

[2025]GRC007

IN THE ROYAL COURT OF GUERNSEY

**ORDINARY DIVISION
(Civil Action No. 2474)**

Between:

NICHOLAS WALTON HOFGREN

Appellant

-and-

**CHAIRMAN OF
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
granting limited leave to appeal**

Decision handed down: 28th January 2025

Advocate M Adkins for the Appellant

Advocate J Hill for the Respondent.

1. The Appellant, (“**Mr Hofgren**”) 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 21 November 2024 (see Report at [2024]GRC079), whereby I dismissed his appeal against the sanctions imposed upon him under the EP Law by a Decision of the Respondent, the Guernsey Financial Services Commission, acting by one of its Senior Decision Makers (Dr Kirsty Hood KC, as she then was: “**the SDM**”) on 16 November 2022.
2. By “the Decision” I refer to the entire record of the SDM’s Decision of that date including her findings and reasons. This Decision culminated in the individual “decisions” as to appropriate sanctions to be imposed which are the subject(s) of any appeal.

3. The principal sanctions were a Prohibition Order made under s 33 of the EP Law prohibiting Mr Hofgren from owning any interest in or acting in any directorial or senior managerial role in a Guernsey finance/financial services business for a period of 14 years, and the issuance of a public statement with regard to him under s 38 of the EP Law. No discretionary financial penalty under s 39 of the EP Law was imposed in view of Mr Hofgren's accepted impecuniosity, but the Decision stated that, but for that fact, a penalty of £290,000 would have been appropriate.
4. The draft Notice of Appeal accompanied by a proposed skeleton argument, specifies six grounds upon which it is sought to appeal.
5. 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.

6. 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, subject to 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).
7. 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 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.

Grounds 1 - Errors as to the requirements of clarity

8. Grounds 1 of the Draft Notice of Appeal argues that I erred in law in “accepting that the SDM was not required to articulate which findings within Paragraph 28 of the Decision amounted to findings of a lack of probity by Mr Hofgren”.
9. This ground is cited as failing to meet the requirements of clarity in and about the expression of a properly valid decision of the Commission by which a person or an entity is sanctioned.
10. I do not consider that this suggested ground of appeal stands any real prospect of success for several reasons.
11. The first is that it somewhat misstates my decision. I did not hold that the SDM was “not required” to identify which findings made against Mr Hofgren in Paragraph 28 amounted to

findings of lack of probity against Mr Hofgren but rather that, having regard to what she had actually said, the material with which she was dealing (his general conduct of the “DXD diamond investment”), the whole context set out in the Decision, and the fact that Mr Hofgren’s acts and activities in relation to this investment were but a part of the acts and activities upon which she ultimately founded her general judgment that Mr Hofgren did not or had not fulfilled the Minimum Criteria for Licensing, she had adequately articulated where she had discerned a want of probity on his part.

12. As to broad considerations, an appeal under s 106 of the EP Law is mandated on the basis that an appellant is “*aggrieved*” by a “*decision*” of the Commission which is one of those listed in s 106 (1) of the EP Law. In this case the relevant such decision(s) were those to impose the sanctions mentioned above. To succeed, the Appellant must satisfy the Court that that particular decision to impose a sanction is flawed in some one or more of the statutorily prescribed respects laid down in s 106 (3) of the Law. Lack of clarity is not a specific ground of such appeal and so any requirement for clarity is ancillary. It simply requires that the supporting Decision discloses, sufficiently clearly, legally satisfactory reasons justifying the sanction decision under appeal.
13. Paragraph 28 provided only a part of the grounds (findings and reasons) which the SDM relied upon as justification for the sanction decision(s) under appeal. The fulfilment of any requirement for clarity in this paragraph therefore needed to be viewed in the context of the whole of the SDM’s reasons as to appropriate sanction(s), overall.
14. I examined the various proposition and arguments of Advocate Adkins with regard to
 - (i) the requirement of clarity in principle,
 - (ii) the question of any particular requirement as to this with regard to findings of want of probity (and the evidential implications of this for the purpose of considering the proper application of the *Ivey v Genting* test) and
 - (iii) whether such requirements were adequately met in the Decision as a whole, including Paragraph 28,

for the purpose of enabling Mr Hofgren reasonably to understand what conduct of his including (but not confined to) conduct exhibiting want of probity, had been found, such that he would be able to exercise his right to appeal against the sanction decision(s) (if so advised) and whether such a requirement was met by the terms of the SDM’s Decision. I did this at some length. I concluded that it was.

