Appeal concerning regulatory sanctions imposed by the Guernsey Financial Services Commission following the collapse of the Providence Group Ponzi scheme; Court of Appeal clarifies Article 6 ECHR compliance, procedural fairness, and remits key issues on findings and sanctions for reconsideration by the Royal Court and GFSC.

[2025]GRC071

IN THE GUERNSEY COURT OF APPEAL
(CIVIL DIVISION)
Court of Appeal Case No: 586

Date: 3 October 2025

Before:

Sir Timothy Le Cocq President
Rt Hon James Wolffe KC JA
Michael Furness KC JA

Between:

THE GUERNSEY FINANCIAL SERVICES COMMISSION

Appellant

-and-

(1) ROBIN FULLER

(2) ADAM TATTERSALL

(3) PATRICK MORONEY

Respondents

Counsel for the Appellant: Advocate J Hill
Counsel for Mr Fuller: Advocate G Dawes
Counsel for Mr Tattersall: Advocate J P Greenfield and Advocate T J Bamford
Counsel for Mr Moroney: Advocate J T Le Tissier

JUDGMENT

WOLFFE JA

1. This appeal arises from the collapse, in 2016, of the Providence Group. The Providence Group included a number of companies in the US and elsewhere, notably Guernsey, which solicited funds from investors on the basis of promises of significant returns from investment in the Brazilian debt factoring market. In fact, a material part of the money raised was used to repay existing investors, to pay commission to brokers or to fund other activities of the promoters. It was a classic "Ponzi" scheme.

2. The Guernsey Financial Services Commission ("the GFSC") conducted an investigation into the entities within the Providence Group which it regulated and certain individuals involved in the management of those entities. The GFSC appointed a Senior Decision Maker, Glen Davis

QC ("the SDM"). On 24 March 2021, the SDM issued a decision which imposed sanctions, inter alia, on the three Respondents and a Mr Dewsnip.

3. These four individuals appealed to the Royal Court. In a judgment handed down on 14 August 2024 the Bailiff set aside certain findings which the GFSC had made against each of those individuals but upheld other findings. He allowed the appeals of Mr Fuller, Mr Tattersall and Mr Moroney against all of the sanctions imposed on each of them. He allowed Mr Dewsnip's appeal so far as concerned the public statement. The Bailiff remitted the case to the GFSC for reconsideration of the sanctions imposed in light of his findings.

4. The GFSC appealed the Bailiff's decision to this Court. Mr Fuller, Mr Tattersall and Mr Moroney ("the Respondents") cross-appealed. This is the judgment of the Court on the GFSC's appeal and the Respondents' cross-appeals. The appeal and cross-appeals have raised a large number of issues. We set out our conclusions on those issues at paragraphs 78 and 475 below. We agree with the Bailiff that the Royal Court requires to remit the case to the GFSC for reconsideration of the sanctions imposed in light of the ultimate outcome of the appellate process including the decision of this Court. However, there are certain matters which the Royal Court will require to address before the case is remitted back to the GFSC and we identify these at paragraphs 79 and 476.

5. The proceedings in the Royal Court took place in private, and the Bailiff ordered that his judgment should not be published. However, by a decision of this Court (Montgomery P, Le Cocq and Furness JJA) [2024] GCA083, the Court rejected an application for privacy orders in relation to this appeal. That judgment concluded that no compelling case for privacy in relation to the appeal had been made out and that it was in the public interest that this Court sit in public to hear this appeal and publish its judgment.

The regulatory framework: general

6. The GFSC was established by the Financial Services Commission (Bailiwick of Guernsey) Law 1987 ("the FSC Law"). The general functions of the GFSC set out in section 2 of the FSC Law include: to take such steps as it considers necessary or expedient for the effective supervision of finance business in the Bailiwick; the countering of financial crime (including fraud and dishonesty); and to take such steps as it considers necessary or expedient for maintaining confidence in the Bailiwick's financial services sector and the safety, soundness and integrity of that part of the Bailiwick's financial services sector for which it has supervisory responsibility. In the exercise of its functions the GFSC is required to have regard to the protection of the public interest, including the protection of the public against financial loss due to dishonesty, incompetence or malpractice by persons carrying on financial business, and the protection and enhancement of the Bailiwick as a financial centre.

