

Application for leave to appeal granted.

[2023]GCA030

IN THE COURT OF APPEAL, GUERNSEY

B E T W E E N:

GUERNSEY FINANCIAL SERVICES COMMISSION

Applicant

And

(1) IAN CHARLES DOMAILLE
(2) IAN GEOFFREY CLARKE
(3) MARGARET HELEN HANNIS

Respondents

APPLICATION FOR LEAVE TO APPEAL DETERMINED ON THE PAPERS

Decision of Helen Mountfield JA, sitting as a single judge of the Court of Appeal

Appeal no: 569

28 July 2023

Counsel for the Applicant: Advocate C. Edwards

Counsel for the Respondent: Advocate A. Williams

Cases, texts and legislation referred to:

Legislation

The Financial Services Commission (Bailiwick of Guernsey) Law 1987

The Protection of Investors (Bailiwick of Guernsey) Law 1987

The Financial Services Business (Enforcement Powers) Law 2020 (excerpts only)

The Regulation of Fiduciaries, Administration Business and Companies Directors etc
(Bailiwick of Guernsey) Law 2020

Caselaw

Walters v States Housing Authority [1997] 24 GLJ 39

Bordeaux Services (Guernsey) Ltd v The Guernsey Financial Services Commission
(Guernsey Unreported Judgment 18-2016)

Y v Guernsey Financial Services Commission (Guernsey Judgment 47/2018)

ITG Ltd v Glenalla Properties Ltd & Others [2022] GCA 091

England and Wales authorities

Re H Minors [1996] AC 563
R(N) v Mental Health Review Tribunal (Northern Region) & Others [2005] EWCA Civ 1605
Re B (Children) FC [2008] UKHL 35
Re Doherty [2008] UKHL 33
Lanes Group plc v Galliford Try Infrastructure Ltd t/a Galliford Try Rail [2011] EWCA Civ 1617
Williams v Solicitors' Regulation Authority [2017] EWHC 1478 (Admin)
Solicitors' Regulation Authority v Wingate [2018] EWCA Civ 366
Miller & Another v The Health Service Commissioner for England [2018] EWCA Civ 144

Other authorities and materials

Article 6(1) of the European Convention on Human Rights
Handbook for Financial Services Businesses on Countering Financial Crime and Terrorist Financing

Introduction

1. This is a renewed application for leave to appeal dated 15 May 2023, made pursuant to section 107(1) of the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law 2020 (**"the Enforcement Powers Law"**). The application is for leave to appeal from the judgment handed down by Her Honour Lieutenant Bailiff Marshall KC on 18 April 2023 in the Ordinary Division of the Royal Court (**"the judgment"**).

2. In the judgment, the Lieutenant Bailiff allowed an appeal brought by the Respondents against sanctions imposed by a Senior Decision Maker (**"SDM"**) appointed by the Applicant, Mr J Russell Finch OBE issued on 29 July 2022. In a lengthy and thorough judgment, she granted applications by the Respondents that:
 - a. prohibition orders imposed by the Applicant pursuant to section 33 of the Enforcement Powers Law be set aside.
 - b. the disapplication of the exemption under section 3(1)(g) of the Regulation of Fiduciaries, Administration Businesses, Company Directors etc (Bailiwick of Guernsey) Law 2020 as imposed by the Appellant be removed.
 - c. public statements pertaining to each individual Respondent pursuant to section 38 of the Enforcement Powers Law be remitted to the Applicant; and
 - d. the level of financial penalty imposed by the Applicant under the Enforcement Powers Law in each case be reduced.

3. The grounds upon which permission is sought in the draft Notice of Appeal are lengthy, running to some 14 pages, and to some extent overlap, but may be summarised as follows.

4. Ground 1: Improper Approach

- a. It is said that the Lieutenant Bailiff pre-determined the merits of the appeal, and thereafter adopted a selective approach to her analysis of the evidence to reject and criticise rational findings made, and reasonable inferences drawn by SDM from extensive evidence.
- b. It is said that at paragraphs 15-33 of her judgment, the Lieutenant Bailiff misapplied the test for factual unreasonableness set out in *Walters v States Housing Authority* 1997-99 GLR 15 CA. The *Walters* test permits a decision to be set aside on the basis of factual unreasonableness, but this must amount to “something greater than simply that they [the jurors] would not themselves have reached the same conclusion”, and the concept of an appeal to a court of “full jurisdiction” in *Y v GFSC* (47/2018), and that she thereby exceeded her jurisdiction under s106(3) of the Enforcement Powers Law, by treating herself as an independent adjudicator on the merits.
- c. Finally, it is said that in exercise of this power, she made new findings of fact which themselves did not reflect the totality of the evidence and/or were irrational.