15. This ground of appeal amounts to arguing that a decision to impose a particular sanction is legally flawed unless individual findings of fact, even though part of a finding of a general course of conduct held to exhibit a lack of probity, are individually identified and labeled as such. Given that the sanction is imposed on the basis of evaluating the totality of the person’s material conduct, I did not (and do not) think that it can reasonably be argued that “clarity” to that level of individual detail is required on pain of vitiating such an overall finding and decision as to sanction. My reasons appear in the judgment.
16. More specifically, I do not (and did not) consider that Mr Hofgren’s criticism of Paragraph 28 is even reasonably arguable as a ground sufficient to vitiate the SDM’s conclusions expressed in Paragraph 28. I accept (and I found) that the SDM had bundled together both (i) her findings as to Mr Hofgren’s conduct and (ii) her various criticisms of that conduct, but the essence of such criticism, including the degree to which she found want of probity, was sufficiently clearly discernible from what she said in Paragraph 28 to enable Mr Hofgren (or

any reasonable and not overly pedantic reader of her Decision) to discern her reasons adequately, on proper examination of that Paragraph.

17. The submission under this ground of appeal that I “mischaracterised” Paragraph 28 as “*amounting to two overall findings which were not articulated by the SDM*” is simply wrong. I referred to two such overarching findings (see [98] of the judgment) as part of my general review of the Decision and the need to keep in mind the totality of the matters which justified the SDM’s ultimate decision to impose sanctions, but I did so as a general observation of the content of the Decision. In considering Paragraph 28 specifically I did refer again to these overarching findings, but to point out that these were relevant context, and not as any “characterisation” of Paragraph 28 itself.
18. I therefore do not consider that any appeal founded on a submission that I failed to find, and to take appropriate account of, any suggested lack of clarity in Paragraph 28 stands any real prospect of success, nor that it raises a point of such public interest or importance that it ought to be considered by the Court of Appeal.

Ground 2: Reading additional findings into Paragraph 31 of The Decision.

19. This ground of appeal relates to Paragraphs [201] to [204] of the judgment, where I was exploring whether the SDM’s factual findings in, or necessarily to be inferred from, Paragraph 31 of the Decision had adequate legal foundation in the evidence and submissions which were before her.
20. It had been submitted by Advocate Hill that “*there was evidence that Mr Hofgren planned to carry out the transactions so as to benefit himself and his associates*”. The material comment in the Decision was “*However, even were it not deliberately brought about by Mr Hofgren....*”. The SDM had clearly, therefore, been considering whether such deliberateness was evidenced, even though ultimately rejecting it.
21. To test whether Advocate Hill’s submission was supported required looking back at the evidence and submissions presented to the SDM as part of the submissions of the ED. I was referring to that presentation when I employed my criticised emphasis of the word “used”, on which so much store is set in this ground of appeal.
22. However, it will be seen, on proper reading, that I emphasised this only to indicate that I had found the presence of submissions/evidence connecting to what the SDM had apparently been assessing when the word “*deliberately*” had occurred to her - which was that the situation had been “used” by Mr Hofgren, whether deliberately or not. The submission that my emphasis must have meant that I had found that the SDM found that Mr Hofgren’s use of GFG in pursuing the Vordere transaction was deliberate, rather than merely factual, appeals against a finding I simply did not make.
23. This was, in other words, not any additional finding, nor any (mis)characterization of the SDM’s own finding. It was seeking to identify a valid evidential source for what was actually said. I do not consider that this ground of appeal has any real prospect of success, nor that it discloses a point of sufficient public interest or importance that it ought to be considered by the Court of Appeal.

