Application for leave to appeal a Royal Court decision (dated 7 March 2025) that allowed the appeals of the four respondents: BTC Sure Group Limited, Sure (Guernsey) Limited, JT Group Limited, and JT (Guernsey) Limited. under section 46(8) of the Competition (Guernsey) Ordinance, 2012.

[2025]GRC042

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between **GUERNSEY COMPETITION AND REGULATORY AUTHORITY**

Applicant

-and-

(1) BTC SURE GROUP LIMITED
(2) SURE (GUERNSEY) LIMITED
(3) JT GROUP LIMITED
(4) JT (GUERNSEY) LIMITED

Respondents

Application for leave to appeal determined on the papers

Judgment handed down: 4th June 2025

Before: Sir Richard McMahon, Bailiff

Counsel for the Applicant: **Advocate J Hill**
Counsel for the First and Second Respondents: **Advocate E R Gray**
Counsel for the Third and Fourth Respondents: **Advocate J J Barclay**

Cases, Texts & Legislation referred to:

The Competition (Guernsey) Ordinance, 2012
In re A (Family Proceedings: Disclosure) [2012] UKSC 60
Medical Specialist Group LLP v GCRA 2023 GLR 17
GFSC v Domaille [2024] GCA 003
Foley v States Housing Authority 2003-04 GLR 137
The Competition (Vertical Arrangements Block Exemption) (Guernsey) Regulations, 2020
ITG Limited v Glenalla Properties Limited [2022] GCA 091
Case C49/92 P *Commission v Anic Partecipazioni SpA* [2001] 4 CMLR 17
Case C-85/15 P *Feralpi Holding SpA v European Commission* (unreported, 21 September 2017)
The Court of Appeal (Civil Division) (Guernsey) Rules, 1964

Introduction

1. The Guernsey Competition and Regulatory Authority ("the Applicant") has applied for leave to be granted to it pursuant to section 46(8) of the Competition (Guernsey) Ordinance, 2012 to appeal against the decision set out in my judgment handed down on 7 March 2025, allowing the appeals of the four Respondents, BTC Sure Group Limited, Sure (Guernsey) Limited, JT Group Limited and JT (Guernsey) Limited, for the reasons set out therein. This Application is

dated 2 April 2025. It is accompanied by a draft Notice of Appeal running to many paragraphs, but which raises four grounds of appeal.

2. Following receipt of the Application and draft Notice of Appeal, it was agreed between Counsel that the content of the draft Notice of Appeal would stand as the Applicant's submissions in respect of the hearing for leave and that the two sets of Respondents (and once again I will refer to them as "Sure" and "JT" respectively) would file their submissions during April. In the event, whilst that deadline was met by them, the papers were only passed to me at the beginning of June. It was further agreed that I could dispense with any oral hearing and determine the application on the papers.

3. For the reasons I set out in this judgment (in which I will also adopt any abbreviations used in the substantive judgment), I have decided that this Court should not grant the leave to appeal sought by the Applicant.

The Four Grounds

4. The first ground in the draft Notice of Appeal relates to the construction that I gave to section 43 of the 2012 Ordinance. In particular, it is said that I "*misinterpreted the statute to mean that any final decision must be on the same terms and grounds as the notice under s. 43 of the Ordinance.*" It is also stated that the "*requirements of procedural fairness required the gist of the GCRA's case to the put to the Respondents*" and to find otherwise was wrong as a matter of law. One reason is that it is said that the approach I took to sections 43 and 44 of the 2012 Ordinance was that a decision cannot "*differ in its reasoning*". Paragraph 22 of the draft Notice of Appeal says that I "*failed to correctly identify and apply the ratio decidendi*" of the authorities referred to in the previous paragraph and that fairness required the other parties to understand the "*essence*" of the case against them (*In re A (Family Proceedings: Disclosure)* [2012] UKSC 60).

5. The second ground relates to this Court erring in the way the scope of its jurisdiction was described. In developing this ground of appeal, I am criticised for relying on what I had set out in *Medical Specialist Group LLP v GCRA* 2023 GLR 17 and for failing to follow *GFSC v Domaille* [2024] GCA 003, a judgment that was handed down between the hearing and the substantive judgment, but which fell to be applied because it explains this Court's functions on an appeal, quoting *inter alia* para. 80 of that judgment. It is suggested that the persuasive burden at the appeal was reversed. Had the reasoning in *Domaille* been applied, it would have shown the need for this Court to have regard to the whole of the statutory framework.