5. Ground 2: Misapplication of the Guernsey Anti-Money Laundering Regime

It is said that in paragraphs 302, 316, 352-353 and 374 of her judgment, the Lieutenant Bailiff erred by misunderstanding the weight to be attributed to anti-money laundering failings, by finding that where no tangible consequences arose from a breach of anti-money laundering requirements, then the level of seriousness attributed to the allegation must be minimal, and that serious penalties should not ensue. It is said that the Court’s analysis fails on public policy grounds since such an approach would reduce the requirements of compliance with anti-money laundering provisions to a duty only to spot ‘red flags.’

6. Ground 3: Error of law as to findings on probity and prohibition orders.

- a. It is said that the Lieutenant Bailiff erred at paragraphs 210 and 237 of her judgment in identifying a different standard of proof, or in any event, a different application of the civil standard of proof to be applied, when assessing allegations of dishonesty or lack of probity.
- b. It is also said that she wrongly held that the two-stage test for establishing dishonesty as set out by the Supreme Court of the United Kingdom in the case of *Ivey v Genting Casinos (UK)* [2017] UKSC 67 applied equally to assessing whether there was a want of integrity or probity, in misapplication of the judgment of Jackson LJ in *Solicitors' Regulatory Authority v Wingate* [2018] EWCA Civ 366. She thereby wrongly rejected as inadequate the SDM's findings on Mr Domaille's state of mind, having recognised that he had considered this (at paragraphs 199-200 of the judgment).
- c. Finally, it is said that she elevated the test for imposing a prohibition order to cases of want of probity or in the alternative 'extreme incompetence', contrary to the observations of the Deputy Bailiff in *Bordeaux Services (Guernsey) Ltd v the Guernsey Financial Services Commission* (Judgment 18/2016) at paragraph 79 of that decision, and thereby wrongly limited the extent of the statutory enforcement power under section 33 of the Enforcement Powers Law.

7. Ground 4: Approach to Assessment of Financial Penalties

- a. The Applicant's power to impose a financial penalty for breaches of regulatory obligations is now contained in section 39(2) of the Enforcement Powers Law, which came into force on 13 November 2017, and which permits imposition of penalties of up to £4 million on a licensee and £400,000 on an individual. Before that date the Commission's powers to impose financial penalties were limited to a maximum of £200,000 in respect of both licensed entities and individuals. The Commission had announced that it would apply the increased penalties to any enforcement action after 13 November 2017, because the penalty was for a current failure to fulfil the applicable criteria for licensing, under section 39(1)(b) of the Enforcement Powers Law.
- b. It is said that the Lieutenant Bailiff erred at paragraph 436 of her judgment in accepting the Respondent's submissions that the decision to apply the new financial penalty amounted to a breach of the principle of retrospectivity and basic fairness.

- c. Finally, it is said that the Lieutenant Bailiff:
 - i. acted irrationally in her approach to factors which had been taken into account by the SDM (such as the level of sanctions imposed in other cases).
 - ii. acted irrationally in considering the interaction of the penalty which would be imposed on a licensed entity and an individual where the individual was also a director of the licensed entity; and
 - iii. had placed too much emphasis on whether there was proven harm and too little on risk of harm (at paragraphs 397-401).
8. The Lieutenant Bailiff considered an application for leave to appeal against her judgment on 19 June 2023, and refused it on the basis that none of the grounds of law was sufficiently arguable and that nor did the case nonetheless disclose an issue which ought to go to the Court of Appeal in the public interest. She gave the written reasons for her refusal on 28 June 2023.

Was there an application for leave to appeal before me, and if so, out of time?

