The appellant initially appealed the GFSC's decision to the Royal Court, which dismissed his appeal. The appellant then sought leave to appeal to the Court of Appeal and leave was granted for Grounds 4, 5, and 6. This judgment concerns his renewed application for leave to appeal on Grounds 1 and 3. The Court of Appeal granted leave to appeal on Ground 1 (DXD Loan Transaction) but refused leave on Ground 3 (Vordere Transaction).

[2025]GCA030

IN THE GUERNSEY COURT OF APPEAL
(CIVIL DIVISION)
Court of Appeal Case No: 596

Date: 20 May 2025

ON APPEAL FROM THE ROYAL COUT OF GUERNSEY
(ORDINARY DIVISION)

Before: **Wolffe JA**

Between:

NICHOLAS WALTON HOFGREN

Appellant

-and-

THE CHAIRMAN OF THE GUERNSEY FINANCIAL SERVICES COMMISSION

Respondent

Counsel for the Appellant:
Counsel for the Respondent:

WOLFFE JA

1. This application concerns a decision ("the Decision") of the Guernsey Financial Services Commission (made on its behalf by a Senior Decision Maker, Dr Kirsty Hood QC) to make prohibition and disapplication orders against the Appellant, and to issue a public statement. Those sanctions were predicated on findings that the Appellant did not satisfy the minimum criteria for licensing set out in the Protection of Investors (Bailiwick of Guernsey) Law 2020 and other applicable Laws.

2. The findings arose from the Appellant's involvement in GFG Limited (a licensed provider of investment management services) and associated entities, including GFG Funds PCC Limited, a protected cell company, authorised by the Respondent to carry on business as an Authorised Collective Investment Scheme. The Scheme had three active cells, including two known as Property Cell and Xenfin Cell.

3. The Appellant appealed the Decision to the Royal Court. On 21 November 2024, the Lieutenant Bailiff dismissed the appeal. The Appellant then applied to the Lieutenant Bailiff for leave to appeal under section 107 of the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law 2020. The Appellant's Note of Appeal advanced six proposed Grounds of Appeal. The Lieutenant Bailiff granted leave in respect of Grounds 4, 5 and 6. In respect of Ground 4, her grant of leave was limited to one of three points taken in Ground 4.

4. The Appellant now renews his application for leave in respect of Grounds 1 and 3. He does not renew his application for leave in respect of Ground 2. In the Skeleton Argument filed in support of the renewed application, he explains that he no longer insists in his application in relation to the remaining parts of Ground 4, on the basis that the points which he wished to advance are sufficiently encompassed within Grounds 5 and 6.

5. This application accordingly relates only to Grounds 1 and 3. These concern, respectively, paragraphs 28 and 31 of the Statement of Reasons which was annexed to the Decision. The two Grounds challenge the way that the Lieutenant Bailiff dealt with the Appellant's criticisms of those parts of the Decision. I have concluded that I should grant leave in respect of Ground 1 but refuse leave in respect of Ground 3. I will explain my reasons briefly.

6. In *ITG Ltd v. Glenalla Properties Ltd* [2022] GCA 091, the Court stated that leave should not be granted unless it is at least satisfied either: (i) that the appeal has a real prospect of success; or (ii) that even though the appeal does not have a real prospect of success, it raises an issue which in the public interest should be examined by the Court of Appeal.

7. I make two preliminary observations:

   (i) I am obliged to address the application *de novo* and not as an appeal against the Lieutenant Bailiff's decision refusing leave on Grounds 1 and 3.

   (ii) I have, of course, reached no concluded view as to the merits of Ground 1. That will be a matter for the Court of Appeal once it has heard full argument.

GROUND 1: PARAGRAPH 28 OF THE DECISION

8. Paragraph 28 of the Statement of Reasons contains findings made by the Senior Decision Maker in relation to a diamond-backed loan called the "DXD Loan Transaction". In paragraph 28, the Senior Decision Maker states compendiously that "with regard to the DXD Loan Transaction, Mr Hofgren's actions demonstrate a lack of competence and soundness of judgment and were lacking in probity". This compendious statement is followed by sixteen specific findings. The paragraph does not identify which of these findings are said to demonstrate a want of probity, as opposed to lack of competence and soundness of judgment. The paragraph contains no explicit finding as regards the Appellant's state of knowledge.