6. The third ground of appeal asserts that I fell into error by limiting the Applicant to the content of the Decision that was the subject of the appeal. In doing so, Advocate Hill seeks to rely on *Foley v States Housing Authority* 2003-04 GLR 137, referring to the Court trying to put itself "*back into the position of the original decision-maker*". The evidence on behalf of the Applicant was "*intended to clarify a discrete issue in the appeal*". There is also reference to the power in section 59 of the 2012 Ordinance for the Court to make rules, although no such rules have yet been made.

7. The fourth ground of appeal appears to be dependent on the third ground (because para. 50 begins "*If the Appellant is correct on its Ground 3 arguments, it follows that many of the RC's findings on matters of competition law (including its findings summarised at ¶¶6.1 to 6.4 above) are unsound – because the RC should have taken into account the Appellant's submissions on those issues in its skeleton argument*"). This ground revolves around the interpretation I gave to the amended section 54 of the 2012 Ordinance. It is suggested that I misunderstood the effect of the amendment to that provision, with one example given being about the enactment of the Competition (Vertical Arrangements Block Exemption) (Guernsey) Regulations, 2020.

8. In para. 9 of the draft Notice of Appeal, it is further suggested by Advocate Hill that "*all of the grounds directly engage issues which should be examined on appeal in the public interest.*"

9. Before turning to what the Respondents' Advocates have said about each of these grounds, I have carefully reminded myself of the way that the Applicant puts its case. However, it strikes me that the way in which I dealt with the case in this Court, as set out in the substantive judgment, means that it is only the first ground of appeal that actually challenges the basis on which the appeals were allowed. This appears to be acknowledged in para. 6 of the draft Notice of Appeal, which refers to the other matters covered in the substantive judgment as being "*provisional conclusions*". In those circumstances, the second to fourth grounds address matters that were not determinative of the appeals. I have, therefore, concentrated on the first ground of appeal, although I will also comment briefly on the other grounds raised.

The Respondents' Submissions

10. Both Advocate Gray for Sure and Advocate Barclay for JT suggest that I should reject all of the grounds advanced in the draft Notice of Appeal.

11. They both point out that section 46(8) of the 2012 Ordinance requires the appeal to be on a question of law, whereas the substantive judgment made a finding of fact when considering the premise on which the procedural error was based, and which was determinative of the appeals. As Advocate Gray puts it, in respect of the first ground in the draft Notice of Appeal, there is no error of law identified but rather the Applicant "*seeks to quarrel with the Court's factual assessment that, on the particular facts of this case and based on a detailed review of the evidence before it, the parties did not know the case against them in sufficient clarity to be able to answer it.*" Advocate Barclay agrees that this is a challenge to a factual finding arising from the detailed comparison that I undertook between the terms of the SSO and what was on the face of the Decision. As a consequence, both submit that the appeal has no real prospect of success.

12. As a general comment in relation to the second to fourth grounds of appeal in the Applicant's draft Notice of Appeal, Advocate Gray disagrees that these have any force of law (as it is said in para. 7 of the Applicant's draft Notice of Appeal). At best the conclusions I reached are *obiter dicta*. The appeals were allowed because of the conclusion I reached on the failure of the Applicant to comply with the terms of the 2012 Ordinance. As the substantive judgment shows, any other comments were intended to assist but were superfluous for the decision to allow the appeals. This approach is supported by Advocate Barclay.

13. Turning to the second ground of appeal, Advocate Gray points out that there has been no suggestion in the substantive judgment that this was approaching the matter *de novo*, which was what the Court of Appeal has stated in *Domaille*. It appears that the Applicant is saying that more deference should have been given to it as the expert decision-maker in relation to issues of infringements of competition law. However, the Court is the arbiter of whether or not the approach taken was within or outside the statutory scheme.

14. Advocate Barclay adds that it is important to look at the whole of the substantive judgment. As a result, there is nothing in it that falls within the criticisms levelled in *Domaille* about the approach taken at first instance in this Court.