7. The GFSC had and has regulatory and supervisory responsibilities under various Laws. Of relevance to the present case are the following:

    - The Protection of Investors (Bailiwick of Guernsey) Law 1987 ("the Protection of Investors Law");

- The Banking Supervision (Bailiwick of Guernsey) Law 1994 ("the Banking Supervision Law");
- The Regulation of Fiduciaries, Administration Businesses and Company Directors etc (Bailiwick of Guernsey) Law 2000 ("the Fiduciaries Law");
- The Insurance Business (Bailiwick of Guernsey) Law 2002 ("the Insurance Business Law"); and
- The Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law ("the IMII Law").

These Laws have been repealed and replaced; but there is no dispute as to their applicability to the present case. We refer to them compendiously as "the repealed Regulatory Laws".

8. The FSC Law itself has also been substantially amended. In particular, the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law 2020 has repealed the provisions previously contained in sections 11A to 11J of the FSC Law, which include the enforcement provisions which are relevant to this case and to which we refer below. When we refer to the FSC Law or to other Laws in this judgment, it is to the FSC Law and those other Laws as they apply to this case and not as they have since been amended.

9. Each of the repealed Regulatory Laws provides for the licensing of regulated entities and specified "*minimum criteria for licensing*". The Bailiff refers in his judgment specifically to Schedule 4 to the Protection of Investors Law, which set out the minimum criteria for licensing under that Law, and the appeal before us was conducted under reference to the provisions of that schedule. Schedule 4 specifies (as applicable to this case):

> *"1. (1) The applicant or licensee is a fit and proper person to hold a licence and every person who is, or is to be, a director, controller, partner or manager of the applicant or licensee, is a fit and proper person to hold that position.*
> *In determining whether a person is a fit and proper person to hold a licence or a particular position, regard shall be had to –*
> *(a) his probity, competence, experience and soundness of judgment for fulfilling the responsibilities of a licensee or (as the case may be) of that position,*
> *(b) the diligence with which he is fulfilling or likely to fulfil those responsibilities,*
> *(c) whether the interests of clients or investors (or potential clients or investors), the interests of any other persons or the reputation of the Bailiwick as a financial centre are, or are likely to be, in any way jeopardised by his holding a licence or that position,*
> *(d) his educational and professional qualifications, his membership of professional or other relevant bodies and any evidence of his continuing professional education or development,*
> *(e) his knowledge and understanding of the legal and professional obligations to be assumed or undertaken,*
> *(f) his policies, procedures and controls for the vetting of clients and his record of compliance with any provision contained in or made under [various specified statutory provisions], and*
> *(g) his policies, procedures and controls to comply with any rules, codes, guidance, principles and instructions referred to in paragraph 2(2).*

(2) Without prejudice to the generality of subparagraph (1), regard may be had to the previous conduct and activities of the person in question and, in particular, to any evidence that he has –

…

(c) engaged in any business practices (whether unlawful or not) –

(i) appearing to the Commission to be deceitful or oppressive or otherwise improper, or

(ii) which otherwise reflect discredit on his method of conducting business or his suitability to carry on business regulated by this Law, or

(d) engaged in or been associated with any other business practices or otherwise conducted himself in such a way as to cast doubt on his competence and soundness of judgment.

2. (1) The business of the applicant or licensee is or, in the case of a person who is not yet carrying on business regulated by this Law, will be carried on –

(a) with prudence and integrity,

(b) with professional skill appropriate to the nature and scale of his activities, and

(c) in a manner which will not bring the Bailiwick into disrepute as an international finance centre.

(2) In conducting his business, the applicant or licensee shall at all times act in accordance with the following documents issued by the Commission –

(a) the Principles of Conduct of Finance Business,

(b) any rules, codes, guidance, principles and instructions issued from time to time under this Law and any other enactment as may be applicable to him."

10. Paragraph 1 of Schedule 4 requires, as one of the minimum criteria for licensing, both a licensee and any relevant officer to be a fit and proper person. In deciding whether a licensee or a relevant officer is a fit and proper person, regard is to be had to a number of mandatory considerations including, *inter alia*, that person's "*probity*". Paragraph 2(1) requires certain standards to be met in the carrying on of the business of a licensee, including that it be carried on "*with prudence and integrity*". Paragraph 2(2) requires a licensee, in the conduct of his business, at all times, to act in accordance with, among other things, the Principles of Conduct of Finance Business issued by the Commission.

