GFSC's application to the Royal Court for leave to appeal from its decision reported at [2024] GRC080. Application refused.

[2025]GRC006

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION
(Civil Action No 2536)

Between:

WEIGHBRIDGE TRUST LIMITED

Appellant

-and-

THE GUERNSEY FINANCIAL SERVICES COMMISSION

Respondent

Before:

Her Honour Hazel Marshall KC, Lieutenant-Bailiff
Sitting alone

D E C I S I O N on papers
refusing leave to appeal

Decision handed down: 28th January 2025

Advocate T W McGuffin for the Appellant

Advocate J Hill for the Respondent

1. The Respondent, the Guernsey Financial Services Commission, applies, under s 107 of the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law 2020 ("**the EP Law**") for leave to appeal my decision in this matter, handed down on 21st November 2024, (see Report at [2024]GRC080) whereby I allowed the Appellant's appeal against the decision of the Commission, acting by one of its Senior Decision Makers (Mr Richard Jones KC) to issue a public statement against the Appellant, set aside that decision, did not think fit to remit the decision to the Commission for reconsideration and ordered the Commission to pay the Appellant's costs of and incidental to the Appeal on the recoverable basis.

2. The draft Notice of Appeal specifies six grounds upon which it is sought to Appeal.

Test

3. The test for giving leave to appeal in this jurisdiction has been laid down in relation to the Court of Appeal itself in the recent decision of *ITG Ltd v Glenalla Properties Ltd* [2022] GCA 091, based on the English law test in similar circumstances. It is that

> "*the Court should not grant leave unless it is at least satisfied either: (i) that the appeal has a real prospect of success; or (ii) that even though the case has no real prospect of success there is an issue which, in the public interest, should be examined by the Court of Appeal….*"

(see judgment at [40]). The Court of Appeal went on to state that the second category of case would be rare.

4. In *Landl & ors v Hogg & ors* [2024] GCA052 the Court of Appeal approved the same approach being applied by the judge at first instance (see [12]-[13] of that judgment) and I will apply that test here, together with one further point mentioned below. With regard to the substance of the test itself, I note that the "*real prospect of success*" is, once again, a test of "*real*" as contrasted with "*fanciful*", but that it is not as high as that the appeal is more likely than not to succeed (which is obviously unlikely to be the view of the judge at first instance in any event).

5. The further point which it seems to me it is right to recognise arises because I am the judge of first instance. My decision will only be determinative of whether there is an appeal insofar as I give leave. If I do not give leave, it is open to the disappointed would-be appellant to apply to the Court of Appeal for leave, and any such application is a completely fresh application; it is not an appeal from my refusal. In those circumstances, and in particular if I were minded to give leave to appeal only on the basis that there was a point of sufficient importance or public interest that it perhaps ought to be considered by to the Court of Appeal, it might well be appropriate for me to take the view that any such judgment was one which ought to be made by the Court of Appeal itself, rather than by myself as the judge of first instance. That, however, would depend very much on the particular circumstances of the case.

6. This decision is in three sections – (1) General, (2) Specific Grounds of Appeal and (3) Final Decision.

(1) General

7. I need first to recapitulate on the essential elements of my decision in this matter. This is because my judgment was structured to address the various grounds of appeal argued by WTL as the then Appellant in a convenient order for doing so, which required somewhat re-casting them, and my ultimate decisions were then synthesised out of those matters.

    (1) I first decided that the SDM's decision to issue a public statement in relation to WTL and by name, was, in the light of the singularly exceptional circumstances of this case, simply "unreasonable" within the meaning of s 106 (3) (b) of the EP Law and should be set aside. I did so applying what I considered to be the properly applicable test for assessing such "unreasonableness" under the Law (see judgment at [181] and the discussion preceding, and then explaining, this paragraph).

    (2) However, if that were wrong - because I had not applied a sufficiently stringent test - I next held that the decision to issue a public statement in relation to WTL, by name, was nonetheless also unreasonable by <u>any</u> such more stringent test, because (and again in the singularly exceptional circumstances of this case) it would only become reasonable in certain circumstances, namely the taking of all reasonably possible steps to avoid or minimise the acknowledged risk of damage to the interests of certain totally innocent third parties who would be affected (always so far, of course, as this could be done consistently with the proper objective(s) of issuing a

public statement): see judgment at [191]. This therefore fed into, and required, (re)consideration of, the terms and the presentation of the SDM's proposed public statement because that requisite standard had not been achieved (or applied). I would therefore, also and in any event, have set aside the decision to issue the proposed public statement on the grounds of that "unreasonableness" under s 106 (3) (b) of the EP Law. (This could also probably be characterised as "disproportionate" under s 106 (3) (d) of the EP Law, but that adds nothing.)