15. In relation to the third ground of appeal in the draft Notice of Appeal, both Advocate Gray and Advocate Barclay point out that the decision about what could and what could not be referred to on their appeals was taken not at the hearing of the appeals in November 2022 but was dealt with at a previous hearing on 11 May 2022 (and had also been raised at a hearing on 11 February 2022). As such, the time for appealing against that ruling, if it were to be challenged, expired in 2022 and did not start to run until the substantive judgment was handed down. Advocate

Barclay further suggests that, contrary to what is set out under this third ground of appeal in the draft Notice of Appeal, it was apparent that the evidence from Sarah Livestro was supplementing rather than clarifying the Decision that was the subject of the appeal. In addition, it is unclear to both Advocates how, even if this ground of appeal could be argued, it would affect the outcome of the further appeal.

16. The inter-dependency between the third and fourth grounds is noted by Advocates Gray and Barclay. Advocate Barclay points out that the objections made in this fourth ground of appeal disregard the fact that the substantive judgment did not disregard the EU decisions to which reference had been made. The interpretation given to section 54 of the 2012 Ordinance in the substantive judgment did not mean that those cases were of no utility but rather could inform the outcome if the appeals had not been allowed for what is addressed in the first ground of appeal.

17. Advocate Gray and Advocate Barclay also contend that there is no public interest in any of these grounds of appeal, but with particular focus on the first ground, being dealt with by the Court of Appeal in the event that I conclude on this leave Application that there is no real prospect of success for any of the grounds. This is especially relevant to the second to fourth grounds which are, at best, *obiter* indications as to what I might otherwise have done if the primary contention had not resulted in the appeals to this Court being allowed.

Discussion

18. At the outset, it is important to remember the terms of section 46(8) of the 2012 Ordinance, which provides that "*An appeal from a decision of the Royal Court made on an appeal under this section lies, with leave of the Royal Court or Court of Appeal, to the Court of Appeal on a question of law.*" In considering the draft Notice of Appeal, it is necessary to identify which question of law is being raised. As the document covers 34 pages, I have looked carefully at how each ground is developed, as summarised earlier in this judgment.

19. Although there is no indication on the face of that subsection as to the test for granting leave, I am satisfied that the usual test for granting leave falls to be applied in the same way as it would be on any application for leave to appeal. As a result, I have considered each of the grounds separately as well as collectively in the light of how the test was set out in para. 40 of *ITG Limited v Glenalla Properties Limited* [2022] GCA 091:

> "*The correct approach, in our view, is that this 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. Cases in the second category – which will be exceptional – 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. The language which we have used allows for the possibility that a case might conceivably, on other grounds, raise "questions of great public interest" (to use the broad language of the Practice Direction of 1999), and would, it seems to us, be consistent with the absence of any express statutory constraint or limit on the power to grant leave. Further, for the reasons we have explained above, even if one of the two conditions which we have identified is met, other factors may, depending on the circumstances of the particular case, justify refusing leave.*"

20. This is the test I have applied. The way in which the test is described in para. 8 of the draft Notice of Appeal that leave to appeal will be given "*unless there is no reasonable prospect of success*", as Advocate Gray and Barclay have pointed out, mis-states the requirements that the Court needs to be satisfied, in respect of the first limb, that the appeal has a real prospect of

success. However, as I have already indicated, if the Application for leave fails in respect of the first ground of appeal, I consider that leave ought to be refused because the second to fourth grounds raised challenge decisions that were not determinative of the appeals before this Court.

21. Given that the first ground of appeal in the draft Notice of Appeal says that I was wrong to allow the appeals on the basis of a material procedural error, having regard to the approach I took to the construction, in particular, of section 43 of the 2012 Ordinance, it will probably come as no surprise, even with me stepping back and considering the issue objectively, that I do not accept that I fell into any legal error in the decision I reached.

22. I expressly cited section 43(2) of the 2012 Ordinance at paragraph 81 of the substantive judgment and addressed the inter-relationship with other provisions of the Ordinance throughout the judgment. In paragraphs following para. 81, I rehearsed the various decisions to which I had been referred. It is apparent that I had all of these clearly in mind. I undertook a detailed comparison between the SSO and the Decision. In para. 133, I note that complying with section 43 is mandatory. I referred to Case C49/92 P *Commission v Anic Partecipazioni SpA* [2001] 4 CMLR 17 in support of the presumption referred to at para. 5.28 of the SSO (para. 139, building on what I had said about referring to decisions of EU courts in para. 132, about which I will also comment when I reach the fourth ground of appeal). I similarly referred in para. 150 of the substantive judgment to Case C-85/15 P *Feralpi Holding SpA v European Commission* (unreported, 21 September 2017) as support for the conclusion I had reached about procedural unfairness. This summary demonstrates to my satisfaction that I was properly considering the arguments that had been raised by Counsel.