Ground 3: The finding of “lack of probity for a strict liability obligation”

24. The basis of this ground of appeal is an assertion that I erroneously approved, as a finding by the SDM of want of probity, a finding of a breach of the duty of a director not to take a collateral benefit from a transaction undertaken by the relevant company (which is said to be a duty of strict liability,) without engaging with Mr Hofgren’s submissions that any want of probity could

be (and was here) removed by consideration of the effects of receiving legal advice on a person's subjective state of mind.

25. This assertion is founded on my references, at [211] and [359] of the judgment, to the fact that the regulatory laws relating to the conduct of financial business in Guernsey are apparently formulated to enable the Commission to require higher standards of probity, avoidance of conflict of interests and regard for the interests of participating investors, than might be imposed simply by ordinary company law principles. From this is constructed an elaborate argument of errors, which I cannot see to have any arguably sound foundation in the above.
26. The submission is that I failed to engage with the effects "*on Mr Hofgren's subjective state of mind*" as a matter affecting probity, of his having obtained the legal advice (from Carey Olsen) which he did. I consider that this submission is not sustainable in three respects.
27. First, I did consider, in detail, the SDM's findings of the effect of such legal advice as a matter of want of probity, and I found no fault with them
28. Second, the supposed test is inaccurately stated in this ground of appeal as having reference to "*a person's [ie Mr Hofgren's] subjective state of mind*" when it does not. The subjective element of the *Ivey v Genting* test is as to a person's state of knowledge or belief of facts, not as to his "state of mind" in broad terms, and to describe it inaccurately in that way muddies the waters. The second stage of the test is then whether it is objectively "proper", according to the appropriately applied standard of ethics, for him to have acted in the way he subsequently did, in that subjective state of knowledge and belief as to facts. This is the test which (I found) the SDM had correctly applied, on the basis that Mr Hofgren subjectively knew of the terms of the legal advice which he had received (fact), but, objectively, that did not justify him, as a matter of probity and ethics, in proceeding to act in the way he subsequently did - as to which his subjective belief in the righteousness of this conduct was irrelevant.
29. Third insofar as it is alleged that by preferring Advocate Hill's submissions to those of Advocate Adkins I gave insufficient reasons, I do not consider that to be arguable, because my reasons were that I preferred Advocate Hill's submissions to the contrary submissions of Advocate Adkins submissions. A judge is not required to spell out reasons in any particular form if it is possible to convey these simply by indicating which Advocate's submissions s/he or found to be the more correct or convincing.

Ground 4: Incorrect construction of s 106 of the Enforcement Powers Law and/or the Approach to Sanctions

4(1) Incorrect construction of s 106(3)

30. It is here submitted that I took the wrong approach to the construction of the EP Law in that I held that the SD's opinion that the reputation of the Bailiwick was put at risk by Mr Hofgren's conduct over the Vordere Transaction was something that could only be challenged on, in effect, "judicial review" grounds (which I could not find were made out). It is submitted that I should have held that this finding was reviewable on the basis of factual "Jurat unreasonableness" as would (it was submitted) be the questions as to whether the Commission (the SDM) was correct in finding that there had been a breach of the requirements of the MCL
31. As already stated, it is the overall decision of the Commission (the SDM) to impose a particular sanction which is the statutorily prescribed subject of an appeal on the grounds of simple "unreasonableness" under s 106 (3) (thus; "Jurats' unreasonableness"), rather than any particular finding of fact. I therefore do not think that an appeal on this ground stands any real prospect of overturning my ultimate decision, at any rate on its own.