9. A point was raised by Advocate Williams on behalf of the prospective Respondent in correspondence to the effect that leave to appeal was refused by the Lieutenant Bailiff (it was said on 19 June 2023); that the application has not technically been renewed since on 12 July 2023 the former application for leave was re-lodged without being re-dated; and that even if it had, the renewal was out of time (because it was a renewed application for leave to appeal against the decision of 18 April 2023); that there has been no application to extend time to bring the application for permission to appeal and that consequently this Court had no jurisdiction to consider the renewed application for leave. I am invited to refuse leave to appeal on that basis alone.
10. Advocate Williams does not suggest that his client is prejudiced by having been notified of the Applicant's intention to renew its application for permission to appeal (as the Lieutenant Bailiff anticipated it would), but says that the application being out of time, it should nonetheless be refused.
11. Advocate Edwards response for the Applicant is to say that the application was re-lodged on 12 July 2023, it is not out of time because it is an appeal against the decision of the Lieutenant Bailiff refusing leave, and even if it is, this is a technical

point which can be cured by an out of time application for leave to appeal out of time.

12. The raising of this point means that I need to consider the chronology and Court of Appeal rules with some care.

Chronology

- The judgment of the Lieutenant Bailiff allowing the Respondent's appeal against the decision of the SDM was handed down on 18 April 2023.
- The Applicant lodged an application for leave to appeal, to the Lieutenant Bailiff, on 15 May 2023 – that is, within the 28-day time limit set out in rule 3 of the Court of Appeal (Civil) Procedure Rules 1964 as amended (“the Civil Procedure Rules”).
- The Lieutenant Bailiff held an inter partes hearing and indicated that she would refuse leave to appeal on 19 June 2023, giving some indications as to her reasoning orally, but reserving her full reasons which she said she would record in writing.
- The Lieutenant Bailiff gave her written reasons for her refusal on 28 June 2023.
- The Applicant took policy advice internally which was dated 5 July 2023, and which has been disclosed, and on the same day, emailed the Court and Advocate Williams for the Respondent indicating an intention to renew the application for leave appeal to a single judge of the Court of Appeal.
- The appeal bundle, including the application for leave, which had been placed before the Lieutenant Bailiff, were re-lodged and re-served on 12 July 2023. It was not re-dated, and no application was made for leave to appeal out of time.
- On 14 July 2023, Advocate Williams wrote to the court asserting that this did not amount to a renewal application and asserting that any application for leave to appeal was now long out of time; so that any renewal application would need to be accompanied by an application for an extension of time.
- On 17 July 2023, Advocate Edwards wrote to say that the renewal application was made as of right; it would have been premature to renew the application for leave until written reasons had been received, and so no extension of time was needed; however, he was in the Court's hands in this respect.
- Also on 17 July 2023, Advocate Williams responding to say that the original application for leave was defunct, having been refused by the Lieutenant Bailiff and that the interest in certainty meant there was no application for leave before me to consider at all.

13. The Respondents have been on notice since 5 July 2023 of the Applicant's intention to renew its application for permission to appeal and cannot have been prejudiced by its doing so one week later. For reasons which I set out below, I consider there is a public interest in a Court of Appeal determination of at least some of the issues in the appeal and would accordingly have been reluctant to regard the application for leave to appeal to have fallen away on so entirely technical a basis.
14. I do not consider there is any great significance in the notice of application for leave which was re-lodged on 12 July 2023 having continued to bear its original date. It is common ground that this was a renewed application for permission to appeal against the original (18 April 2023) decision and not an appeal against the Lieutenant Bailiff's decision of 19 June 2023, perfected with written reasons on 28 June 2023.
15. However, Advocate Williams is indeed right to say that technically an application for leave to extend time should have been lodged at the same time as the renewed application for leave to appeal against the 18 April 2023 decision.
16. Rule 16(6) of the Court of Appeal Rules provides that:

"Where an application has been refused by the presiding judge of any court below, an application for a similar purpose may be made to the Court or to a judge thereof".