(3) I then held, in addition, that a further and separate reason for setting aside the decision was that it was, in any event, vitiated by error of law under (s 106(3)(a) of the EP Law). This was, first, because its proposed terms did not fulfil the fundamental "imperative" of accuracy (see [111] of the judgment) required of such a statement; they distorted the true subject matter of the Commission's decisions and/or conveyed an inaccurate impression of fundamental matters regarding what had; happened in WTL and how the Commission had dealt with it all: see [229]. It was also, second and separately, because the terms of the public statement had been "drafted" (it was actually little more than a process of endorsement) by the SDM without taking into account what might well be a material matter in that regard (namely the content of a separate and presumptively different public statement which the Commission now proposed to issue in respect of (other) persons, in particular the person who had centrally perpetrated the relevant misconduct in fact); the SDM, acting for the Commission, ought to have all the potentially relevant knowledge of Commission. The statement also did not fairly publicise the Commission's (the SDM's) regulatory treatment of the particular exceptional circumstances of this case, which must be a material matter for fulfilling the requirements of full and balanced public information. I held that I would accordingly also have set aside the decision to issue the public statement in its actual proposed terms for error of law, on that further two-limbed basis. (I mentioned that no doubt issuing an inaccurate public statement could also be described as "unreasonable" but, once again, that adds nothing.)

(4) I then held, as my final disposal of the matter, that, on whichever of the various separate grounds summarised above I set aside the decision to issue the proposed public statement, I would not, in all the circumstances, think fit to exercise my discretionary power, under s 106 (6) (a) of the EP Law, to remit the matter to the SDM for reconsideration.

I will refer to the above as my Primary, Second and Third Reasons and my Fourth Decision.

8. In order to succeed on appeal, it is therefore necessary for the Commission to overturn all three of my Primary, Second and Third Reasons summarised in (1) – (3) above for setting aside the SDM's decision. The draft Notice of Appeal makes no attack on my Fourth Decision.

9. A second preliminary point is to emphasise that my decision in this case was very much fact specific, and made in thoroughly exceptional circumstances. I reiterate that these were that by the time the relevant decision had come to be made, in 2023, (1) the current owners, controllers and new Board of WTL were persons who had had nothing to do with any of the disgraceful and delinquent conduct, over four years previously, of the Former Directors and personnel for whose actions WTL was vulnerable to being sanctioned and (2) those new persons had actually behaved in a thoroughly diligent and exemplary fashion, in fully remedying that previous delinquent conduct and its consequences and preventing recurrence - and the Commission itself had even recognised this fact (albeit without apparent enthusiasm). This particular combination of factors was quite exceptional, and very unlikely to recur, (although if it did, it would presumably be a matter to be welcomed).

10. The whole of my judgment must therefore be read and assessed against that background. It is not practical for a judge to recite laboriously at every juncture in a long judgment that findings or decisions are made "in the exceptional circumstances of this case" and whilst I did so whenever this seemed really necessary to remind the reader of this context, I will not have done so all the time. That does not mean that I was laying down any general approach, except where it is obvious that I was doing so; my findings and decisions were all made against the background of this being an acknowledged exceptional and unusual case, and the specific considerations to which this gave rise.

11. A third preliminary general point is that under s 107 of the EP Law, an appeal lies to the Court of Appeal from a decision of the Royal Court only on point of law. Where, therefore, I was deciding on a particular test, I accept that the correctness of that test would be a matter of law. However, my application of a correct test would, it seems to me, then be a matter of a decision of fact from which there is no appeal.

12. This brings me to the fourth preliminary general point, which is that I discern that, underlying all the Commission's suggested grounds of appeal, is the proposition that, absent any palpable mistake of law, mistake of procedure or mistake of fact, a relevant decision of "the Commission" (by whatever organ that is made) is not open to effective question or challenge, simply because it is a "decision of the Commission". In other words, a decision of the Commission which cannot be seen to be affected by any such error is *ipso facto*, to be regarded as factually reasonable, and not only is that a presumption, but it is an irrebuttable presumption.

13. I simply do not see how that proposition can be the law, for at least four reasons.

14. First, it is contrary to what the EP Law actually says. It says that such a "decision" of the Commission is subject to being appealed (ie potentially successfully challenged) on the grounds of simple, unqualified "unreasonableness" in s 106(3)(b). Even if the appeal process is to be by way of review, rather than a fresh hearing (as held in *GFSC v Domaille* [2024]GCA003), the section thus stipulates that the decision can be "reviewed" for unreasonableness - ie examined, for assessment of whether it is simply "unreasonable" - and appealed on that basis.