The regulatory framework: sanctions

11. The FSC Law (as applicable to this case) confers on the GFSC power to impose discretionary financial penalties on and to publish statements in respect of licensees, former licensees and "relevant officers". Specifically, sections 11C and 11D provide as follows:

"*11C. (1) Where the Commission is satisfied that a licensee, former licensee or relevant officer –*

…

(b) does not fulfil any of the minimum criteria for licensing specified in the regulatory Laws and applicable to him,

it may, subject to the provisions of section 11E, publish a statement to that effect.

…

(2) In deciding whether or not to publish a statement under this section and, if so, the terms thereof, the Commission must take into consideration the following factors –
(a) whether the contravention or non-fulfilment was brought to the attention of the Commission by the person concerned;
(b)the seriousness of the contravention or non-fulfilment;
(c) whether the contravention or non-fulfilment was inadvertent;
(d) what efforts, if any, have been made to rectify the contravention or non-fulfilment and to prevent a recurrence;
(e) the potential financial consequences to the person concerned, and to third parties, including customers and creditors of that person, of publishing a statement;
(f) the action taken by the Commission under this section in other cases."

11D. (1) Where the Commission is satisfied that a licensee, former licensee or relevant officer –

…
(b) does not fulfil any of the minimum criteria for licensing specified in the regulatory Laws and applicable to him,

it may, subject to the provisions of section 11E, impose on him a penalty in respect of the contravention or non-fulfilment of such amount not exceeding the relevant sum calculated in accordance with subsections (1A) and (1B) as it considers appropriate.

(2) In deciding whether or not to impose a penalty under this section and, if so, the amount thereof, the Commission must take into consideration the following factors –
(a) whether the contravention or non-fulfilment was brought to the attention of the Commission by the person concerned;
(b)the seriousness of the contravention or non-fulfilment,
(c) whether the contravention or non-fulfilment was inadvertent;
(d) what efforts, if any, have been made to rectify the contravention or non-fulfilment and to prevent a recurrence;
(e) the potential financial consequences to the person concerned, and to third parties, including customers and creditors of that person, of imposing a penalty;
(f) the penalties imposed by the Commission in other cases …"

The maximum financial penalty applicable in the present case was, for reasons explained by the Bailiff at paragraph 88 of his judgment, £200,000. The "*regulatory Laws*" referred to in sections 11C and 11D include the repealed Regulatory Laws.

12. The repealed Regulatory Laws also contain provisions empowering the GFSC to make a prohibition order against an individual whom the Commission concluded was not a "*fit and proper person*" to perform regulated functions. For example, section 34E of the Protection of Investors Law provides inter alia:

> "*(1) If it appears to the Commission, having regard to the provisions of Schedule 4, that an individual is not a fit and proper person to perform functions in relation to controlled investment business carried on by a licensee, the Commission may make a prohibition order (a 'prohibition order') prohibiting that individual from performing any function, any specific function or any specified description of function."*

There is no statutory maximum duration for a prohibition order.

13. Section 3(1)(g) of the Fiduciaries Law contains an exemption from regulation in respect of an individual acting as a director of not more than six companies. But the section also empowers the GFSC to disapply that exemption on the ground that the GFSC is "*not satisfied that he is a fit and proper person to be or to become a director of a company*". Again, there is no statutory maximum period for the disapplication of that exemption.

14. We observe that the precondition to the making of a prohibition order is a finding that the individual in question is not "*a fit and proper person"* to fulfil the relevant functions. By contrast, the precondition to the making of a public statement or imposing a financial penalty is a finding that the individual does not fulfil "*any of the minimum criteria for licensing"* applicable to him. One of the minimum criteria, which specifically applies to relevant officers under paragraph 1 of Schedule 4 to the Protection of Investors Law (and other repealed Regulatory Laws), is that the individual is a "*fit and proper person".* Thus, a finding that a relevant officer is not a "*fit and proper person"* has the consequence that the relevant officer also does not fulfil one of the minimum criteria for licensing applicable to him. Such a finding accordingly provides a foundation for imposing a prohibition order and a financial penalty and for making a public statement in respect of the individual.

