guidance Note, summarised below) was as follows:

10.1 The Appellant was interviewed by GFSC Enforcement Division - 13 March 2019
10.2 The Enforcement Division produced a Draft Enforcement Report - 30 December 2019
10.3 The Appellant provided a written Response to the Draft Enforcement Report - 27 March 2020
10.4 The GFSC issued a Final Enforcement Report - 30 June 2020
10.5 An SDM was appointed to review the Final Enforcement Report and reach a decision as to whether there had been a breach of regulatory standards and if so, what penalties were appropriate - 20 August 2020
10.6 The SDM issued a draft 'Minded To' Notice - 16 October 2020
10.7 The SDM issued a final 'Minded To' Notice - 27 January 2021
10.8 The Appellant made a signed statement in response to the final 'Minded To' Notice - 1 February 2021
10.9 Formal Written Representations to the 'Minded To' notice were lodged on behalf of the Appellant - 10 February 2021
10.10 The GFSC Enforcement Division issued a Response to the Appellant's representations - 15 February 2021
10.11 Meetings (or hearings) between the SDM, GFSC and the Appellant's representatives - 17-19 February 2021
10.12 Closing submissions were made to the SDM by both GFSC's Enforcement Division and the Appellant's representatives - 22 February 2021
10.13 The SDM issued the Decision - 21 March 2021.

11 As we have already noted, the SDM reached the conclusion that the Appellant's actions had not wanted probity in relation to the second of these two matters (see paragraph 333 of the Decision). In respect of both matters, he concluded that the Appellant's actions had demonstrated a want of integrity, want of competence and soundness of judgment, and lack of knowledge and understanding of his legal and professional obligations (paragraphs 245-248 and 333-334 of the Decision).

12 We deal with the three grounds of appeal in the same order as they are summarised above.

Ground 1 – Burden of Proof

13 The GFSC put before us a helpful and uncontested summary of the statutory enforcement powers which it used to reach a Decision and to impose sanctions on the Appellant. The GFSC's enforcement powers, the powers relevant to the present appeal, are now to be found collected into the Enforcement Law. Before that they were in various Laws, including the

Financial Services Commission (Bailiwick of Guernsey) Law, 1987 ("FSC Law") and the Fiduciaries Law.[2] Strictly, it is those earlier regulatory laws which have given rise to the questions now before us.

14 The imposition of sanctions by the GFSC against someone in the position of the Appellant in exercise of the enforcement powers depended upon the GFSC being "*satisfied*" about something in relation to the person (for example that the person does not fulfil any of the minimum criteria for licensing under applicable regulatory laws), or upon something about the person "*appearing*" to the GFSC, for example that the person is not a fit and proper person to hold specified positions or perform specified functions.

15 Central to the way in which the GFSC guided itself in its approach to the exercise of the enforcement powers, and in particular to its arriving at decisions in exercise of those powers, is a document, entitled "*Decision Making Process Relating to the Use of Enforcement Powers*", setting out the GFSC's policy in relation to the exercise of those powers. This document, the Guidance Note, is a public document, published under section 8(2)(c) of the FSC Law. At the time of the GFSC's decisions with which this appeal is concerned the relevant Guidance Note was one issued in 2019. This has now been superseded by one issued in September 2022; but on the material point there is no distinction. In what follows we refer to the 2019 edition of the Guidance Note.

16 The Guidance Note explains in the Introduction that it is intended as a guide to the way in which the GFSC will approach the exercise of its statutory powers when making decisions which involve the use of "Enforcement Powers", and that the GFSC's role is to enquire into and investigate matters that come to its attention, decide whether breaches of any of the Regulatory Laws have occurred and, if so, what the regulatory response will be. However, the Guidance Note records that it does not hold the force of law.

17 By the time the appeal reached this Court, the Court of Appeal, a challenge to the GFSC's ability to exercise the enforcement powers engaged in the present case (considered and rejected by the Deputy Bailiff at paragraphs 18-28 of the Judgment) had been abandoned. But Ground 1 of the appeal before us turned on whether, in applying his powers as described in the Guidance Note, the SDM had erred by failing to apply a burden of proof, and consequently acting unfairly.

18 Advocate Edwards, in his Skeleton Argument on behalf of the GFSC, summarised the relevant provisions of the Guidance Note as follows:

"*13. The Guidance Note sets out the principles the Commission will apply when reaching a decision at any stage of the decision-making process:*

> '***1.3. The Commission is not a judicial body. However it does undertake quasi-judicial functions. So, whilst the Commission is not bound to follow fixed rules of***

[2] The detail does not matter, but can be found in paragraph 3 of the Judgment of the Deputy-Bailiff.

procedure in reaching decisions, it must follow principles of natural justice and fairness. In doing this, the Commission is the master of its own procedure. For the avoidance of doubt the standard of proof applicable in these proceedings is the balance of probabilities.'

The Guidance Note explains that the stages of the decision-making process (set out below) are "collectively designed to ensure that the final decision taken:

'***1.6.1 has been arrived at in accordance with the principles of natural justice; and 1.6.2. is proportionate and reasonable based on all relevant information before the Executive Officers SDM or CDC ("the decision-maker") at the time.***'"

19 From paragraphs 14 to 21 Advocate Edwards' Skeleton described what is to be found at paragraphs 6 to 14 of the Guidance Note. These paragraphs all stand within the part of the Guidance Note headed "*The Decision-Making Process*". What he explained is as follows:

"*14. Before the appointment of a decision-maker by the Respondent, any matter is subject to:*

(a) review by the Enforcement Division following initial referral; and

(b) review by a Case Review Panel in which proposed recommendations for further action are considered and a decision is made as to how the Commission should deal with the matter going forward.

15. After these stages, a Draft Enforcement Report is prepared by the Enforcement Division (with oversight by the Commission's General Counsel Division) containing "all of the relevant information on which the Commission proposes to rely in asking the decision-maker to act." This is supplied to the relevant individuals or licensees who are invited to make representations.

16. In light of any representations, a Final Enforcement Report is prepared. This is considered again by the Case Review Panel which then decides whether the case should proceed to a decision-maker – usually an SDM. Throughout the decision-making process, a party may enter settlement discussions with the Commission at any time at the discretion of the Commission (a discretion exercised in accordance with the Commission's obligation to discharge its statutory functions).