15. Second, the Commission's apparent proposition effectively strips s 106(3)(b) of any actual substance, relegating an appeal on the grounds of "unreasonableness" to having to be the equivalent of an error of law, and the distinctly provided statutory appeal process to being the equivalent of judicial review. That again is not what the Law says.

16. Third, the desirability, even need, for the availability of such an effective review and appeal for unreasonableness is all too obvious, since otherwise the Commission becomes unaccountable for its decisions, simply by its own *ipse dixit.* Given the relationship between the Commission and those it regulates, the absence of any such mechanisms constitutes the Commission judge in its own cause. Without wishing to be melodramatic, where an authority is accorded great power to issue fiats which seriously affect the lives or livelihoods of people without effective accountability, the danger of slipping into institutional injustice is created. The legislation recognised this, and provided ultimate curbs on this possibility.

17. Fourth, such an effective review and appeal would even appear to be legally mandated by the "human rights" principle (Article 6) that a person (legal or natural) is entitled to have his civil rights determined by an independent and impartial tribunal. The Commission's SDM procedure (which is not statutory but has been devised by the Commission) determines such a person's rights, but is not an independent and impartial tribunal. The first independent and impartial tribunal as to his/its rights which an aggrieved appellant encounters is the Royal Court. Any limitation on the mechanism by which the Royal Court can effectively review a decision of the Commission for simple impressionistic "unreasonableness" at some independent level appears to be contrary to the appellant's rights.

18. I therefore consider it to be not merely arguable, but clearly right, that the Royal Court hearing an appeal from the decision of an SDM, has jurisdiction to review the "unreasonableness" and thus, as its mirror, the "reasonableness" of that decision.

19. Where the reasonableness of a decision rests on a relative evaluation of competing factors, the jurisdiction to review it inevitably involves considering and testing the soundness of the process of evaluation which apparently supported it. This necessarily involves the reviewer comparing his own evaluation, to see whether it sufficiently approximates. Logically, such an exercise has to be legitimate. And for this process then to have any meaningful operation, it further involves that the reviewer must be entitled to disagree with the original process. (This is not just my postulation; it reflects the dictum of the now Bailiff in *Bordeaux Services Guernsey Ltd v GFSC* Guernsey Judgment 18/2016 cited at [93] of my judgment.)

20. Of course appropriate respect must be given to a decision of an organ of the Commission, but the Commission's underlying proposition is that such "appropriate respect" is total unquestioning acceptance, and that any decision by it is reasonable, by definition. That proposition, much as the Commission might wish it to be the case, and even think it ought to be the case, simply goes too far.

21. The above is not inconsistent with the Court of Appeal's decision in Domaille. It held that the court's error (my error) lay in impermissibly substituting my own findings for those of the SDM, rather than simply reviewing the validity of his findings. However, as I read the decision, that was as regards my substituting findings of <u>primary</u> <u>fact</u> (as the Court of Appeal thought I had done), with the Court of Appeal then holding that, having found the SDM's decision to contain errors of law, the correct course was to remit the matter to the Commission for yet another SDM to make a fresh determination. I do not read the decision as intending to emasculate the statutorily prescribed justification for allowing an appeal on a finding of "unreasonableness".

22. This means that the issue really becomes that of the appropriate test by which the Royal Court should exercise its express jurisdiction to allow an appeal against a decision of the Commission for "unreasonableness".

23. Importantly, in both this case and in the *Domaille* case, counsel for the Commission conceded that the test for such "unreasonableness" under s 106(3)(b) connoted a threshold for "unreasonableness" which was <u>lower</u> than that of the "unreasonableness" at law (ie "<u>*Wednesbury*</u>" unreasonableness" - illogicality, irrationality or perversity) which is the standard required on judicial review. They did so in acceptance of the Court of Appeal's own test, approved and applied in respect of similarly expressed statutory grounds of appeal ("*an unreasonable exercise of the Authority's powers*") in the cases of *Walters v States Housing Authority* 1997-99 GLR 15 (GCA) and *Matheson v States Housing Authority* [1998] 26 GLJ 68 (GCA). Furthermore, in *Domaille* itself, I had set out this approach and its justification in detail (see [22] to [25] of that judgment) and it was agreed by counsel in this case that the Court of Appeal in *Domaille* had not criticised or disapproved that holding in any way, despite the Court of Appeal's overturning my decision on other grounds.

24. Not only do I regard this concession as plainly correct, but I do not think it is open to the Commission to resile from it. It appears to me that their proposed grounds of appeal seek, in places, to do so.