The Regulatory Framework: Statutory Procedures

15. Section 11E of the FSC Law sets out procedural requirements to be followed by the GFSC when it proposes to exercise its powers under section 11C or 11D to publish a statement or to impose a financial penalty. Section 11E provides as follows:

> *"(1) Where the Commission proposes to make a decision in respect of which a right of appeal is conferred by section 11H it shall serve on the person concerned a notice in writing –*
> *(a) stating that the Commission is proposing to make the decision,*
> *(b) stating the terms of, and the grounds for, the proposed decision,*
> *(c) stating that he may, within a period of 28 days beginning on the date of the notice, make written or oral representations to the Commission in respect of the proposed decision in such manner as the Commission may from time to time determine, and*
> *(d) giving particulars of the right of appeal which would be exercisable under section 11H if the Commission were to make the decision.*
>
> *(2) The Commission shall consider any representations made in response to a notice served under subsection (1) before giving further consideration to the proposed decision.*
> *...*
> *(4) For the avoidance of doubt –*
> *(a) a notice about a proposal to publish a statement must set out the terms of the statement, and*
> *(b) a notice about a proposal to impose a financial penalty must state the amount of the penalty."*

16. Section 11F of the FSC Law provides:

"*Where the Commission decides (having taken into account, where appropriate, any representations made by the person concerned) to make a decision in respect of which a right of appeal is conferred by section 11H it shall serve on the person concerned notice in writing of the decision –*
(a) stating the terms of, and the grounds for, the decision, and
(b) giving particulars of the right of appeal conferred by section 11H."

17. Like section 11E of the FSC Law, section 34G of the Protection of Investors Law requires the GFSC to serve notice in writing of its intention to make a prohibition order and the reasons for proposing to do so, specified a period of 28 days for making written or oral representations, and requires the GFSC to consider any representations made. There are similar provisions in the other repealed Regulatory Laws. The Fiduciaries Law contains no statutory procedural requirements in respect of the disapplication of the exemption in section 3(1)(g).

The Regulatory Framework: Rights of Appeal

18. Under section 11H(1) of the FSC Law, a person aggrieved by a decision of the GFSC to publish a statement or to impose a financial penalty or to make a prohibition order, or to make various other types of decision under the statutory regime, has a right of appeal to the Royal Court (to be constituted by the Bailiff sitting without Jurats). Section 11H(2) provides that where a ground for one of these decisions is that any applicable minimum criterion for licensing is not or has not been fulfilled, or may not be or may not have been fulfilled, the person to whom the ground relates has a right of appeal to the Royal Court. Section 11H(3) specifies:

"*The grounds of appeal under this section are that –*
(a) the decision was ultra vires or there has been some other error of law,
(b) the decision was unreasonable,
(c) the decision was made in bad faith,
(d) there was a lack of proportionality, or
(e) there was a material error as to the facts or as to the procedure.

19. Section 11H(5) provides:

"On an appeal under this section the Court may –

(a) set the decision of the Commission aside and, if the Court considers it appropriate to do so, remit the matter to the Commission with such directions as the Court thinks fit, or

(b) confirm the decision, in whole or in part."

20. A further appeal lies from a decision of the Royal Court to the Court of Appeal "*on a question of law*": section 11H(9). In an appeal "*on a question of law"* the appellate court is not limited to correcting a patent misconception of the law which appears on the face of the judgment under appeal but may also intervene if it is otherwise apparent that there has been an error of law, for example where the facts found are such that no person acting judicially and properly instructed as to the relevant law could have reached the conclusion under appeal.

21. Section 36 of the Protection of Investors Law provides for a right of appeal similar in terms to section 11H of the FSC Law, and there are similar provisions in the other repealed Regulatory Laws. Section 19(1)(d) of the Fiduciaries Law also gives a right of appeal to any person aggrieved by a decision to disapply the exemption in section 3(1)(g). Section 36(7) of the Protection of Investors Law which, like section 11H of the FSC Law, provides for an appeal on a point of law from the Royal Court to this Court explicitly states that a decision of the Royal Court "*shall be final as to any question of fact*". It has not been suggested that this difference in the wording of the provision affects the scope or nature of the appeal to this Court.

The Commission's published guidance

22. The GFSC has published a note titled *Decision-making Process relating to the use of Enforcement Powers,* dated October 2017 ("the Note"). This is described as a general guide to the way in which the GFSC would approach the exercise of its statutory powers that involved the exercise of enforcement powers. The Note has no statutory force and makes clear that it is not prescriptive of a process that will always be followed.