32. Having said that, I do consider that the degree of deference which the Royal Court, on an appeal from a decision of the Commission, usually by its SDM, in respect of major sanctions, is required to show to the opinion of an SDM on such a matter is itself a matter of some importance to the correct construction of the grounds of appeal under s 106 (3) of the EP Law.
33. The SDM system is not statutory but has been devised by the Commission. SDMs are appointed by the Commission upon the only apparent qualification of being senior lawyers whom the Commission itself judges it appropriate to select, and to whom the Commission then submits (and advocates in support of) its own prior decision arrived at by its Enforcement Division, in the apparent hope and expectation of endorsement. The basis on which such an SDM is to be regarded as having particular expertise is thus opaque. Given the importance of the statutorily prescribed grounds of appeal, and in particular s 106 (3), as the prescribed means of holding the Commission's decisions up to scrutiny, I do consider that this raises a matter of public interest and importance which it would be beneficial to have considered by the Court of Appeal.
34. I am accordingly minded to give leave to appeal on this first part of Ground 4.

(2) Suggested treatment of misleading the Commission as being *de minimis* with regard to sanction.

35. This ground of appeal rests on the fact that (i) I acknowledged the seriousness of a finding that a licensed entity or person misled the Commission, but subsequently (ii) found that Mr Hofgren could not fairly be treated by the SDM as having misled the Commission at interview with regard to moneys he earned from the company in all the circumstances of the questioning, but then (iii) did not treat this mistaken finding as being of sufficient import as to lead to a conclusion that the overall sanctions imposed by the SDM must have been unreasonable.
36. Viewed on its own, I do not regard this to be an arguable ground of appeal. This is because this was not the only example of a finding of Mr Hofgren's having misled the Commission. The other and far more serious such finding was that he had improperly misled the Commission into gaining the impression that he took no part in the company's decisions in pursuit of the Vordere Transaction when this was not true. I do not, therefore consider this grounds of appeal on its own to have sufficient substance to have any real prospect of any success.

4(3) Failing to properly to follow up the consequences for sanctions of there being no finding of want of probity as to an instance of misleading fellow directors.

37. The complaint here is that, having found that the SDM had not (as Mr Hofgren submitted she had) actually found a want of probity as to Mr Hofgren's possibly misleading his fellow directors in answering a question regarding a third party's previous connections with entities engaged in the Vordere transaction, I then "treated this as *de minimis*" because I did not find that it had, in the event, had any discernible effect on the level of sanction imposed by the SDM.
38. The oddity of this particular matter is that, having carefully analysed the SDM's actual findings, I concluded (contrary to Mr Hofgren's submission) that it was open to the SDM to find that Mr Hofgren had misled his fellow directors in point of actual fact, as regards a relatively minor matter to do with the Vordere Transaction, but that she had not, either expressly or by necessary implication from what she had actually said, found that this was a matter of want of probity on Mr Hofgren's part (as contrasted with accident or innocent carelessness), although Mr Hofgren had appealed on the assumption that she actually had so found.
39. I therefore said that I could not make any finding as to this subject of appeal unless it appeared to me later that its supposed character as perceived by Mr Hofgren (but not justified) must be taken to have affected, adversely to him, the sanction subsequently imposed on him. This is

because it was only this latter (the sanction) which was the subject of the appeal before me. I subsequently did not find any evidence that any supposed such mischaracterisation had been operative in this way.

40. I cannot see that this particular matter provides any arguable grounds of error of law.

Ground 5: Treating the “excluded findings” as de minimis to the sanctions imposed.

