

Appeal against the decision of the Senior Decision Maker on behalf of the Guernsey Financial Services Commission. All three appellants appealed the decision on a comprehensive basis.

[2023]GRC032

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)**

Between:

(1) X
(2) Y
(3) Z

Appellants

-AND-

**THE CHAIRMAN OF THE GUERNSEY FINANCIAL
SERVICES COMMISSION**

Respondent

Judgment circulated under the Practice Direction: 14th September 2022

Final Judgment handed down: 5th October 2022

Anonymised version released on: 3 August 2023

Before: Jessica Roland, Deputy Bailiff

Counsel for the First Appellant: Advocate N J Barnes

Counsel for the Second Appellant: Advocate E R Gray

Counsel for the Third Appellant: Advocate A C Williams

Representative of the Respondent: Alison Grant

Legislation, texts and cases considered:

The Financial Services Commission (Bailiwick of Guernsey) Law 1987, as amended;

The Insurance Managers and Insurance Intermediaries, (Bailiwick of Guernsey) Law 2002, as amended;

The Protection of Investors (Bailiwick of Guernsey) Law 1987, as amended;

The Insurance Business (Bailiwick of Guernsey) Law 2002, as amended;

The Banking Supervision (Bailiwick of Guernsey) Law 1994, as amended;

The Regulation of Fiduciaries, Administration Businesses, Company Directors, etc (Bailiwick of Guernsey) Law 2000, as amended;

The Royal Court Civil Rules 2007

Cees Schrauwers (Chairman of the Guernsey Financial Services Commission) v David John Merrien.
24/2016

Bordeaux Services (Guernsey) Limited & Ors v GFSC (11 May 2016);

Y v The Chairman of Guernsey Financial Services Commission (47/2018);

Guernsey Financial Services Commission v Y [2019] GCA076

Alan Michael Chick v The Guernsey Financial Services Commission [2020] GRC 035;

Bushell v Secretary of State for the Environment [1981] AC 75;

R v Secretary of State for the Home Dept. ex parte Doody [1994] 1 AC at 531;

Bryan v United Kingdom (1995) 21 EHRR 342;

R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2) [2000] 1 AC 119;

Porter v Magill [2002] 2AC 357;

Hoodless & Anor v Financial Services Authority [2003] UKFTT FSM007 (3October 2003);

P (A Barrister) v General Council of the Bar [2005] 1 W.L.R. 3019;

R (Primary Health Investment Properties Ltd) v Secretary of Health [2009] EWHC 519 (Admin);

Shah v HSBC Private Bank (UK) Ltd [2011] EWCA Civ 1154;

R (on the application of Kaur) v Institute of Legal Executives Appeal Tribunal and another [2012] 1 All ER 1435;

Burns v the FCA [2017] EWCA Civ 2140;

R (Mynnyd y Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy [2018] EWCA Civ 231;

Y v The Chairman of The Guernsey Financial Services Commission and Her Majesty's Procureur
(47/2018).

R v Akle and Bond [2021] EWCA Crim 1879

Introduction

1. All three of the Appellants in this matter appeal against the decision of the Senior Decision Maker Mr Richard Jones QC (the "SDM") on behalf of the Guernsey Financial Services Commission (the "GFSC" or "Respondent") made on the 23 March 2021 (the "Decision"). Although all three Appellants commenced individual appeals, by consent the three appeals were joined and heard together over a series of days on the 7, 8, 9, 10, 15 and 21 December 2021. All three Appellants appeal the Decision on a comprehensive basis. The First Appellant, X submits that the whole process was flawed because the SDM is an Officer of the GFSC and thus sitting as a judge in his own cause in breach of the rules of natural justice.
2. The Appellants each lodged extensive skeleton arguments in support of their appeal which were responded to by the Respondent with its 55 page skeleton argument (not including annexures) and all parties augmented their written arguments with oral argument over the 6 days of hearing. The Appeal bundles consisted of six lever arch files plus additional documentation handed up during the hearing. There is no prescribed format to a cause setting out the grounds of appeal and each of the Appellants approached the task differently.
3. The Decision was issued pursuant to Section 11 of the decision making process and:
 - a) The Financial Services Commission (Bailiwick of Guernsey) Law 1987 as amended, ("the FSC Law");

- b) The Insurance Managers and Insurance Intermediaries, (Bailiwick of Guernsey) Law 2002, as amended, (“the IMII Law”);
- c) The Protection of Investors (Bailiwick of Guernsey) Law 1987, as amended (“the POI Law”);
- d) The Insurance Business (Bailiwick of Guernsey) Law 2002, as amended (“the Insurance Business Law”);
- e) The Banking Supervision (Bailiwick of Guernsey) Law 1994, as amended, (“the Banking Law”);
- f) The Regulation of Fiduciaries, Administration Businesses, Company Directors, etc (Bailiwick of Guernsey) Law 2000, as amended (“the Fiduciaries Law”);

collectively called the “Regulatory Laws”. All these laws have the same rights of appeal, namely, the grounds of appeal are:

- a) *“The decision was ultra vires, or that 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. As regards the decision to make a prohibition order under each of the POI Law, the IMII Law, the Insurance Business Law and the Banking Supervision Law, the rights of appeal against the making of such order which are, *mutatis mutandis*, the same as those which apply under Section 19 of the Fiduciaries Law.
 5. As regards the decision to make a public statement, and the decision to impose a financial penalty, section 11(H) of the FSC Law provides that the grounds of appeal are the same as those set out above.

Background

6. The following summary of facts is taken from the Decision. Firm A was incorporated in 1997 and was granted a full fiduciary license by the GFSC on 4 July 2002. From the time of its incorporation until December 2013, Y was the sole controller. He was executive director from 1 September 1997 to 30 November 2017. On 10 December 2013 X acquired 24 percent of the share capital, which he retained until 6 April 2016, when he left Firm A and sole control was resumed by Y. X was an executive director from 4 May 2010 to 7 April 2016 and the Money Laundering Reporting Officer (“MLRO”) from 14 November 2014 to 6 April 2016. Z was an executive director from 22 February 2016 to 16 November 2017.
7. Another director V against whom action was also taken by the Respondent is not the subject of this appeal.
8. Firm A was sold to Firm C on the 30 November 2017. Y was a non-executive director of Firm C from 30 November 2017 to 22 March 2018.
9. Firm D was a joint licensee of Firm A and subject to the same ownership and control. Firm B was a Country C entity wholly owned by Y through a family trust. This entity was liquidated in 2013 and struck off the commercial register in Country C on 2nd December 2013.
10. The primary activities of Firm A were the management and administration of trusts and companies, provision of individual or corporate directors, provision of individual or corporate secretaries, registered office services and nominee services. Firm A had around 120

clients/relationships and £154million assets under management. It operated a system whereby each director was considered a relationship manager for certain clients, and, in addition, each director would sit on a board of client entities, either in a personal capacity or as director of Firm D.

11. The findings made against the Appellants by the SDM in summary are that each of them has failed to fulfil the fit and proper requirements as set out in Schedule 1, para 3 of the Fiduciaries Law, paragraph 1 of the Minimum Criteria for Licensing as set out in Schedule 4 to the POI Law and Schedule 4 to the IMII Law (and Schedule 3, para 3 of the Banking Law, Schedule 7, para 3 of the Insurance Business Law).
12. As a result of those findings, financial and other penalties have been imposed against all three Appellants. Findings and penalties were also made against Firm A however there was no appeal against them.
13. In order to keep this judgment within manageable proportions, I shall not be referring to all the documents which I have read or to which I was referred, only to those which I regard as necessary to explain the reasons for my conclusion. Nevertheless, in view of the nature of the arguments put forward by the parties, it is of necessity a lengthy judgment. Inevitably the grounds of appeal overlap one another but where possible I have identified the paragraphs outlining the grounds of appeal by the relevant Appellant.

Procedural History

14. Following the acquisition of Firm A by Firm C on the 16 March 2018, Firm C expressed concerns to the Respondent about various client structures that had been administered by Firm A. On 5 May 2018, a notice for information under section 23 of the Fiduciaries Law (“Section 23 Notice”) was served on Firm A for the production of material. The matter was then referred to the Respondent’s Enforcement Division on 31 August 2018. On 26 October 2018 and 14 January 2019 respectively, the Respondent issued two Section 23 Notices requesting the production of further material.
15. Voluntary interviews were held with Y and Z. X did not attend a voluntary interview. The Decision records that X declined to attend, X does not accept he declined, rather, he was unable to attend due to being on holiday and another one was not rearranged. It does not appear that either X or the Respondent followed up on this. As X does not rely on this as a ground of appeal, it is not necessary for me to consider the lack of interview further other than to note that as a consequence of the voluntary interviews of the other two Appellants two further Section 23 Notices requesting the production of material were issued on 4 April 2019 and 4 July 2019 (bringing the total to five Section 23 Notices). On 7 October 2019, Firm A submitted a surrender of licence application following the migration of Firms A’s clients to Firm C. The Respondent issued a Draft Enforcement Report dated 30 December 2019. Responses were filed on 26 March 2020, 27 March 2020 and 17 April 2020 by the First, Third and Second Appellant respectively. The Respondent issued the Final Enforcement Report dated 30 June 2020. On 20 August 2020, the Respondent referred the matter to the SDM. A draft Minded to Notice was issued on 16 October 2020 and a Final Minded to Notice including the public statement was issued on 27 January 2021. An oral meeting was set down before the SDM (“the Oral Meeting”). Each of the Appellants submitted written submissions ahead of the hearing, to which the Enforcement Division responded. Oral submissions were made at the Oral Meeting held on the 17-19 February 2021 and subsequently further written representations and submissions made by the Appellants to the SDM with a further response filed by the Respondent. On the 23 March 2021 the Decision was issued by the SDM.
16. In considering this appeal I adopted the conclusions of the Deputy Bailiff, as he was then in Y v The Chairman of Guernsey Financial Services Commission (47/2018) paragraph 121 where he said,

“ it is necessary to consider the subject-matter of the original decisions, the manner in which they were reached, the content of what is now disputed and what Y wishes to argue on this appeal. I am satisfied that the breadth of the potential grounds of appeal, for example in section 19(4) of the Fiduciaries Law (quoted above) extend further that (sic) what might be considered as classic judicial review. This was clear under the former style of statutory appeal grounds common in this jurisdiction (see, eg, the analysis of Beloff JA in Walters v States Housing Authority (1997) 24.GLJ.76). In particular, para. (e) enables an appeal alleging that there has been a material error as to the facts. I regard the grounds of appeal as effectively conferring on the Court the ability to look at anything that an appellant wishes to raise about the decision-making process of the GFSC and the decision reached.”

17. However, as the Respondent reminded me, it is a review of the process and the decision reached and not a rehearing.

Challenges to the Process

18. In addition to grounds of appeal which relate to the specific allegations, comprehensive grounds of appeal were made against the process, and I shall deal with these first before dealing with the grounds of appeal in relation to the specific allegations (although there is overlap).
19. X, at paragraph 12 of his cause, pleads the SDM acted in breach of natural justice by hearing the case when SDM is not independent of the Respondent. X argues that the procedure is fundamentally flawed rendering it impossible to provide a fair hearing.
20. Although the Respondent is one body in law, it divides itself into parts. When considering whether to exercise its statutory powers of sanction against any person, the Respondent follows its published decision making process, which is outlined in its published Guidance Note entitled Decision Making Process Relating to the Use of Enforcement Powers (“the Guidance Note”). The version that was relied on during this process was the November 2019 document. The Guidance Note sets out that it is a general guide to the way in which the Respondent approaches the exercise of its statutory powers that involve the exercise of the Respondent’s enforcement powers. The Guidance Note states that it does not hold the force of the law and says that each case will be considered on its own merits. It provides that in exceptional circumstances the Respondent may depart from the process. In response to questions from me, the representative on behalf of the Respondent confirmed that these cases were not treated as exceptional circumstances. The Guidance Note states that the objective is to enable those affected to understand where they are in the process. It explains in some detail what is involved in each stage.
21. The Guidance Note sets out that from the commencement of the investigation there are a series of formal reviews. It is after the second review by the Case Review Panel (“CRP”) and the provision of the Final Enforcement Report and where a decision has been made to continue the action, the matter can be, as it was in this case, referred to a SDM. The Guidance Note says that it is designed to ensure that each decision has been arrived at in accordance with the principles of natural justice and is proportionate and reasonable based on all relevant information.
22. Advocate Barnes acknowledges that there have been previous unsuccessful challenges to the process but not on this basis. He likens the position of the SDM to the position of the PCC in *P (A Barrister) v General Council of the Bar* [2005]1 W.L.R. 3019 and *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte* (No 2) [2000] 1 AC 119 and says by analogy this process does not comply with the rules of natural justice. It is alleged that there is a breach of the fundamental principle that a man may not be a judge in his own cause. Advocate Barnes submitted that this challenge goes further than a human rights challenge, as if it is successful the outcome is automatic disqualification (see paragraph H page 132 of *Pinochet*), and the process cannot be rectified by a right of appeal. Advocate Barnes says that

the legislation “*doesn't work*” due to this fundamental flaw which is a breach of a basic rule of natural justice and should not be applied. Advocate Barnes does not allege any actual bias on the part of the SDM.

23. The Respondent says *Y v The Chairman of The Guernsey Financial Services Commission and Her Majesty's Procureur* (*ibid*) is a complete answer to Advocate Barnes. However, I agree with Advocate Barnes the point he is making in this matter is a different one.
24. At paragraph 86 of the judgment *P (A Barrister) v General Council of the Bar* [2005]1 W.L.R. 3019 it says:

“It is clear from the analysis of Lord Hoffmann's position that the key consideration for the purposes of automatic disqualification at common law in a case where the judge or tribunal member is not a party to the proceedings is the nature of that person's connection with or relationship to a party and in particular whether that connection or relationship is such that the person in question must be treated as if the "cause" of one of the parties was also his "cause". The rationale for so treating such person is that by reason of the connection or relationship in question he is taken to share the interest of the party in a particular outcome.”

25. It also seeks to distinguish the test for automatic disqualification from the test of “*mere apparent bias*”¹ which is

“The conclusion that would be derived by the fair-minded and informed observer by consideration of all the circumstances which had a bearing on whether there was a real possibility that the judge was indeed biased is therefore not the relevant test.”

which is the test from *Porter v Magill* [2002] 2AC 357 (and which has already been tested before this Court in *Y v Guernsey Financial Services Commission* (*ibid*) and *Chick v The Guernsey Financial Services Commission* [2020] GRC 035).

26. In *P (A Barrister) v General Council of the Bar* (*ibid*) the Court came to the conclusion that each member of the PCC had in respect of each prosecution of proceedings, a common interest with the PCC as a whole in procuring the conviction of the barrister who has been charged and upon any barrister's appeal, a common interest in procuring that the appeal should be dismissed. In order for X to be successful under this ground of appeal, it would be necessary for him to show that the SDM has an interest in the outcome.
27. Whilst rules of bias arising from a personal interest are not limited to judicial bodies, I do not consider that the principles in the *Pinochet* case and *P (A Barrister) v General Council of the Bar* to automatically disqualify the SDM have application in an administrative decision such as this (rather than a judicial or disciplinary tribunal setting). However, in any event, if I am wrong, as is clear from the Guidance Note, the SDM can, when a particular matter is referred to him:

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; or

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

Thus, the SDM has no interest in the outcome. Unlike the members of the PCC, the independence of the SDM is built into the process in the Guidance Note. As the Deputy Bailiff

¹ Although see paragraph 144 *R (on the application of Kaur) v Institute of Legal Executives Appeal Tribunal and another* [2012] 1 All ER 1435 where Rix LJ observed he was “somewhat sceptical” that these were separate doctrines.

as he was then said in *Y v The Chairman of Guernsey Financial Services Commission & HM Procureur* (*ibid*) at paragraph 123:

“I also consider that it is important to recognise that the way the GFSC operates its enforcement cases is intended to introduce a regime as close as it can come without referring the decision to an external person by giving it a semblance of independence and impartiality. The reason for having a panel of Queen’s Counsel from whom the SDM to which a matter is referred for determination is selected is to remove the decision-making from the Commissioners themselves or the other permanent officers of the GFSC.”

28. I have therefore come to the conclusion that this ground of appeal should be dismissed.
29. Y (at paragraphs 3, 24-32 of his cause) and Z (at paragraph 1) rely on a ground of appeal that the Decision was subject to an error of law based on a failure by the SDM to apply the correct burden of proof.
30. The Guidance Note and the legislation are silent as to the burden of proof.
31. The SDM issued a ruling in relation to the burden of proof on 27 January 2021 prior to the Oral Meeting (“the Ruling”) (which he confirmed in his Decision at paragraph 27) after correspondence from Z’s counsel referring to the order in which the parties should make written representations and referencing that the Respondent was “*the party with the burden of proof*”². His ruling is in the following terms:

“....., 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”.

32. Y and Z argue that the SDM’s Ruling on this issue cannot be right. Further that the burden of proof that is used in the FCA procedure should be adopted i.e., the burden of proof is on the FCA as regulator. Y refers to the SDM’s conclusions set out above as placing the Respondent “*in a position of extraordinary advantage over normal litigants and as a corollary put the Appellant and others like him at extraordinary disadvantage.*” Y says that the Respondent must prove its case against the individual. He says the approach of the SDM represents a serious error of law and a breach of the requirements of a proportionate, reasonable and fair process. Such an approach would allow a “*vexatious party*” to exploit such circumstances without any recourse for the injured party. Z uses similar language in his appeal describing the SDM’s position as “*extraordinary*” and “*plainly perverse and contrary to common sense*”.
33. Further Z complains that in the Decision, the SDM repeats the conclusion of his Ruling in respect of the burden of proof and does not refer to or take into account the submissions made on his behalf on the concept of the burden of proof. He says it is well-established that as a matter of natural justice the party which asserts the affirmative of an issue must prove the assertion. This anticipates a burden of proof and it is no different in regulatory matters. He also says that if this had been correctly considered by the SDM this should have then led the SDM to seeking further and better disclosure (by reference to correspondence written on behalf of Z seeking the same from the Respondent). He also says that the Respondent seeks to reverse the

² Letter dated 25 January 2022 to SDM from Appleby.

burden of proof by asking what attempts Z has made to obtain the documentation from Firm A direct.

34. The Respondent says that the SDM was right in relation to the burden of proof due to the nature of the Decision which is an administrative one by having regard to *all* the information before it, including written and oral representations. The SDM is not limited to considering the allegations advanced by the Enforcement Division and can “*decide that it is minded to take some other enforcement action.*” The SDM is an independent decision maker for the Respondent. It relies in particular on the comments of Jackson LJ in *R (Mynnyd y Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWCA Civ 231, although in the context of planning appeals, LJ Jackson concluded:

“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.” (Paragraph 31).

35. 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 bringing the action, however, as the Respondent says, these are administrative proceedings and not civil proceedings. Despite the robustness with which these proceedings were dealt with throughout by all parties, this does not make them adversarial civil proceedings.

36. I do not consider the comparisons to the role of the Tribunal in England and Wales helpful as it is quite different from the procedure which has been adopted here. The Tribunal is considering afresh the decisions of the FCA and the burden of proof before the Tribunal is on the FCA. It is the decision-maker on reference supplanting in those circumstances the FCA.³ It is wholly independent and is a judicial body. In a similar way to the comments of the Court of Appeal in *Guernsey Financial Services Commission v Y* [2019] GCA076 in relation to a comparison made in relation to the treatment of prohibition orders in England and Wales “*no help can be gained from examination of the position taken in the UK by the regulators there in relation to their powers under the UK legislation*”.

37. The SDM is not limited to considering allegations advanced by the Enforcement Division. Under the Guidance Note at 11.1 the SDM “*should consider the enforcement report and evidential documents presented to it, and decide whether it is necessary to request further information on specific issues that arise out of the enforcement report, either from the Enforcement Division or from the parties via the Enforcement Division.*” 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 as demonstrated when at paragraph 49 he concluded in relation to outstanding loans between F and Entity A:

“I am not satisfied that this particular failure, important as it was, was in context so serious as to amount to a failure by Firm A to conduct its business with integrity.”