23. At paragraph 1.3 of the Note, the GFSC acknowledges that, whilst the GFSC is the master of its own procedure, it requires to follow principles of natural justice and fairness. In Part 2 of the Note, the GFSC sets out the overriding objective which it has adopted "to enable the relevant decision-maker to deal with matters in a fair and reasonable manner". This overriding objective is:

> "*To deal with matters justly, including (so far as practicable):*
> *(a) ensuring parties are on an equal footing;*
> *(b) dealing with the matter in ways that are proportionate to the:*
>
> *(i)amount of money involved;*
> *(ii) importance of the matter;*
> *(iii) complexity of the issues; and*
> *(iv) financial position of each party; and*
> *(c) ensuring that the matter is dealt with expeditiously and fairly."*

24. The Note states (para. 1.5) that, when the GFSC considers it appropriate to do so, it may appoint a Senior Decision-Maker (or SDM) to be the decision-maker. The SDM is appointed from a panel and is authorised to exercise GFSC's enforcement powers (with certain specified qualifications not of relevance to the present case). Paragraph 10.3 of the Note states that the choice of SDM from the Panel will be made by the President of the Panel, based on availability and whether any specialist area of expertise was required and is subject to conflict-of-interest checks.

25. After an initial review by the Enforcement Division (Section 6) there is a review by the Case Review Panel (Section 7), which decides the way forward. At this point, the draft Enforcement Report is provided to the party, along with disclosure of the material upon which the GFSC proposes to rely in asking the decision-maker to act. The party is asked to consider the information provided and to respond in writing confirming that the facts presented are correct, or, if not, to suggest changes, and also to provide any additional information considered to be

material or relevant and include any comments on the recommendations in the Enforcement Report.

26. The Enforcement Division considers and evaluates that material before preparing a Final Enforcement Report, which is re-presented to the Case Review Panel. If the Case Review Panel concludes that the matter should proceed to a decision-maker, the Final Enforcement Report is provided to the party, and the Commission makes further disclosure, following an approach similar to that of standard disclosure under Rule 65(4) of the Royal Court Civil Rules 2007.

27. Unless there is a settlement at this stage, the GFSC appoints a decision-maker. The decision-maker considers the Enforcement Report and evidential documents and considers whether it is necessary to request further information from the Enforcement Division or from the party via the Enforcement Division. Thereafter, the Note envisages that the decision-maker will issue a Minded-to Notice in draft to the Enforcement Division and the party, with a view to allowing representations to be made.

28. It is for the decision-maker to decide whether a meeting is required so that the decision-maker may receive oral representations. The Note states (para. 11.14): "*Oral evidence may be given and cross examination will be permitted only where the decision-maker considers that the interests of justice so require. This is not expected to be a frequent event since the parties and potential witnesses will normally have been interviewed by the Enforcement Division and will have had an opportunity to comment on the transcript of the interview"*.

29. The Note further specifies that it is for the decision-maker to determine the procedure to be followed where written submissions and oral representations are made. As regards oral representations, the Note states (para. 12.5) inter alia that any oral submission should explain why the party thinks that the proposed decision is inappropriate or not justified and that the party might thereafter *"be required to answer questions from the decision-maker and clarify issues that may arise".* The Note reiterates (para. 12.5.13): "*The giving of oral evidence and cross-examination will only be permitted where the decision-maker has permitted it under paragraph 11.14".* The Note states: "*The process is intended to be interactive rather than adversarial in nature. For the avoidance of doubt, court rules, process and procedures do not apply."*

30. After receiving representations, the decision-maker proceeds to a decision. The Note contains a number of time limits and time scales. In the present case, these were significantly departed from. The Bailiff observed: "*[i]n the circumstances of the extensive nature of the investigation and, in particular, the length of the Decision, it is unsurprising that the GFSC did not manage to adhere to the timetable it has set for itself in its published guidance".* None of the Respondents has argued that GFSC was not entitled to depart from the time limits set out in the Note in a case such as the present one.

31. The Note states (paragraph 14.1 and 14.2):

> "*14.1. In deciding any matter of disputed fact or whether any of the allegations have been proved, the standard of proof to be applied will be the balance of probabilities.*

14.2. in reaching its decision, the decision-maker will have regard to the written and oral representations received and all other information in the documents before it. It is for the decision-maker to decide which of the matters it accepts and which it does not."