41. The “excluded findings” refers to the two findings considered under Grounds 4 (2) and (3) above, together with a third finding that the SDM had treated a misstatement by Mr Hofgren of the costs of transporting diamonds as having more damning significance than it warranted. These were the only individual matters on which I considered that the SDM had, or had possibly, been in error.
42. This ground of appeal is thus that, it is submitted to have been an error of law for me to treat those three individual findings as being *de minimis* in the overall context of the sanctions imposed by the SDM, and therefore to uphold the sanctions and dismiss Mr Hofgren’s appeal, rather than treating them as significant, allowing the appeal and (presumably) remitting it to the SDM to reconsider her sanctions.
43. I do not think that the substance of my decision in this regard was arguably incorrect, as I do not consider that, viewed in the overall context of the entire Decision, it was arguably incorrect to infer that these actual aspects of incorrect or possible incorrect findings were sufficiently material to the SDM’s ultimate decision as to sanctions to render the latter unsound.
44. However, I do accept that the threshold for whether and when errors found in an SDM’s findings of adverse facts can be treated, as a matter of law or procedure under s 106 (3), as being sufficiently insignificant in the context of the whole of the rest of the findings underlying a decision to impose a sanction which are either upheld or admitted (as here) may be a sufficiently important point of law that it would be helpful to have it considered by the Court of Appeal. I will therefore give leave to appeal on this Ground 5.

Ground 6 Assessing sanctions anew

45. This ground of appeal effectively combines and repeats the substance of Grounds 4 and 5 which I have already dealt with, putting an argument that the consequence of my treatment of those issues was, in effect, to substitute my own decision as to sanctions, because my ultimate decision was therefore based on a different group of findings from those actually articulated by the SDM. This appears to me to be simply a different way of putting the arguments under Ground 5.
46. Great stress is laid in the ground of appeal on my use of the tense “*may have proceeded*” at [355] of the judgment, in considering the basis on which the SDM then imposed sanctions, with the submission that my following statement that I judged that I could “*therefore rightly proceed on the basis that the sanctions imposed by the SDM would have been the same...*” was illogical. With respect, this is incorrect, since my subsequent statement showed that when I said “*may have*” proceeded I was indicating the basis (but of overall seriousness of the position and not specific findings) on which I was inferring she actually had proceeded. I could have omitted the words “*may have*” or substituted the word “*apparently*” without in any way changing my meaning, as my following statement showed. There was no actual illogicality.
47. I have already indicated that I would think it appropriate to grant leave to appeal on Grounds 4(1) and 5, but not on the other Grounds of Appeal (excepting insofar as these logically feed into Grounds 4 (1) or 5.

48. In those circumstances, whilst I do not consider that Grounds 6 actually adds anything of substance to the other grounds of appeal raised in the Notice of Appeal and I will grant leave to appeal on Grounds 6.

Further point

49. I have considered whether the fact that I do think it appropriate to grant leave to appeal on Grounds 4 (1) and 5 and 6 means that I should reconsider my views as to Grounds 1, 2 and 3, and permit them to be argued as a matter of practicality or convenience, but I do not think so. They are entirely discrete and distinct in their effect on the possible substance of any appeal, and I do not consider them to have any real prospect of success or to raise any point of importance of public interest which ought to be considered by the Court of Appeal, even in the context of those which I do so consider.
50. I have also considered whether my view that it would be helpful for the principles behind the grounds of appeal in 4 (1) and 5 to be considered by the Court of Appeal notwithstanding my view that there is no real prospect of successfully arguing that my actual decision was wrong is a matter which I should leave to the opinion of the Court of Appeal, but I am, on balance, satisfied that it is appropriate for me to give leave to appeal, limited as I have indicated.

Conclusion

51. My ultimate decision, therefore is that I grant leave to Mr Hofgren to appeal on part of Grounds 4 (as indicated above) and Grounds 5 and 6 in his Draft Notice of Appeal, but I refuse leave to appeal on Grounds 1, 2, 3, and the remainder of Grounds 4.
52. As this decision has been made on the papers, I will also extend Mr Hofgren's time for filing Notice of Appeal (and, if intended, his time for further pursuing any application for leave to appeal to the Court of Appeal) to the date 14 days after the issue of this decision.
53. I will also grant his application that the Orders in question be stayed pending determination of any appeal, provided that in this respect the Commission has liberty to apply.

Hazel Marshall KC

Lieutenant Bailiff

28th January 2025