38. I therefore reject this ground of appeal.
39. X’s ground of appeal at paragraph 11 of his cause is that the SDM wrongly declined to permit the Appellant to cross-examine the author of the Final Enforcement Report. Advocate Barnes made the request to the SDM to cross-examine the author of the Report and was asked to justify it. Advocate Barnes responded on 17 November 2020 on the basis that the Oral Meeting had been characterised as a hearing by the SDM and by the legislation, the cross-examination was

³ See *Burns v the FCA* [2017] EWCA Civ 2140 at paragraph 145.

required to respect the rules of natural justice and fairness and that the process was akin to disciplinary proceedings. Further it was a process for which X was entitled to legal representation and a reasoned decision, that the process was subject to Article 6 of the ECHR and thus he should be entitled to properly challenge the evidence laid against him by cross-examination.

40. In the SDM's refusal for permission for Advocate Barnes to cross-examine the author of the Final Enforcement Report he said he was applying the principles of *Bushell v Secretary of State for the Environment* [1981] AC 75. He said that the overriding issue was one of fairness, and X has not only responded to the draft report, but also has an opportunity to make further representations to the SDM. On the basis that the procedure to be adopted under the Decision Making Process is a matter for his discretion he declined to exercise it to allow Advocate Barnes request.
41. Advocate Barnes relies on *Bushell v Secretary of State for the Environment* as well as De Smith paragraph 7-084. Advocate Barnes said that if he had been given the opportunity to cross-examine, he would have asked the maker of the report, the questions which he highlighted in bold on his written representations to the SDM dated 1 February 2021. He would have challenged the conclusions that the author had come to. The importance of the enforcement process on a party's livelihood meant that his client should have the benefit of the process of the challenge cross-examination brings.
42. The Respondent said that the SDM's decision was correct and within the range of reasonable responses.
43. The Guidance Note states at paragraph 11.14:

“Oral evidence may be given, and cross examination will be permitted only where the decision-maker considers that the interests of justice so require. This is not expected to be a frequent event since the parties and potential witnesses will normally have been interviewed by the Enforcement Division, and will have had an opportunity to comment on the transcript of the interview ...”
44. I note that the questions within the written representations were not contained in the response that Advocate Barnes gave when he was asked to justify why he wanted to cross-examine the maker of the report, however in any event, the requirements of natural justice are not a set of rules and whether fairness requires the maker of the report to be cross-examined must depend on all the circumstances. The true question in every case is whether the absence of cross-examination renders the decision unfair in all the circumstances. The Respondent says, and Advocate Barnes accepted in his oral submissions, the author of the Enforcement Report was not a person giving primary evidence in the proceedings. The fact that the Enforcement Report then puts forward conclusions about what that evidence means in terms of, for example, a party's fitness and propriety does not entitle the party to cross-examine the author of the report. Ultimately it is the SDM's conclusions on the balance of probabilities on that issue which are determinative.
45. X had the opportunity to challenge the conclusions of the Report by oral and written representations (which he did). This was not a “judicialised procedure”.⁴ In considering X's request and the reasons for it, the SDM exercised his discretion under the Guidance Note⁵ appropriately setting out the opportunities X had already had and would have to respond to the Enforcement Report and decided fairness did not require cross-examination of the maker of the report. Article 6 does not guarantee cross-examination and the SDM's decision not to allow cross-examination was reasoned and did not restrict X's ability to present arguments in support of his case.

⁴ See De Smith 7-084

⁵ Paragraph 12.5.15 of the Guidance Note

46. I do not consider that X has shown that the decision by the SDM not to allow Mr Barnes on behalf of X to cross-examine the author of the report was wrong and this ground of appeal is dismissed.
47. At all stages of the process and during the Appeal process there has been considerable and robust challenge by all of the Appellants to the disclosure of documentation by the Respondent and the investigation undertaken by the Respondent. These form grounds of appeal and/or parts of grounds of appeal pursued by all three Appellants.
48. X alleges at paragraph 2 of his cause that the Respondent acting by the SDM wrongly denied the Appellant disclosure of documents namely accounting records and bank mandates along with other documents referred to under the other parts of his appeal. Y pleads at paragraphs 6,16, 42 45-82 that there was a material error as to the facts or the procedure in that the Respondent failed to meet the requirements of procedural fairness in the conduct of the investigation and the hearing, including in particular in relation to its approach to disclosure and its failure, through the SDM, to address or give any reasons for not addressing any of the submissions of the Appellant on the facts and law in the Decision. In so doing the Respondent acted contrary to natural justice and fairness and/or were led to material errors as to fact. Y also relies on an alleged failure to take into account the requirements of Article 6 of the ECHR pleading that the delegation of the disclosure function to Firm C as alleged by Y breaches Article 6(1). Z alleged at Grounds 2(a)-(f), that the SDM's conclusion that the Respondent had undertaken a reasonable investigation and made full and adequate disclosure in support of its case against Z was an error of law and/or plainly unreasonable. At Ground 2 (a) he says that the SDM wrongly placed reliance and/or placed excessive reliance upon the undertaking provided by the Respondent's UK Counsel who was not Guernsey qualified that the Respondent had made full and adequate disclosure. He then particularises Ground 2 (at b-f) by reference to the particular matters.
49. I will deal with the allegations of a general nature first and then where complaints have been raised in relation to specific issues, to the extent that they have not been dealt with by my conclusions below, I will deal with these under the entity hearings.
50. At paragraphs 22-26 of the Decision, the SDM deals with the general submissions made to him by the parties in relation to disclosure. In summary, he found that the process had been conducted in accordance with the Guidance Note, that the Respondent had not acted unreasonably and rejected criticisms that the parties had made against the Respondent. At paragraph 33 he takes into account the lack of personal access to documentation or records after the Appellants departure from Firm A or Firm C.
51. At paragraphs 8.6 to 8.9 of the Guidance Note there is a section entitled Disclosure of Additional Material Held (Unused Material). In this section it states at paragraph 8.6:
- “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.”*
52. Thereafter at paragraph 8.7, the Guidance Note sets out what is an amended version of rule 65(4):
- “Subject to the Commission’s statutory confidentiality obligations and issues of privilege, the Commission will disclose to a party a schedule of documents. The schedule of documents will contain documents which:*
- 8.7.1 *adversely affect the Commission’s case;*
- 8.7.3 *support the party’s case; or*
- 8.7.3 *adversely affect the party’s case.”*

53. Therefore, what is disclosed on the schedule is limited to those documents which the Commission has and which fulfil the criteria at 8.7.1-8.7.3. As the heading makes clear the disclosure that the GFSC is referring to in this section is the documentation which they have received as a consequence of their investigation but is “unused” i.e. the Respondent is not relying in support of the Enforcement Section draft Report.
54. Paragraphs 8.8 and 8.9 of the Guidance Note confirms that electronic copies of the documents on the list (which I have presumed is the same as the “schedule”) will be made available for inspection upon request and that the GFSC will continue to monitor its disclosure obligations throughout the enforcement process and make any further disclosure that is appropriate as a case develops and/or new material is uncovered.
55. Earlier on in the guidance note at paragraphs 8.1-8.5, the information that the GFSC is relying on for the decision-maker to make their decision and therefore will be provided to the decision-maker is dealt with:

“8.1 This stage involves the disclosure to the party draft Enforcement Report and all of the relevant information on which the Commission proposes to rely in asking the decision-maker to act. It will be carried out by the Enforcement Division, who will be responsible for the investigation and findings.

8.2 The party will be asked to consider the information that has been provided and respond to the Enforcement Division, in writing by a specified date:

8.2.1 confirming that the facts as presented are correct or, if not, suggesting what changes might be made so that they are correct;

8.2.2 providing any additional information they consider to be material or relevant to the matter; and

8.2.3 including any comments they may wish to make in relation to the recommendations contained in the draft Enforcement Report.

8.4 All comments and material received will be considered and evaluated prior to a revised Enforcement Report being produced by the Enforcement Division. This will be marked as the “Final Enforcement Report”.

8.5 The Final Enforcement Report will be re-presented to the CRP, together with any representations received from the party. The CRP will review the matter and decide whether the initial proposed sanctions should be varied, and whether referral to a decision-maker remains appropriate. If the CRP decides that the matter should proceed to a decision-maker the Final Enforcement Report will be provided to the party.”

56. Thus, when the process reaches paragraph 8.5, the party should be in receipt of all the documentation which is relevant to the Final Enforcement Report and which will be referred to the decision-maker, in this case to the SDM. In accordance with the chronology provided by the Respondent at the end of the Skeleton Argument at the time that the Final Enforcement Report was produced, the Enforcement Division found that there was not any further material that was disclosable under 8.7 and informed the parties.⁶ The Guidance Note provides that the SDM has an option to request more information from the party or from the GFSC at this point (see 11.5 & 12.5.16 of the Guidance Note). No more information was requested in relation to the investigation into any of the Appellants by the SDM.

⁶ Letter dated 29 March 2020 GFSC to Counsel for X, letter dated 29 March 2020 GFSC to Counsel for Y, letter dated 29 March 2020 GFSC to Counsel for Z.

57. The Appellants and the Respondent corresponded on multiple occasions over disclosure throughout the process. At one point during oral submissions Advocate Barnes compared the process unfavourably to civil proceedings indicating that if he had received the requests that he had made it would have been obvious to him why the documents were within scope for disclosure. The mutual frustration with the issue led to a letter of 20 July 2020 being sent by the Respondent to counsel for Z copying the other two Appellants which set out the disclosure process. Disclosure was an issue raised in the representations at each stage by the Appellants and responded to by the GFSC including before the SDM. In the Decision at paragraphs 21-25 the SDM rejected the criticism of the parties. He considered that the disclosure process had been carried out “*fully and in accordance with the Paragraph 8.7 of the [Guidance Note]*” and that it was his view “*that the case against each Respondent has been set out with clarity and supporting documentation relating to each of the allegations has been identified. This has enabled the Respondents to reply in detail, which they have, to the allegations made against them. I cannot detect any prejudice which has been suffered by the Respondents in the way the investigation has been conducted or the enforcement proceedings pursued.*”
58. As I have set out above, the Respondent in its Guidance Note, sets out that it is obliged to follow the principles of natural justice and fairness to arrive at a proportionate and reasonable decision and the Respondent, in submissions, was clear that this is what had happened during this process.
59. In considering the duties of the Respondent in relation to the investigation and disclosure I have found the comments of Lord Mustill in *R v Secretary of State for the Home Dept, ex parte Doody [1994] 1 AC at 531*, which although it applies to an Act of Parliament, helpful:

“What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-sighted authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that

- i. Where an Act of Parliament confers an administrative power, there is a presumption that it will be exercised in a manner which is fair in all the circumstances.*
- ii. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in the application to decisions of a particular type.*
- iii. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.*
- iv. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.*
- v. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf, either before the decision is taken with a view to producing a favourable result; or after it is taken with a view to procuring its modification; or both.*
- vi. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interest, fairness will often require that he is informed of the gist of the case which he has to answer to.”*

60. The Appellants submitted that the obligations of disclosure of material included an obligation to undertake a reasonable search of documents; a duty to disclose documents which are or have been under the Respondent's control including the ability of the Respondent to obtain documents under a notice under Section 23 of the Fiduciaries Law notice ("Section 23 Notice"). The Respondent in submissions argues that Y in particular has gone beyond the points he made in argument to the SDM. However, I consider that the very wide breadth of the representations made at the SDM stage were such that this is not a new point on appeal.
61. As I indicated at the hearing, I consider that the reference to rule 65 (4) of the Royal Court Civil Rules (the "RCCR") in the Guidance Note to the unused material creates a tension in the process because it is taken out of context from the remainder of the RCCR (and then in any event the Guidance Note provides a modified version at paragraph 8.7). The "cut and paste" approach to the RCCR has the effect of excerpting a rule from an adversarial civil procedure into a process which is administrative in nature and in this particular case, asymmetrical in terms of the disclosure obligations as the documents are all in the hands of the Respondent. However, I do not agree that the reference to the RCCR has the effect argued by the Appellants of incorporating any other obligations in relation to disclosure found under Part X of the RCCR.
62. There was considerable argument on the tendency of counsel for the Appellants to refer to whether a particular document was relevant rather than the test set out in paragraph 8.7 of the Guidance Note. The Respondent relied on *Shah v. HSBC Private Bank (UK) Ltd [2011] EWCA Civ 1154* to show the impact of the change of language from the relevance test pre-CPR and in Guernsey pre-RCCR. However although this may be helpful to a limited extent, the fundamental differences between the disclosure process under part X of the RCCR and under the Guidance Note and the decision-making process under this regulatory regime mean that it does not take the matter very far including when taking into account the manner in which paragraph 8.7 was actually being applied.
63. The words of Lord Diplock in *Bushell v Secretary of State for the Environment [1981] AC 75* at page 95 are apposite:

"In exercising that discretion, as in exercising any other administrative function, they owe a constitutional duty to perform it fairly and honestly and to the best of their ability, as Lord Greene M.R. pointed out in his neglected but luminous analysis of the quasi-judicial and administrative functions of a minister as confirming authority of a compulsory purchase order made by a local authority, which is to be found in B. Johnson & Co. (Builders) Ltd. v. Minister of Health [1947] 2 All E.R. 395, 399-400. That judgment contains a salutary warning against applying to procedures involved in the making of administrative decisions concepts that are appropriate to the conduct of ordinary civil litigation between private parties."

64. It is right that the Appellants should see all the documents that the SDM has seen in coming to his decision. See *R (Primary Health Investment Properties Ltd) v Secretary of Health [2009] EWHC 519 (Admin)* McCombe J said at paragraph 120:

"Elementary fairness in any decision-making process requires that the parties should have seen all the documents in the case that are presented to the decision maker [My emphasis] and/or any adviser that decision-maker may consult."

However, Y wrongly conflates this obligation in his submissions with an obligation to search similar to that found under Rule 66 of the RCCR. It is not alleged by any of the Appellants that the SDM has seen documents which they have not. The "golden rule of full disclosure" to which Y refers to in submissions is an obligation in criminal proceedings (considered in the context of the decisions of the parole board) and of no assistance here.⁷ Further rule 66 of the RCCR (the duty to search) as pleaded by Y has no relevance to the process.

⁷ R (Roberts) v Parole Board [2005] UKHL 45 at 43

65. The Appellants rely on the ability of the Respondent to issue Section 23 Notices to support their positions in a number of ways. They say this power is tantamount to the documents being within the control of the Respondent and therefore there is an obligation on the Respondent to exercise this power on Firm A/Firm C to conform with what they say is the Respondent's duty to disclose documents which are in its control. To the extent the Respondent did not have the documentation which the Appellants sought, the Respondent could or should have used its powers under Section 23 of the Fiduciaries Law to compel Firm A/Firm C to provide this documentation. The Appellants argue that the failure by the Respondent to expand its investigation including using the powers under section 23 to request the documentation that had been set out in correspondence by each of the Appellants means that the investigation was one-sided and/or the evidence before the SDM was taken out of context. Further the Respondents did not properly engage with the requests and as a consequence the Appellants were unable to put forward their cases in response properly. It was further argued that the Section 23 Notices themselves should have been disclosed in support of the Appellants' argument that it was not a fair investigation.
66. Section 23 of the Fiduciaries Law gives the GFSC the power to require a licensed fiduciary to provide the GFSC with such information (s.23(1)(a)) or documents (s.23(2)(a)) as the GFSC may reasonably require for the performance of its functions. The general functions and statutory functions are set out in Sections 2 and 3 of the Financial Services Commission (Bailiwick of Guernsey) Law, 1987 and are drafted widely to include "*Such steps as the [GFSC] considers necessary or expedient for the effective supervision of finance business in the Bailiwick (section 2 (2) (a) and to take such steps as the [GFSC] considers necessary or expedient for (i) maintain confidence in the Bailiwick's financial services sector, and (ii) the safety and soundness and integrity of that part of the Bailiwick's financial services sector for which it has supervisory responsibility Section 2 (2) (e).* However, despite the extent of this power it does not equate to the Respondent having control of documents held by a licensed fiduciary. Section 23 must only be exercised in accordance with its statutory objectives and purpose. The Appellants have not established any basis of a right for the Appellants to require the Respondent to issue Section 23 Notices as part of its investigation under its duties of procedural fairness or natural justice. Representations from a party during the enforcement process might lead the GFSC to decide to use this power and indeed it is evident from the chronology that after the interviews with Y and Z, two further Section 23 Notices were issued. However there cannot be an obligation on the Respondent to use this power, if it does not consider the circumstances meet the criteria under the Fiduciaries Law as to do so would be, as the Respondent submitted, an abuse of power.
67. Z sought to rely on the recent case *R v Akle and Bond [2021] EWCA Crim 1879* in relation to his arguments on disclosure. However, I do not find that it is of assistance in this case as the law, the tests and obligations of the Serious Fraud Office are very different from those of the Respondent that relate to the enforcement of the Regulatory Laws. Relevantly, the process does not contain an obligation for all unused material to be provided to the parties or the SDM other than that which falls within the definition at paragraph 8.7.
68. Z and Y both assert that the five Section 23 Notices served on Firm A/Firm C should have been provided as part of the disclosure material from the Respondent. Z says the Section 23 Notices fall within the parameters of paragraph 8.7 of the Guidance Note as it goes to the Appellants' case that there was not a full and fair investigation. Y says in absence of the Section 23 Notices it is not possible to know or assess the nature of extent of the requests made to Firm C, the extent to which the Respondent recognised and appreciated its duty of search and the extent of compliance. Disclosure of the Section 23 Notices has an initial attraction however as the Respondent submits the provision of the five Section 23 Notices would not assist in establishing whether the investigation was full and fair in the absence of all the material received under the Section 23 Notices or the material which was voluntarily provided. There is no obligation to provide a list of all undisclosed material. The position that the Respondent took was that the Section 23 Notices themselves were not disclosable, but it was the underlying material that was

potentially disclosable under request in accordance with paragraph 8.7. Significantly no application was made by any of the Appellants for the specific disclosure of the Section 23 Notices and I will deal further with specific disclosure below.

69. It is argued by Y that the Respondent delegated its disclosure function to Firm C and this in turn is in breach of Article 6(1) of the Human Rights (Bailiwick of Guernsey) Law 2000 because it is not “independent and impartial”. However, I do not agree that the Respondent delegated its disclosure obligations. The arguments put forward by Y are on the basis of a misunderstanding of the disclosure process here. Unlike a civil process where disclosure follows the issue of proceedings between the parties, the obligation on the Respondent to disclose documentation is centred on the documentation that the Enforcement Division have provided to the SDM to make the decision and thereafter on other material they may have received as part of their investigation but have not provided to the SDM if the material comes with paragraph 8.7. Whilst Firm C was obliged under the five Section 23 Notices that it received to provide documentation which will have formed part of the investigation by the Respondent as well as it providing documentation to the Respondent voluntarily, this does not mean that it has played a part in the disclosure process under this regime. It is the Respondent alone who exercises the disclosure function under the Guidance Note.
70. I do consider that some of the criticism levelled by Appellants and in particular by Y that the position of the Respondent in relation to disclosure has at times been confused is a fair one. It does seem that at various stages the Respondent required the parties to jump through disclosure hoops that were not always necessary before the documents were dealt with in one way or another in accordance with the Guidance Note. However, I do not agree with Advocate Gray that this was a strategy of “*if we block, they will go away*” or is indicative of a cynical approach to the process by the Respondent.
71. Having heard all the arguments and carefully read all the pleadings, submissions and the correspondence leading up to the SDM’s Decision, this confusion appears to have been caused to a large extent by the parties being at cross-purposes about the disclosure process, the way that paragraph 8.6 and 8.7 of the Guidance Note was applied and what I have come to the conclusion are its limitations. For example, the Guidance Note does not provide for specific disclosure but it is evident from the correspondence between the parties that whilst paragraphs 8.6 and 8.7 refer to “*standard disclosure*”, during this process these paragraphs were being used as a form of specific disclosure for the unused material. Requests by the Appellants for groups of documents were generally rejected. The letter of 20 July 2020 from the Respondent to the Counsel for Z and which was copied to all counsel to which I have already referred makes clear that the Respondent “*will disclose the information it holds, where requests for specific documents [their emphasis] meeting the criteria in 8.7 of the Guidance Note are received.*” There is no reference in the Guidance Note to a party being able to apply to the SDM for specific disclosure. Y and Z did not make an application for specific disclosure to the SDM. Advocate Barnes did on behalf of X on 10 November 2020 which was unsuccessful. However, in the absence of a reference to the ability of a party to make an application for specific disclosure to the SDM in the Guidance Note and in the treatment of disclosure requests in the manner of specific rather than standard disclosure, I have considered whether this creates a procedural unfairness that undermines the Respondent’s case.
72. After careful consideration of the circumstances of this case I have come to the conclusion that it did not create a procedural unfairness. In doing so I take into account X made an application for specific disclosure (even if unsuccessful) and engaged in correspondence with the secretary to the SDM to which the other parties were copied into; that neither Y nor Z argued that if it had been explicit on the Guidance Note they would have made such an application (Advocate Gray on behalf of Y in her representations to the SDM specifically referred to not making such an application and Advocate Williams in his representations to the SDM refers to the SDM’s ability to order further disclosure but did not make an application); and the SDM also referred to “*absent of any specific disclosure application*” during the Oral Meeting which did not prompt

any applications by the parties. In relation to the wording in 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 Respondent to ensure that it discharges its obligation fairly. This process is based on the principle of the maintenance of the highest standards by the Respondent as a regulatory body. The Respondent 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. The fact that it was a non-Guernsey qualified counsel who undertook this process does not assist the Appellants. I have come to the conclusion despite the criticism levelled at the Respondent, that the Appellants have not been successful in any of their grounds of appeal in relation to the disclosure process. The Respondent 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 Respondent 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.