(2) Specific grounds of appeal

25. I now turn to examine the individual aspects of the Commission's grounds for seeking leave to appeal, but always against the background above. Where appropriate, for ease of reference, I refer to the Notice of Appeal by its paragraph numbers (§x).

Ground 1: ***The Royal Court's Decision to overturn the public statement was not in accordance with the statutory scheme of s.38 of the EP Law.***

26. This is divided into two subsections. **Grounds 1.1** asserts that the Court "***failed to take into account all factors in s 38 (2) of the EP Law in the assessment of whether the decision was reasonable,***"

27. I do not consider that this suggested ground of appeal stands scrutiny on the facts, and when my judgment is read in its totality.

28. It is perfectly apparent that I was well aware of the whole range of factors which were to be taken into account in the Commission's (more accurately, its SDM's) making a proper "decision" to issue a public statement. I recited them at [6]. I also recognised that the SDM had taken them into account.

29. My own judgment that the SDM's decision to issue a public statement was nonetheless "*unreasonable*" within the meaning of s 106 (3) (b) of the EP Law applied the test discussed above. This exercise did not ignore the totality of the factors within s 38 (2), including "seriousness" and "lack of inadvertence" (ie deliberateness) but it naturally involved focusing on the particular factors which appeared to be the key ones logically operating on whether the relevant decision was factually unreasonable, in the particular circumstances.

30. The Commission does not appear to contend that I was not entitled to engage in this exercise, but rather that when doing so I "must have" ignored, in particular, the "seriousness", of the relevant conduct – principally, actively facilitating tax evasion. That is not the case, for the reasons given above. Seriousness was a perfectly obvious given; it did not need discussion. Such seriousness (in particular the very obvious seriousness of Mr Cairns' conduct) was referred to and acknowledged throughout my judgment. That such misconduct is "serious" is so obvious that it hardly needs a public statement in 2023 to make that point. But even if it did, "seriousness" is an abstract factor, and bringing that to the proper attention of the public does not <u>in itself</u> require naming the entity concerned. There was no evidence before the SDM (or referred to in the on appeal by the Commission) which suggested otherwise.

31. In addition, (and see my Second and Third Reasons) giving prominence to "seriousness" as the justification (here propounded) for issuing a public statement must, in all objective reasonableness, require (a) fairly associating this with the natural persons who were the real perpetrators and (b) giving equal prominence to the extenuations which had led to the singular treatment of this case in the Commission's (its SDM's) not imposing any financial sanction on WTL. None of this had been achieved in the way in which the Commission has proceeded, and all this contributed to the unreasonableness or error of law (in my judgment) of then imposing on WTL the sanction of issuing a public statement in the actual terms proposed.

32. In the light of the above, including my further comments under "General" I do not consider that this discloses any ground of appeal with any real prospect of success.

33. **Ground 1.2** is that the Court "***postulated a novel legal test which serves to distort the analysis of factors in s 38(2)".***

34. This ground of appeal misrepresents my decision and fundamentally misunderstands its basis.

35. It lights on the wording which I used in my summary at [275] of my judgment, where I certainly used the word "duty" as a shorthand, in describing my Second Reason for holding the actual decision to be unreasonable. It was thus entirely fact specific.

36. First, as can be seen from the terms of my judgment, this had nothing to do with my Primary Reason, which was simply, that applying the test for assessing "unreasonableness" which I considered to be mandated by the Law (see under General) the decision passed the threshold for being factually unreasonable, in principle. The supposed "novel legal test" objected to here had nothing to do with this.

37. What that matter had to do with was my alternative Second Reason. I described this as being that, however stringent a test for factual reasonableness was proposed, I was perfectly satisfied that any, and every, reasonable person would regard it as unreasonable on the particular exceptional facts of this case to take an action which risked damage to the interests of the wholly innocent and impeccably behaved persons in the exceptional circumstances noted, without taking all reasonably possible steps to minimise or avoid this (of course, always consistently with the proper objective(s) of issuing a public statement at all). I articulated this in [191]. I subsequently considered how such "reasonableness" would have to be given effect in practical terms. I concluded that this had not been considered as such, and the requisite effect not achieved in point of fact. I concluded that this therefore rendered the decision unreasonable for this different, and very much fact specific, reason.

38. That "qualification" thus had nothing to do with distorting the analysis of the factors which would go towards the Commission's making its own decision (the first stage of the sanction exercise), but was part of the court's practical judgment in applying any test of reasonableness to the particular facts of this case. My use of the word "duty" [in 275] was a shorthand description of the effects of the qualification for producing reasonableness which I had found to apply in this case. It was in no way laying down any general "novel legal test" but was simply descriptive of how the general legal test would operate in this particular instance.