17. An SDM is appointed from the Commission's panel of SDMs. The SDM panel is currently made up of nine senior English and Scottish counsel with one ex-judge of the Guernsey Royal Court. They are generally appointed to the panel given their experience in financial services law. Upon appointment to deal with a decision, the SDM is provided with the Final Enforcement Report, all evidential material or supporting documents referred to in the Final Enforcement Report and the parties' representations in response to the Draft Enforcement Report.

18. Once appointed, the SDM has the power to seek further information at any stage of the process, from the Enforcement Division and those parties subject to the Final Enforcement Report.

19. Following consideration of the papers the SDM issues a notice setting out the decision they are "minded to" make. Importantly, the SDM is not limited to simply accepting or refusing to accept the recommendations of the Enforcement Division as contained in the Final Enforcement Report. The SDM may exercise "all applicable Enforcement Powers" of the Commission when making a decision. Accordingly, the Guidance Note provides that the SDM may:

*'**11.3.1 decide that it is minded to take the recommended enforcement action;***

11.3.2 decide that it is minded to take some other enforcement action;

11.3.3 decide to take no further enforcement action;

11.3.4 refer the matter to a person with the authority to take the appropriate action.*'*

20. Once the SDM has issued a minded to notice, the parties have the statutory right to make written and oral representations (see paragraphs 11.8, 12.4 and 12.5 of the Guidance Note). The SDM is obliged to take these representations into account. Oral representations are made at private decision-maker meetings. Members of the Commission's Executive have no right to make submissions or present evidence at the meeting but may be invited to comment on "matters raised by the party, to answer questions posed by the decision-maker or clarify issues. "Oral evidence may be given, and cross-examination permitted only where it is in the interests of justice and at the discretion of the SDM.

21. The Guidance Note provides [at paragraphs 14.1 and 14.2] that:

*'**In deciding any matter of disputed fact or whether any of the allegations have been proved, the standard of proof to be applied by the decision-maker will be the balance of probabilities.****'***

and

*'**In reaching its decision, the decision-maker will have regard to the written and oral representations received and all other information in the documents before it. It is for the decision-maker to decide which of the matters it accepts, and which it does not.***'"*

20 The last sentence of paragraph 1.3 of the Guidance Note, quoted above, is reflected in paragraph 14.1 of the Guidance Note, quoted at paragraph 21 of Advocate Edward's Skeleton in the present case and repeated above. In our judgment the proper interpretation of this text is that the GFSC acknowledges that facts needed to decide on a regulatory sanction must be established. In other words, the SDM's decision required by paragraph 14.1 of the Guidance Note, as to whether "*any matter of disputed fact or whether any of the allegations have been proved*", will be reached by their testing whether they are satisfied as to the facts or allegations, arrived at by applying a balance of probabilities standard.

21 In our judgment, it follows from this that when the SDM was engaged in the final stage of the enforcement process, his role was a quasi-judicial one. His role was to ensure that he did not treat a primary fact as established for the purposes of the Decision, and was not to draw inferences from those facts, unless satisfied on the balance of probabilities that such a fact was established or inference was properly to be drawn. That was the evidential standard, or in other words degree of conclusivity, which the Guidance Note sets out in various ways in the paragraphs cited above.

22 Equally, the SDM could not properly have reached a conclusion that the Appellant had misconducted himself so as to fall below the minimum licensing requirements as a fit and proper person, for example, and that he should be sanctioned or penalised, unless he had satisfied himself that his findings of primary fact and inferences supporting the conclusion were arrived at on the balance of probabilities. The evidential test to be met for any findings

was, we have no doubt, that stated in paragraphs 1.3 and 14.1 of the Guidance Note. This, indeed, is acknowledged by the GFSC.

23 In the Decision the SDM described submissions made to him concerning the evidential standard to be applied. His explanation of the standard and the way it is to be applied in cases where there are allegations of a really serious character, was not criticised by the Deputy Bailiff or before us on this appeal.

24 However, the GFSC's submission was that the concept of a 'burden of proof' on the SDM to establish his findings was unhelpful and irrelevant because, as Advocate Edwards submitted before us, "*The Guidance Note clearly sets out a decision-making process which is non-adversarial and administrative in nature and is silent on the burden of proof*". From this, as we first understood it, the GFSC sought to deduce that there is no "burden" of proof at all.

25 In support of this submission Advocate Edwards referred us to an English judgment, that in *R (Mynnyd y Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWCA Civ 231, in which Jackson LJ had explained that "*The use of the expression 'burden of proof' … is not helpful [where] the task of the decision maker is to make an assessment on the basis of all the available information, applying the appropriate legal test*". That case has arisen as a challenge to a decision of the Secretary of State to refuse a development consent order for a wind-farm.

26 In contrast, for the Appellant Advocate Williams submitted that in substance, the SDM was acting in a quasi-judicial way, resolving a dispute between the individual or licensed entity under threat of sanction and the GFSC, so that the GFSC had a burden of proving facts upon which it sought to rely to impose sanctions, and that both the SDM and the Deputy Bailiff had erred in law in accepting that there was no burden of proof. He said that the SDM and Deputy Bailiff had erred in relying on planning cases like *Mynnyd* (above), which were truly administrative decisions involving multiple perspectives and evaluating various competing interests. What was at stake here was, in reality, an adversarial process, where it was necessary to understand where the burden of proof lay.

27 While accepting that there were some differences between the GFSC's processes and those of the old United Kingdom Financial Services Authority, Advocate Williams sought to draw an analogy between the GFSC's process, involving decision-making by an SDM, and the process to financial services enforcement proceedings in the United Kingdom at a time when the final stage was before the Financial Services and Markets Tribunal. Advocate Williams referred us in particular to *Thomas v The Financial Services Authority* decided in that Tribunal on 22 September 2004. We return to that case below.

28 We accept the first part of Advocate Edwards' submission, described above, when he characterises the enforcement process as non-adversarial and administrative. Nevertheless, as Advocate Williams rightly pointed out, from the perspective of a person subject to the process it can feel extremely adversarial, since the person subject to enforcement action may be facing

damaging findings and professional and personal ruin. But that is only to comment on the effect of the process, if the GFSC's submissions are correct based on the framework established by the relevant legislation and the implementation set out in the Guidance Note.