73. However, I do consider it would be helpful for the Respondent to consider reviewing the disclosure process including whether the parties should be supplied with a list of material which the Respondent has but is not relying on for the decision particularly in circumstances where the parties are not still part of the organisation where the documents have been sourced. This would alleviate the guessing game which the current system produces in these circumstances and more importantly provides the parties with an understanding of the full breadth of documents that the Respondent has obtained subject of course to any obligations of privilege or appropriate confidentiality (and as Advocate Gray said in her submissions the Guernsey Competition and Regulatory Authority have a process for dealing with this or something akin to rule 76 under the RCCR could be introduced (subject to my warnings about piecemeal importation of the RCCR)). Further the Respondent should consider rewording the Guidance Note to reflect more accurately the process and also making explicit the ability of a party subject to the enforcement process being able to make such a specific disclosure request to the SDM.
74. Complaints were made throughout the process and in the appeals, that in the absence of material which the Appellants said existed or might exist that the SDM lacked the context in which to place the allegations made by the Enforcement Division which would vindicate the Appellants. In fact, what the Appellants wanted to achieve by many of their requests for disclosure was the expansion of the investigative framework that the Enforcement Division had decided was sufficient to make the recommendations that it did in the enforcement report.
75. Advocate Gray on behalf of Y said that the investigation demonstrated confirmation bias on the part of the Respondent. She complained of the failure by the Respondent to adopt a wider process (perhaps more akin to the process of investigation undertaken by Guernsey Competition and Regulatory Authority) as well as the failure by the SDM to take into account that the extent of the investigation by the Respondent was only that which conformed to the narrative of the Enforcement Division and the reliance on the support of a third party whose interests were directly opposed to Y. In the absence of being able to place the documents for example within the context of an entire client relationship the SDM could not make a reasonable decision about the conduct of Y or in the absence of all the documents, the few documents that the Respondent relied on were effectively taken out of context and therefore the SDM could not make a fair decision. The SDM failed to take into account that "context is everything". This is further exacerbated by the Appellants not having access to the documentation that they needed to assist with their case unless the Respondent obtained the documentation.
76. The Respondent argued that there is no unfairness to the parties that documents were not obtained (if they existed) as the parties are unable to establish that the documents sought would have assisted them or undermined the Respondent's case. The Respondent says that the

documents sought were just as likely to have assisted its case. The Respondent says that the parties obtained an advantage in being able to make submissions on the absence of material to attempt to convince the SDM that he did not have sufficient material to make a decision. I do not consider that this argument assists the Respondent. The Respondent is obliged to carry out an investigation in accordance with the principles of natural justice in the context of the statutory scheme set out in the Regulatory Laws.

77. As I have noted above, the interviews lead to two further Section 23 Notices being issued. During the course of the hearing in response to questions by me in relation to the Entity B and Entity C matter, the representative for the Respondent confirmed that following the written responses to the Draft Enforcement report, this led the Respondent to contact Firm C by email requesting more information. This was provided on 14 April 2020 which included the Loan Agreement and this was subsequently referred to in the Final Report and the Loan Agreement was included in the additional documents that were provided with the Final Report on 21 June 2021. Evidently where the Respondent considered it needed to extend its investigation due to issues raised by the parties, it took steps to do so.

78. Paragraph 11.5 of the Guidance Note provides that a decision maker has a right to seek further information and/or clarification at any stage and specifically:

“Where an SDM wishes further information to be provided, a request will be sent via the secretary who will seek the information from the relevant party or from the Commission and revert to the SDM.”

79. There is also a provision at 12.5.16 of the Guidance Note in the section dealing with the Meeting:

“The decision-maker may, at its sole discretion, adjourn the meeting. This may occur where the decision-maker requests that the Principal Executive Officer or the party provide further material or attend a subsequent meeting, or to assist the decision-maker in obtaining information it requires in order to make a final decision, though where strict statutory provisions exist the decision-maker is unable to adjourn a meeting scheduled to hear oral representations beyond the Representation Period.”

80. None of the parties made an application for the SDM to obtain more information although in written submissions to the SDM (in the context of disclosure) Z reminded the SDM of the power under paragraph 11.5 and said that there were certain documents which should be placed before the SDM before making his final determination. The attempts to use a data protection subject request (to Firm C and the liquidators of Firm A) by Y and Z were unsuccessful. Although I am not convinced that these requests were pursued as far as they might have been, given that it is only information about the subject that would be provided i.e. Y and Z respectively, they are unlikely to have been very helpful. After consideration of all the evidence before me I am not convinced that the Appellants did all they could to try to obtain the documentation which they say they needed to present their case from Firm C. Nor do I consider that there are grounds for Y's assertion that the Respondent was reliant on the support of a third party whose interests were directly opposed to Y. It was the Respondent's investigation. There was some voluntary disclosure but Section 23 Notices were issued which compelled Firm C to provide the documentation that the Respondent said it required. If Firm C had failed to comply with the notices then the Respondent no doubt would have taken appropriate action. It appears that the position was taken to an extent that it was the Respondent's role to “prove their case”. Y's and Z's positions in particular were informed by their view that the burden was on the Respondent however as I have found above, the burden of proof is not relevant to these proceedings. Nevertheless, if the Appellants are able to establish that in the absence of the material which the Appellants say should have been part of the investigation, the SDM could not perform his functions and that the SDM could not apprise himself of all factors relevant to its decision as to fitness and propriety of the Appellants, then this has the basis for a potentially successful ground of appeal. However, to do this it is necessary to consider the findings made against the

Appellants and where it is alleged by the Appellants that additional material was necessary in order for the SDM to properly make his decision. In view of the seriousness of this allegation I have considered this issue in relation to each finding, even if I do not explicitly mention it in this judgment.

81. In line with my comments above about amendments to the Guidance Note, the GFSC should make transparent the mechanism for the parties to request the SDM to exercise his discretion to obtain further material.
82. The Appellants complain with Y specifically asserting in his appeal at paragraphs 4, 5 and 33-40 that there is a failure by the SDM to properly take account of the submissions of the Appellants. This is demonstrated most clearly by the lack of change in the documentation as it went through the process despite numerous and substantial representations made by the Appellants at each opportunity. Advocate Gray described this as the process adopting “one narrative” by failing to take into account the explanations put forward by the parties. Advocate Williams helpfully produced a comparison document which showed the lack of change between the Final Minded to Notice and the Decision. The Appellants argue that a failure to take into account the representations of the Appellants means that the Decision was wrong, unreasonable, irrational or lacked proportionality and a breach of Article 6 of ECHR.
83. Whilst I am not persuaded that this is a criminal or quasi-criminal matter, there is no question that Article 6 of the ECHR confers a right to a fair trial in civil matters and the consideration of the Appellants’ human rights in this context is important. Further, the more substantial the interference with human rights the more the court will require by way of justification, before it is satisfied that the decision is reasonable or proportionate.⁸ That the decision is proportionate is not only a requirement of a human rights compliant decision, it is a specific ground of appeal under the relevant legislation.
84. At paragraph 19 to 21 of the Decision the SDM sets out why he did not ventilate in detail the representation made to him. He states that he has reconsidered his provisional views set out in the Minded To Notice, having regard to the representations, both oral and written, made to him by the Appellants. He recognises that the representations were extensive, detailed and wide ranging. He says he has carefully considered all of the submissions made but has only referred to those submissions where he concluded it was essential for him to do so for the purpose of the Decision. I do not consider it was necessary for the SDM to set out in detail all the extensive representations that were made to him when he has made clear that he has considered them all. Contrary to the submissions on behalf of Y I do not consider that this demonstrates that there has not been a balancing exercise of the respective representations before the SDM nor that he has not given the Appellants’ representations sufficient weight nor that he failed to take them into account. The reasons that the SDM gives are proper, adequate and intelligible and deal with the substantial points that have been raised.⁹ I consider that the Decision meets the expectation that it will, “*bear the hallmarks of fairly closely reasoned decisions at, or approaching, the style of decision that would be expected from a judicial tribunal.*”¹⁰
85. I will consider whether the Decision was reasonable and proportionate as I deal with the individual matters where findings were made against the Appellants.

Trust A

86. Trust A comprised five trust structures established by four brothers and one sister of the same family, all are Country A nationals and residents. Originally the trustee had been Firm D. Firm B became the trustee of four of the trust structures (Trust C, Trust D, Trust E and Trust F) on 19 December 2008. On 6th February 2013, Y confirmed to the Commission that administration

⁸ See also *Pham v Secretary of State for the Home Department* [2015] UQC 19

⁹ *Uprichard v Scottish Ministers and another* [2013]UQC 21

¹⁰ *Bordeaux Services (Guernsey) Limited et al v GFSC (ibid)* at paragraph 28,

for Firm B was undertaken from Guernsey by Firm A under an administration agreement, with the trustee decisions undertaken by a third party trustee, Firm E.

87. Firm B was liquidated on 2 December 2013 and struck from the Country C company records.

Y

88. In July 2012, discussions commenced between Y / V and Family A with regard to the family making voluntary disclosures to the Country A revenue service on each trust and terminating the trust, with trust assets being repatriated to the individuals in Country A. Family A retained the services of C, a Country A based Advocate to assist with the exercise.
89. Between 30 July 2012 and 13 August 2012, closure fees amounting to £353,481.45 were debited from accounts for Trust A and these fees were credited to Firm A's Bank 2 Deferred Interest Account (the "DI account"). In correspondence about the fees to be charged Y referred to the costs of insurance required by the GFSC as being part of the fees, saying he had no option as this was a requirement of the GFSC. In the correspondence on fees there is no reference to personal payments being made to Y or to Firm B although payments were made to Y and Firm B out of the funds held on the DI account. There was also a meeting at some time before the 11 September 2012 between members of Family A and Y along with C where fees were discussed. There are references in correspondence to the fees relating to further work relating to closure and a percentage of the retained fees being for "*eminent work during the years*". A calculation provided by Firm A works out fees on the basis of 3 years' fees. A schedule, subsequently provided by Y at the Oral Meeting, shows those fees as having been paid to Firm B although Firm B had ceased to issue invoices after January 2012. The amount returned to beneficiaries from the retained amount was £66,069.35. The refunds were made to the Trust A beneficiaries between 20 September 2012 and 18 December 2012 leaving the sum of £287,412.10 on the DI account.
90. Y admitted in his interview that when he referred to insurance in the correspondence with the family, he was referring to the cost of Firm A's Professional Indemnity Insurance. This was not an additional or separate premium which had to be paid, but it was a stance adopted in a charging negotiation with his clients. Y stated: "*I was laying it on a bit thick basically trying to get a decent fee out of the closure is what it comes back to.*" Furthermore, he stated that "*at the end of the day we're in business to make money, aren't we?*" and "*so these are tough. these are big strong boys. You know, they come from a business family. They have a pretty robust negotiating stance and you have to deal with that.*".
91. Y said that closure fees were the culmination of a number of services provided to the family over a period of 25 years to be viewed against the backdrop of his relationship with the family. Y's case in essence is that the sums paid to and held by Firm A in the DI account were in fact due to him as the successor in title to Firm B. After the repayment of the sums to Family A, the residual sums in the DI account less any payments due to Firm A for work done by Firm A would be held for the benefit of Y.
92. Y accepted that there were no consultancy agreements or other documents in place between him and Family A stating that he was undertaking work in a personal capacity and being remunerated accordingly.
93. The SDM found that it was not documented that personal payments to Y had been agreed by Family A, there is no evidence of informed consent, no fee notes were filed and Firm B stopped issuing invoices after January 2012. Further, that there was no record of the nature of the payments described by Y in the books of Firm A, nor explanation given to the directors of Firm A.
94. Y also said that schedules and supporting ledgers provided for the first time by Y on 22nd February 2021 at the Oral Meeting were inconsistent with the description of the payments in an email of 2 December 2013 from Y to D for the Country A tax authorities for "*Firm's B*

management fees during 2012 in relation to Trust E” (disclosed prior to the Oral Meeting by X) where Y referred to a payment to Firm A of £90,041.12 as “*the agreed 1.75% retention to cover insurance and further work relating to the closure*”.

95. The SDM found that the holding of the £353,481.45 and the retention of £287,000 as well as the stance adopted during negotiation of the appropriate fees was neither fair nor transparent in manner. He found that there was a deliberate ploy which demonstrated a lack of probity on the part of Y. Y knew that no insurance premium was due but was determined to achieve as high a level of fees as he could. Further that by the objective standards of ordinary decent people this moved beyond hard bargaining and was dishonest.
96. He found it was an aggravating factor that there was a reference to an insurance requirement of the GFSC to justify and explain the level of fees being charged. He found that the holding of the £353,481.45 in July and August 2012 and the asset distributions commenced before the deeds of appointment indemnity and termination were fully executed in December 2012, and therefore without having the necessary information or appropriate written authorities demonstrated Firm A acting without prudence or integrity.
97. Relying on analysis by the Respondent he also found that the level of closure fees charged by Firm A (2.5% of Trust assets, or the equivalent of the last 3 years fees) was significantly out of step with market practice.
98. In March 2013 V gave the payment instructions for £110,000 to be paid into accounts in the name of Y or directly for his benefit and £18,718.44 to be paid to Firm A. Attached to the payment instruction is a hand-written note headed up “*Slush Fund*”. The Slush Fund appeared to be the monies held on the DI account.
99. Further amounts were deducted from the DI account in August 2013 to pay invoices issued by Firm A dated 15 July 2013. On 17 December 2013 £7,000 was transferred from DI account to another Firm A account held with Bank 2 and subsequently transferred to Company L, in Guernsey in relation to expenses on Y’s local property.
100. On 17 April 2014 a payment of £182,741.82 was made from the DI account to the account of Firm A and Y at Bank 3 Guernsey. Y received a total of 88.45% (£254,210.86) of the Fees paid by Family A for which the SDM found there was no rationale.
101. During his interview, Y stated that the money that was paid directly to him or for his benefit from the DI account were personal fees for consultancy activity, adding: “*that was a quasi-tax advisory activity. It wasn’t professional, it wasn’t fiduciary administration which was Firm A’s business. This was a separate activity, that was the view I took.*”. Y accepted that the fee agreement was with Firm A and not him.
102. The SDM found that work carried out for Trust A in a personal capacity by Y had not been identified, and indeed it is difficult to assess how such work could be done and properly charged for absent informed agreement. He further found that this work would plainly have to be outside the scope of work which Firm A would have carried out.
103. He also found that the change of stance by Y between his interview and the representations made on his behalf on how the substantial sums were justified as personal payments was “*regrettable*” and reflects adversely on his competence and probity. He also came to the conclusion that the change of stance supported the conclusion that the amounts taken by Y were not for any form of due personal consultancy fee. He also found the explanations about Firm B unconvincing.
104. The SDM found that Y in his conduct fell far short of what is required to be fit and proper.
105. Y stated that he had paid income tax on the transaction however the SDM found that Y’s income tax returns and assessments appear to demonstrate that what he stated during his interview and

in his response to the draft report was untrue, and therefore this reflected adversely on his probity and integrity.

106. The SDM was satisfied that the actions in respect of Trust A fees and explanations given for personal payments are further examples of failure to conduct business with integrity as required by Principle 2 of the Fiduciaries Law TSP Code and Principle 1 of the Principles of Conduct of Finance Business and a failure to treat the interests of beneficiaries as paramount as required by Principle 4 of the Fiduciaries Law TSP Code.
107. The SDM found that, as a director of Firm A, Y had obligations under Principle 3 of the Fiduciaries Law Directors Code to treat the firm as a separate entity from its directors, shareholders and others and avoid conflicts of interest. As a director, Y had a fiduciary duty to act in the best interests of the firm, but again failed to do so.
108. Y's grounds of appeal on this matter are set out in paragraphs 97 -100 of his cause. Y says that contrary to the findings of the SDM, there is no fundamental change in his explanations. However, the lack of access to underlying documents and what he says are defects in the interview process including the lapse in time, he could not have clarity on every precise date and detail. In particular, he says the failure by the GFSC to obtain the full trail of correspondence between Y, D, and V and the full client file means that there would have been clarity on the insurance issue. Y says that the evidence of E and C was dismissed by the SDM for want of contemporaneous documentation which would have been supported by the entire client file and the SDM therefore failed to afford sufficient or indeed any weight to this evidence. Y also says that the client files would have shown demonstratively that Firm B was the trustee for all five trusts and that the Commission had no jurisdictional competence over this matter due to the trusts being managed entirely in Country C and therefore the enforcement action would have been seen to be ultra vires.
109. Y's position is that the insurance position is a red herring and that there was no proper basis for inferring dishonesty or a lack of integrity from his references to insurance. Y also argues that additional disclosure of emails would have clarified the position. Advocate Gray submitted that I should take account of the fact that only 130 pages of disclosure were produced for this matter of which nearly half were trust deeds. The criticism of Y in relation to the changing of his story was also unfair "*without access to underlying documents, and in light of the defects noted above in relation to the interview process, he cannot have clarity on every precise date and detail*".
110. Y also says that comparisons with the level of fees charged by other organisations should not be used to show that it was significantly out of step with market practice as the comparisons were not like with like.
111. In relation to the weight placed on E and C's evidence, I can find no proper basis for this pleading. In the Decision at paragraph 151 the SDM refers directly to the statement of C but also to its limited assistance which given the contents of the letter from C was an entirely reasonable conclusion to come to. E's brief email exchange did not assist Y other than to say the family had not complained.
112. The representations made said that the money paid to Y accounted for in his personal tax calculations as income of a company called Company M. However, the SDM was entitled to take into account that the assertions in relation to Company M were unsubstantiated by evidence and that Y failed to mention Company M in previous explanations.
113. Y says that the retention of funds and then subsequently agreeing a level of fees which would be deducted was in line with industry practice. However, there is no evidence that there was any agreement about the substantial personal fees he deducted. At interview he accepted that this was the case and although he relies on the confirmation of C as to the level of fees, there is no indication in the correspondence either at the time or subsequently from C that there was an expectation that Y would be in receipt of a substantial portion of the fees. Whilst the retention

of fees is something that happens within the industry, there is no evidence that there was an agreement by Family A to do this in principle or the amount or on the timing. I do not consider the fact that there was no complaint by the family assists Y.

114. I agree with Y's submissions that the comparison of fees with the other trust companies is not necessarily helpful unless the comparisons are of similar firms undertaking similar steps. There will be a considerable range of fees charged in the industry depending on the type and size of trust company undertaking the work in the fees and the complexity of the matter. Whilst perhaps not used as much as they used to be ad valorem fees can be used. Nevertheless, although the SDM refers to market practice in the Decision, it must be read in the context of his entire reasoning on this issue and taking into account the entirety of his reasoning where he says at paragraph 168 and 169:

"168. During the negotiations with Family A incorrect and misleading statements

were made by Y to justify the level of fees being taken. I accept that it is an

aggravating factor that the Firm referred to an insurance requirement of the GFSC to justify and explain the level of fees being charged.