39. On a proper understanding of my judgment, therefore, this finding does not impinge, in any way, on the obligation to take into account any and all of the factors in s 38 (2) of the EP Law, as this ground of appeal asserts (at §11). The suggestion that my comment now mandates some extra non-statutory duty on the Commission in general in every case is absurd exaggeration. All my decision has done is to indicate situations in which the normal consideration of the factors at s 38(2)(e) might, in (I emphasise again) very exceptional cases, suggest that the Commission ought reasonably to give more consideration to such factors than it may possibly have occurred to it to do, up to now; but in no way does it dictate the result of any actual such consideration, in any future case.

40. In the light of the above, including my further comments under "General" I do not consider that this discloses any ground of appeal with any real prospect of success.

Ground 2: ***The Royal Court erred in failing to treat the Respondent as a separate legal (and corporate) entity responsible for its conduct carried out as a corporate entity.***

41. This ground of appeal effectively alleges that the Commission is entitled to decide to deal with the Appellant on the basis and expression of its separate legal personality in law, whatever the circumstances, and that the mere legal fact of such separate legal personality shuts out any consideration of whether it is actually reasonable, in all the circumstances, to do so.

42. Stated in terms of this practical effect, it is in conflict with the requirements of s 38 (2) (e), which are required to be considered, with no qualification that they are to be subordinated to the circumstance of separate legal corporate identity. As thus formulated I therefore do not consider that it articulates a ground of appeal with any real prospect of success.

43. I would also observe that this suggested ground of appeal is – tellingly – inconsistent with the Commission's attitude in other cases, as certain authorities cited by the Appellant demonstrated. The Commission has, at times, recognised that it is not always appropriate (presumably on grounds of reasonableness) to issue a public statement against, and naming, an entity in respect of conduct committed in its name by an individual or individuals, because it has not always done so.

44. Of course the Commission had the power to issue a public statement, and to name WTL in doing so, because of WTL's separate legal personality, but that was not the issue; the issue was whether it was reasonable in all the particular circumstances, for it to exercise that power, and if so in what manner.

45. The reference to the Court of Appeal's dicta with regard to the effect of separate legal personality in the *Domaille* case (see §15) as not pertinent, because that was in an entirely different context. The issue in *Domaille* was whether the assessment of the reasonableness of the quantum of a "discretionary financial penalty" imposed on an individual should take account of the indirect impact on that same individual of a simultaneously imposed financial penalty on the corporate entity of which he was part owner. The Court of Appeal held that this was an irrelevant consideration in that context, because the two exercises of assessing appropriate financial penalties were different and entirely distinct exercises, requiring different elements to be considered in relation to each separate situation. That is not the same here where there is a single exercise being carried out, under the single principle of whether it is reasonable to issue a public statement against WTL as a corporate entity at all (or if so in what terms).

46. My judgment did take account of the fact of the discrete corporate legal personality of WTL and it explained why, in the context of this (I emphasise again) very exceptional case, the artificiality of that fact, (separate corporate personality is an artificial construct of law) required to be recognised as a properly material circumstance. In constructing its grounds of appeal, the Commission now appears to resort to asserting that it is mandatory to do so as a matter of law, when nothing in the Law actually dictates that, if it is unreasonable in particular circumstances. The Commission overstates its case in this regard.

47. I accept that my quoted metaphor that

> "*whilst a leopard cannot change its spots a company can change its board of directors*"

would have been better and more appropriately expressed as

> "*whilst a leopard cannot change its spots a company can change its board of directors and its beneficial owners.*

but that was, and was plainly, intended as a descriptive metaphor, to illustrate the actual situation, and the difference between personal reputation and fair current corporate reputation (goodwill) which ought rightly to be considered. It was not a purported description of a legal rule.

48. In the context of a general overall assessment of the objective factual reasonableness, of issuing a public statement, (or doing so in the terms proposed) I do not think it arguable that such a point must be irrelevant.

49. Furthermore, the fallacy of this ground of appeal is apparent in the final sentence of Para 19. The question is not whether it was "appropriate" to describe the conduct as the conduct of "WTL" (which it plainly would have been as a matter purely of legal principle) but whether it

was reasonable to do so in a public statement which would be issued against, or would name, WTL, in 2023.

50. In the light of the above, including my further comments under "General" I do not consider that this discloses any ground of appeal with any real prospect of success.

Ground 3: ***Incorrect assessment of the scope of Public Interest.***

51. The complaint here appears to be that my judgment would "*oblige the Appellant to identify a specific public interest pertaining to the facts of the cas*e" (see §22) on the grounds that this would prevent the Commission from relying on "generalities" when wishing to make a decision which could have serious consequences for persons and entities.