29 In our judgment the process is one of inquisition (or investigation), rather than trial, albeit subject to an appeal on points of law or reasonableness to a Royal Court of full jurisdiction. When the matter reaches the SDM he or she is partly in the position of a reviewer of the material provided by, and conclusions drawn by, the Enforcement Division of the GFSC while being able to make his or her own enquiries, and consider further material in order to reach his or her own determinations.

30 In our judgment the ***Thomas*** case (above), relied on by Advocate Williams, does not support his submission. The process there was one in which the Tribunal served an appellate function after findings and decisions had been made. As Advocate Edwards submitted, the Tribunal was not itself the decision-maker, as the SDM is here, but was available to conduct a review when applied to. In other words, before the Tribunal there was to be an adversarial contest.

31 Nevertheless, the ***Thomas*** case is instructive, and if anything supports the position taken by the GFSC before us. The point at issue in ***Thomas***, so far as relevant, was which party bore any burden before the Tribunal of showing something, and what was to be shown. This was in circumstances where, in the proceedings before the Tribunal, *"the parties agreed that the burden of proof will be on the [FSA] but did not agree about what the [FSA] had to prove"*. Mr Thomas as applicant contended that the FSA had to prove that he was not fit and proper, while the FSA as respondent contended that it had to prove that it was not satisfied that he was fit and proper. The FSA's contention was found to be correct (at para [99]). In reaching this conclusion the Tribunal explained (at paragraphs [99] and [102]):

> *"… in this reference the Respondent does not have to prove that the Applicant is not fit and proper but rather that it is not satisfied that the Applicant is fit and proper; that in determining whether it is or is not satisfied that the Applicant is fit and proper, the Respondent (and the Tribunal) is entitled to rely on any evidential material which might reasonably and properly influence the making of a responsible judgment in good faith and that includes hearsay evidence in the absence of direct evidence; and that, in making a decision, account should be taken of all relevant circumstances …*
> *…*
> *… The Tribunal will reach its decision on the evidence and argument presented to it and the burden of proof will be on the Respondent to show that on that evidence the Tribunal cannot be satisfied that the Applicant is fit and proper. The Respondent does not have to prove that the Applicant is not fit and proper*."

32 It follows, in our judgment, that an SDM in the position of that in the present matter has to ask themselves whether they are satisfied, having regard to what has been provided by the Enforcement Division, taken with anything else submitted to them and also making such further investigations as they might consider appropriate, of the unfitness of the person involved in the enforcement. In this regard, both as a matter of elementary fairness and in

accordance with the Guidance Note, the SDM has to give that person a proper opportunity to make representations.

33 In other words, the SDM in the present case had to be confident, that is confident at least to the standard of assurance prescribed in the Guidance Note while not necessarily having to be completely certain beyond any doubt, that on the materials before him the Appellant had failed to satisfy the minimum licensing criteria.

34 If the GFSC's submission to us as to the absence of an adversarial burden of proof was intended only to mean that there is no 'trial' between parties, we would agree. Whether such facts were actually 'proved' to the relevant standard would be relevant only in the context of a submission on an appeal to the Royal Court that the SDM's findings of fact were unreasonable.

35 In other words, we agree that the absence of an adversarial burden of proof, following the characterisation of the enforcement process as not adversarial, means that there is no need for anyone to "prove" anything to the SDM, as that is commonly understood when describing a trial process. This is because the expression "burden of proof" when used in a legal context, while naturally invoking the idea of a weight or the like to be shouldered by someone or placed by them in a scale, also suggests a responsibility or duty of that person as party in a contest to prove something to someone else. It is impossible to fit this concept into a case where there are no contestants apart from the person involved in the enforcement process and the decision-maker themselves. One cannot naturally describe a decision-maker as having to prove something to himself or herself.

36 On the other hand, we have no doubt that the SDM is engaged in an exercise of fact-finding, followed by the drawing of inferences and evaluation as to appropriate consequences of the facts as found. We consider that the references in the Guidance Note to findings made "on the balance of probabilities" is an acknowledgement, and a proper acknowledgement, that when the SDM is making a decision in the enforcement process, there is an evidential benchmark (ie facts found to be true on the balance of probabilities) short of which the SDM should not be reaching conclusions of fact adverse to someone potentially exposed to sanctioning in the process.

37 In that sense, in the present case the Appellant must benefit from any doubt which may continue to exist as to the making of any finding of fact which the SDM used to reach a decision concerning him. In this process it was not for the Appellant to prove or demonstrate or adduce anything, and certainly not for him to show that he <u>was</u> a fit and proper person or otherwise met the minimum licensing requirement: it was for the SDM to be satisfied of the contrary if, but only if, the SDM could properly do so on the basis of the materials before him.

38 More particularly, it is not for a person who is the subject of an investigation and enforcement to prove the negative of what is relied on by the GFSC. If the GFSC is contending the contrary, then we reject that submission. The point can be illustrated simply by saying that the person should have the benefit of any doubt: the person should not be subject to penalties of the sort imposed in the present case unless the SDM is satisfied positively that they are appropriate.

39 It follows that, in the context of the GFSC's enforcement process described in the Guidance Note, the expression "standard of proof" means no more than the relevant degree of conviction or satisfaction (stated to be the balance of probabilities measure). The expression, with the word "proof", is not being used to convey either that the SDM needs to prove something to themselves, or having someone else prove something to the SDM: it is being used to indicate a test, or measure, of degree of assurance.

40 Ultimately, however, we were left with the understanding that it was common ground that the SDM could not, and would not, rely on a factual finding adverse to the Appellant unless the facts upon which the finding was made were established on the balance of probabilities. As we apprehended, what the GFSC was really concerned about, as regards the "burden of proof" issue before us, was to preserve the enforcement process explained and framed by the Guidance Note as one which does not involve anything like court proceedings leading to a trial between two parties. As it was put in paragraph 8 of GFSC's defence in the recent case referred to in the paragraph below: "*The process is more akin to being inquisitorial in nature than adversarial. The burden of proof, within that context, is an inquiry undertaken by the SDM as to whether they are satisfied that relevant facts have been determined, thresholds have been met, etc*".

41 Our understanding as to the extent of what was, and what in truth was not, in issue between the parties in the present case was reinforced by reference to a recent judgment given in the Royal Court by Lt Bailiff Hazel Marshall KC in *Domaille v Guernsey Financial Services Commission* [2023] GRC 017, which (as it happened) involved the same advocates as those who appeared before us in the present case. In the *Domaille* case the Judge stated, at paragraph [144] when dealing with matters of burden and standard of proof where a senior decision maker had imposed penalties, "*It is common ground that the burden of proving facts which justify such a finding [sc of want of probity or integrity] lies on the Commission*". Although we understand that there is an application for permission to appeal in *Domaille*, that finding is not subject to challenge.