9. The Lieutenant Bailiff was critical of the approach which the Senior Decision Maker took in paragraph 28. However, she took the view that it was not necessary for the Decision specifically to identify which of the specific findings justified the conclusion that the Appellant was lacking in probity. At paragraphs 156 and 157 of her judgment, she set out an analysis to the effect that it would suffice if at least one of the specific findings would justify the conclusion that the Appellant was lacking in probity.

10. At paragraph 162 of her judgment, the Lieutenant Bailiff observed:

> "The SDM's findings in relation to the DXD Transaction are not that Mr Hofgren was engaged or complicit in the unlawful theft or depletion of the security for this loan. What she does find is that is that the totality of Mr Hofgren's conduct in respect of such loan, citing all the aspects of what he actually did or did not do, (and he was obviously and necessarily aware of his own actions and their immediate context) disclosed a wholesale disregard for exercising the extreme skill and care which is obviously required in regard to dealings with this kind of security (diamonds being plainly of high value and eminently portable) as one aspect. As another aspect, it displayed lack of respect for the need to keep fellow directors properly and accurately informed as to the circumstances of this important security. These failings were acts and circumstances of which Mr Hofgren clearly had actual knowledge in order to do what he did. Overall she judged that it was fair to describe an overall assessment of his conduct in such circumstances as "*demonstrating that Mr Hofgren's actions were lacking in probity*". I do not see that this judgment can be faulted, in form or in substance."

11. Ground 1 contends: (i) that the Lieutenant Bailiff erred in law in accepting that the Senior Decision Maker was not required to articulate which findings in paragraph 28 of the Decision (a paragraph which was concerned with a transaction described as the "DXD Loan Transaction") amounted to findings of a lack of probity on the part of the Appellant; and (ii) that, in paragraph 162 of her judgment the Lieutenant Bailiff recharacterized paragraph 28 of the Decision as amounting to two findings and this is said to be an error in the construction of the Decision.

12. The Note of Appeal amplifies these criticisms. The Appellant contends, under reference to the decision of the Court of Appeal in *Domaille v. Guernsey Financial Services Commission* [2024] GCA 003 and *Ivey v. Genting Casinos (UK) Ltd* [2017] UKSC 17*,* that he is entitled to be told which aspects of his conduct are said to amount to a want of probity and, further, that without that clarity, it is not possible to assess whether the findings are supported by findings of knowledge such as to satisfy the test in *Ivey.* The Appellant contends that it was a mis-construction of paragraph 162 to group the specific findings into two categories, not found in paragraph 28 itself. He contends that it was an error to find that his knowledge of his own actions was sufficient to satisfy the *Ivey* test.

13. It seems to me to be arguable that the Respondent should, in its decisions, state clearly the basis for a finding of want of probity, as opposed to a lack of competence and soundness of judgment, and that, in doing so, it requires to address both aspects of the *Ivey* test. It also seems to me to be arguable that paragraph 28 of the Decision did not provide that clarity. The contention that the Lieutenant Bailiff accordingly erred in law in dismissing the appeal insofar as it challenged the finding of want of probity in paragraph 28, seems to me to have real prospects of success. I accordingly take the view that this Ground should be added to those in respect of which leave has already been given.

GROUND 3: PARAGRAPH 31 OF THE DECISION

14. Paragraph 31 of the Statement of Reasons contains findings made by the Senior Decision Maker in relation to a transaction which involved transferring to a company called "Vordere" certain securities taken by Property Cell and Xenfin Cell for loans made by those cells to a German

property investment which subsequently collapsed. The Appellant was on the board of Vordere and stood to gain personally from the transaction if it was successful. There is no dispute that he was in a position of conflict of interest. As I understand it, he recused himself from voting on the decision at meetings on 30 May 2019 and in June 2019.

15. Paragraph 31 contains a finding that "[d]espite the conflicts of interest presented by his roles in GFG Limited and Vordere, Mr Hofgren took the lead in negotiations …". The Senior Decision Maker found that, even if the Appellant did recuse himself from the decision on 30 May 2019, he had been heavily involved up to that point, and "continued to opine that the transaction was in the best interests of Property Cell and Xenfin Cell at the 30 May 2019 Scheme Board meeting itself", as well as continuing to be involved in June and July 2019. The Senior Decision Maker found that the Appellant failed to manage the conflicts of interest. She found that advice was "eventually sought" from Carey Olson, and that this agreed with the proposal that the Appellant should "at the very least" recuse himself from the decision. The advice (provided in draft on 6 June 2019 and in final form 8 July 2019) post-dated the meeting of 30 May 2019, and did not state that recusal would be sufficient to manage the conflicts of interest which existed. Against a narrative describing the Appellant's actings in relation to the transaction both before and after that advice was received, the Senior Decision Maker concluded that: "[i]n all the circumstances … Mr Hofgren failed to prioritise the interests of investors over his own interests … this demonstrates a lack of probity, soundness of judgement and competence".