17. This is a renewal of the initial application – i.e., time runs from the original decision and not the refusal of leave. My attention has been drawn to the decision of the Court of Appeal in *Fort Trustees & Balchen Management Ltd v ITG Ltd & Bayeux Ltd* 2021 GCA 29, in which a single judge of the Court of Appeal considered whether it was necessary to seek leave. In that case, a Royal Court judgment had been refused and was renewed. The issue was whether an extension of time was needed. The judge said this:

Extension of time

The decision below was handed down on 23 April 2021 and an Application for Leave to Appeal together with a draft Notice of Appeal served on 21 May 2021, within the one-month time limit provided for by Rule 3 of the Court of Appeal (Civil Division) (Guernsey) Rules 1964. In accordance with Section 15(e) of the Court of Appeal (Guernsey) Law 1961 leave was required and, as provided for in Rule 16(7) of the Rules, the application had to be made first in the Royal Court. The hearing took place on 10 June, when the application was refused.

In accordance with what may be a common practice, when the application for leave was made to the learned Lieutenant Bailiff a separate application was also made for extension of the one-month time limit; but, as the application was refused, there was no consideration of that, unopposed, separate application. In my judgment, in circumstances such as existed before the Royal Court, there was no need for an application for extension. This question had been raised in *Macnamara v Gauson* (2009-10 GLR 387] when an Application for Leave together with a Notice had been served within the one-month limit, but the Respondent contended that a Notice could not properly be served without leave to appeal and that the failure to seek an extension deprive the Court of jurisdiction. In finding against that argument the learned Deputy Bailiff (Collas) stated at [17]:

"In my view time is deemed to have stopped running when the application was lodged with HM Greffier and served on the defendant.....the underlying purpose of the Rules has been achieved, namely to ensure that notice of the application is served on the defendant in a timely manner and without delay."

It follows from this that, once there has been timeous service of the application for leave together with what, necessarily, is a proposed Notice, the Court has jurisdiction, without the need for further extension, to grant leave to Appeal on the basis of the Notice which has been served.

The application below having been refused on 10 June; the Applicants may renew the application to this Court under Rule 16(6). No separate time-limit is provided for in such circumstances and the Applicants have again sought an extension which is opposed upon the basis that, in not making the application to this Court until 13 July, there has been a significant delay which ought to be taken into account in determining whether to grant the extension.

For the Applicants it has been stated that the reasons for the delay were that, since the hearing on 10 June, the Applicants have been heavily involved in other aspects of the overall proceedings, including a three-day hearing before the Judicial Committee, following which further written submissions required to be filed and, separately, that time was taken with filing and service of extensive particulars of objections to legal costs sought by the Respondents. That said, the Applicants have pointed out that such changes in wording as there are between the draft Notice below and that now before this Court are not substantive and in fact reduce the number of complaints following the hearing below.

In my judgment it is correct that, where an application for leave is renewed before this Court, it will, almost inevitably, be necessary for there to be an application for an extension unless, perhaps, matters have been dealt with so expeditiously that the initial application has been made within days of the judgment below and the renewed application served within days of the refusal, thus meeting the one-month time limit. What is clear is that the initial application stops time running; and in my judgment time starts to run again upon a refusal by the lower court. Rule 16(6) provides no separate time-limit as

between the refusal and the renewed application and the position is, simply, that the Rule 3 time-limit requires to be addressed at this later stage.

It seems to me, therefore, that as with any application for extension of time, the matter is at large for the court under Rule 17. Being at large, the whole circumstances ought to be taken into account but, in essence, time having started on the handing down of the judgment below and interrupted by the application below, it is the whole period from initial application to date of the making of the renewed application which must be considered, the period of the proceedings below being excised. This exercise will vary with circumstances but, whilst an applicant is, in a sense, entitled to use the whole month before serving below, there is certainly no reason for an assumption that a further month should be available within which to make the renewal.

The underlying purpose of Rule 3 is an expeditious commencement of an appeal where a court of competent jurisdiction has made its finding and the fact that there has been an application to the lower court and a refusal should not deflect from that purpose. To the contrary, Rule 16(7) provides for a potentially dual application process: the renewed application is not an appeal from the refusal, it is a second opportunity to obtain leave for the proposed grounds) of appeal, and ought to be brought expeditiously." (emphasis added).