52. This objection is, in itself, rather remarkable. It does not appear unreasonable to expect a public authority to be able to identify the actual reality, or some content, of any "public interest" which it asserts it is entitled to proclaim and rely on, in making a decision which may have serious consequences for individuals/entities affected. The Commission appears to assert that, simply because it is the Commission, its assertion that something is "in the public interest" must be accepted without question. I would respectfully suggest that this assertion itself only goes to illustrate why some degree of accountability for justifying such a statement is not only necessary, but must be envisaged and intended by the legislation. Its content is not onerous – unless there is no identifiable public interest beyond the Commission's *ipse dixit.* There is no temerity in expecting that the Commission should be able to describe and explain the actual public interest which it has thoughtfully perceived in terms more focused than just vague "generalities".

53. Furthermore, this suggested ground of appeal ignores the fact that I *did* carefully identify and consider all the possible elements of the statutory function of the Commission, and their roles (even those mentioned in the Grounds of Appeal), in order to reach my conclusions on reasonableness, this being the ultimate issue before me. I *did* note the weighing exercise apparently conducted by the SDM, albeit concluding that he had not (as he ought to have done) sought to satisfy himself that the supposed "public interest" went any further than the Enforcement Division's mere assertion of "powerful factors" (but not identified or actually examined).

54. I also acknowledged the invocation of the purposes of the Policy Letter, mentioned at §22.3, but (a) even those do not necessarily require the particular entity to be named and (b) they are quoted self-servingly selectively in the Notice of Appeal. It omits to mention that the self-same Policy letter envisaged that the norm would be to discuss the terms of a proposed public statement with the relevant sanctionee and also that the issue of a public statement would be a power used "*sparingly*" - a limit which the Commission apparently now does not observe (see [103]-[108] of the judgment).

55. This ground of appeal is to the effect that the mere assertion of the Commission itself that its own action is "*in the public interest*" is never susceptible to examination, or challenge even in the context of the Royal Court's statutorily conferred power to review and pronounce on whether such action (eg the imposition of the particular sanction) is "unreasonable". I do not think it arguable that such an extreme proposition can be right.

56. As to the three points made in §23 of the Draft Notice of Appeal

    a. I do not I do not consider it arguable that my decision introduced a legal approach to the determination of what was in the public interest which was contrary to the legislation; it merely required the safeguards and requirements of the scheme of the

legislation to be implemented. Moreover, the "policy" of the Commission does not have legislative force and cannot alter the requirements of the legislation.

b. By the same token, my decision did not "unlawfully" limit the scope of what can be seen to be in the public interest; it simply required this to be capable of proper and coherent explanation.

c. The accusation of usurping the "evaluative" decision of the Commission is dealt with under "General". Moreover, where the actual decision is delegated to an SDM whose qualifications appear to be those of being a senior qualified lawyer whom the Commission has thought fit to select, the "evaluative role" appears to become one of legal assessment, rather than of (even assumed) financial services regulatory expertise, or knowledge of running a financial services business.

57. Finally, I observe that the question whether or not it was properly "*in the public interest*" to issue a public statement in the circumstances of this case at all was only material to my Primary Reason; both my Second and Third Reasons were predicated on the assumption that it could still be thought reasonable, in the public interest, to do so, and so this ground of appeal does not dispose of those Reasons.

58. In the light of the above, including my further comments under "General" I do not consider that this discloses any ground of appeal with any sufficient real prospect of success.

Ground 4 The Royal Court exceeded its jurisdiction in making findings

59. This ground of appeal oversimplifies my judgment and reasoning in order to challenge it. It also relates entirely to my Primary Reason, and ignores my Second and Third Reasons. It is substantially dealt with in my fourth point under "General" with regard to the underlying approach of the Commission in their grounds of appeal (see paras [18]-[22]); it is the epitome of this. It is, essentially, the assertion that it simply was not open to the Royal Court to disagree with the balancing assessment which the SDM had made. For the reasoning there set out, I do not see how that can be correct.

60. Furthermore, I did not simply "disagree" with the SDM's assessment; I actually found it wanting in that the SDM had simply, apparently, taken the bare assertion of the Enforcement Division that there were "powerful factors" in favour of issuing a public statement without even asking himself what their reality was, and had in any event given insufficient weight to the factor, albeit a more nuanced factor, which was the basis of my Second Reason.