169. It would appear from an analysis by the GFSC that the level of closure fees charged

by the Firm (2.5% of Trust assets, or the equivalent of the last 3 years fees) was significantly out of step with market practice. The majority charge on a time incurred basis, subject to minimum fees ranging from £1,000 - £4,000. One other firm included in the analysis which charged on a percentage of assets basis, was at the rate of 0.13% where assets exceeded £1,119,000. I am satisfied that, particularly as the level of fees was achieved by reference to a non-existent insurance premium, the charges were excessive and neither fair nor transparent in the way they were negotiated. True it is that the fees were agreed with Family A, but they may well have been unaware they could have negotiated a smaller fee. It may well be that percentage calculations are not unusual, but they have to be fair and proportionate. That was not the case here, and the fees were excessive, especially having regard to how they were negotiated."

115. Therefore, on this issue I do not consider that the comparison with other trust companies affects the finding overall and his conclusions on this issue was a reasonable one for the SDM to come to.

116. With regard to the insurance issue, despite the submissions of Advocate Gray including praying in aid the passage of time and other possible documentation, and alleged hostile questioning in the interview transcript, Y is unequivocal in interview about why he had referred to the insurance in the correspondence. With regard to the criticism of the interview I carefully read the transcript and could find no fault in the conclusion that the SDM came to when he said he could detect no aggression. Further it is clear that the work carried out for Trust A in a personal capacity by Y has not been identified or has been set out in an informed agreement. It appears to be work outside of the scope that Firm A would have carried out (Y refers to it as "*quasi tax advisory*"). In interview, Y stated,

"At the end of the day I think it was a judgement exercise on how much Firm A had done and how much... because at the end of the day we had an agreed fee and it was... it was divided."

117. Although there is no specific ground pleaded by Y in respect of this matter, at paragraph 105 of his cause, Y pleads that the arguments on disclosure undermine the SDM's conclusions on Y's lack of honesty and integrity and his general grounds assert that the Decision was one no reasonable decision-maker could have reached and was subject to a lack of proportionality include these conclusions.

118. The SDM makes a number of findings in relation to Y demonstrating a lack of probity in relation to this matter. The SDM sets out a paragraph 30 of the Decision the applicable test for dishonesty which equates to a lack of probity from Ivey v Genting Supreme Court in Ivey v Genting Casinos (UK) [2017] UKSC 67:

“These several considerations provide convincing grounds for holding that the second leg of the test propounded in Ghosh [1982] QB 1053 does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378 and by Lord Hoffmann in Barlow Clowes [2006] 1 WLR 1476, para 10 [...]. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was dishonest is to be determined by the factfinder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”

119. The test is not disputed by any of the Appellants. At paragraph 32 of the Decision, he considers the approach he will take in relation to serious allegations where it is the civil standard of proof:

“I was referred to the well-known principles from H (Minors) [1996] AC 563 and other related decisions, as summarized in Phipson on Evidence, 19th Ed at paragraph 57, setting out the approach to be adopted when serious allegations are made when the standard of proof is the civil standard: “Where a serious allegation is made in a civil case, such as an allegation of criminal conduct, the standard of proof remains the civil standard. Otherwise, where there was a claim for fraudulent misrepresentation and breach of warranty, the court might hold that the warranty claim was proven and the fraud claim was not proven on the same facts. However, the civil standard is flexible in its application. Thus if a serious allegation is made then more cogent evidence may be required to overcome the unlikelihood of what is alleged, in order to prove the allegation. It has also been held that the more serious the consequences for an individual if allegations are proved, the stronger the evidence must be before a court will find the allegation proved.” I have throughout applied these principles when assessing the allegations made against the Respondents.”

120. The SDM found that Y knew that no insurance premium (other than the professional indemnity insurance) was due, but he was determined to achieve as high a level of fees as he could. By the objective standards of ordinary decent people this moved beyond hard bargaining and was dishonest. Further that his income tax returns did not show the income from the fees that Y said he had declared to income tax in his interview and response to the draft report. Subsequently the ledgers that were produced by Y on 22 February 2021 refer to substantial payments by way of consultancy fees to Company M, which apparently owed Y money on a loan account. These latter assertions by Y were unsupported by evidence other than the ledgers themselves and a reference was made to a 2013 meeting with the GFSC after an anonymous letter where Company M was referred to by Y. On the issue of insurance Y’s own admissions in interview were clear evidence of what was Y’s actual state of knowledge as to the facts. Further the SDM was entitled to conclude that what Y stated during his interview and in his response to the draft report was untrue. The SDM was entitled to conclude that Y knew when he said unequivocally that when he said he had declared these fees on his own personal income tax declaration in interview and in response to the draft report that this was not the case. There was cogent evidence for the SDM to come to the conclusions that he did in relation to Y’s dishonesty. Further, the SDM was entitled to conclude that objectively Y would be viewed as dishonest by the standards of ordinary decent people.

121. Y argues that the rulings of lack of integrity were not ones that the SDM should have come to. At paragraph 31 the SDM makes clear his approach to allegations where the Respondents were alleged to involve a lack of integrity:

“This concept was considered in Williams v SE [2017] EWHC 1478 and in Wingate & Evans v SE and SE v Malins [2018] EWCA Civ 366. It is a different concept to dishonesty (though dishonesty plainly involves a lack of integrity). In Williams, the court stated at paragraph 54: “Want of integrity arises when, objectively judged, a solicitor fails to meet the high professional standards to be expected of a solicitor.” The nebulous nature of the concept and difficulties of defining it are referred to in Wingate. In paragraph 100, the court stated “Integrity connotes adherence to the ethical standards of one’s own profession.”

122. Despite the submissions put forward on Y’s behalf in relation to the Family A matter I am not persuaded that Advocate Gray has shown that the SDM made any error, howsoever framed, in making the findings that he did in relation to Y’s failings in the Family A matter. Having come to the conclusions that he did, the SDM was entitled to separately conclude that objectively Y had demonstrated lack of integrity. The arguments on disclosure put forward by Y, including in relation to the entire client file, do not assist him given the basis of the SDM’s finding. His conclusions in relation to Y’s conduct on this matter are reasonable and proportionate.
123. In Y’s pleading he contends that full documentation would have shown that Firm B was trustee for all five trusts and therefore the Respondent has no jurisdiction competence as the trusts were managed in Country C leading to a strong suggestion that the action would have been seen as ultra vires. This was not pursued in oral argument, however, for the avoidance of doubt, I do not consider the actions of the Respondent are ultra vires as the trustee had been Firm D, it was not Firm B that is the subject of this Decision but rather the actions of Firm A and the individuals who are the Appellants to this appeal.

X

124. X’s grounds of appeal are set out at paragraphs 1-5 of his cause. He says that the SDM wrongly decided that X knew Firm A had charged Trust A inappropriately large fees for the closure of the trust and X ought to have challenged the charges; wrongly denied X the disclosure of documents namely accounting records and bank records; wrongly decided that X was aware that the fees had been paid into the DI account and from that account to the personal benefit of Y rather than Firm A; wrongly decided that X ought to have objected to the charging of the fees; and wrongly failed to take into account the matters pleaded in support of the previous grounds of appeal.
125. The SDM found that X should have been put on alert by Y’s use of the term “*slush fund*”. The SDM found that X must have known that the retained fees from Trust A had been put on the DI account, that he ought to have challenged Y about the email from Y saying, “*can you liaise on the amounts drawn down from the slush fund*”, that he was aware of the fees being taken and held in a Firm A bank account, and he signed off Firm A’s accounts for 2013 and 2014, which did not include the income from the fees. Further, he ought to have challenged the payments made to Y rather than the Firm, and as MLRO X had additional responsibility in ensuring Firm A’s compliance. He concluded that along with Y, X led Firm A to breach Principle 2 and Principle 4 of the Fiduciaries Law TSP Code, that X (along with Y) breached Principle 3 of the Fiduciaries Law Directors Code; that along with Z and Y he breached Principle 1 of the principles of Conduct of Finance Business.
126. In his submissions X asserts that the document where the word “*slush fund*” appears is not a complete document and lacks context. He says that there is no response recorded and that this

is the basis of the case against X. Whilst taken on its own, the reference to “*slush fund*” could be passed off as a flippant comment. If this unprofessional comment had been the extent of issue, then I would have sympathy with X. Although Advocate Barnes raises the issue of the email not being authentic, given that the use of the phrase by Y is not denied by X, nor is X arguing that the trail of emails would reveal his challenge I am not satisfied that this assists X. Contrary to the submissions of Advocate Barnes, the context of this comment is that a substantial amount of funds was being deducted from Trust A, of which only a relatively small proportion were being used for the fees for Firm A of which he was a director with the duties responsibilities and obligations that go with this role. The thread of X’s appeal is that ignorance is sufficient defence, that it was enough that the clients were not complaining and that the time spent by Firm A in closing was not produced for something that was complex. However, the SDM’s conclusions are carefully considered. Given X’s role, the amount, purpose and distribution of the fees were all things that the SDM reasonably concluded that X ought to have been aware of. Whilst X says he was not aware of the actual account into which it was going, he should have been on proper enquiry as to where these substantial amounts were going. As a director of Firm A, it was reasonable to conclude that, given that he was aware of the monies going to an account (from which the Firm A’s fees were subsequently deducted), the scale of the fees that were apparently being charged, he should have challenged the deductions being made given the fees that Firm A was charging. The fact that it was to his own disadvantage does not mean that on the evidence that the SDM was not entitled to conclude X a director, MLRO and qualified accountant should have challenged it. The SDM accepted that X was not certain as to the nature of the residual Trust A fees and therefore his role was much less than Y’s, but X had knowledge of the fees charged and failed to challenge these fees. Given X’s role the SDM was entitled to come to these conclusions.

127. Given the nature of the findings against X I do not consider that the mandate for the DI account nor the other documentation sought would have assisted X given the findings of the SDM on the Trust A matter as a whole. Further the Respondent was clear that this was not a matter of disclosure as they did not have the DI account mandate. It was reasonable for the SDM to come to the decision that he did in the absence of this mandate.
128. With regard to the reference to the MLRO, this is a further example of where the context is important and I agree with the submissions of the Respondent that this is a reference to X’s responsibilities generally as an MLRO and not specifically in relation to the Trust A matter.

Entity A

129. Entity A is a Nevis registered entity incorporated on 23 February 2007. Firm A took on the administration of this entity on or around June 2012. Entity A was previously administered by another firm, of which X had been a director. Upon transfer to Firm A, X was the relationship manager given his previous dealings with Family B. Following X’s departure from Firm A on 6 April 2016, the relationship manager was Y, with the directors of Entity A being Y, V and Z (who replaced X when he left).

Y

130. Y sets out his specific grounds of appeal with regard to this matter at paragraphs 83-86.
131. As majority shareholder, controller, managing director and constant member of the board, Y oversaw and controlled the operation of Firm A. The SDM found that Y failed to act with probity, competence and soundness of judgment in dealing with the issues on Entity A and that he knowingly sought professional advice based on incorrect information that he misleadingly provided. He concluded that this was not the behaviour of a professionally competent person and, objectively, Y would be viewed as dishonest by the standards of ordinary, decent people. Further, he found that the whole issue of the beneficial ownership of Entity A and the transfer to G evidences Y’s lack of probity and soundness of judgement. He led Firm A to fail to conduct business with integrity, as required by Principle 2 of the Fiduciaries Law Corporate

Services Providers code (“Fiduciaries Law CSP code”) and by Principle 1 of the principles of conduct of finance business. The SDM concluded that Y was fully aware in February 2017 that G was the documented owner of Entity A and he engaged with professional firms, presenting knowingly false information to obtain advice in respect of the proposed transfer of ownership.

132. The SDM refers to Y producing two file notes with regard to ownership in February and June 2017 which contradict one another, with the latter note not referring to the other or correcting the other. In a file note dated 3 February 2017, Y wrote to F and enclosed a file note headed, “*Entity A notes as of 3rd February 2017*”. This was the note on the Firm A file. In this note, Y states unequivocally that the company is owned by G. In the note, Y records the lack of a client agreement and raises concerns regarding G’s tax position in Country B and whether she should or has declared her ownership. He notes that the ownership aspect is serious, as exchange of information with that country was due to start in June 2018. It also says, “*However, it may be that all is in order.*” In the covering email, Y suggests to F that there is a tax issue that potentially could be avoided by declaring Entity A as a gift from F, that G would declare as an inheritance.
133. On 23 February, Y wrote to H of Company D, London and sought information in relation to a hypothetical scenario where a UK domiciled resident owns 100 percent of an off-shore company and, in particular,

“It is now proposed that he gives the company (or the funds) to his daughter who lives in Country B, so I will check out that side of things over there.”

134. The SDM was satisfied that in making the above statement, Y demonstrated a lack of probity and soundness of judgment. This is because Y was fully aware that G is the documented owner of Entity A, as he set out unequivocally in his file note dated 3 February 2017 (and therefore F did not need to gift the company to G). He found that Y is knowingly seeking professional advice based on the incorrect information he has misleadingly provided. This is not the behaviour of a professionally competent person, and objectively Y would be viewed as dishonest by the standards of ordinary decent people. Y in interview stated that he thought that the Firm had made an error, and notwithstanding all the documented references to G being the beneficial owner, it was F all along who was the beneficial owner. The SDM found this explanation implausible and contrary to the clearly documented ownership of Entity A.
135. There was then further, additional advice sought by Y on 23 February 2017 from Company K again setting out a scenario reflecting ownership of Entity A by F and not by his daughter, contrary to Y’s file note of 3 February 2017 and the evidence contained on the file, from which he obtained information which led to the file note.
136. Y wrote again on 7 March 2017 to Company D, again setting out scenarios which were on the basis that F was the owner, gifting the value of Entity A to G, rather than her being the actual owner. The SDM concludes the scenario is clearly that of Entity A, but the details are falsely portrayed by Y and not based on the known facts held by Firm A.
137. This was repeated in other requests for advice. At interview, Y produced a copy of the file note dated 6 June 2017 which he read out. This was the first time this document had been seen by the GFSC as the file note was not on the Firm A records. Y stated that he met with F on 6 June 2017 to discuss the situation, and that he considered F to be the beneficial owner by virtue of his being the economic contributor to Entity A and the lack of engagement with G. In the file note, Y records:

“We hold no due diligence on G, despite numerous requests, and it is clear that G has never given an instruction, asked for information nor involved herself in any way with the company. Emails to her are ignored.”

Y said in interview:

“I’ve got here that we hold no due diligence on G. I think that was actually incorrect. I think we probably did have some due diligence on her but it was not fully up-to-date and despite numerous requests”

The SDM noted that the evidence was that Firm A did hold acceptable CDD for G from June 2012, and emails or the file, showed that she had been in contact with X at various times.

138. Further, there is a reference in the note to further action, *“On the basis of the above, I will approach Company K in Country B to establish if there is a tax efficient way to transfer the value from F to G”* However, the SDM found that the evidence shows that Y had already initiated contact with Company K.
139. At paragraph 58 of the Decision, the SDM records that he is, *“Highly sceptical as to the authenticity of the file note on the basis that no copy was on the file, it contradicts the file note of 3rd February 2017, to which it makes no reference, and that it is materially inaccurate in terms of recording the position with Company K.”*
140. The SDM also points to an exchange of correspondence in January 2018 between Company K and Y. Company K wrote to Y on 11 January 2018, enclosing a letter they had provided to G dated the previous day. Y, in his response to Company K did not correct any of the errors in Company K’s letter dealing with the actual ownership of Entity A.
141. The SDM also points to the emails between Y and V following the exchange with Company K. When Y asked V to assist, her response dated 15 February 2018 was, *“As you know, the advice given doesn’t directly relate to the facts on the file, and I know you have had many chats with F and Company K, so I’d like your feedback so we know what was discussed if that’s okay, and then we can decide how to proceed.”*
142. On 1 March 2018 V wrote to Y and I *“It’s not just this, it is also the fact that our files show G as being the [beneficial owner] so we need to know how to deal with this.”* Y’s response to this on 1 March 2018 copying in I, was:
- “I know that it is a problem but please bear with me because if, our nominees can sell to a structure where G is the ultimate owner, the end result is that the client is who we have documented as the client. (My twisted mind again). The reality here is that X fudged the issue on the basis that nobody would know about it. The problem is that they virtually hang you in Country B for undeclared offshore assets. F contends that he always wanted the assets in Entity A to end up with G so if we can engineer that in a declarable form without compromising ourselves... big fee. Rest assured, I won’t commit us to anything until everyone is comfortable.”*
143. In interview, Y was adamant that an error had been made by Firm A in terms of the UBO of Entity A. Whilst the SDM did not think that was the case, he accepted that steps could have been taken to resolve the position, but they were not.
144. The SDM took the view that the whole issue of beneficial ownership and transfer to G of what was already hers was to avoid tax and this clearly evidenced Y’s lack of probity and soundness of judgement. He also refers to the correspondence with professional advisors where Y states with certainty that F is the owner of Entity A when he knows this not to be the case. He concluded that ordinary, decent people would find this to be dishonest. He also refers to the position of V, who recognised the true position. On the 2 March 2018, Y wrote to I stating that, *“The records were fudged by X and we only got details (CDD on G) after I involved Company K”*. The SDM noted that the comment of CDD on G (as the beneficial owner) was incorrect as it had been held since June 2012.
145. Y, in his interview referred to a meeting that he says that he would have called in order to regularise the ownership position. However, the SDM notes that no record of any such request has been evidenced, nor referred to by any of the other board members. V, in her interview

stated, “*You couldn’t make that sort of decision (ownership transfer) without having a meeting and having all the parties, the tax advisors, everybody on the board, everything involved.*” It was in this context that the SDM came to the conclusion that Y, by his actions, led Firm A into failing to conduct business with integrity as required by Principle two of the Fiduciaries law CSP code, and Principle one of the Principles of Conduct of Finance Business. Y was fully aware in February 2017 that G was the documented owner of Entity A, and he engaged with professional firms presenting knowingly false information to obtain advice in respect of the proposed transfer of ownership.

146. Advocate Gray set out by detailed reference to the April 2020 submissions and the written and oral representations that she made before the SDM, the representations made on behalf of Y and says that the reasons set out in the Decision are wrong and wholly inadequate. Y complains that the SDM has failed to take into account the extensive representations made on his behalf as the only change between the Minded to Notice and the Final Decision is a reference to a general ledger document that Y had found in his papers. This demonstrates a failure of the SDM to balance the representations made on behalf of Y or put sufficient weight upon them. She says this also goes to her client’s complaints about disclosure as before the SDM was only a tiny snapshot of the papers on this client matter as there are only 77 pages of documentation.
147. Y argues that following X leaving Firm A he reviewed the file and he said that he had to try to work out the position of who was the UBO as there were inconsistencies. Advocate Gray says that there were markers and flags which pointed to F and Y did nothing wrong in following his line of enquiry.
148. Y denies that the file note of 6 June 2017 is contradictory to the file note of 3 February 2017 and is reflective of him taking actions in relation to Entity A from a desire to rectify what he understood to be an historic mistake in documentation. Advocate Gray argued that there was a distinction between the note stating that the records indicating G was the UBO and her actually being the UBO.
149. Y argues that it was necessary for the Respondent to obtain IT records to confirm whether or not this file note was contemporaneous. He also points to the disclosure gathering exercise obtaining the entire client file, and that there is insufficient evidence to show that the file note was not contemporaneous.
150. Despite the submissions put forward on behalf of Y, Y’s file note on 3 February 2017 does not raise concerns about the ownership of the company. It raises concerns about the impact of the tax upon G if she hasn’t declared her ownership of the company. The file note does not say that Firm’s A practice had been to treat F as the beneficial owner or give an indication that Y’s real concern is identifying who is the actual beneficial owner. He has an email exchange with F on 3 February 2017 where F asks if the funds could be put in a trust, replies that it would be “reportable” too and that he favours “*something like a gift from you which she declares as an inheritance (even though you’re not dead). Not sure what the tax will be on that*”. There is no reference to any question about an error in the records on the beneficial ownership. As the SDM commented in the Decision, no steps were taken to resolve the situation. Whilst Advocate Gray went through in some detail the information on the documentation that could raise questions about the ownership such as the source of wealth, references to beneficial owners “plural” in the source of funds section of the take on list, emails to F rather than G, the SDM was entitled to come to the conclusion that he did about Y’s own conclusions as set out in the 3 February 2017 file note as reflecting Y’s own understanding of the position then. Further although Advocate Gray ties the Enforcement Division and SDM’s conclusions to those of Firm C (as set out in a letter from Advocates A dated 16 November 2018) about the beneficial ownership of Entity A, there was no evidence which shows that the Respondent did not come to the opinions that they put before the SDM independently from Firm C and I consider that the SDM’s conclusions were reasonable ones for him to have come to.