18. The application for leave is therefore out of time, and an out of time application for late service of the application for leave will have to be made, as Advocate Edwards has indicated he is content to do. However, I regard this as a technical failing which does not detract from what the then-Bailiff, Collas R, described as the underlying purpose of the Rules, namely, to ensure that notice of the application is served on the defendant in a timely manner and without delay.
19. I agree with Advocate Edwards that it was reasonable to wait to consider the Lieutenant-Bailiff's written reasons for refusing leave to appeal before deciding whether to renew the application. The written reasons were received on 28 June 2023, and within a week the Applicant had both undertaken quite detailed policy consideration and notified the Court and Respondent of its intention to renew the application for permission to appeal. The renewal was lodged on 12 July, only one week after that.
20. My discretion as to whether to grant leave to appeal out of time is at large, and factors which I consider to be relevant are the length of the delay, the reasons for it, whether it causes the Respondent prejudice or the public interest in ensuring an appeal is lodged in a timely manner and without delay has been harmed, and finally, the strength of the prospective grounds of appeal and any public interest in its being heard.

21. The delay in this case was not, in my view, unacceptably long. I consider that the period until 5 July 2023 was entirely explained by legitimate reasons. I do not hold it against the Applicant that the original application for leave was lodged on the last day for doing so, given the complexity of the judgment and the policy considerations which arose in deciding whether to appeal. Time then stopped until the hand-down of the Lieutenant Bailiff's judgment refusing leave, which I take to be 28 June 2023. But even if the earlier date of the oral decision is taken as the date of decision, I do not consider that it was unreasonable to take until 5 July to notify the court of the intention to renew, nor to take one more week to re-lodge the bundle. (I note that the date on the renewal application was not changed, but I consider this to be a minor mistake capable of being corrected through the slip rule).
22. The reason for the failure to make an application for leave to appeal out of time is not a good one – namely a misunderstanding of the rules on this. However, it can be corrected by the lodging of a formal application for leave, which I intend formally then to grant, for the following reasons. Firstly, it was envisaged by the Lieutenant Bailiff and the parties that a renewal application would be made, and so no one is taken by surprise by this. Secondly, no one is prejudiced by this relatively short delay, and had the application for leave to appeal out of time been made at the same time as the renewed application for permission, it would have been granted, because the actual renewal application was a timeous one. Thirdly, the failure to make the application has caused the Respondent no prejudice. Fourthly, for the reasons which I set out below, I consider the appeal raises issues which there is a public interest in being determined at appellate level, and I consider it has reasonable prospects of success. And finally, the public interest in those issues being determined outweighs the public interest in ensuring proceedings are brought promptly, because the renewal application was brought in a reasonable time after the initial refusal of leave, and in any event with 28 days of that decision.
23. Accordingly, should this technically be required, I grant the Applicant leave to amend its application for leave to appeal against the decision of 18 April 2023 so that it encompasses an application for leave to renew its application for permission out of time, and to re-date it 12 July 2023. For completeness of the court record, I invite Advocate Edwards to take that formal step within seven days of receiving this decision. My decision on leave to appeal is granted including leave to bring the application out of time, on 12 July 2023.

The approach to granting leave to appeal

24. Section 107(1) of the Enforcement Powers Law provides that:

“An appeal from a decision of the Royal Court made under the provisions of this law ... lies, with leave of the Royal Court or Court of Appeal, to the Court of Appeal on a question of law.”

25. The test for leave to appeal is set out in *McNamara v Ganson* [2009-10] GLR 387, approved by the Court of Appeal in *Carlyle Capital Corporation Ltd v Conway* [2011-12] GLR 562:

“The general rule applied by the Court of Appeal, and thus the relevant basis for first instance court’s deciding whether to grant permission, is that permission will be given unless an appeal would have no real prospect of success. A fanciful prospect is insufficient. Permission may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal.”

26. In *ITG Ltd v Glenalla Properties Ltd & Others* [2022] GCA 091 at [40], the Court of Appeal observed that for a case with no real prospect of success to be granted permission would be exceptional, but

“... may arise in particular, where a question of general principle falls to be decided for the first time, or where there is an important question of law upon which further argument and a decision of the Court of Appeal would be to the public advantage ...”.

27. The Applicant submits that it has a real prospect of succeeding on its appeal, and/or that their issues regarding the proper interpretation and application of its enforcement powers which it is the public interest be subject of a determination by the Court of Appeal.