16. This finding is discussed at two parts of the Royal Court judgment. At paragraphs 166-212 the Lieutenant Bailiff addresses a general challenge to the findings in paragraph 31. At paragraphs 219-230 she addresses an argument specifically directed to the way that the SDM had dealt with the legal advice from Carey Olson.

17. Ground 3 contends that the Royal Court erred in law in not applying the correct test when making the finding of want of probity set out in paragraph 31 of the Decision. This contention is advanced on two bases. First, it is said that the Lieutenant Bailiff understood the want of integrity described in paragraph 31 to flow from breach of a strict liability rule that a director should not benefit collaterally from a transaction, irrespective of his belief in the benefits of the transaction, and that since the rule is a strict one, its breach cannot demonstrate a want of integrity. Second, it is said that the Lieutenant Bailiff's judgment failed to engage with the effect of taking legal advice on whether the Appellant objectively lacked probity. It is said that the judgment did not give adequate reasons and/or failed to take relevant factors into account. The skeleton argument develops a detailed argument in support of these grounds.

18. At paragraph 205 of her judgment, the Lieutenant Bailiff concludes that the factual matters set out in paragraph 31 logically justify the finding of want of probity, specifically related to not prioritising investor's interests over the Appellant's own interests. She took the view that the fact that Mr Hofgren inevitably knew what he was doing and knew that no serious consideration had been given to other alternatives provides was sufficient subjective knowledge to justify a finding of want of probity. Having read paragraph 31 of the Decision, and paragraphs 199-205 of the Royal Court judgment, that seems to me to be a justified conclusion.

19. The subsequent discussion, about the nature of the rule against conflict of interest and which is criticised in the Ground of Appeal, falls to be read against that background. I am not convinced

that it is right to say that the Lieutenant Bailiff proceeded on the basis that there was a "strict liability" rule, as described. At paragraph 210, she sets out Advocate Hill's characterisation of the rule – which leads her to say that "the vice, it seems, is in failing to observe the pure principle as to dealing with conflicts of interest". She then doubts if she would accept the point as put by Advocate Hill, but states that she does not require, "on the facts of the present case", to grapple with it. That would appear to be because (paragraph 211) she is content (as she had already concluded at paragraph 205) that the SDM, having heard all the evidence and the explanations provided, concluded that there had been a want of probity specifically in respect that the Appellant prioritised clients' interests above his own.

20. I turn to the criticism of the Lieutenant Bailiff's approach to the way that the Senior Decision Maker dealt with the Carey Olson legal advice. I have read that advice. It made plain that there was a conflict of interest. The advice was taken only relatively late in the transaction, and apparently after (on the Senior Decision Maker's findings) the Appellant had already been heavily engaged in advancing the transaction. The advice does not state that recusal would, on its own, suffice to deal with the conflict of interest. In her judgment, the Lieutenant Bailiff narrates the competing submissions and accepts those of Advocate Hill. There is, it seems to me, no real substance to the contention that she did not, herself, grapple with the terms of the advice letter. The inference, to be taken from the fact that she has recorded submissions focused on that letter, is that she did consider its terms. Nor does it seem to me to be a valid objection to her judgment that, on this issue, she chose simply to adopt the submissions advanced by Advocate Hill. She narrates those submissions sufficiently to make clear why she has found as she has. I do not myself read those submissions as containing any inherent contradiction or inconsistency. The essential points appear to be: (i) that the advice was taken late in the day, when the damage had essentially already been done; and (ii) that it was, for the specific reasons set out in paragraph 225, "opportunistically simplistic" to read the advice as stating that recusal would suffice to address the issue. Paragraph 226 is somewhat obscurely worded, but it cross-refers to the discussion in relation to Ground 2(c), and it seems to me that, reading the paragraph with paragraph 177 in mind, that the point being made is that there was a contrast, unfavourable to the Appellant, to be drawn between the lack of care to take securities in respect of other transactions in which he was not interested, and the care taken in this transaction, where he was.

21. For these reasons I do not consider that Ground 3 has real prospects of success; and I accordingly refuse the application so far as it relates to that Ground.