151. Y further appeals that the SDM was wrong to conclude that he was dishonest and lacked integrity. In relation to the findings that Y was dishonest and lacked integrity in relation to the professional advice sought by Y, whilst the initial approaches by Y on 22 February 2017 and 23 February 2017 to the English professional advisers were on a hypothetical basis, the SDM was entitled to conclude that Y made these approaches despite being fully aware that the documented beneficial owner was G. Therefore, he was seeking professional advice based on incorrect information. However, I am not convinced that the second stage of the test of dishonesty is satisfied by these specific approaches i.e. that Y's actions at this time would be viewed as dishonest by the "objective standards of ordinary people". Wanting to find out the answer on a version of events even if not representative of the actual underlying facts of the case on a hypothetical basis does not in my view satisfy the second stage of the dishonesty test.
152. However once the advice sought moves from the hypothetical to a statements of facts which are contrary to the information held on the file which it does when Y contacts Company K on 23 February 2017 and in his email to F of the same date and the correspondence thereafter with the professional advisers, where he states without ambiguity that F was the owner, then the SDM's conclusion that Y is dishonest at paragraph 65 is a reasonable one. This includes the SDM's conclusion that the issue of beneficial ownership and the transfer to G to avoid tax clearly evidences Y's lack of probity and soundness of judgement. In all his correspondence with professional advisors he has stated with certainty that F is the owner of Entity A. Ordinary decent people would find this to be dishonest. Further and distinctly, objectively this is not the behaviour of a professionally competent person.
153. Advocate Gray argued that additional emails could elucidate the position more clearly. I do not agree. The documentation shows that throughout the period up until Y left Firm A, Y was unequivocal in his misrepresentation of the facts to the professional advisers and he knew this did not reflect the position in the corporate ownership documents (which if wrong he had done nothing about despite taking the opportunity to take other steps including the seeking of the advice) nor do I consider the particular additional emails that were referred to in the Oral Meeting are of any assistance. Also, it cannot be ignored in February and March of 2018, V was clear about what the file said which doesn't support Y's case, as was I nor can Y's own admissions at interview be ignored. It was reasonable for the SDM to conclude that the red flag that Y was following through was not that the alleged wrong beneficial owner being recorded on the file as argued by Advocate Gray but rather tax avoidance. I do not consider that my conclusion on the hypothetical advice not being dishonest makes any difference to the SDM's overall final conclusions on Y's conduct on this matter.
154. With regard to the June 2017 file note, whilst the SDM expresses scepticism about the file note, he does not expressly refer to this in his conclusions with regard to this matter and I do not consider that they form part of his reasoning. However, if I am wrong, I consider that it was reasonable for him to come to this conclusion for the reasons he sets out. I also note the evidence before the SDM was that no request for disclosure of this document had been made by Y which appears to be at odds with his argument that there should be IT interrogation. I also note in the interview, which was before the SDM, Y could not recollect seeing the 3 February 2017 attendance note (to which the 6 June 2017 made no reference directly or indirectly) although he accepted he must have written it. Also V does not refer to seeing the June note at interview nor in her reference to the file in February and March 2018 (nor I). At interview Y accepted that corporate ownership documents indicate that G was the owner as did V in her interview. I do not consider that the interview with V assists Y, particularly as she is unequivocal about who she understood the beneficial owner to be i.e. G and that she was not aware of any planned board action to deal with an error in the beneficial owner. Thus the evidence undermines the submissions that disclosure of the client file would have led the SDM to different conclusions.
155. Advocate Gray submitted it was unacceptable for the SDM having had all the representations that he had and because of the evidential gaps that she said there were between the Minded to

Notice and the Decision not to set these out in the Decision. However as I have set out above a “*closely reasoned decision*” does not mean that it is necessary for the SDM to set out all the extensive representations that were made before him. It is clear from the Decision the reasons why the SDM came to the Decision that he did. The findings he made on this matter against Y were ones that he was permitted to make on the material before Y. Further the conclusions were reasonable and proportionate.

X

156. X appeals at paragraph 6 on the basis that the SDM wrongly decided that the absence of the signed client agreement was a proper subject of complaint, as the client was evidently content with its terms. Advocate Barnes submitted that during the period of time X was involved there was never a question that the client was G. Further that it was a pretence that the lack of the signed client agreement contributed to the alleged ownership issue when the documentation including the nominee declaration certificate showed clearly it was G.
157. The SDM did not accept X’s submission that silence is sufficient to constitute an agreement for the purpose of Principle five of the CSP Code. He concludes that the lack of a client agreement for Entity A has resulted in Firm A purporting to act on instructions from an individual (F) who was not the beneficial owner and pressure could have been brought upon G by increasing requests for a signed client agreement but that an allegation in relation to loans was not made out. However, at paragraph 391 of his decision, he does conclude that X’s failure to obtain the client agreement document contributed to the ownership issue in relation to Entity A, albeit in a minor way.
158. Principle 5 of the CSP code states as follows:

“Client Agreements

CSPs should discuss terms of business with each prospective client and keep a written record of the terms of the agreement with each client, including evidence of the client’s agreement to those terms. That agreement should include: a clear description of the services to be provided and fees to be charged, a record of how and by whom requests for action are to be given, a record of any provision for the termination of the agreement, and the consequences of termination, a description of the CSP’s procedure for dealing with any complaints, and the statement that the CSP is licenced by the Commission.”

159. The requirements of Principle 5 are clear. The absence of any such agreement entitled the SDM to conclude that there was a breach of Principle 5 of the Fiduciaries Law CSP code. Further on the evidence before him it was a reasonable conclusion of the SDM that the absence of a signed client agreement contributed to claims that the identity of the beneficial owner was in question after X left the business.

Z

160. In relation to Z, the appeal at paragraph 4 of the cause is that the SDM failed to adequately take into account his conclusion that there had been no wrongdoing by Z in respect of Entity A when imposing the sanctions subject to the Decision. Although Z was a director of Entity A during the relevant period, the SDM concluded that whilst he could not avoid the responsibility for all conduct of Firm A in administering Entity A in the context and in the light of the actions of Y, he concluded that his actions or omissions did not amount to a breach of the Minimum Criteria for Licencing under the Fiduciaries Law. I will deal with the sanctions below.

Entity B and Entity C's Client Relationships

161. Entity B and Entity C were two entities incorporated by Firm A in 2016 and 2017. The original beneficial owner of both companies was J . In 2017 the beneficial ownership was transferred to K under the instruction of L, J’s son. Findings were made against Z by the SDM.

Z

162. Z raises extensive grounds of appeal against the SDM's conclusions in respect of Entity B and Entity C at paragraphs 2 b, 3 and 5. Z appeals against the SDM's conclusion that Z was dishonest was an error of law and/or plainly unreasonable on the basis that the relevant legal test was incorrectly applied and/or there was no evidence, or insufficient evidence, to support such a finding. He also appeals the SDM's decision that Z's actions amount to a failure to conduct business with integrity as required by Principle 2 of the Fiduciaries Law CSP Code and Principle 1 of the Principles of Conduct of Finance Business was based on an error of law and/or unreasonable and/or based on a material error as to the facts.
163. Z complains that the failure by the Respondent to deal with disclosure properly and to conduct a reasonable independent and objective investigation into the issue of disclosure means that the Decision of the SDM was not one which a reasonable decision maker would have made and resulted in the proceedings being unfair and contrary to the principles of natural justice. Specifically in relation to this matter: that the Respondent did not disclose any further correspondence or communicate with L, K or J relating to the transfer.
164. Z submits that the SDM erred in wrongly placing reliance and/or excessive reliance on Z's email of 10 July 2017 to L and in doing so the SDM fell into error in concluding that K was used to conceal the true beneficial ownership of Entity B and Entity C and that the transfer was therefore nothing more than a façade whereas it was in anticipation of a potential property investment. Z contends that the content of his email was simply an explanation of the options for L (and Company J which was the trading name of Company J(1)) to consider, take advice upon and then decide which he believed was commercially the best route. It was the beginning of discussions about how L might structure a transaction and not that the beneficial owner should act in a nominee capacity or in any other way act on behalf of someone else in an unlawful manner. Further Z argues that no or no sufficient evidence supported the finding and the SDM should have placed more weight on assessing the intention of Z. This rendered the Decision one that fell outside the range of a reasonable decision that could follow in the circumstances.
165. Z also contends that the SDM wrongly concluded that there was no commercial rationale for the transfer of the beneficial ownership of the two entities to K when he had been working for Company J for many years and the provision of equity in such circumstances was not unusual nor could he come to such conclusion in the absence of proper disclosure by the Respondent. Z also argues that the SDM misdirected himself as to the criteria for beneficial ownership and again for this reason the Decision was one that no reasonable decision maker should have reasonably made. Z also argues that the SDM wrongly concluded that Z encouraged K to provide improper source of funds ("SOF") or source of wealth ("SOW") information when prompted. In reaching this conclusion he failed to take into account that Z always anticipated Customer Due Diligence and SOF/SOW information would be obtained and that at the time of the August 2017 correspondence, there was no obligation to collect this. Firm A subsequently carried out the appropriate CDD, SOW and SOF checks on K which allowed Entity B and Entity C to be formally transferred. By failing to take into account these circumstances, the SDM should have reasonably concluded that Z did not disregard SOW/SOF requirements and therefore Z's behaviour was not such that it was illustrative of Z' incompetence to be a director.
166. Further, Z asserts that the SDM also fell into error by failing to have regard to, or sufficient regard to a Loan Agreement dated 27 October 2017 (the "Loan Agreement") concluded between J and Entity C and failed to recognise as he should, that the Loan Agreement was concluded for the purpose of recording how K would obtain the funds (on behalf of Entity C) to acquire the property(s). The SDM failed to recognise that the Loan Agreement, in any circumstances, would not set out which party(s) would retain the profits by way of dividend or any other means. Z asserts that the details of who would retain the profits by way of dividend or any other means would be set out in the memorandum and articles of association or associated documents for Entity C and Entity B, as well as under the terms of the declaration

of trust and these documents were not disclosed. Z argues that there is no evidence in the documents disclosed and relied upon as to who derived the ultimate commercial benefit from the transaction as contended by the Respondent. Z contends that a board meeting would have been convened in order to discuss and approve the Loan Agreement. The Appellant was satisfied at the time that K was the beneficial owner and was the one who was going to benefit from the overall profit of any transaction. As a consequence, based purely on the facts that were before the SDM (and described above), the only conclusion that the SDM could, or should, have reached was that the loan, pursuant to the Loan Agreement, was repaid, with interest and that K derived the commercial benefit as beneficial owner.

167. Z argues that the SDM also fell into error when he placed reliance and/or placed excessive reliance on the absence of commercial terms and/or commercial benefit in relation to the transfer of Entity B and Entity C and thus he erred in law, and/or in fact when recording his findings on this aspect of the Decision, therefore rendering his decision one which no reasonable senior decision maker would have reached. In particular the SDM failed to place sufficient weight that at point of the transfer on 26 September 2017, Entity C and Entity B were effectively shell companies. They had no value and had no assets or liabilities and had not entered into any commercial transactions for property. It is Z's case that the intention behind the structure of the proposed property investment was that the purchase of any property would have been funded principally by way of interest-bearing loans, which were going to be provided by Company J (through J). Upon receipt of the funds and the subsequent acquisition of the property, Entity C would develop the property and then look to resell the same property. The loan would then be repaid from the proceeds of any sale and any profit would be retained by K by way of dividend from Entity C. This explains why no consideration paid at the time of the transfer was documented. The failure by the SDM to recognise and take into account the applicable burden of proof, the fact that this burden was not discharged and the Respondent's failure to comply with their disclosure obligations, the Decision must be set aside on the grounds that it is unreasonable, unfair and is contrary to the interests of justice and Z's rights to a fair process.
168. During the robust written exchanges between counsel on the issue of disclosure the Respondent asked "*advise what attempts, if any, your client has made to source the documents that he requires and whether any approach has been made to the Directors of Firm C for the information*"¹¹. Z in response says it is for the Respondent "*to prove their case against our client and most certainly not the responsibility of our client to do the job of the Enforcement Division*".¹² The Respondent in its response makes clear that it considers it is open for Z to approach Firm C and that it believes it has conducted the investigation in a reasonable manner.¹³ Both Z and the Respondent have maintained their respective positions in their representations and submissions before the SDM and in the appeal before me.
169. As I have set out above, I have already concluded that the burden of proof is not a concept that is part of the proceedings before the SDM which are administrative proceedings and that it is unhelpful to treat the proceedings before the SDM as though they are inter partes civil litigation. Further as I have set out above, the Respondent has considerable obligations to ensure that the investigation is a fair one. It must also disclose the information that it wishes the SDM to consider for his or her decision or on request that which comes under paragraph 8.7 of the Guidance Note. Whilst I recognise that Z was not still working for Firm A and that relations between Firm C and he were acrimonious, it does appear that having come to the conclusion that it was the Respondent's role to obtain the information he does not appear to have attempted to source the documents by other means or evidenced failed attempts despite their apparent importance. Z complains that as part of the investigation there should have been contact by

¹¹ Letter from the Respondent to Mr Sheldon, Appleby 14 February 2020

¹² Letter from Mr Sheldon, Appleby to the Respondent 28 February 2020.

¹³ Letter from the Respondent 5 March 2020

the Respondent with the three individuals however there is no evidence that he has made any effort to do this (or sought consent do so) although their details appear to be publicly available.

170. Further as I set out above, the SDM concluded that he could not detect any prejudice which has been suffered by the Respondents in the way the investigation has been conducted or the enforcement proceedings pursued. It is evident from the Decision the SDM looked at the matter in the round. He had the benefit of the representations made by Advocate Williams as well as Z's witness statement on this issue. The Enforcement Division put forward their case on the basis of the information that was disclosed and the SDM made his findings on the information before him on balance of probabilities. It is unfortunate that this matter was not dealt with at an interview, but Z was given the opportunity to make representations and the Respondent does appear to have complied with the disclosure process. Again, this issue is not helped by the conflating of disclosure and investigation in the submissions and in the correspondence between counsel for Z and the Respondent. However, having considered all the submissions made by Z's counsel, I have come to the conclusion that the SDM was entitled to conclude that it was a fair investigation. It is then necessary for me consider whether he was entitled to make the findings that he did on the evidence.
171. On 19 January 2016, a firm client assessment form was completed in respect of J. No specific corporate entities were detailed, however, the documents state, *"Each new SPV will have a different property enterprise/purpose. J's son, L, is a property magnate based in London and will be identifying property projects, each of which will require an SPV."* J is described as the beneficial owner in terms of the client relationship. This form was completed by Z and signed off by X and V. This document also confirms that *"J has asked us to follow L's direction, on her behalf with regard to the administration of this (and potential future structures)."* J and L's UK property interests are held under the name of Company J, a trading name of Company J(1).
172. On 21 October 2016, Entity C was incorporated in Guernsey with J detailed as the beneficial owner. On 26 May 2017, Entity B was incorporated in Guernsey, with J as the beneficial owner.
173. Contained in the evidence before the SDM was a series of emails which starts in an email dated 6th July 2017 at 15:38. The first email is to L from Z, where he states as follows:
- "JC & Co have left me a phone message. They have conducted background (and Equifax) checks on the company, its shareholders, the trustee and on J. Unfortunately, Equifax shows that J is also a director of the Company J/companies. J says that the Company J has a poor track record with X numerous agencies in the UK, and he is obliged to advise his client of this point. J has asked me to give him a call. Before I call J, I thought you might like to have a quick word.*
- Z."*
174. This email was set in the context of a potential purchase of a property by Entity C. The response from L is, *"How do they do this? The idea of using you is that your secrecy [sic]."* Also, another email from L:
- "Why was a company name given: even if it was, we cannot give. Co S [sic] where we are behind them. The idea is to cloak us as he says they don't want to sell to us. We are traders! The truth is. [sic] We need a company with none of this. I need to check Equifax. It's [sic] gives nothing on offshore Guernsey cos or does it? Please give me the details given so we can check on our Equifax system; A, we will have to look at this in [sic] detail. If it's true let's see, they may be trying to smoke J out. It may be a total bluff."* The reference to 'A' is to an employee at Firm A.
175. Z responds to these emails with the following email:

“Hi L, I can only state that the trustee is the beneficial owner up to a certain point. Because the trust document is a simple nominee declaration, J is the sole beneficiary and her interest is ‘vested’. More sophisticated cloaking would require a more sophisticated trust arrangement with discretionary beneficiaries.

This is new legislation in the UK which means they need to look through trust arrangements to individuals behind the trust and identify beneficial owners (persons). This legislation is the Money Laundering, Terrorist Financing and Transfer of Funds, (Information on the Payer) Regulations 2017.

I have had this request from all the UK estate agents now.

Z.”

176. A further email on 10 July 2017 at 9:32 from Z to L, copied into Administrator 1 and Administrator 2:

“L and A,

I called them on Friday and thanked them for pointing out to this concern re J. Merely because J is a director on a lot of companies this should not influence their decision and we would like to proceed. I requested that they issue the memo of sale.

They will contact their client, advise that we wish to proceed and call me back Monday. When I hear from them I will let you know.

Z.”

177. This led to an email from L at 9:39 on 10 July to Z, *“Next time we put forward some [sic] else also need o [sic] think of trust structure? Jus [sic] to front these not for cash management? idea soon pl.”* It is to this email Z responds at 15:17 on the same date:

“L,

Some ideas that might work, for you to consider L:

- Cheapest – the company beneficially owned by someone else.*
- Trust – implement a full trust agreement (need a settlor/ trustee /beneficiaries and there would be annual trustee fees).*
- Life insurer (or licenced fund) as the owner – they would issue a life insurance bond or shares in a sale of a fund. (annual fee is typically 1% of AUM, subject to a minimum of say £70,000 plus VAT).*

Z.”

178. Z had introduced these clients to Firm A and was the relationship director for them. The SDM has viewed this exchange of correspondence as a red flag to Z as to how this client conducted its business affairs and should have prompted a reconsideration of the client risk rating or whether this was a client that the firm wished to retain. However rather than doing so it was Z who suggested a 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 are after it was suggested by L that the ownership of the two companies, Entity B and Entity C, be cloaked. It was plain that L did not want it to become known that there was any connection between Company J and the acquiring company of a property. The beneficial ownership of both companies was subsequently changed by Firm A at the request of the real owners to a known associate and was undertaken without any documented rationale or understanding if the change was undertaken on commercial terms. The Guernsey Register of Beneficial Ownership was

amended to reflect the associate of J and L as the registered owner when the firm clearly understood this not to be the reality.