28. I note the observations of Lord Woolf in *Smith v Cosworth Casting Process Ltd Practice Note* [1997] 1 WLR 1538 at paragraphs 3 and 4:

“3. When leave is refused, the court gives short reasons which are primarily intended to inform the applicant why leave is refused. When leave is granted, reasons may be given which are intended to identify for the benefit of the parties and the court hearing the appeal why it was thought right to give leave.”

4. *When leave is granted, the applicant does not need to know more than that he has leave which he needs and therefore he is entitled to proceed with the proposed appeal. The intended respondent has no entitlement to receive reasons as to why the application has been granted, in the same way that he does not normally have any right to be heard on the application, which is usually made ex parte”.*

29. The present application, however, was made inter partes, and I have the benefit of a skeleton argument from the putative Respondents as well as from the Applicant. I have considered these, together with the Lieutenant Bailiff’s decision on the issue of leave, in reaching my decision.

Discussion

Ground 1

30. Although she expressed her preliminary provisional views on the level of sanctions in trenchant terms, I do not accept that on a fair reading of her judgment, including paragraph 130, her comments reach the threshold whereby it is arguable that the Lieutenant Bailiff, a respected barrister and judge, pre-determined the appeal in the sense of having reached a final conclusion before she was in possession of all the relevant evidence and arguments. Nor is it arguable that she acted, or indeed indicated that she would act, in anything other than an open and balanced way. I refuse permission to advance any such argument.

31. However, following a discussion of the effect of Guernsey and Strasbourg authorities concerning the effect of Article 6(1) of the European Convention on Human Rights and the need for a “full” right of appeal on the appropriate scope of the right of appeal to the Royal Court under section 106(3) of the Enforcement Powers Law, at paragraph 33 of her judgment, the Lieutenant Bailiff said this:

*“The centrally important point which I take from all the above ... is this. My function, as the appellate tribunal from the Decision of the SDM in this case is not so much that of an appellate court, or a reviewing court, but is the last component step in a convention compliant process of adjudicating finally upon the disputed rights and obligations of the [Respondents] arising from the process of enforcement which has been exercised in respect of them by the Guernsey Financial Services Commission. **To my mind, this serves to underline, forcefully that my jurisdiction imports not only a power to correct mistakes of law or of a procedural nature which I may find to have affected***

the Decision in question, but also an element of original and independent authority to appraise and evaluate the materials in the case, in particular, in considering whether the outcome may be flawed under the terms, of grounds of appeal (b) and (d)". (Emphasis added).

32. It is properly arguable that in that paragraph, and by describing her proper function as "not so much that of an appellate court or a reviewing court", the Lieutenant Bailiff gave an over-broad interpretation to the scope of her jurisdiction on an appeal under section 106(3) of the Enforcement Powers Law.
33. If that is right, then it is also arguable that she may thereby have taken upon herself, to an inappropriate extent, an "original and independent authority to appraise and evaluate the materials in the case", so as to treat herself as having an independent fact-finding authority, which arguably went beyond what could rationally be regarded an appropriate performance of the appellate function.
34. This is an important question of law in the context of a regulatory regime affecting a large number of licensed bodies in an important sector of the Guernsey economy.
35. Accordingly, I conclude that it is proper to grant leave to appeal on Ground 1 of the Grounds of Appeal to the extent that it concerns the proper interpretation of the scope of the Royal Court's jurisdiction under section 106(3) of the Enforcement Powers Law, when read in conformity with Article 6(1) of the European Convention on Human Rights, but not to the extent that it alleges pre-determination. The allegation of pre-determination is not arguable.

Ground 2

36. Had the Lieutenant-Bailiff regarded herself as bound to impose lower penalties or no penalties on the Respondents because the breaches of anti-money laundering legislation had not in the result led to any discernible damage either to members of the public or the reputation of the Bailiwick as a financial centre, I would have regarded that as an error of law.
37. However, I accept that this was not the approach which she adopted, on a fair reading of the judgment. In her decision refusing leave to appeal, the Lieutenant Bailiff emphasised that she had looked at the actual impact of breaches of anti-money laundering regulations only as part of the whole factual picture in assessing the penalty to be applied. She held that the proposition that the actual impact of breaches must be regarded as irrelevant *as a matter of law* was a ground of appeal which did not stand any real prospect of success.