23. I have already referred to para. 22 in the draft Notice of Appeal. None of the cases referred to in the preceding paragraph bind the Royal Court. I do not consider that what is asserted would make any difference to the conclusion I reached about the material procedural error for which I found the Applicant to be responsible. Although I accept that *In re A* was before the Court, I preferred the approach that I set out in the substantive judgment when deciding that there had been a failure to comply with section 43 of the 2012 Ordinance. Whilst I accept that there is an iterative process, I remain of the view that there was a difference of approach by the Applicant between the First SO and the SSO which then led to the Decision. Because the Applicant had abandoned the First SO and replaced it with the SSO, this supported my conclusion that that SSO should have been dealt with by a further Statement of Objections and that it was improper to move to the Decision.

24. I am not, therefore, persuaded that there is a real prospect of success in the way the Applicant puts its case on this ground. In doing so, I am treating this ground as seeking to raise a question of law because it challenges the approach I took to statutory interpretation. I accept what both Advocate Gray and Advocate Barclay have submitted that this first ground may also appear to challenge the analysis I undertook between the SSO and the Decision before concluding that there had been a material error as to procedure. That would, in my view, be a challenge to the factual analysis I undertook, and so not amount to an appeal on a question of law, even if it were being suggested that this was a perverse conclusion to reach (which I note is not how it is put in the draft Notice of Appeal). If the ground raises a question of law on the basis of the statutory construction, I do not accept that it has a real prospect of success.

25. Having decided that the first ground of appeal has no real prospect of success, I have also considered whether it is a matter that, in the public interest, should be considered by the Court of Appeal. Although the pressures on that Court are not to the same degree as if there were a further appeal to the Judicial Committee of the Privy Council ("the JCPC"), I consider that a Judge of Appeal is better placed than I am (whilst accepting that I am, of course, the President of the Court of Appeal, although I could not decide any matter where I have sat in the Royal Court, as was the case here) to determine whether, despite there being no real prospect of success, leave to appeal should be granted. Under section 46(8) of the 2012 Ordinance, the

Applicant can renew its application for leave to such a Judge of Appeal (see rule 16(6) of the Court of Appeal (Civil Division) (Guernsey) Rules, 1964), which is why it is better, in my view, to follow the approach of applications for leave made to the Court of Appeal for further leave to appeal to the JCPC of being slow to find that this element of the test for granting leave to appeal is engaged. Because I am satisfied that I applied the correct legal test in respect of the first ground of appeal, with which a Judge of Appeal might or might not agree, if that Judge were to disagree, it would then be possible for the second limb of the test for leave to be considered more dispassionately. My inclination is that the second limb is not satisfied in respect of this ground where I have found that there is no real prospect of success as a matter of law, which is why I will not grant leave to appeal this ground on that basis.

26. Before turning to deal briefly with the second to fourth grounds of appeal, which I similarly view as having no real prospect of success for reasons that follow, I can also deal with the second limb of the test in relation to any public interest in the appeal being heard by the Court of Appeal. On the basis that whatever is set out in the substantive judgment on these matters does not bind anyone, and further if there were to be a subsequent appeal to the Royal Court my thoughts on each of the issues covered by these three grounds do not have to be followed, I would not be persuaded to grant leave to the Applicant for any of these grounds. Again, if there is a renewed application, a Judge of Appeal might approach this question differently.

27. Even if the second ground of appeal in the draft Notice of Appeal had a bearing on the outcome of the appeals (which it clearly does not), I do not accept that there is a real prospect of the appeal succeeding on the basis that I fell into error as a result of the decision of the Court of Appeal in *Domaille*. Before the substantive judgment was handed down, the Applicant was represented by Advocate Dawes. He knew full well from another matter with which I was dealing that I had invited comments about the effect of the *Domaille* decision. If he had considered it relevant, he should have enquired whether I was minded to invite representations. In any event, I did not feel the need to do so, even if that enquiry had been made. There is no reference to that decision on the face of the substantive judgment because I had not invited the parties to comment on it, but I was aware of what it had stated. The appeals fell squarely within the basis of the terms of the Decision and there was no consideration of matters *de novo*. To the extent that I commented on any issue of my own motion, it did not impact on the outcome. As the substantive judgment clarifies, there was no shifting of any burden between the parties, as suggested in the draft Notice of Appeal.