61. It is disingenuous to state in §26 that "*Significantly the Royal Court did not find that the SDM was wrong to reach any of his conclusions*" (emphasis added) when it is perfectly plain that the whole basis of my judgment was effectively such a finding, based on my judgment that the notional fair-minded and informed observer, assessing factual reasonableness on the test which I had postulated, would have concluded that his ultimate conclusion was "wrong *in that sense.*

62. The criticism at §28 that I "*described the impact on the Appellant in far more serious terms than those reached by the SDM*" seeks to achieve a ground of appeal by turning my legitimate assessment of the reasonableness of the final decision into a supposed finding of fact, when it actually was not; it was merely my commentary on considerations arising out of the SDM's actual findings of fact.

63. Whilst the grounds of appeal seeks to criticise as illegitimate, my statement that the public interest actually found was "rather thin", I note that the ground of appeal itself does not seek to suggest that it had any more actual substance than the assertion of the Enforcement Division.

64. In the light of the above, including my further comments under "General" I do not consider that this discloses any ground of appeal with any sufficient real prospect of success.

Grounds 5 The Royal Court's decision was irrational

65. This ground of appeal is predicated on the correctness of Ground 4 and therefore adds nothing to it except hyperbole.

66. However, it is also to be noted that it is framed in terms which show that it is viewing the test of factual unreasonableness in s 106 (3) (b) of the EP Law as being the test applicable to judicial review (where the test is the possible reasonable judgment of the decision-maker itself) rather than the separate objective factual assessment of simple "Jurats' unreasonableness".

67. As such it is contrary to the concession expressly made by counsel that the test for "unreasonableness" within the meaning of s 106(3)(b) of the EP Law is a lower threshold than that for legal "unreasonablelenes" (irrationality, illogicality or perversity) applicable to judicial review, and I do not consider it is therefore open to the Commission.

Grounds 6 The Court erred in its description and the application of the test for factual unreasonableness.

68. This ground of appeal asserts that I reached a "novel" conclusion as to the test for factual unreasonableness which was to be applied under s 106 (3) of the EP Law.

69. Insofar as this seeks to resile from the concession made at the hearing that the test for "unreasonableness" in s 106 (3) (b) is a lower test than that of unreasonableness on judicial review, I do not think it is open to the Commission. The application of such a lower test was accepted.

70. There was no argument before me as to what exactly what was connoted by this lower threshold test, and it was left to me to consider and decide; I concluded that the correct test which would give s 106(3)(b) practical effect, was by reference to the preponderant view of the kind of fair-minded and informed observer considering the position responsibly, like a Jurat, and that consequently the likely view of a panel of Jurats based on the *Walters* direction was the best proxy for assessing such threshold (given that, emphatically, the test was not whether I myself would have come to a different decision). This was the test I applied, thus equating it as best I could with the comparable *Walters* situation.

71. The quotations from my judgment set out in this section were simply describing, so as to be comprehensible by the reader, how I had come to envisage the relevant proxy test, giving such deference as is properly due to a decision of the Commission's SDM in the context of also giving the statutory ground of appeal some actual substance. Again, I do not see how this is open to criticism; a judge has to explain his or her reasoning. It was not applying the wrong test it was explaining the right test.

72. The objection that this was a test relating to "disproportionality" is not understood. The importance of the difference is not explained and, in any event, "disproportionality" is itself a grounds of appeal under s 106(3)(d).

73. The argument as to distinguishing the position from *Walters* has no substance. In *Walters*, the Court, sat as an ordinary Court comprised of the Bailiff with Jurats, whereby the distinctive functions of deciding matters of law and fact are allocated to them separately. In these appeals the Judge sits alone and is therefore the judge of matters both of law and of fact, although it is notable that the Law provides (s 137 (1) and Schedule 1) for the "Royal Court" to be constituted

with the additional appointment of assessors to sit with the judge if thought appropriate (thus underlining that the Royal Court's appelate function may include deciding matters of fact).

74. Criticism that the Court's conceived test is contrary to the *Walters* approach because that was "the decision of the Court" (ie the Jurats) rather than that of a "*conceived objective third party*" is simply playing with language. The decision (mine) was the decision of the Court (me), but to ensure that it was not simply substituting "my own" decision for that of the Commission, or thought to be simply applying the fact that I myself would have made a different decision which is expressly not enough, it was necessary to go further and demonstrate the objective application of a proper test corresponding with the *Walters* principle. I do not see how this reasoning can be faulted on any common sense basis.

75. I also do not see how any higher standard of reasonableness can actually be applied without, in effect depriving s 106 (3) (b) of any practical effect. To do so would involve holding, in effect, that the standard of factual reasonableness is dictated by the standards of a notional reasonable regulator, but as the Commission could then (presumably) not be assumed to be other than a reasonable regulator, this would mean that, *ipso facto*, its decisions could not be other than reasonable, thus begging the entire question. For the reasons given under "General" above, I do not see how that can be right.