179. The SDM considered that such actions were very serious, particularly given the recent external attention and focus on the Bailiwick's register, its accuracy and integrity of data.
180. On 24 July 2017, J wrote to the firm requesting that the beneficial ownership of Entity C be transferred from her to K. No commercial rationale was provided in this letter for the transfer of ownership, whether by payment of any consideration or any profit, share or otherwise. K is an accountant who provided tax advice to J under the company name LTB. It is evident from the email dated 20 July to Z that Z had not, for example, met K, as the email refers to Z meeting K at the races that were coming up and which Z was attending as L's guest.
181. On 8 August 2017, solicitors acting for the purchasers confirmed receipt of the documents relating to the sale and the solicitors wanted due diligence information on Entity C. L wrote to Z, "*Remember, it's K*".
182. A board meeting was held on 9 August 2017 of Entity C. The meeting was chaired by Z and attended by Y and V and considered the proposed purchase of a UK property. No reference was made to the change in ownership to K. A minute from the meeting states "*The chairman advised the meeting that the beneficial owner, via her representative, L, had requested that this company be established with intention...*" It is further recorded that, "*Evidence of sufficient liquid assets held by this beneficial owner for the transaction,*" had supposedly been provided to the company. The SDM found that this evidence and the nature of the liquid asset was not recorded and was also at odds with the response given by K to the request for source of funds in an email from K to L 8 days later on 17 August 2017: "*Hi, I'm being asked for the Firm A due diligence questionnaire. Not a problem, except that they want a statement of source of the funds to be introduced. I can't send them a bank statement with loads of dosh in it. Any suggestions? If you have an account with a large balance and wrote to me saying that it's held to my order, that should do it. But you would have to trust me to take the dosh and hare off into the sunset.*" In response, L stated, copying Z, "*Silly question. Z, can you help? It's your request!*" Z replied on 17 August 2017, "*K, for now please just state that you 'have been a practising chartered accountant for more than XXX years until MMYYY (date at which you ceased practising).*" He said that if Firm A needed evidence such as a bank statement "*we will ask for it separately*". He also said, "*We may also need this evidence to be able to prove at some time in the future that we have funds to meet a potential property purchase*" No such evidence appears on the file. K states in the form "*I practiced as a Chartered Accountant since qualification in 1971 until 1 July 2017, total of 46 years.*"
183. K appears to have signed various take-on documents on 17 August 2017. The declaration by Firm D that the shares in Entity C were held as nominee of and trustee for K is dated 22 August 2017. The declaration by Firm D that the shares in Entity B were held as nominee of and trustee for K is dated 24 August 2017. There is an email of 24 August 2017 from Administrator 2 of Firm A asking L "*if the beneficial ownership of Entity B should be transferred from J to K as we just did for another entity?*". There are letters from J requesting the change of beneficial ownership for both entities to K although she does not say why. Z in an email to L of 21 September 2017 refers to K being the current beneficial owner. The Guernsey Register was changed on the 26 September 2017. However, it is L with whom Firm A discusses the Loan Agreement and a property purchase in September/October/November 2017 and potential changes to the arrangements in January 2018 although there is no equivalent instructions notice on the file.
184. The SDM was unconvinced about the justification for L's requirements for confidentiality (which related to the circumstances to do with his birth mother) and the SDM was entitled to come to the conclusion that what drove the requirement for concealment was the established market view about Company J which is in line with the email chain from JC & Co and the

response from L to this. He was also entitled to take into account that no request for any increased privacy or confidentiality is recorded within the client on-boarding documentation.

185. The SDM is critical of Z's approach to source of funds and possible abuse of controls. He says Z should have ensured compliance with the information sought on an accurate basis, rather than encouraging no proper information at all. Z was aware, because he is copied into the emails between K and L, that it appears they are seeking to circumvent SOF/SOW controls. The SDM was entitled to find that Z's response to this exchange of emails, which, as I've set out above, was: "*K, for now please just state that you: 'have been a practising chartered accountant for more than XXX years, until MYYYY (date at which you ceased practising)'*" as a further example of failure in his conduct. In the circumstances the SDM was entitled to come to the conclusions that he did, contrary to the arguments put forward by Z. Regardless of Z's representations of what he might have done in the future evidently at the time he emailed K about the SOF/SOW, Z's suggestion of how K should respond was not true and he knew it not to be true. The SDM makes clear in his reasoning that this all forms a pattern of a serious failing on the part of Z. Further the SDM was entitled to find that by the objective standards of ordinary, decent people this was dishonest and such a finding and his reasoning on this was in line with the authorities of a finding of dishonesty. He was also separately able to find on the same evidence that Z lacked integrity having objectively judged that Z had failed to meet the relevant professional standard.
186. The SDM found that whilst it may be the case that L would sometimes dispose of entities to deserving connections of the business in such a way, there was no evidence of this on the files for either entry. There was no commercial rationale provided for the transfer of ownership from Entity B, whether payment, profit, share or otherwise. Further it doesn't explain why J would transfer the ownership of companies of which she was the beneficial owner.
187. On 15 January 2018, Company J wrote to Firm A asking that when payments were due to Firm A, they should be sent to a specific email address addressed to N Limited. On 31 January 2018, Firm A received two amounts of £500 into its account with Bank 3 Guernsey, in settlement of two invoices issued on 2 January 2018 to Entity C and Entity B in respect of Guernsey Registry annual validation fees. J is an active director and person of significant control of N Limited.
188. Z refers to discussions in relation to the recipient of the transfer of the beneficial ownership being recorded in his desk journal which was not disclosed by the Respondent. The Respondent said the desk journal was not in its possession. The Respondent in its written representations to the SDM said Firm A had not been able to find any desk journal. In any event, it was reasonable for the SDM to conclude that any documentation relating to these issues should have been on the file in order for Z to conform to the standards expected of him. Particularly when taking into account the other circumstances of this matter, such as the lack of reference to K in the subsequent board meeting, the payment of the invoices by N Limited and the continuing injection of funds as set out in more detail below. Although Z provided a justification for L's reasons for confidentiality and how the property transactions in Entity B and Entity C were funded, the SDM was entitled on the evidence to conclude that he was satisfied from the circumstances of these two entities that the requirement for concealment was the established market view of Company J. See, for example, the reaction to the enquiry from the agent. Further, contrary to the submissions of Z, the SDM's consideration of the lack of commercial rationale does not go to whether in fact there was value in the entities but rather the motivation behind the transfer in circumstances where there were clear indicators that the transfer of beneficial ownership was to conceal their true ownership and he was entitled to take this into account when coming to his conclusions on this matter.
189. Z also relies on the provision in the client agreement dated 7 August 2017 where K made covenants in relation to which Z and/or Firm A relied. However, it is not apparent from any of the information that K was involved in any of the decision making and, in any event, it is insufficient for Z to seek to avoid his own obligations by relying on the covenant.

190. Following an inquiry from the seller's solicitors, Z sent L an email, "*The current beneficial owner (BO) of Entity C is K, as we advised to A at PR Solicitors very recently. A has asked what the connection with J is and informed me that they thought she was the BO, and she is also the source of funds. I need to clear her records up and want to be consistent. Would you give me a call when convenient, please?*" Then there is a further email dated 25 September 2017, also headed "Beneficial owner".

"Hi L

No problem, but if the BO is K and source of funds is J, we need to document/evidence the loan from J – will the loan be to K or to Entity C? We are happy to put together a simple loan agreement between Entity C and J, but if it is between K and J, this would not involve us.

Z."

191. The response to this is also dated 25 September 2017 from L. "*Land and buyers and Entity C. Whatever suits, you choose.*" A draft loan agreement was sent to L on the 27 October 2017, with a covering email from Administrator 2. "*Dear L, I hope you are well. Please find attached a draft loan agreement which we need to put in place to show the funds being paid from J to the lawyers for deposits received on behalf of the company. Please can you confirm if you are happy with the terms, if so, please arrange for J to sign and return two originals to us? Kind regards, Administrator 2.*"

192. The loan agreement, which states it is effective 1 November 2016 (i.e. whilst J is still the recorded beneficial owner), is between J and Entity C and is dated 27 October 2017 and is executed by J and by V on behalf of Entity C. No explanation is given on the file about what the commercial benefit was to J being replaced as beneficial owner and yet continuing to inject the funds to finance property transactions by way of interest bearing loans. There is no record or note that this was her intention when the beneficial ownership was changed. There is no explanation as to why the loan agreement, which was made on 27 October 2017 was to be made effective 1 November 2016. This appears to have been acknowledged in the email dated 25 September 2017, when Z wrote to L "*if the BO is K and the source of funds is J, we need to document/evidence the loan from J – will the loan be to K or to Entity C?*" The SDM concludes if monies had been paid over to the company, then there would have been no issue about source of funds. There was no provision in the loan agreement for any profit sharing with K. Nor is there any other documentation on file in relation to this, including any board meeting approving such a profit share. I agree with Z's submissions that a loan agreement would not normally be the place which would deal with profit share however the SDM's conclusion must be read in context i.e. there is no reference to a profit share in any documentation on the file. Z submits that is because the details of who would retain the profits by way of dividend or any other means would be set out in the company's memorandum and articles of association or associated documents, as well as under the terms of the declaration of trust. He also says that the financial documentation and accounting records should have been produced.

193. Z is critical of the SDM, saying that he fell into error by failing to have regard to or sufficient regard to the loan agreement concluded between J and Entity C. Whilst the SDM does refer to the fact that there was no provision in the loan agreement for any profit sharing, this is in the context that there was no document to justify K's appointment as beneficial owner in place of J. Having considered all the elements of Z's appeal on the matter, I find that I do not uphold any of them. The SDM was able to look at the overall circumstances of the case, the documentation or lack thereof, and come to the conclusions that the absence of these elements or justification contained and properly recorded demonstrated an absence of commercial terms or benefit in relation to the transfer. He is entitled to come to this conclusion on the balance of probabilities. His conclusions are reasonable and proportionate. Having come to this conclusion it is unnecessary for me to consider the alternative relief set out in Z's skeleton

argument that the matter be remitted with amongst other directions, directions for specific disclosure.

Entity E

194. Entity E was a Guernsey registered company incorporated on 6th December 2016. The relationship manager was Z and the directors were Y, Z and V.

Z

195. Z's appeal in relation to Entity E is a comprehensive complaint about the SDM's Decision set out at paragraphs 2b, 3 and 6 of his cause which I shall summarise. He pleads that the SDM's conclusion that the Respondent has undertaken a reasonable investigation and made full and adequate disclosure in support of the case against him was an error of law and plainly unreasonable and again makes specific reference to the correspondence between the Respondent and counsel for Z in February 2020 identifying documents that Z argued would have enabled the SDM to make a fair and just determination. He says that the conclusions that Z was dishonest were an error of law or unreasonable on the basis that the relevant test was incorrectly applied and or there was no evidence or insufficient evidence to support such a finding. He also complains that the SDM's decision that his actions illustrated his failure to conduct business with integrity as required by Principle 1 of the Fiduciaries Law CSP code and Principle 1 of the Principles of Conduct of Finance Business were based on an error of law/were unreasonable/ or based on a material error as to the facts. He says in particular that the SDM wrongly decided Z accepted the views provided to him on 24 August 2016 by M with regard to P and that further CDD was always anticipated. The SDM erred in not placing reliance or sufficient reliance on the evidence that P did not become a client of Firm A. The SDM wrongly decided that there was a real risk of P contaminating the Entity E structure. The SDM wrongly placed reliance and/or placed excessive reliance upon the investor brief provided by Q. The SDM wrongly placed reliance and/or placed excessive reliance on the finding that there was no formal engagement between Firm A and M and that M had no official role within Entity E or alternatively he erred on not making a finding about whether the M arrangements impacted on Z's competence, probity, soundness of judgment or otherwise. The SDM wrongly decided that the management of Entity E was reactionary. Further the SDM erred in finding that Z was required to explore the link between Entity H and Entity E. He failed to provide reasons or clearly ascertainable reasons why Z was required to explore or identify the links between these companies and erred in finding that there should have been evidence how Firm A instructed Company E to act on their behalf and if any consideration was given to that solicitor's firm as acting as Entity E's solicitor and should have found that it was not for Firm A to instruct Company E but to be instructed by Q as director of the UK registered companies and therefore no due diligence of Company E was required by Firm A.

196. The background to this matter was an introduction by M, who wrote to Z introducing a potential client and on 22 August 2016 he provided the name of P as that potential client. On 24 August 2016, a World-Check One report was run on P by the Firm A's outsourced MLRO which returned numerous adverse media hits related to the collapse of a bank in Country E. The adverse hits are of a very serious nature and listed reports include June 2010 "*charged in absentia with fraud*"; and January 2011, "*sentenced to 15 years imprisonment and a substantial financial penalty*". Further, a Google search of P produced numerous adverse media articles about him, including a UK article from September 2014.

197. A telephone message dated 24 August 2016 from Z, and emailed to Y and V, records the details that M had provided in response to the adversities and background to P's involvement with the bank in Country E. P is recorded in the same note as being interested in UK property investments, including, "*Looking for properties in HMO (houses of multiple occupancy) in Blackpool*".

198. On 25 August 2016, Z forwarded his 24 August 2016 telephone message note on P to an administrator in the Firm advising that he had spoken to Bank 2 and, “*They seem to think that it sounds ok...we need to fill in the forms and send them in. they would then come with any additional CDD requests that they have. We can fill the forms in on a ‘company name TBA in due course’ basis. Can we start the process please?*”
199. The SDM concluded at paragraph 261 of the Decision that whether or not CDD requests were met, on the evidence available P posed a very significant reputational risk to the firm and to the Bailiwick, which the collection of CDD could not mitigate. He further concludes that by failing to decline P, a lack of integrity and soundness of judgement was demonstrated on the part of Z. No further correspondence was on the file with regard to whether or not Firm A or Bank 2 decided to take P on as a client. The Firm A’s declined business register for 2016 does not detail an entry for P.
200. The submissions of Z are that there is no evidence that any application for onboarding was ever made by P or that Z expressed a view upon the matter either way. Z further complains that the Decision fails to explain why he lacked integrity envisaging that a form could potentially be filled out in respect of a prospective applicant.
201. However, it is evident from the documentation that Z did not proactively reject this individual as a client, despite the open source material upon him. He didn’t appear to express any view despite the adverse hits nor M’s responses to them which the SDM concluded showed a very considerable downplaying of the media coverage and reflected the subjective views of M unsupported by objective fact. Whilst Z argues that the silence on a view being taken was sufficient, the SDM was entitled to conclude that in the absence of any recorded concern by Z, that this demonstrated a lack of soundness of judgement. I have considered carefully whether the SDM was right to conclude whether this also showed a lack of integrity as well or whether this would be within the “grey areas” identified at paragraph 19 of *Hoodless & Anor v Financial Services Authority* [2003] UKFTT FSM007 (3 October 2003). However, it is my view that objectively¹⁴ Z’s failure to act or react to this information was inconsistent with his professional duties as a director and did show a lack of integrity particularly placed in the context of the other evidence in this matter. P should have been declined forthwith (and not set out in his attendance note which he sent to his colleagues “*that we would have a conversation about the client*” and then the next day instructing another colleague to “*start the process*”) and there should have been bright red flags for Z thereafter in relation to any connection to this gentleman. It should not have required further CDD for Z to come to a conclusion. The SDM was entitled to come to the conclusion that he did he relation to Z’s lack of integrity and he had proper regard and applied the law correctly in this area.
202. On 6 September 2016, the Firm A’s outsourced MLRO ran a World-Check One report on another prospective client introduced by M, Q who was resident in Country F. The report is clear and there is no adverse media. Q became a client of Firm A and CDD/verification questionnaire was completed by him on the 15 September 2016. Entity E was then proposed as a company to invest primarily in residential and commercial property in the UK. Entity E was subsequently incorporated by Firm A on the 6 December 2016 with Q as the beneficial owner.
203. On the 18 November 2016 Firm A issued an invoice for £4,600 to Q at his home address in Country F as a standard establishment fee. On 2 December 2016 that sum was paid into Firm A’s account by P. On 5 December 2016 Z wrote to M saying: “*Good morning M. We received £4,600 on Friday, which appears to be from the account of P, I am asking the bank to confirm the details of this transaction, as obviously we are not anticipating funds in from P at this time.*” M replied, “*Is that an issue that he has paid the bill??*” Z responded,

¹⁴ See *Newall-Austin v Solicitors Regulation Authority* [2017] EWHC 411 para 48

“Hi M, if the funds have been paid by P for the benefit of Q, then it is a ‘third party’ transaction where one client is paying for the benefit of another. It presents us with a concern that we have to address regarding ‘co-mingling’ of client funds, as well as source of funds question. The main issue being around why? And what paperwork is in place to reflect the arrangement?”

Usually in these instances it is easiest to return the funds and have them come from the correct source than it is to address the issue that it raises. If you agree with this course of action, I will arrange for the bank to return the funds and Q can then send the funds to us. Alternatively, I can ask the questions that would need to be satisfied.

Z.”

204. The SDM considered it notable that P is being described as a client, and also there is no reference to him being rejected as a client or concern over the provenance of P’s funds based on the information that Z had on P by virtue of the open source adverse media. On 5 December 2016, M wrote to Z and stated that, *“P made payment as Q is currently travelling in Asia and needed the co set up ASAP.”* Z properly arranged for the funds to be returned and notified M that he had done so. The SDM noted that Z was, however, alerted to a highly significant link between P and Q, which should have made him assess the risk of the relationship on an ongoing basis with scrupulous care.
205. On 24 February 2017, Q wrote to Z enclosing a 37-page Investor Brief. Within the covering e-mail, Q states: *“The value of the first deal (blackpool) is round GBP6.3mio.”*
206. Within the Investor Brief is a proposed investment into 149 units of HMOs (houses of multiple occupancy) in Blackpool i.e. the same type of property and location that was referred to when P was the proposed client. Given the established link between P and Q, the SDM considered that this should have put Z on alert. This is a reasonable conclusion for the SDM to come to. Z’s failure to raise red flags at this juncture does in my view cast doubt on his competence and soundness of judgement.
207. On 27 February 2017, Z wrote to M suggesting a meeting in London and asking questions in relation to the Entity E proposal. In response, M replied: *“We could also aim to meet P beforehand if you have the time. There is still a plan to onboard him.”*
- Z replies but makes no comment in relation to the onboarding or not of P. There is then a further email exchange later that day where M says, *“Can do IOD. I will ask P now if he’s available. Q can do 12, maybe we can grab a light lunch with him??”*
- Z responds, again not referencing P, but indicating that lunch would be good.
208. Z is confident that he did not meet P and the SDM appears to accept this evidence.
209. In the email of 27 February 2017 recorded at 09:58, Z refers to the Blackpool deal as, *“An offering paper for a closed ended investment fund, (or something that looks very much like one). It would presumably require licencing by the GFSC.”*
210. M replies at 10:12 on 27 February 2017: *“This 100 percent is not a closed ended fund. It’s a club investment with a small number of investors which are friends and business associates of Q’s that are investing. There is the potential, at some stage in the future, to open this up to a wider audience for fundraising when there has been a track record of investment, at which time it would certainly be a collective investment vehicle and require POI licencing.”*
211. Within the investor brief under the heading “About the sponsor”, reference is made to Entity H. The investor brief states, *“Entity H are a boutique and alternative investment firm focused on healthcare and real estate development, advisory and management based in the heart of Central London. Its focus has grown from Mayfair to the fast-growing South East Asia region.”*

212. Entity H is a Guernsey-registered company incorporated by Firm A on 16 October 2015. Entity H was a standalone incorporation and Firm A did not provide any ongoing administration services. The sole director and resident agent was N, M's brother. Entity H had been incorporated by X at the request of M. The beneficial owner was detailed as O, a UK national. On 24 December 2015, M advised X that, "*Entity H was set up to transfer the ownership of Company Q, a UK company, being placed into voluntary liquidation. The company was set up with O as a sole shareholder, but this will change. It might be something worth discussing with you, but there is approx. 130 shareholders, so not sure if the GFSC would view that as a fund, though it is not.*" Company Q had one director, O, who was appointed in November 2015. A retiring director, AB, had adverse media articles relating to him. Between 1 December 2014 to 30 November 2015 Company Q had in excess of 140 shareholders, several of which are corporate nominee names with no indication as to the ultimate shareholders. O does not appear individually as a shareholder. On 26 May 2017, M confirmed to Z that Entity H was a shareholder in Entity E, and that a list of shareholders provided by Q was accurate. He also stated that Entity H will invest £3 million in equity to Entity E (although there is no evidence that this sum was in fact invested by Entity H). Z did not explore the link between Company Q, Entity H and its various roles within the Entity E structure.
213. In June 2017 Z wrote to M regarding the standing of Entity H, as it was listed for strike off due to non-filing of annual returns. The SDM is critical that Z approached M and not the sole resident director, N. This, he says, raises questions about the role of M, how he was viewed by Firm A, and the fact that the precise relationship, role and authority of M should have been agreed and documented. On 16 October 2017, M wrote to Z, seeking assistance in getting some documents which need to be signed by N in respect of Entity H notarised. These documents related to the opening of bank accounts for Entity H with Bank 4. The bank documents show that the signing mandate was going to be in the name of Q and P. Although Z was on gardening leave, he appears to have been dealing with client matters until October 2017.
214. On 23 February 2017, M, in an email to Firm A, refers to a Jersey trust being administered by Bank 1. On 11 April 2017, M confirmed that it was the S Trust and it would be investing £1 million into Entity E PCC. On 26 June 2017, Bank 1 executed two subscription agreements on behalf of S Trust. Each were £500,000 in respect of investment into Entity F and Entity F(2). Bank 1 arranged for £1 million to be remitted to Company E.
215. On 31 May 2017, consent was given by the GFSC for Entity E to be converted to a PCC. The purpose of converting to a PCC was so that sales could be formed to hold separate UK property assets.
216. On 26 June 2017 a lawyer from Advocates B in Guernsey wrote to Z, "*Re: PCCs and fund characteristics*". The email states, "*Hi Z, Further to our discussion I have attached a quick snapshot of PCCs (and ICCs) for your perusal. In respect of what is or is not a fund.....*". There was then a two-page summary of funds, licencing requirements and related issues with a generic seven page document on Guernsey cell companies.
217. Z admitted in his interview that he had very little experience with dealing with managing PCC structures with external investors prior to Entity E. The date of the advice is the date of the remittance of the £1 million by the S Trust referred to above and he was asked in interview why he was seeking advice on that date. Z replied, "*I suspect the answer is because there is £1m of investors' funds coming, shareholders' funds coming on board.*" and "*But it has been ongoing with Advocates B since February. So I think I'd had an earlier discussion with Advocates B. In fact, I think I had a couple of earlier discussions with Advocates B's*" The SDM noted that he acted properly in taking advice but that he had not brought to bear the same level of inquiry when it came to the question of the ongoing assessment of risk. The SDM noted that the three main factors to consider regarding whether a structure is a collective investment scheme or not are: the pooling of contributions from investors, third party management / no day-to-day control for investors and spread of risk.