38. In my judgment, she is probably right on this. However, the Applicant appears to submit that breaches of a regime which is intended to uphold proper precautionary standards to prevent money-laundering in Guernsey are necessarily harmful to the reputation of the Bailiwick, so that, *as a matter of law*, the absence of tangible consequences of such a breach in terms of damage to individuals or the Bailiwick should be regarded as an irrelevant consideration.
39. This is a very short point, where I can see some public interest in a determination of the Court of Appeal. So, having granted permission on part of Ground 1, I grant permission also on Ground 2, on the basis that there is a public interest in this court making a pronouncement on whether tangible consequences of such breaches may, or may not, be relevant to the level of penalty to be applied.

Ground 3: Error of law as to findings on probity and prohibition orders.

40. The relationship between what falls to be proved for a finding of dishonesty, a finding of lack of probity, and a finding of want of integrity is a difficult and complex one. The submission that the Lieutenant Bailiff wrongly misapplied the two-stage *Ivey* test to decisions as to whether there was a want of integrity as well as situations where there was dishonesty, is arguable, as a matter of law.
41. As to application of the civil standard of proof to a finding of want of integrity, in paragraph 237 of her judgment, the Lieutenant Bailiff did appear to hold the seriousness of a finding that a professional person's conduct was 'lacking in integrity' to be relevant to the application of the appropriate standard of proof. I consider the criticism of this approach, levelled by Ground 3 of the grounds of appeal, is arguable as a matter of law.
42. This is particularly so in the light of a recent decision of the UK Supreme Court in *Jones v Birmingham City Council & Another* [2023] UKSC 27. This English judgment was handed down on 19 July 2023 (after the judgment, and after Grounds of Appeal were lodged, and so not available to the Lieutenant Bailiff or the parties). It appears to hold that the seriousness of the consequences of a finding of fact to a party affected must be regarded as irrelevant to the standard of proof to be applied to establishing its existence. There is a public interest in the Court of Appeal deciding whether this approach ought to be applied in the Bailiwick of Guernsey.
43. Accordingly, I grant leave on Ground 3 of the grounds of appeal.

Ground 4

44. The principal issue engaged by this ground is whether a penalty imposed under section 39(2) of the Enforcement Powers Law is concerned with a present breach of current licensing conditions (and so may be imposed by reference to post-13 November 2017 limits, irrespective of when behaviour giving rise to the breach occurred), or alternatively, as the Lieutenant Bailiff found, that to impose such a penalty by reference to past conduct without having regard to the levels of penalty which were in place at the time when conduct said to breach such licensing conditions took place amounts to retrospective penalisation and is therefore unlawful and/or unfair.
45. This is arguable either way, and is a point of general public importance, upon which it would be useful to have a determination of this court.
46. As to the issue of whether the Lieutenant Bailiff took the wrong approach, and so acted irrationally, in her approach to matters which had been taken into account by the SDM (such as level of sanction applied in earlier cases), this appears to me to be a re-statement of that aspect of Ground 1 on which I have given leave – ie whether the Lieutenant Bailiff erred in regarding herself as having a level of original jurisdiction rather reviewing the reasonableness of the SDM’s decision.
47. As to whether the Lieutenant Bailiff erred in having regard to the effect of the interaction of an individual penalty, and the effect of the penalty imposed on a licensed entity of which the individual was a director, where the individual was also a shareholder of the licensed entity, this is an arguable point. Moreover, as this is a situation which is likely to arise on a number of occasions, there is a public interest in having Court of Appeal authority on it.
48. The issue of whether the Lieutenant Bailiff erred in placing too much emphasis on whether there was proven harm and too little on risk of harm (at paragraphs 397-401) is a restatement of Ground 2, on which I have granted leave on public interest grounds.
49. Accordingly, I also grant leave to appeal on Ground 4.

Conclusion

50. I give leave to the Applicant to appeal to amend the renewed application for permission to appeal so that it is re-dated 12 July 2023, and so it encompasses an application for permission to appeal out of time, such amended application to be lodged and served within seven days of this order.

51. I grant leave to appeal on all the grounds set out in the draft Notice of Appeal attached to the application for leave, save that leave to advance the allegations of pre-determination and/or a lack of an open mind in paragraphs 11 and 12 of the draft Notice of Appeal are refused.