42 In our judgment, therefore, the issue raised by the Appellant before the SDM as to the burden of proof was directed, not at any question of evidential standard, but rather at one of procedure.

43 The issue arose when the Appellant, having taken part already in various of the earlier stages of the GFSC's investigations, was about to have the opportunity to make oral representations

through his lawyers to the SDM at a meeting (or, in other words, hearing) scheduled to be conducted remotely by video link (due to Covid restrictions) on 8 February 2021. In advance of the meeting he had provided a witness statement explaining his evidence concerning the M&T Relationship matter and the TT matter.

44 At this point, the Appellant's lawyers wrote to the SDM asking for the postponement of the meeting scheduled for 8 February 2021 and raised a question of procedure for the forthcoming meeting, namely whether the Appellant should provide oral representations responding to the final Minded To Notice before the GFSC's Enforcement Division commented on those representations, and whether the Enforcement Division's officers should have the floor as it were at the meeting before any response from the GFSC. The letter dated 25 January 2021 sent on the Appellant's behalf explained as to the second of these two points as follows:

> "*We submit … that the Enforcement Division is required to first present their case to the SDM, followed by each of the respondents then submitting their evidence and submissions in defence in turn. This is not only the ordinary process followed in contentious proceedings, but will also encourage natural justice and fairness. We emphasise that the onus is on the Enforcement Division to prove their case on a balance of probabilities, and not for [the Appellant] to disprove the submissions made by the Enforcement Division. In this regard it is our working assumption that the Meeting will deal with the allegations against the individuals in turn … followed by those against our client. This is of course subject to any interlocutory or technical issues which may arise during the Meeting.*"

45 The SDM responded in a letter dated 27 January 2021 in which he refused the postponement, and rebutted any suggestion of an adversarial process of the kind apparently envisaged by the Appellant. His letter explained:

> "*6. I refer to two other points raised in correspondence. The purpose of the meeting is set out in the Decision Making Process Guidance (see Paragraph 12.5), and it is to permit a Respondent to explain to me why my proposed decision, set out in detail in the MTN, including any sanction, is inappropriate or not justified. It is not for the Enforcement Division to present anything.*
>
> *7. Secondly, there has been reference to the burden of proof. I remind the parties that this is an administrative process, albeit of a quasi-judicial nature, as provided for in the Decision Making Process. The concept of burden of proof is not a relevant one. As SDM, I consider all evidence and materials provided to me. The SDM then makes a provisional decision based entirely upon his own review and assessment of that evidence and those materials. After considering any representations made, the SDM gives further consideration to his proposed decision. The SDM decides any disputed fact or whether any allegations have been proved, on the balance of probabilities. He of course has regard to the written and oral representations received, and all other information in the documents before him. And it is for the SDM to decide which matters he accepts and which he does not*."

46 The debate, in other words, in the context of which the question of burden of proof arose, was one to do with procedure at a particular point in the process, namely the order in which representatives might address the SDM at the meeting. Quite rightly the SDM pointed out that he was not conducting a trial in which the GFSC would seek to prove before him a case against the Appellant. He described the inquisitorial, or quasi-judicial, process set out in the Guidance Note in which he conducted investigations but in which, before he reached final conclusions, the Appellant was to be able to make representations concerning what might be found against him in the Decision.

47 Before us the Appellant does not challenge the practical effect of the SDM's direction of 27 January 2021, or make any complaint about how the SDM then conducted the meeting. We have not been told that the sequence followed at the meeting involved any unfairness or failure of principles of natural justice.

48 However, in paragraph 27 of the Decision, the SDM directed himself as follows, before repeating the text in paragraph 7 of his letter of 27 January 2021 set out above:

> "*Before oral representations were made, I was asked to rule upon the burden of proof and have done so in writing, concluding as follows: 'I remind the parties that … [etc]*'"

49 If Ground 1 of the appeal before us were simply that, in that paragraph of the Decision, the SDM had misdirected himself that there was no obligation to determine any facts proved against the Appellant on the balance of probabilities, in reaching the Decision, then on the narrow language of that paragraph, we might see some force in this Ground. But this does not stand when the decision is read as a whole, and one sees the approach the SDM took in reaching findings of fact. It is quite clear that the SDM did not consider that he could reach adverse findings against the Appellant without having established facts which justified such a conclusion (ie in practice, the Appellant got the benefit of the doubt); he directed himself correctly concerning the evidential standard or degree of conclusivity; and must have understood–- correctly–- that he had positively to be satisfied of matters adverse to the Appellant on the balance of probabilities before subjecting his conduct to criticism and/or sanction through the Enforcement Process.

50 There are three considerations which satisfy us about this.

50.1 First, in what the SDM said in paragraph 27 of the Decision the sentence, "*The SDM decides any disputed fact or whether any allegations have been proved, on the balance of probabilities*", is a paraphrase of paragraph 14.1 of the Guidance Note and describes the approach he considered himself to be taking. In turn, in the context in which it stands, the SDM's statement only makes sense if referring to "disputed" fact or of "allegations" being "proved", with a balance of probabilities measure (that is "standard of proof", as expressed in paragraph 1.3 of the Guidance Note) as

applicable for testing whether matters are to be found or concluded, or–- for that matter–- taken to be proved or established, where there is someone against whom the enforcement process is directed. In the present case that was the Appellant, so far as material.

50.2 Second, the Deputy Bailiff in the Judgment (at paragraph 37) drew attention to a particular matter where the SDM explained that he was not satisfied as to an alleged failure on the part of one of those appealing to her against the Decision, demonstrating the way in which the SDM had in fact tested the matter before him when using the balance of probabilities standard of proof or measure.

50.3 Third, in the case of the Appellant the SDM explained (at paragraph 333 of the Decision), in relation to the TT matter, "*Overall, after considering the representations, I am not satisfied on a balance of probabilities measure that there was a lack of probity*". This the SDM explained in a context where the final Enforcement Report had offered a conclusion that there was lack of probity on the part of the Appellant as to the TT Matter, and where lack of probity was being equated with dishonesty.