218. Unbeknown to Firm A, two UK registered companies were incorporated as subsidiaries of Entity E to hold the UK property assets that were to be acquired. Company A was incorporated on the 14 December 2016 and Company B was incorporated on the 26 January 2017. On 16 March 2017, having become aware there was an English company owned by Entity E, an administrator from Firm A wrote to M enquiring as to whether Entity E owned a subsidiary company. She stated within this email, *“Items like this must be approved by the Directors before they take place, not after the fact. The Directors must be advised of all matters arising with Entity E before they happen. We must receive information on the Company which we are the owner of.”* M responded, *“Understood. The name is Company A. It’s 100 percent owned by Entity E [sic]. The sole director is Q. There is no local administrator.”*
219. On 16 June 2017, Z wrote to a EM at Company E requesting copies of their engagement letters for the Firm A’s records. EM responded enclosing two letters, the first dated 8 February 2017 addressed to Company B and the second 9 March 2017 addressed to Company A. Both letters of engagement predate the Firm A’s email to M of 16 March, 2017. Company B letter is addressed to care of P, at [anonymised, UK residential address] At the bottom of page one of this letter under the heading “Instruction” it states: *“You have also confirmed that it is an order for me and other members of the firm as may be appropriate to report to and act on the instructions of P and Q.”* During his interview, Z could not explain why the letter should be addressed to P. Company A letter is not addressed c/o P, although it has the same details re P under the “instructions” as the Company B letter. The SDM states in the Decision that the reference to P called for an explanation, yet there is no evidence of any enquiry being made. Explanations should have been sought and documented.
220. On 16 June 2017, Z wrote to M requesting that the ownership of Company A and Company B be changed to reflect the ownership was now by Entity E for Entity F and Entity E for Entity F(2). It states, *“Please arrange for the shares in the two UK companies issued in the name of the relevant sales prior to the first investor coming on board (otherwise the investment will be made in the core of the PCC and will then need shareholder approval to transfer the assets to the sales).”* No response to this email has been traced. A review of the UK Companies House records for both entities shows that as at 27 December 2018, (Company A) and 1st September 2018 (Company B) ownership was reflected as Entity E with no reference to the cells. On 27 June 2017, M wrote to EM at Company E. He stated, *“Hi EM, let me know when the GPP IM hits as we will have to cover a few things – Remi loan return and the exchange for Company B* Z was subsequently copied into this email exchange on 27 June 2017. Z during his interview was asked about the control and oversight that Firm A had over the UK asset holding companies and the investors proceeds whilst held at Company E. Z explained that *“I mean, we would have a reporting expectation, rather than a control expectation of the underlying companies.”*
221. Management Agreements were executed between Company I and Entity E in respect of Entity F and Entity F(2) on 20th June 2017. Company I is a Country F registered company incorporated on 14th October 2016. The majority shareholder detailed as at 9 February 2017 was Entity H with 79.31%. The sole director of Company I is detailed as at 9th February 2017 as Q, who is also the beneficial owner of Entity E.
222. I have set out at some length much, although not all, of the detail in this matter. I have done this because it is evident from the SDM’s decision and reasoning that it is necessary to consider the multiplicity of factors that lead to his conclusions about Z’s conduct on this matter. Despite the very careful deconstruction of the findings of the SDM by Z’s counsel, it is clear that the SDM carefully considered the representations made on Z’ behalf and the extensive evidence that was before him, he was entitled to come to the conclusions that he did. Over and again, there were issues that should have put Z on alert and should have led to further enquiry but did not. Other than sending back P’s payment he appears to have been unquestioning about the very concerning aspects that were present in this matter including M’s role although he appears to be intimately connected to the entities in question, the interconnections between P, M and Q, the investor brief sent by Q to Z is a proposed investment into 149 units of the same type of

property and location referred to in the P proposal given the established link between P and Q, the ownership and ongoing role of Entity H, the inconsistencies around Entity H's stated purpose at incorporation as opposed to its various roles within the Entity E structure, the lack of communication with the resident sole director during this period, the lack of evidence that Z undertook checks and reviews in relation to P and the lack of reaction to P's presence in this relationship.

223. The SDM's conclusions include that Z lacked integrity in relation to P's involvement both in his failure to decline P and thereafter his failure to investigate his ongoing involvement. Z knew P was involved in Entity E, Z knew what the background checks had revealed on P and yet he failed to take any steps to investigate this further. Therefore, the SDM was entitled to come to the conclusion that he did. It was a complicated and complex series of transactions and required Z to exercise control and oversight. The SDM was entitled to conclude on the evidence before him that Z was not fully aware of events which an administrator should have been as the multiple different aspects of the structure started to materialise and to require attention in the first half of 2017. Of particular concern was the client undertaking actions without the knowledge or consent of the company directors or Firm A. This included his failure to understand what was happening with regard to Company E or to react to P's name appearing on the letters of engagement. I have therefore come to the conclusion that the SDM was entitled on the evidence to come to the conclusions that he did in relation to Z and that he was able to make a fair and just determination on this matter. Z has not shown that the SDM has made an error in law – whether in relation to his conclusion on the investigation and disclosure or otherwise. The investigation was a reasonable one and the arguments on disclosure do not assist Z since the conclusions that the SDM came to were all supported by the evidence before him. The Decision was a reasonable one for the SDM to come to and was proportionate. As with the Entity B/Entity C matter, having come to this conclusion it is unnecessary for me to consider the alternative relief set out in Z's skeleton argument that the matter be remitted with amongst other directions, directions for specific disclosure.

X

224. X appeals at paragraphs 8 to 10 of his cause that the SDM's findings on the basis that it was wrong to criticise X for not making inquiries about the proposed activities of Entity H, when the company was not a client and X had not been employed to carry out any work in respect of it. He also pleads that the SDM was wrong to find that X had not ascertained the object of Entity H when X gave instructions to form it as such evidence would have been available from the permanent file of the company. X also appeals the SDM's conclusion that X was dishonest in relation to him entertaining a proposal to share an introducer fee with a potential client who had introduced business to a regulated financial services business to preserve their client's anonymity.
225. X incorporated Entity H on 16th October 2015, one day after being approached by M to do so. Whilst Firm A was not providing ongoing administration to the entity, the SDM found it noteworthy that X failed to enquire about O's occupation, the purpose of Entity H and potentially the SOW/SOF until 23 December 2015. The SDM also expressed concern that when he did enquire and received the response from M that he failed to undertake checks on Company Q and therefore failed to see the connection to an individual referenced in several news articles related to Carbon investment scams. Nor did X question, or document his understanding of M's comments about 130 underlying shareholders in Company Q. The nature of Entity H changed considerably from the time of its incorporation in October 2015 as set out at paragraph 294 of the Decision. The SDM found that along with Z, X failed to identify the inconsistencies in what they had been told or have not taken adequate steps to fully investigate, understand and document them, particularly as Entity H's role changed over time. Furthermore, no evidence has been adduced that any communication has taken place with the resident sole director during this period.

226. In his submissions Advocate Barnes submitted that although the Respondent has not provided the file with the incorporation paperwork (or permanent files) as he had requested, X must have had the information because the additional disclosure that was provided by the Respondent in March 2020 showed that the company had been formed in October 2015 and would have required this information to have been completed. I agree with Advocate Barnes it does appear that this information was included when the form was completed nevertheless it is evident from the emails in December 2015 that it was then that X enquired about O's occupation, the purpose of Entity H, the SOW/SOF and "*what is the purpose for Entity H*". I consider the reference to "*really?*" by Advocate Barnes in submissions which is at the top of the email from X before setting out in detail what he wants from M as a red herring as its importance or lack thereof is entirely speculative. In any event, I consider that the SDM was able to come to the conclusions that he did on this matter. Whilst Advocate Barnes sought to persuade me that X's role in this was minimal it is X's failure to properly engage with his obligations and duties in this matter that the SDM was rightly critical of X and his findings on this are reasonable and proportionate.
227. On 18 December 2015, M emailed X and Z and asked that a company in the name of Company C be incorporated with S as shareholder, and N as director. The company was incorporated on 18 December 2015 and the relevant information and searches obtained and held by the firm. M advised X on 24 December 2015 that S was CEO of Company G, with a net worth of US\$20 million. Company G was a UK incorporated entity offering property investment in Brazil, with offices in London, Country F and Thailand. On 3 February 2016 M wrote to X seeking assistance with a transaction which he referred to as "*a slightly odd request*". He then said, "*A friend of mine has introduced a client to a regulated company in London to set up a fund management company. The regulated company has agreed to share the fees with him, however, my friend doesn't really want the client to know that he specifically will be receiving the fee, and so wants it to go to a corporate.*"
228. Later in the email, M shares "*I was wondering if either you can do a deal where you offer setup and director and shareholder very cheap, or if there is some mechanism whereby Firm A receive the fee and to pay it less 2k to the client for consultancy services or whatever. This all is connected to Entity D, which is S who you set up Company C for.*"
229. X indicates to M that Firm A could assist, and on 11 February 2016 Entity D is confirmed as the client involved in the transaction. On 15th February 2016, X provided the Firm's full bank account details to M to facilitate what was proposed. X states in this email, "*Will it just be the 40K of fees (per attached) due to Firm A to introduce this business of which £38,000 is due to you?*". The SDM concludes that it was inappropriate for payment to be made by a regulated fiduciary in order to disguise the recipient of a fee and to receive a fee for providing the service.
230. In the email exchange in February 2016, following the initial request, X says in an email at 15:01 on 3rd February 2016: "*Hi M, is the money coming via the regulated company with an account at a UK bank. Do you have the name of the remitting party – thanks.*"
- M responds at 15:44 on the same day: "*So the client will pay TGC bank account and TGC will then pay out. You will then pay a portion to me direction and RJ, who is a UK resident, into a UK bank account. So my Bank 5 and his Bank 6.*"
- At 15.52 X responds: "*Hi M, I suspect that if we can invoice TGC that would be fine.*"
- M responds at 16:49, "*You can.*"
231. The SDM concludes that there is no evidence that due diligence was conducted on RJ or how he is connected to this transaction. Further, that although attempts were made on behalf of X to downplay this sequence of events, the whole transaction lacks genuine commercial rationale and raises concerns around X's competence, soundness of judgment and probity. He was fully aware of what was proposed and by the objective standards of ordinary, decent people this was dishonest.

232. Advocate Barnes says it was “*odd*” but not dishonest but in any event it never happened.
233. At paragraph 30 of the Decision, the SDM makes clear that allegations relate to lack of probity, equate to dishonesty. I do not consider that in the context of enforcement action by the GFSC it is necessary for an action to have been completed in order for the SDM to decide that a party’s conduct lacked probity and was dishonest using the test as set out in *Ivey v Getting Casinos*. The first limb is a subjective enquiry. The focus is not on whether a party believed his conduct was honest, but what X (who was a director and the MLRO at the time) knew or believed to be the factual circumstances. The SDM was entitled to come to the conclusions on the evidence that X was fully aware of what was being proposed. The SDM was also entitled to conclude that the sort of “*cover up*” that X was willing to be part of that was on the objective standards of ordinary, decent people, dishonest.

Entity D

234. Entity D is a Country J registered company incorporated on 19th August 1996 and is jointly owned by Country D Nationals, T and U. Contact with the client was through W
235. The relationship manager for this client was Y and the directors of Entity D were: Y, who was appointed 19 September 1996 (when he worked at another firm); V, who was appointed on 12 October 2011; and X, who was appointed to 27 June 2011. X resigned on 6 April, 2016, and Z was appointed on 22 February 2016.
236. The purpose of Entity D was to receive royalty payments from Country D via an intermediate Country K registered entity, Company N. The structure was taken on/setup by Y in his previous role as a partner of an accounting firm prior to establishing Firm A. Entity D became a client of the firm from 30 March 1998. Y has a long-standing relationship with the beneficial owners.

X

237. X appeals at paragraph 7 of his cause on the basis that it was wrong to find that X failed to comply with his obligations in respect of understanding the source of funds relating to Entity D when a compliance adviser (AA) was apparently satisfied. He says Entity D was not one of his clients and he relies on the minutes of a meeting in November 2015 where the problem had been apparently resolved. However, it is evident from the Decision that the SDM had taken into account the points made by AA but he concluded that X was aware of the deficiencies and the enhanced due diligence that was required was not properly sought and obtained. X cannot absolve himself of his duties as a director and MLRO of Firm A. I find that the SDM’s conclusions on this were reasonable and proportionate.

Y

238. Y appeal on this matter is set out at paragraphs 87-93 of his cause. Y pleads that Y defence on this matter was significantly inhibited by access to relevant documents which would have supported his case or undermined the case for the Respondent. The client business involved exploitation of patents over a lengthy period of time. Y asserted that royalties from the sale of the cosmetic products, for which Entity D owned the patent rights, were received into Entity D via Company N. Y said that there was a complete file for Company N, including audited accounts for each year since the arrangement commenced, within the records and alleged that they were taken by Firm C while he was hospitalised in 2017 shortly after the sale to Firm C. He said that there should also have been a copy of the tax advice on the file which would have reflected the serious, structured and properly advised approach adopted by the client. It would have also supported Y’s case as to the reason that the arrangement with the third-party company was brought to an end and that there was due diligence which another company was able to rely on to open an account. Further the client file for Entity D could have had an impact on the SDM’s conclusions, AA’s letter of support.

239. The SDM relies on Firm A's periodic review dated 20 October 2017 approximately 19 years after Entity D became a client of Firm A that there was no client agreement, no tax advice was held on file, no documentary evidence existed to support incoming funds; that fees fell outside the standard Firm A parameters and could be considered abnormal for a client with virtually no activities; and the sole point of contact for Entity D had no formal appointment.
240. The SDM also found there was no clear description of the services to be provided and fees to be charged. The charging of *ad valorem* fees over a period of 10 years at the rate of .625% per annum, notwithstanding the minimal transactional activity, was charged, making an annual fee of US\$45,625. The SDM notes that there is no complaint about the level of fees from the client. The SDM found that the documented evidence relating to the source of funds and source of wealth held by Firm A in respect of Entity D was grossly inadequate. The royalties relating to skin care products sold in Country D were supported by minimal documentation. Y confirmed that Firm A held physical supplies of the cosmetic products however, a combination of those samples as well as the patent documents in relation to royalty payments did not, in the SDM's view, approach what should have been done to meet EDD requirements. Further, he found that a perusal of the documentation relating to royalties kept on the file showed no active agreement supporting the payment of royalties. Of the licence agreements that were held on file, some of the documents appeared to be time expired insofar as they were renewable, with no evidence of renewal. He also comments that there was a degree of opacity since some of them were indifferently translated from the original. For a relationship such as this with high risk factors due to the provenance of the funds, the documentation fell well short of explaining the source of wealth or source of funds and go, "*Nowhere near reaching the required standards for EDD as set out by the regulations and the rules in the handbook. There is no documented explanation given as to how these documents provide adequate evidence of SOW/SOF.*"
241. He also noted that on the 20 March 2014, the Country K administrator of Company N, Company P, wrote to Firm A and advised that the SOW/SOF information held by Company P was not adequate and requested more information. Further, there was a question raised about whether or not beauty products were in fact being developed by the clients recently or at all. There was no reply to this, nor a further email from Company P on the 15 August 2014. In this email the ultimate beneficial owners were asked to attend to Company P's offices in Spain or elsewhere, bringing proof of identification and containing various deadlines. On 16 August 2014, Y wrote to Entity D as follows: "*Dear W. As you can see from the email below that things are getting very difficult with the managers of the Country K company. I need your instructions urgently or I will close the company on the basis that we don't need it anymore.*" Y emailed V on 19 December 2014 and stated, "*V, by strange coincidence I had the opportunity to speak with W this morning. The first thing is that T and U agree we should close the Country K company – Naturally they'd like it done before the end of the year! At least it solves that problem...*"
242. The SOW/SOF information within the firm's periodic review forms is recorded:
- 7 September 2015. Cosmetic products. This was signed off by X and V*
- 12th October 2016. Product royalties from sales of cosmetic products. Signed off by Y and V.*
- 20 October 2017 'For a client such as this it would be helpful to have a comprehensive record for all incoming funds. There appears to be no information kept for the period from incorporation to 2008, and therefore it is impossible to comment on the origin/source of funds into the company as the patents and set up with the Country K subsidiary was set up in 1995 but the only year I can see patents being received into the Country K company was Y/E30.09.08 [Y] please discuss'* Signed off by Y and V.
243. Following the 7 September 2015 review, AA, Firm A's outsourced compliance consultant wrote to X, V and Y, having checked the review, and under due diligence he states "*It was not possible to evidence how [the firm] had met the requirements of Regulation 5 and Chapter 5 [of the*

handbook] regarding enhanced due diligence. It is recommended that the enhanced due diligence is evidenced and noted on the file.” It was not added on to the file, nor in 2016 or 2017. AA in a letter dated 16 March 2020 sent in support of Y, stated that after raising the issue in 2015 he was shown a brochure from Entity D setting out the history of the clients and the selection of cosmetic products. He was also aware that Y had, “Met the owners of Entity D in person from time to time.” He concluded this “Solved EDD problems regarding the source of wealth and funds.” with no adverse references found on database checks and, accordingly, no further raising of these issues was required.