76. My decision in this case applied a sufficiently high test to the question whether the actual decision under review in this case was, objectively viewed, factually unreasonable, and found that it was. Any conclusion that this process of reasoning did not apply the statutory ground of appeal would deprive this express ground of appeal of any practical content, and would render the Commission effectively unaccountable for its decisions, however, unreasonable they might ever be seen to be. That cannot be correct.

(3) Final decision on leave to appeal.

77. I now come to decide whether, against all the above background, I ought to give the Commission leave to appeal, on any of the above grounds.

78. However, in the particular and largely exceptional circumstances of this case, I do not think it would be right for me to do so, for several reasons.

79. The first is the practical one that, even though the Notice of Appeal seeks to suggest that its arguments go to undermining all three of my Reasons, I do not see that this is the case.

80. None of the grounds of appeal actually grapples in any way with the reasons given under my Third Reason for setting aside the decision, nor suggests why these were wrong; the grounds of appeal merely assert this peripherally, with no supporting argument focused on the constituent elements which I carefully found.

81. This is, in particular, but separately as to (i) my finding as to lack of sufficient properly required accuracy in the public statement and (ii) the fact that the SDM had not taken into account the terms of whatever public statement was to be issued in respect of Mr Cairns, (which the Commission had declined to produce, claiming that it was "irrelevant" ie, in effect "none of WTL's business").

82. In particular as to the latter, I do not see how this can be justified. If the justification for sanctioning WTL by the issue of a public statement is the conduct actually committed by a natural person for which it is legally responsible, then this in itself must mean that it is reasonably "WTL's business" how such person's conduct is also being dealt with. As I said, considering the context of the contents of such statement might not have affected, or affect, the SDM's decision, but that is not the point; it might have, it was not considered and this is

particularly unsatisfactory having regard to the fact that, in making his decision, the SDM is "the Commission".

83. None of the Commission's proposed grounds of appeal deal with those findings above, which are entirely separate from the findings which its grounds of appeal attack. I therefore conclude that "the appeal" by the Commission does not have any real prospect of success.

84. This means that if I am to give leave to appeal, I can only do so on the grounds that the Notice of Appeal raises some issue which is of sufficient importance or public interest that it ought to be considered by the Court of Appeal, nonetheless.

85. Whilst I accept that some of the arguments above, in particular those founding Grounds 4 and 6 are no doubt seen as important by the Commission as a matter of principle, I have concluded that they really cannot be right for, in effect, usurping the Royal Court's intended jurisdiction.

86. Next, I am unconvinced that the actual circumstances of this case are of sufficient moment that sending it to the Court of Appel is really justified. I have emphasised that it is entirely fact specific and it is unlikely in the extreme that such a combination of facts will occur again.

87. I also cannot see how it will actually make a jot of difference to the Commission's reputation, the reputation of the Bailiwick, or the proper furtherance of the Commission's objectives as regulator (even though I accept that these are to be duly recognised) - or, indeed any member of the public - whether or not a public statement is issued in this case at all.

88. My third reason is the inequality of arms in this case. The Commission is a public authority with a bottomless pocket and ample time and resources for the zealous pursuit of an appeal. WTL is a relatively small company, and one of the reasons why I declined to exercise my power to remit the matter to the Commission (applicable if my Second or Third Reasons were the correct basis for setting aside the decision to issue the proposed public statement) was that WTL had already been subjected to the great burden and expense of defending the long drawn out enforcement proceedings, - exacerbated by the way in which the Commission had handled these, which I found to be clumsy, and to have caused WTL confusion and possible prejudice by its mistake in sending out a "wrong" draft.

89. Had I been minded to think that the public interest really demanded that the matter should be referred to the Court of Appeal, (notwithstanding my own view that, when examined dispassionately the grounds of appeal were without legal merit) I would have wished to grant such leave only on the condition that the Commission should pay the costs of the Appellant (WTL) of and incidental to any such appeal on the indemnity basis in any event. However, I am not satisfied that I would have jurisdiction to do this. If it could be imposed at all, it may be that it would only be an appellate court itself which could impose any such condition.

90. In all the circumstances, therefore, I conclude that notwithstanding the arguments advanced by the Commission, this is not a case upon which I should make the decision to grant leave to appeal myself. I consider that any such decision should be that of the Court of Appeal.

Conclusion

91. In conclusion, therefore, I refuse the Commission leave to appeal.

92. As this decision has been made on the papers, I will also extend the Commission's time for pursuing any application for leave to appeal to the Court of Appeal to the date 14 days after the issue of this decision, as requested.

Hazel Marshall KC

Lieutenant Bailiff

28 January 2025