51 In the Judgment the Deputy Bailiff set out paragraph 27 of the Decision, referred to above. She then described the submissions made to her by the Appellant, and by another appellant, concerning what was said to be a serious error by the SDM, with the Appellant having (it would appear) characterised the SDM's position as "extraordinary" and "plainly perverse and contrary to common sense". In summary the Deputy Bailiff understood the contention to be that the GFSC "*must prove its case against the individual*", and also that "*as a matter of natural justice the party which asserts the affirmative of an issue must prove the assertion, [which] anticipates a burden of proof and is no different in regulatory matters …*". The Deputy Bailiff explained the submission of the GFSC, in reliance on the ***Mynnyd*** case, as being that it was incorrect to refer to a burden of proof in the context of the Decision, and that the SDM had directed himself correctly concerning the "burden of proof" question.

52 The Deputy Bailiff addressed the competing arguments, succinctly and elegantly, in the Judgment which had to cover a vast amount of other matters and ran to over 270 paragraphs. She noted at paragraph 35 that "*The dual concepts of burden of proof and standard of proof are most clearly understood in the adversarial civil system. In civil proceedings the burden of proof rests with the party brining the action, however, as the [GFSC] says, these are administrative proceedings and not civil proceedings*".

53 The Deputy Bailiff then rejected the Appellant's submission in favour of the GFSC's, concluding at paragraph 37:

> "… *The decision of the SDM is the final stage of the decision making within the GFSC. It is the SDM who must decide taking into account all the evidence before him on the balance of probabilities any disputed fact or whether any allegations have*

been proved, and on the balance of probabilities whether or not the acts or omissions of the parties amount to a breach of the requirements under the laws. It is important to distinguish between the standard of proof and the burden of proof. If he does not come to a conclusion on the balance of probabilities, then he will not make the finding …"

54 In our judgment the Deputy Bailiff was correct in her decision because she recognised that in substance the SDM would not, and could not, have made a finding adverse to the Appellant without having satisfied himself that there was a proper factual basis for reaching such a finding, applying the balance of probabilities measure. The fundamental proposition is captured by the statement at the end of the passage we have just quoted. In other words, in practice, as a result of fair operation of the SDM process, disputes (or doubts) as to fact and allegations will be resolved in favour of the person subject to enforcement, and there will not be found to be any breach, and no breaches of the requirements under the laws will be found, unless the SDM is satisfied positively as to those matters on the balance of probabilities. But this is not because the GFSC by its Enforcement Division has to "prove" anything to the SDM in a judicial capacity, but because the SDM cannot appropriately make a decision for the GFSC as to the imposing of enforcement penalties or sanctions unless the SDM has satisfied himself positively, that is on the balance of probabilities, that he should.

55 We therefore reject the first ground of appeal. Precisely what facts had to be established, and the approach to be taken to determining whether there was dishonesty, want of probity, or want of integrity is considered further in our analysis of Ground 3.

Ground 2

56 The second ground of appeal distils itself to a contention that the GFSC acted unfairly because it either had, or could have obtained, documents or information which might have been of assistance to the Appellant in that they might have undermined material suggestive of, or conclusions as to, his being unfit, in particular as to want of probity or integrity; and that – in the case of documents which it had - it did not properly consider them; and in relation to documents which it did not have, it did not consider what they might have added if it had obtained them. The contention, set out in the Notice of Appeal before us, is that the Deputy Bailiff erred as a matter of law in "*rejecting the appeal of the Appellant that the [GFSC] had undertaken a reasonable investigation and made full and adequate disclosure in relation to the Decision was itself an error of law and/or unreasonable (sic)*". The Notice of Appeal amplifies this by complaining about aspects of the Deputy Bailiff's rejection of the challenge before her to the disclosure process on the part of the GFSC down to the time of the Decision.

57 According to the Appellant's Skeleton Argument for this appeal, the Deputy Bailiff was in error when she rejected the appeal "*against the finding that the [GFSC] had undertaken a reasonable investigation and made full and adequate disclosure in support of its case against the Appellant*". From the outset of the GFSC's investigation and enforcement process

representatives on behalf of the Appellant were making requests of the GFSC for as much material as possible. The issue is whether the response to these requests was reasonable and appropriate.

58 The background to Ground 2 is paragraphs 8.1 to 8.9 of the Guidance Note, together with paragraphs 11.5 and 12.5. These paragraphs, concerned with document production, set out the approach in particular to be taken by the GFSC's Enforcement Division towards the provision of material to a person subject to an enforcement process. The paragraphs were described at length in paragraphs 51 to 59 of the Judgment, a passage which followed the Deputy Bailiff's summary of the SDM's conclusions. As she explained at paragraph 50 of the Judgment, those conclusions were "*that the process had been conducted in accordance with the Guidance Note, that the [GFSC] had not acted unreasonably and rejected criticisms that the parties had made against the [GFSC]. At paragraph 33 [of the Decision the SDM] takes into account the lack of personal access to documentation or records after the Appellants departure from [the Company]…*".

59 In simple outline, the Guidance Note contemplates that the GFSC will provide anything it proposes to rely on in asking the SDM to act; and in addition, the GFSC will provide anything which could be described as being in a category listed in Rule 65(4) of the Royal Court Civil Rules, 2007. These categories are listed at paragraph 8.7 of the Guidance Note and, with immaterial exception, are documents which (a) adversely affect the GFSC's case; (b) support the other party's case; or (c) adversely affect that party's case. Paragraph 8.6 of the Guidance Note explains this as follows:

> "*As an administrative body, the Commission is not bound to follow court procedures. However, in order to follow principles of natural justice and fairness, in most cases the Commission will adopt an approach similar to that of "standard disclosure" as per Rule 65(4) of the Royal Court Civil Rules, 2007*".

60 Paragraph 8.9 explains that the GFSC will continue to monitor its disclosure obligations throughout the enforcement process and make any further disclosures that are appropriate as a case develops or new material is uncovered.

61 An issue of principle before us arises from the reference in paragraph 8.6 of the Guidance Note to the GFSC in most cases adopting "*an approach similar to that of 'standard disclosure' as per Rule 65(4) of the Royal Court Civil Rules, 2007*". As an aspect of this, the Appellant's argument, in summary, is that the GFSC could and should have exercised the power which the GFSC has under section 23 of the Fiduciaries Law to obtain certain documents, if and to the extent that it did not already hold them as a result of its investigations.