244. The SDM concludes that these enquiries fell well short of establishing with adequate evidence the source of wealth and source of funds for a high risk client with no signed client agreement on file and very poor documentation as to how the royalties were generated. There is no documentation on the file to describe the relationship between Entity D and a foundation by the name of Company F how the royalties were generated and how they flowed to the foundation. Y depended on his understanding from explanations provided by U and T. These individuals were not only the beneficial owners of Entity D, but also board members of the foundation. Y had been to Country D to visit the factory producing cosmetics, but had no sight of any documentation confirming the structure of the foundation and its relationship to Entity D. He had also met the board. However, none of this was documented or supported by written material. Y indicated that he was satisfied with the honesty of U and T and relied on his long relationship with them.
245. The SDM concludes, however, that the evidence did not establish source of wealth or source of funds for this relationship, recognised as being high risk. The SDM further concluded that Y and X were both aware of the deficiencies during the administration of the client, further, that X was the MLRO for the firm at the time and held additional responsibility for ensuring that the firm remedied deficiencies identified and complied with the requirements. The unsatisfactory documentation supposedly supporting EDD was known to X in 2015, and Y in 2016 and 2017.
246. The SDM concluded that the supposed clearance of outstanding issues by AA was superficial, and, in his view, the EDD was never properly sought and obtained. The SDM is further critical of the use of a personal Hotmail account for communication with this client, the explanation given, that U and T did not want to receive emails with the words “Fiducial Trust” in the address. Y said that other staff members had access to the personal email account, however, it would appear there were two other personal email accounts that were used which the staff did not have access to. There was no procedure or evidencing of how and when emails were printed, held on the client file or saved electronically. This, the SDM found, was contrary to the regulations, transaction documents and customer due diligence information were not readily retrievable and available promptly; the use of non-firm email accounts as a sole means of written communication with W and Entity D and there is no evidence of periodic reviews of the ease of retrieval. As Y is no longer with Firm A, a complete electronic record of emails exchanged has been lost to the firm, and they have no way of knowing whether all emails were printed and retained on the Entity D file.
247. At no stage was due diligence conducted on W, other than a handwritten letter dated 3 July 1997 held by Firm A which authorised W to be a point of contact. There was no instruction or agreement in place between Firm A and Entity D in relation to W’s role (the letter dated 3rd July 1997 being before Firm A were involved), and no attempt appears to have been made to retrospectively identify her or verify her identity. By not collecting suitable due diligence on W, the Firm has failed to comply with Regulations 4(3)(b), and Rules 74, 86, 87, 98 and Principal three of the Fiduciaries Law CSP code.
248. On the 5 February 2018 V produced a file note headed, “File note from Y”, which refers to a client instruction dated 15 January 2018 in relation to the issue of an additional ten shares to U. There is no rationale or explanation, other than a reference in the email to U having taken tax advice in Country G, and he and the other shareholder, T had agreed that U would be majority

shareholder. There is no copy of the tax advice on the file. On 6 February 2018 V wrote to Y advising they still needed a signature for T on the stock transfer form (“STF”) and commented on the difficulty in getting documents executed. On 13 February 2018, W wrote to Y and stated, *“After consulting with some experts here, we came to the conclusion that the issue of additional shares will not allow T to achieve the desired objectives that were formulated. Therefore, T decided to transfer his one share in favour of [U].”*

249. Again, the SDM found that there was no explanation or rationale detailed in this email as to why one shareholder is transferring his holding to the other. On 13 February 2018, Y wrote to V and stated, *“V, there has been a long conversation about this, but we have now arrived at the point where all T’s shares should be transferred to U, leaving U as sole shareholder.”* The email goes on to request that a blank STF is sent to him to forward to the client. Again, no rationale or reason as to why this transfer is taking place or any contemporaneous documentation with regard to the *“long conversation”*.
250. During his interview, Y stated that he was obtaining the signed STFs from the client in advance of completing necessary internal meetings and documentation. When asked about the documentation that showed the rationale for the transfer, Y said he had not got to that stage. The SDM commented that the approach adopted of obtaining signed documentation without any clear or coherent explanation for a significant change to the shareholding in Entity D demonstrates a lack of prudence, integrity, and professional skill, particularly when the client is high risk and there is a lack of visibility around the source of wealth and source of funds. The proposed transfer of ownership was being processed without any documented rationale or explanation, despite the company holding cash deposits of US\$7.3 million at the time. This should have preceded the preparation of the STF. Y said that the transfer was a work in progress in March 2018, and the further understanding of the commercial rationale would be documented before it was implemented. He refers to a number of discussions between the client, their advisers and himself. However, there is no file note. The SDM also came to the conclusion that the email of 13 February 2018 evidences a decision that has been made and Y simply instructs V to prepare the transfer. The SDM evidently found the explanations of why T would effectively transfer 50% of Entity D (with an asset of USD7.3 million cash) to U unsatisfactory.
251. V stated in her interview that she did not have an understanding as to why the transfer was requested, and that she was not going to sign or officially register the change in ownership without having a full understanding of the rationale. V made it plain that *“it would also be a good idea to get something in writing from both parties confirming this decision and that they understand the implications of this action. Shall I email W directly to ask for this?”* although it does appear she prepared blank STFs for Y to send to the client for signing.
252. Again, the complaint between the Minded to Notice and Decision is that there no change after extensive representations both oral and written by Advocate Gray. Advocate Gray in her submissions was assiduous in going through the representations made to the SDM however despite her diligence I do not consider that she has shown that in relation to this matter that the SDM’s decision was an unreasonable one nor, as I have said, do I consider it necessary that the SDM needs to set out in more detail the representations that were made to him. In relation to enhanced due diligence, which is raised in the review by AA on 7 September 2015, Advocate Gray referred to the note on the subsequent review on 20 October 2017 referring a file note prepared by Y however the review under the heading “Action Taken” (which appears to have been signed off on 14 November 2017 and 7 December 2017) also states, *“however there is no documentary evidence to support incoming funds other than the patents mentioned.”* The SDM is entitled on the evidence to disagree with AA’s opinion that the outstanding EDD issues had been resolved. Likewise, the SDM was entitled to the conclusions he did with regard to the transfer of the shares. He notes that Y, when asked about documentation that showed the rationale for the transfer Y said *“I never...I never...I never got to that stage. I never got to that stage.”* but nevertheless he was prepared to send a STF which he obtained from V despite this.

253. Y says that the SDM casts doubt on the evidence of W however the SDM states that her email of 10th April 2020, confirms that neither she nor anyone at Company D was asked to supply Company H directly with any client due diligence, source of funds or source of wealth documents. She says she could “*only assume this was given to Company H directly*” by Firm A, however the SDM states that he had not seen any evidence to support this i.e. that the material was in fact supplied by Firm A.
254. Y was aware that the Respondent did not hold the accounts for Company N as his legal advisers were informed on the 8 April 2020. The SDM did not utilise his power to require this information however, at Y’s interview he said that there had been no flow of funds into Company N by the time of the enquiry from Company P for 6 or 7 years. In fact it would appear that after 2005 there was no significant inward flow of funds. Y did not make a disclosure request to the Respondent for tax advice or material relating to the third party company who opened the account allegedly relying on the due diligence held by Firm A. In any event I was unpersuaded, given the failings that the SDM found, that the information Y complains should have been before the SDM would have assisted Y’s case. Much of the SDM’s conclusions come directly from Firm’s A own client reviews and Y’s evidence in the interview and to the extent they were not, the SDM was entitled to come to the conclusions in the light of the material placed before him and the submissions that he heard. I am satisfied that the conclusions the SDM came to were supported by the evidence, were reasonable and proportionate.

Trust B

255. Trust B was created by a declaration of trust on 10 June 1994 and the original trustee was a service provider in Country H. The principal beneficiaries were R, her children and remote issue, and the brothers of R. Firm A became trustee on 9 April 2001. R subsequently had three children between 1994 and 1997 who became the beneficiaries of Trust B, one of whom was born with a severe medical condition and requires specialised residential care, and a proportion of trust distributions are to fund this care. Entity G is a Country H registered company incorporated 13 June 1994. The company is wholly owned by Trust B and is the primary asset holding vehicle for Trust B. Based on the financial statements for the year ended 30 June 2017, there were assets of CHF 3,748,563.

Y

256. Y’s appeal at paragraphs 94-96 focuses on a lack of disclosure in particular correspondence from Advocates C (which he would have been privy to) that he said could have supported his assertions that reserves were held in relation to costs for a court blessing application. Further that the full client file would have assisted in the submissions in relation to this matter.
257. On 28 February 2012, the directors of the trustee of Trust B made a decision to remove R as a beneficiary with immediate effect to limit the amount of assets R’s ex-husband could potentially claim during divorce proceedings. The minutes record: “*Y proposed that R be removed as beneficiary, having not been in receipt of distribution from the trust for more than ten years.*” In fact, she had received numerous distributions, but these were retrospectively changed to loans in January 2011. Distributions were made in 2014, 2015, and 2016 in respect of education and care fees in respect of her sons. On 28 January 2016 R was reappointed as a beneficiary of the trust, but only in her capacity as guardian for her disabled son, so distributions could be made for the son’s benefit. In August 2015, Firm A appointed Advocates C. One of the issues which had arisen is whether Advocates C was instructed by Firm A who were now in dispute with R or for and on behalf of the trust. According to the response from Firm A, the initial advice was to Firm A, with fees taken from Trust B by Firm A to pay for advice given to Firm A itself, and these fees were later reimbursed to Trust B by the current directors of Firm A. The engagement letter from Advocates C states that they are acting for Firm A in relation to advice on issues relating to a former beneficiary of Trust B. Subsequently, Advocates C was instructed by Firm A as trustee of the new trust to advise upon the closure of Trust B and resettlement of the assets onto a new US compliant grantor trust.

258. On 14 June 2017, Y wrote to V and stated “*I met with [Advocates C] last evening. We are progressing towards a solution. I think we need to take out about 2.5 percent by way of provision for closing fee. The court approval will cost about £25,000 and there will be our time and Eva’s time. I’m thinking £60,000 pounds should cover it and we should hold that on deferred income account.*” V responded, “*Thanks for the update. Nice to hear things are progressing finally. Okay, I will transfer £60,000 to our deferred income account at Bank 2 today.*” Y replied, “*Take it proportionately from the two portfolios.*” On 20 June 2017, Firm A requested payments of £44,400 and £15,600 respectively, to be made from the two bank accounts of Entity G to Firm A’s DI account held at Bank 2. However, the fees for Advocates C were paid from Trust B accounts on 30 June 2017 and 11 January 2018 rather than from the DI account despite being after the £60,000 had been removed. Y states that the fee was seen as a cost provision and therefore transferred to the DI account, which was effectively a Firm A client account. The Firm A’s main banking arrangements, including client accounts, were held with Bank 3. V had to request that Bank 2 reopen the DI account, and the specific transaction and four entries relating to Trust B were the only ones transacted through this account after it was opened.
259. A payment of Swiss Francs 55,175, (the CHF equivalent of the £44,400 fee taken out of one of the accounts of Entity G) was recorded on the Entity G accounts/transaction records as, “*Transfer to KC Re final settlement on 1st July 2017*”. During interview, Y said that this was an inputting error. On the other Entity G account, the payment of £15,600 was included in a transaction which was recorded as “*Reevaluation of investments*”. Again, Y’s evidence was that this was an inputting error.
260. Advocates C wrote to Firm A on 19 January 2018 detailing seven areas that needed to be addressed before Trust B could be restructured. By this time amounts deducted as the closure fee had been held in the Bank 2 DI account for seven months. The SDM questioned Y’s response that the closure fee was taken out because of imminently expected completion of the restructuring, when there were many unresolved matters in relation to the restructuring of Trust B, and the matters were not close to completion. The SDM further found that the closure fee being retained on the Bank 2 DI account meant that Trust B was deprived of assets and the ability of those assets to generate income for a considerable period. Further, there is no evidence that either R or any of her advisers were consulted about the £60,000 taken from trust funds, nor was their agreement sought or obtained. No invoice in respect to those fees has been traced. The Firm had full control over the investment portfolios and over settlement of its final fees prior to the proposed trust termination and transfer to a new trustee. Further, no reference is made to the closure fee in the signed copies of the financial accounts for the year 30 June 2017 for Trust B and Entity G. Y in interview said that any of the closure fees not used up would have been paid back. He said it did not occur to him to pay any of the legal fees from that account. The SDM questioned the reasoning for the transfer and concluded that there was no sensible or coherent explanation given. On 19 February 2018, Firm A instructed Bank 2 to return the £60,000 to Entity G, with a deduction of £30 being made by Bank 2 being the cost of the electronic payment.
261. In December 2018, R wrote a six-page complaint letter to the GFSC. Included within the matters raised was that she did not know the purpose of the closure fee, nor why it was taken from the trust.
262. Y relies on a full client file which he says would have assisted in the submissions presented to the SDM and should have been available for allowing proper disclosure by the Respondent. He refers to correspondence between Firm A and Advocates C that may have supported his assertions that the reserves were held in relation to costs associated to the blessing fee and why there were delays in dealing with what was a complicated structure. The Respondent says that there was no request for correspondence between Advocates C and Firm A and it has responded in accordance with its obligations of disclosure in relation to those requests that have been made (I note that the fee notes with detailed narratives are included). The material if it existed was

not in the possession of the Respondent and in any event it was speculative whether it would assist. I do not consider that Y has shown that the additional documentation to the extent it exists would assist him. The conclusions of the SDM were that the taking of the closure fees was not fair nor transparent. This was a reasonable conclusion given the evidence and the basis upon which the SDM found that this allegation was made out on the balance of probabilities. The Advocates C's file would not assist with this even if it had been requested. I note that contrary to the submissions of Y's counsel he did not dismiss Y's evidence in relation to entries in the DI account referencing "*payment to KC*". He notes that this was his evidence and that this should have been amended and that is the extent of his conclusion (although the Enforcement Division's representations before him went further). Looking at the conclusions that the SDM came to with regard to Y's failings in this matter, I consider that there was ample evidence before him to come to the conclusions that he did. The careful submissions made on behalf of Y in relation to disclosure do not assist Y's case given the conclusions that SDM came to. The decision was proportionate and reasonable and one that the SDM was properly able to make.

Sanctions

263. The SDM imposed the following sanctions:

X

- (a) A discretionary financial penalty of £15,000 to be paid by X pursuant to section 11D of the FSC Law;
- (b) But for the fact that X is currently prohibited under each of the Regulatory Laws until 8 June 2022, the Commission would have proposed a prohibition period of 2 years in respect of X's conduct; and
- (c) The issuance of a public statement relating to X's conduct pursuant to section 11C of the FSC Law.

Y

- (a) A discretionary financial penalty of £100,000 to be paid by Y pursuant to section 11D of the FSC Law;
- (b) Orders under each of the Regulatory Laws prohibiting Y from holding the position of shareholder, controller, director, partner, manager, money laundering reporting officer and money laundering compliance officer for a period of 10 years;
- (c) The issuance of a public statement relating to Y's conduct pursuant to section 11C of the FSC Law; and
- (d) The disapplication of the exemption set out in section 3(1)(g) of the Fiduciaries Law in respect of Y for a period of 10 years.

Z

- (a) A discretionary financial penalty of £40,000 to be paid by Z pursuant to section 11D of the FSC Law;
- (b) Orders under each of the Regulatory Laws prohibiting Z from holding the position of shareholder, controller, director, partner, manager, money laundering reporting officer and money laundering compliance officer for a period of 6 years;
- (c) The issuance of a public statement relating to Z's conduct pursuant to section 11C of the FSC Law; and
- (d) The disapplication of the exemption set out in section 3(1)(g) of the Fiduciaries Law in respect of Z for a period of 6 years.

X

264. X appeals on the basis that the sanctions were unreasonably severe and/or that no reasonable tribunal acting reasonably, would have imposed them. The Respondent says that the sanctions imposed were reasonable and should not be set aside.
265. The SDM sets out from paragraph 388 onwards the factors relevant to and consequences of proposed sanctions. He had reduced the fine for X from the Final Minded to Notice from £20,000 to £15,000. Nevertheless, X says the sanctions against him were at odds with other cases such as *Blenheim* and *Richmond*. However as the Deputy Bailiff said in *Bordeaux v GFSC* these “are regulatory penalties where the approach on an appeal is not exactly the same as it would be in respect of a sentence from a criminal court. The public law principles to which I have referred apply.” The central question is whether the sanctions were within the range of responses open to the GFSC in this case. The SDM has carefully set out his reasoning including distinguishing between the roles of the Appellants and placing the conduct of X at a different level than of his colleagues when applying the various factors. He also takes into account the penalties imposed by the Respondent on other cases, the impact of a public statement and the representations made on X’s behalf. I consider that the sanction imposed on X were within the range of reasonable responses and were proportionate in the circumstances.
266. X also appeals some of the content of the draft public statement which he says is incorrect in that it said that the Appellant referred to the deferred income account as a “*slush fund*”, that in the absence of a signed client agreement in relation to Entity A resulted in a legal dispute as to the actual beneficial owner and he was aware of the payments to Y from the DI account and that he failed to treat Firm A as a separate legal entity.
267. At paragraph 107 of *Y v Guernsey Financial Services Commission* the Deputy Bailiff as he was then set out: “*that a public statement should be a factual notice for the benefit of persons reading it, in particular for the purpose of protecting them as consumers and to explain sufficiently to ensure that others do not act in a similar fashion or, if they do, will potentially face similar consequences, ie, as a deterrent.*”
268. Whilst the public statement is not a substitute for the SDM’s reasoning it is imperative that it is accurate. The SDM did not find that the DI account was referred to as “the slush fund” by X. He found that X should have been put “on alert” by Y’s use of the term “slush fund”. Therefore the statement that “*The bank account was referred to at times as “the slush fund” by Y, X and a fellow director*” (p6 of Public Statement) is not, contrary to the submissions of the Respondent, a summary of that which is set out at paragraphs 175 to 178 of the Final Decision. This must be amended.
269. The draft public statement says in relation to the lack of client agreement: “*Entity A was taken on by Firm A in 2012 and initially X and latterly Y (who had direct knowledge of this client) failed to ensure that a signed client agreement was obtained. In this particular case, the lack of a signed agreement resulted in a legal dispute as to who the actual beneficial owner of the company was.*” Again, I agree with the position put forward by X that this is not an accurate reflection of the SDM’s findings who only went so far as to find that with a signed agreement the ownership issue could have been avoided (paragraph 70) and contributed to the ownership issue albeit in a minor way (paragraph 391) particularly in circumstances where there was no material in relation to the litigation before the SDM.
270. However, the final challenge in relation to the public statement does reflect the findings of the SDM on Trust A which I have upheld in this appeal.

Y

271. Y does not specifically appeal the sanctions although I consider (perhaps generously) the wide drafting of his notice of appeal to include the sanctions should he be unsuccessful on his substantive challenges to the sanctions. However, as I have set out with regard to X the SDM

has carefully set out his reasoning and considerations from paragraph 388 and given the seriousness and nature of the findings against Y, I consider that the sanction imposed on him were within the range of reasonable responses and were proportionate in the circumstances.

Z

272. Z appeals the sanction on the basis that they were unreasonable and/or oppressive and/or excessive. He submits that the sanctions also fail to have regard to the previous relevant cases, and in relation to the proposed prohibition order to be issued under the Regulatory Laws, represent a departure from previous decisions of a similar nature. He says that the SDM failed to adequately take into account his conclusion that there had been no wrongdoing by Z in respect of Entity A when imposing the sanctions subject to the Decision. He also submits that liability cannot be attributed to him on the Entity B/Entity C matter and that Z's failing were that on a number of occasions he missed red flags. However as submitted by the Respondent, this assumes that I have accepted his submissions on the merits of the SDM's decision which I have not done. Z notes the SDM had limited information upon which he was able to consider the financial impact of the fines on the parties, however, it was a matter for the parties including Z if they chose not to provide this information nor make representations about it (something which the SDM has specifically highlighted in the Final Minded to Notice at paragraph 406). I also take into account the comments of the Court of Appeal in *Cees Schrauwers (Chairman of the Guernsey Financial Services Commission) v David John Merrien* 24/2016 at paragraph 62 that "this is merely one of a number of specified factors which the commission must take into consideration". I have set out above the SDM did properly consider the factors that he should have done and considered whether the sanctions were proportionate. Between the Final Minded to Notice and the Decision the fine has been reduced by £10,000 to £40,000. This is not specifically attributed to the overt acknowledgment in the Decision that Z's acts or omissions did not amount to a breach of the MCL nor do I consider it necessary for the SDM to have done so. I consider that the sanctions imposed on him were within the range of reasonable responses and were proportionate in the circumstances.

Conclusion

273. For the reasons I have given, all of the appeals against the Decision are dismissed save that X's appeal is allowed to the limited extent of the two successful challenges to the public statement. Any applications arising from this judgment are to be lodged within 28 days of the formal handing down of this judgment.