28. For these reasons, I do not consider that the second ground has a real prospect of success.

29. Similarly, the third ground of appeal would, in my view, need to be accompanied by an application for leave to extend time for the reasons explained by Advocates Gray and Barclay. The ruling from which this ground seeks to appeal was made in 2022. Whilst I appreciate that Advocate Hill was not instructed until after the substantive judgment was delivered, there was no criticism by Advocate Dawes, who represented the Applicant at the relevant time, of what I had set out at an interlocutory stage of the appeals.

30. Further, I do not accept that *Foley v States Housing Authority* has any bearing on this ground of appeal. This was a decision in the Royal Court and so does not bind in any event. The principle quoted in para. 43 of the draft Notice of Appeal relates to the conclusion I had reached about seeking to supplement the reasoning found on the face of the Decision that was being appealed. I take the view that there is a difference between permitting the Sure Appellants to refer to what was set out in Ian Kelly's Affidavit and the approach I took to the other Affidavits from Sarah Livestro and Alistair Beak. As para. 13 of the substantive judgment confirms, Advocate Dawes acknowledged that the Applicant had no objection to me considering Ian Kelly's Affidavit. Further, I did consider the evidence in all three Affidavits (as explained in para. 16), but I stated that I wound not be taking into account anything I regarded as

supplementing the terms of the Decision, which I duly disregarded. I consider that this is entirely consistent with the *Foley* case.

31. In relation to what Advocate Hill states about rules under section 59 of the 2012 Ordinance, if there were any rules, they would fall to be taken into account. However, the Royal Court has not made any rules under the powers conferred upon it by the Ordinance and until such rules are made, they have no bearing on how such appeals proceed.

32. For these reasons, I am not persuaded that this third ground of appeal has any real prospect of success.

33. I have already pointed out that I accepted that I could properly take into account decisions of EU courts. To the extent that the fourth ground of appeal argues that I was obliged to follow those decisions, it is apparent that section 54 of the 2012 Ordinance enables these to be taken into account but it is for the Court to decide the relevance of them. In relation to the comments I made about infringement by object (which run from paragraph 233 of the substantive judgment), I have referred to a number of EU decisions and also how those cases have been applied in the United Kingdom. I remain of the view that I was entitled to conclude that finding an infringement by object should be interpreted restrictively (para. 261 of the substantive judgment). Similarly, I stand by what I set out in para. 265. In respect of this fourth ground of appeal, my conclusion in para. 268 is no more than indicative of where I might have found myself in the event that this issue had needed to be determined. It is, therefore, clearly open to the Applicant in any subsequent case either to be more expansive in whichever decision it will be taking or to run similar arguments that it is permitted to conclude that there has been an infringement by object without being more expansive. Nothing in this section of the substantive judgment amounts to anything more than an indication, because the appeals had been fully argued, of my thinking in relation to those particular grounds.

34. For these reasons, I am also not persuaded that the fourth ground of appeal has a real prospect of success. It was not, in any event, determinative of the appeal.

Conclusion

35. For the reasons I have set out as briefly as I can, I will not grant the leave to appeal sought by the Applicant.

36. As I have explained, I have concentrated particularly on the first ground of appeal, because it is the only ground that touches on the reasons why the appeals to this Court were allowed. I do not regard that ground as having a real prospect of success and, as I have indicated, I do not regard it as being in the public interest that this issue should be heard by the Court of Appeal, although I recognise that it is possible that a single judge of that Court can re-consider that issue in the event that the Applicant renews its application for leave. In respect of the second to fourth grounds of appeal, none of these had a direct bearing on the outcome of the appeals to this Court. In my view, none raises a ground with a real prospect of success and I am similarly not persuaded that it is in the public interest for the Applicant to be granted leave to appeal in respect of any of them.

37. As regards para. 2 of the Application (an extension of time for filing the Notice of Appeal), where leave has not been granted, I am not minded to grant the extension sought by the Applicant. I expect that if the application for leave is renewed and were to be successful, para. 2 would also be sought and it makes more sense for whoever is seized of the renewed application to consider everything in the Application.

38. There is nothing on the face of the Application itself seeking costs, although the draft Notice of Appeal, if the appeal succeeds, seeks an order for the Applicant's costs in both Courts. Costs

would normally follow the event. As leave to appeal has been refused, I expect the parties be able to agree the costs consequences. However, if the Application for leave is renewed by the Applicant, the issue of costs can be left for determination by whoever determines the renewed Application.