62 Rule 65(4) of the Royal Court Civil Rules, 2007 ("the RCCR") describes "standard disclosure" in terms which are well-known, describing an obligation to disclose "only"

documents which the disclosing party relies upon, documents which adversely affect his or another party's case, or support another party's case, or which are required to be produced by a relevant practice direction. There are other relevant provisions in the RCCR (see below) which explain such matters as a duty of search and also that the disclosure duty is limited to documents which are or have been in the disclosing party's control (a concept defined as physical possession, having a right to possession, and having a right to inspect and take copies).

63 In the present case it is not suggested that the SDM, in reaching his Decision, saw or relied on documents which were not also made available to the Appellant. The essential question is whether the GFSC had provided to the Appellant all that they had in their control which met the description in Rule 65(4) of the RCCR, that being the categories listed out in paragraph 8.7 of the Guidance Note.

64 The Appellant submits before us that the GFSC's duties as regards document provision went further than merely providing the material within these categories, and also carrying out the monitoring described in paragraph 8.9. Rather, the proposition was that the reference in the Guidance Note to "standard disclosure" and Rule 65(4) of the RCCR carried with it an obligation on the part of the GFSC to "make a reasonable search for documents" within Rule 66 of the RCCR, this rule being directed at the categories in Rule 65(4) "*When giving standard disclosure*"; and it is said that while, by Rule 67 of the RCCR the obligation is limited to documents in the GFSC's control, this will include documents which are no longer in its control. Finally we were referred by Advocate Williams to Rule 70 of the RCCR, which makes the disclosure obligation a continuing one.

65 At paragraph 61 of the Judgment the Deputy Bailiff rejected this particular submission concerning the importing into the enforcement process of all the provisions in the RCCR surrounding disclosure. In our judgment she was correct in this, and we reject the Appellant's challenge to her decision on this point.

66 Most obviously, paragraph 8.6 of the Guidance Note indicates that the GFSC is not bound by all the disclosure provisions in the RCCR. So, for example, there is no machinery for the making of applications for and obtaining orders for, specific disclosure. Paragraph 8.9 is sufficient to displace Rule 70 of the RCCR. While crucially paragraphs 8.6 and 8.7 together make it clear that the GFSC will not be expected to list or produce all documents which are, or might be, "relevant": it is only the listed categories in paragraph 8.7 which will ordinarily be produced.

67 Based on the reference in the Guidance Note to Rule 67 of the RCCR, it was the Appellant's case before the Deputy Bailiff that section 23 of the Fiduciaries Law, referred to above, had the effect of bringing within the GFSC's "control" any documents held by the Company, as the section gives the GFSC power ("the Section 23 Power") to require licensed fiduciaries to provide information or documents "*reasonably required by [the GFSC] for the performance*

of its functions". There are other detailed provisions dealing with such matters as further persons who may be required to produce material and the consequences of failing to comply with a requirement.

68 The Deputy Bailiff rejected this submission, rightly in our judgment.

68.1 First, the Section 23 power is only available in the first place where the GFSC determines that for the performance of its functions information or documents are reasonably required. It does not follow that the Section 23 power would be appropriately exercised simply because a person who was involved in an enforcement process contended that categories of information or documents might assist it.

68.2 Secondly, Advocate Williams has not directed our attention to any authority for the proposition that within Rule 67 of the RCCR the GFSC has "control" of a document because, in exercise of a regulatory power for furthering the performance of its functions, it might be entitled to require a third party to produce the document. Quite simply the fact of there being the Section 23 power given by the Fiduciaries Law does not make documents which the GFSC might ask for documents within the GFSC's "control", were it to be assumed that there could be a proper exercise of the power (that is, an exercise for proper purposes for which the power has been given).

69 Before the Deputy Bailiff the GFSC provided a table listing out the material correspondence between the GFSC and the Appellant's representatives in which the latter made requests for material and the way that the GFSC had responded. This was in support of the GFSC's case that it had discharged its disclosure obligations fairly and conscientiously. In the Judgment the Deputy Bailiff gave detailed consideration to the way the disclosure process had developed.

70 The way the Deputy Bailiff dealt with the general challenge to GFSC's document production, at paragraph 72 of the Judgment was as follows:

> "*In relation to the wording of the Guidance Note, it is important to take into account that when the documents are all in one party's hands as in this case without an obligation to provide a list of all the documents that the party holds but only a list of those that fulfil the criteria set out under paragraph 8.7, it places a weighty responsibility on the [GFSC] to ensure that it discharges its obligations fairly. This process is based on the principle of the maintenance of the highest standards by the [GFSC] as a regulatory body. The [GFSC] has set out in detail all that it has done to ensure that it has fulfilled this obligation. In this case in addition to its own reviews it appointed a nominated disclosure officer and set up a review of the on-going disclosure by independent counsel. … I have come to the conclusion despite the criticism levelled at the [GFSC] that the Appellants have not been successful in any of their grounds of appeal in relation to the disclosure process. [GFSC] has conformed to the disclosure process as it is required to do. The procedure meets the standard of fairness in this case so that the Appellants all knew what the [GFSC] was relying on, in coming to the decision that it did. As I have said above there was no*

allegation that the SDM received or appeared to receive evidence which was not disclosed to the Appellants."

71 Before us Advocate Williams developed his argument as to Ground of Appeal 2 by reference to paragraph 2 of the Appellant's Cause before the Royal Court. We would summarise as follows the criticisms as explained to us.

71.1 First, Advocate Williams made specific criticism of the GFSC's response to various requests for document production, referring us to certain of the correspondence and submitting that the response was inappropriate and should have been found by the Deputy Bailiff to be inadequate and to have resulted in unreasonably insufficient investigation. He also highlighted an exchange which took place during the meeting on 18 February 2021 and suggested that the exchange should have prompted the SDM to make his own enquires into whether there were documents. He further submitted that the GFSC could not have satisfactorily stated that it has disclosed all the documents "which meet the test in the Decision-Making Process" as the GFSC would not have these documents in their possession.

71.2 Second, he identified what he submitted were a number of mistakes by the GFSC in their appreciation of their document production obligations, mistakes which he submitted should have been recognised as such by the Deputy Bailiff.

71.3 Third, he set out in his written argument a schedule of material which he submitted could and should have been produced by the GFSC but had not been. This schedule repeated in substance the same list set out in the Appellant's Cause at paragraph 2(b), and also to be found in the correspondence we refer to below.

72 As to Advocate Williams' first criticism, he drew to our attention a letter of 5 February 2020 from the Appellant's representatives asking for various categories of documents. The list with this letter very much resembles that at the end of his Skeleton Argument.

73 In a letter dated 14 February 2020 the GFSC replied to say that they had approached an officer of the Company's present owner "*who has confirmed that they would be amenable to reasonable requests for documents*" and suggesting that the Appellant might be able to obtain material from that source. The letter went on to say that the request for disclosure was on the whole too broad, failing to indicate how the material might assist; that is, how it might fall within the paragraph 6.7 categories. It offered to help if the request were to be narrowed and made reasonably targeted. And it responded with comments on the listed categories of documents in the letter of 5 February 2020. Accompanying the letter were various documents the GFSC had identified as responsive to the requests.

74 The Appellant's representatives replied by letter dated 28 February 2020 to say that it was inappropriate for him to make his own requests from the Company's owner. The letter also

put forward reasons why the requested categories of documents were considered to be relevant. In addition, it was suggested that the GFSC should issue Section 23 Notices to the Company or its owner requiring the production of further material.

75 The response of the GFSC, in a letter dated 5 March 2020, was to explain why there was no impediment to the Appellant approaching the Company's owner for material; to say that the requests being made by the Appellant were, broadly, too general and anyway for wide categories of documents, on the assumption that the further material might support the Appellant. The conclusion of the letter was that "*The [GFSC] will continue to endeavour to undertake its disclosure obligations throughout the enforcement process – but must request that any further correspondence in relation to disclosure must provide the granular detail discussed throughout this letter*".

76 There was a further email dated 14 July 2020 to the GFSC from the Appellant's representatives asking for copies of any Section 23 Notices served on the Company or its owners and of any response. The contention was explained as being that "*the scope of the investigation is directly relevant to the scope of [the Appellant's] case*".

77 On 20 July 2020 the GFSC sent a letter in which, among other things, it referred again to the tests in paragraph 8.7 of the Guidance Note and explained that it would reject requests for documents which were vague or insufficiently detailed, failed to explain how the documents would meet one of the tests, and would reject fishing requests and blanket requests for large bodies of documents. The letter concluded by saying that if there were thought to be undisclosed material in the possession of the GFSC, the Appellant was encouraged to ask for it.

78 Finally, we were shown an email exchange of 18 and 19 February 2021 arising out of the meeting which had started on 17 February 2021. On 18 February 2021 there had been a brief exchange before the SDM concerning whether or not the GFSC had in its possession certain financial statements or minutes of a board meeting reflecting a particular transaction. In the second of these two emails the GFSC explained that it did not hold the financial statements and that it did not have in its possession documents which met the disclosure test. It was the exchange of 18 February 2021 which founded the contention that the SDM should have required to GFSC to look for and provide to him additional documents.

79 We cannot see that the Deputy Bailiff fell into any error, or reached a conclusion which was unreasonable or outside the range of what she might properly have concluded. We would not characterise the GFSC's responses to the Appellant's document requests as falling short of its obligations as set out in the Guidance Note or arising as a matter of fairness or natural justice. There is no basis for concluding that the GFSC failed to provide material which it had, and which could reasonably have assisted the Appellant; nor that it was remiss in failing to look properly for what it had which might have assisted. Further, we do not see the exchange which took place at the meeting of 18 February 2021 and which was reflected in the emails of

that and the following day as having left the SDM with a responsibility for making further investigations.

80 As regards the submission that the GFSC had failed in its appreciation of its disclosure obligations, Advocate Williams highlighted GFSC's refusal to produce the five Section 23 Notices that had been served (see the email of 14 July 2020, referred to above), and argued that the Deputy Bailiff was in error in concluding that the GFSC was entitled to withhold these documents. The Deputy Bailiff at paragraph 68 of the Judgment referred to the GFSC's submission that what mattered was the material produced in response to the Section 23 Notices (insofar as satisfying the tests in paragraph 8.7 of the Guidance Note), not the notices themselves. This is because the question for the SDM was whether or not the Appellant was to be found to have failed to meet the applicable licensing requirements, and the Section 23 Notices were irrelevant to that question. On this point we are satisfied that the Deputy Bailiff was correct.

81 The final submission, connected with the list of materials said to have been missing and remaining undisclosed, is that the SDM's review of facts and allegations cannot have been properly carried out in circumstances where, as Advocate Williams put it, "*all the information relevant to the investigation and allegations had not been disclosed*". We considered the list of materials said to be missing and were struck with its breadth and generality. It would not have founded a promising application, in proceedings before the Royal Court, for an order for specific disclosure. We do not accept that there is or may be a pool of material which the SDM should properly have examined, but did not examine, before reaching the Decision, or that the GFSC is to be criticised for its response to the Appellant's request for the listed categories of material.

Ground 3

82 The Appellant accepts that the Deputy Bailiff accurately identified the correct test for dishonesty/ lack of probity, but submits that she failed to apply it; alternatively, that she gave no adequate reasons for her decision. This is in the context of a challenge before the Deputy Bailiff that the SDM had failed to take into account the Appellant's actual knowledge. In particular, the third ground of appeal is that the Deputy Bailiff, at paragraphs 186 (the M&T matter) and 202 (the TT matter) of the Judgment, had not addressed the complaint that the SDM had failed to make any findings as to the state of knowledge of the Appellant.

83 There was no issue raised in the Notice of Appeal regarding the test for lack of integrity. However, the Appellant's skeleton argument in support of this appeal does raise the issue of the correct test for want of integrity and we heard full argument on the point without any technical pleading objection by the GFSC.

Lack of Integrity

84 Advocate Williams submitted that in *Newell-Austin v Solicitors Regulatory Authority* [2017] EWHC 411 (Admin) Morris J had acknowledged that although the test for lack of integrity was an objective one "*the state of a person's knowledge was relevant*". It followed that the subjective element required for a finding of dishonesty or lack of probity, following *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2017] UKSC 67 at [74], applies equally before a finding of lack of integrity can be made. He also sought to derive support for this approach from the decision in *Domaille* at [154] – [158].

85 We do not accept that a fact finder must make express findings as to the actor's state of knowledge when considering an allegation of lack of integrity. In *Newell-Austin* at [48] – [50] Morris J had stated that:

> "… *by contrast with the test of dishonesty, the test of 'lack of integrity' is an objective test alone. A distinction must be drawn between subjective knowledge of the facts of the underlying conduct (which are alleged to give rise to the lack of integrity) and subjective knowledge of the fact that the conduct would be regarded by reasonable people as lacking in integrity. There is no requirement that a solicitor must "subjectively" realise that the conduct lacks integrity… there is no requirement that the person himself must have an appreciation of the lack of integrity…the person's state of knowledge or intention in relation to the underlying conduct (said to demonstrate lack of integrity) is a relevant consideration in assessing whether, in carrying out such conduct, a person demonstrated a lack of integrity*".

86 This test was approved subsequently in the English Court of Appeal in *Wingate & Evans v The Solicitors Regulatory Authority* [2018] EWCA Civ 366, per Jackson LJ at [118]. In our judgment the two-stage test for dishonesty or want of probity in *Ivey* is not required when considering the lesser allegation of want of integrity.

Application of tests for dishonesty/want of probity and for want of integrity

87 At paragraphs 208-247 and 399-400 of the Decision the SDM concluded (1) that the Appellant had failed to understand the implications of what he was proposing and implementing in relation to the transfer of beneficial ownership of T from L to H, and that his explanation regarding D's personal reasons for secrecy was lacking in any credibility (ie was false) and (2) that his conduct was dishonest and lacking in probity by the standards of ordinary decent people. This was a legitimate application of the two-stage test.

88 The Deputy Bailiff reviewed these findings at paragraphs 162-193 of the Judgment and concluded that it was indeed the Appellant who had suggested the change in ownership for the structures so that the counterparties in any property transactions would not be able to see who the real beneficial owners were, following D's suggestion that the ownership of T and M be cloaked. Therefore, the SDM was entitled to dismiss the alleged justification for D's requirements for confidentiality and instead to determine that what drove the need for privacy and concealment was only the established market view about The H Trust: "*[The Appellant]*

was aware, because he is copied into the emails between H and D, that it appears they are seeking to circumvent SOF/SOW controls…Mr Robilliard's suggestion of how H should respond [to the Company's due diligence questionnaire regarding source of funds] was not true and he knew it not to be true".

89 At paragraphs 255-333 and 401-402 of the Decision the SDM concluded (1) that the Appellant knowingly (or recklessly) failed to investigate the true extent of R's involvement in TT, despite the numerous credible adverse media hits – including a 15 year sentence of imprisonment for fraud, given the proven link between R and S and the possible cloaking of the former by the latter; but (2), that there was no lack of probity on the part of the Appellant, only a lack of integrity, in not immediately declining R as a client and, thereafter, failing to investigate his ongoing involvement. The Deputy Bailiff reviewed these findings at paragraphs 195-223 of the Judgment and concluded that the SDM was entitled to find a lack of integrity, applying the necessary objective test. There was no need to consider the Appellant's state of mind and we reject the submission to the contrary at paragraphs 76 and 95 -96 of Advocate Williams' Skeleton.

90 In the light of the above there were no errors of law in the application of the relevant tests, whether for dishonesty and lack of probity, or for lack of integrity. The true challenge is to factual findings made by the SDM which this court will not entertain. Nor was there a failure to provide adequate reasons by the Deputy Bailiff.

91 Finally on this point Advocate Williams raised the matter of overall fairness and reasonableness. He referred us to a decision of the then Deputy Bailiff (McMahon) in *Bordeaux Services Guernsey) Ltd v The Guernsey Financial Services Commission* (18/2016) at [30]:

> "*Ultimately, though, 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 (see, eg, Lord Carswell in Gokool v Permanent Secretary of the Ministry of Health and Quality of Life [2008] UKPC 54). It can also involve consideration of whether the end-product of the Decision amounts to a disproportionate interference with an appellant's rights or interests, which is sometimes referred to as an "oppressive" decision. At para. 11-070 in De Smith's Judicial Review, the comment of Laws LJ in R (Khatun) v Newham LBC [2005] QB 37 is quoted: "Clearly a public body may choose to deploy powers it enjoys under statute in so draconian a fashion that the hardship suffered by affected individuals in consequence will justify the court in condemning the exercise as irrational and perverse." In such a case, the review is less about process and more about outcome. As noted in De Smith (at para. 11-071), "each case must be considered in the context of the nature of the decision, the function of the particular power and the nature of the interests or rights affected.*"

92 We do not believe that the SDM's Decision fell outside the range of reasonable responses open to him on the issues of dishonesty and lack of probity, or of lack of integrity, or that overall it was unfair or unreasonable. As noted above "*the review is less about process and*

more about outcome". We have already noted that the SDM did not need to make any findings as to the Appellant's state of mind at the material time in order to conclude that there was a lack of integrity.

93 Advocate Williams asserts that the SDM did not refer to the Appellant's evidence. This is simply not the case (see eg paragraphs 19, 227, 240-247, 275, 293, 307, 309, 313, 316, 324, 328, 332 and 399 of the Decision). In her review the Deputy Bailiff took an extremely broad view of the extent to which the Decision could be challenged (see paragraphs 16 and 85 of the Judgment). She specifically considered the questions of overall fairness, breach of natural justice and reasonableness (see paragraphs 162-170, 195 and 223). She took into account the Appellant's evidence (see eg paragraphs 186, 188-192, 208, 217, 219-220 and 222). In all the circumstances we also dismiss this further challenge to the reasonableness of the Decision.

94 In his Skeleton Argument on behalf of the Appellant, Advocate Williams made detailed submissions about the underlying documents referred to by the SDM, and reviewed by the Deputy Bailiff, in relation to each of the M&T and TT Matters. Although he did not, in the course of his oral submissions, address us on any of this material in detail, we have looked at it, as well as at the Appellant's evidence, and would summarise by saying that we did not see any basis for ourselves concluding that the Deputy Bailiff was mistaken in her assessment of the material or, therefore, of her judgment in respect of the Decision.

Conclusion

95 For all these reasons, we find that none of the grounds of appeal is made out. On proper analysis, the GFSC properly directed itself that to form the basis of regulatory action, facts had to be established on the balance of probabilities. There was no culpable failure to disclose relevant documents; and neither the SDM nor the Court misdirected themselves or reached an unfair or unreasonable decision as to whether the Appellant's actions were dishonest or lacked probity or integrity. Accordingly, we dismiss the appeal.