32. In *Robilliard v. Chairman of the Guernsey Financial Services Commission* [2023] GCA 035, the Court of Appeal elaborated on the role of the Senior Decision-Maker in the following terms:

"*21. … when the SDM is engaged in the final state of the enforcement process, his role was a quasi-judicial one. His role was to ensure that he did not treat a primary fact as established for the purposes of the Decision, and was not to draw inferences from those facts, unless satisfied on the balance of probabilities that such a fact was established or inference was properly to be drawn. That was the evidential standard, or in other words degree of conclusivity, which the Guidance Note sets out in various ways …*
22. Equally, the SDM could not properly have reached a conclusion that the Appellant had misconducted himself so as to fall below the minimum licensing requirements as a fit and proper person, for example, and that he should be sanctioned or penalised, unless he had satisfied himself that his findings of primary fact and inferences supporting the conclusion were arrived at on the balance of probabilities. …
…
29. … the process is one of inquisition (or investigation) rather than trial, albeit subject to an appeal on points of law or reasonableness to a Royal Court of full jurisdiction. When the matter reaches the SDM he or she is partly in the position of a reviewer of the material provided by, and conclusions drawn by, the Enforcement Division of the GFSC while being able to make his or her own enquiries and consider further material in order to reach his or her own determination.
…

32…. an SDM … has to ask themselves whether they are satisfied, having regard to what has been provided to them by the Enforcement Division, taken with anything else submitted to them and also making such further investigations as they might consider appropriate, of the unfitness of the person involvement in the enforcement. In this regard, both as a matter of elementary fairness and in accordance with the Guidance Note, the SDM has to give that person a proper opportunity to make representations.
33.In other words, the SDM in the present case had to be confident, that is confident at least to the standard of assurance prescribed in the Guidance Note while not necessarily having to be completely certain beyond any doubt, that on the material before him the Appellant had failed to satisfy the minimum licensing criteria."
…
36. … when the SDM is making a decision in the enforcement process, there is an evidential benchmark (ie facts found to be true on the balance of probabilities) short of which the SDM should not be reaching conclusions of fact adverse to someone potentially exposed to sanctioning in the process.
37. In that sense, … the Appellant must benefit from any doubt which may continue to exist as to the making of any finding of fact which the SDM used to reach a decision concerning him. In this process it was not for the Appellant to prove or demonstrate or adduce anything, and certainly not for him to show that he <u>was</u> a fit and proper person or otherwise met the minimum licensing requirement: it was for the SDM to be satisfied

of the contrary if, but only if, the SDM could properly do so on the basis of the materials before him.

38. More particularly, it is not for a person who is the subject of an investigation and enforcement to prove the negative of what is relied on by the GFSC. … The point can be illustrated simply by saying that the person should have the benefit of any doubt: the person should not be subject to penalties of the sort imposed in the present case unless the SDM is satisfied positively that they are appropriate."

33. This analysis was not criticised by the parties to this appeal, and we endorse it.

Factual background to the present case

34. Around 2008, the founders of the Providence Group, Mr Buzaneli, Mr Ordoñez and Mr Rivera, established Providence Holdings International ("PHI"), a Delaware-incorporated company based in Florida. PHI had two subsidiaries, Providence Financial Investments Inc ("PFI") and Providence Fixed Income Fund LLC ("PFIF"), also based in Florida. Mr Buzaneli, Mr Ordoñez and Mr Rivera were the principals of these three companies ("Providence US").

35. Between 2010 and June 2016, Providence US raised more than $64 million from investors in the USA, through brokers who received commissions on the funds they raised for Providence US. The investors purchased promissory notes bearing annual interest rates between 12% and 24%. The investors were enticed by representations that the Providence companies would use the investors' funds for the sole purpose of lending to a Brazilian subsidiary which would use the proceeds of the loan to acquire receivables or financial instruments in the Brazilian debt factoring market.

36. In fact, a large part of the funds invested was used to pay interest and redemptions to investors, commission to brokers and for various other purposes. As early as 2010, Mr Buzaneli, Mr Ordoñez and Mr Rivera were aware that Providence US had substantial cashflow problems.

37. In 2011, with the assistance of Lumiere Fund Services Limited ("LFS"), at that time a subsidiary of Trust Corporation of the Channel Islands, Mr Buzaneli, Mr Ordoñez and Mr Rivera incorporated Providence Global Limited ("PGL") in Guernsey. PGL became the holding company for all the Providence interests outside the USA. Over time, PGL became the sole or majority beneficial owner of more than thirty companies in eleven countries.

38. In Guernsey, PGL became the sole holder of the management shares in two protected cell companies, Providence Investment Funds PCC Limited ("PIF") and Providence Investments PCC Limited ("PIP"). PIF was registered under the Protection of Investors Law as a Closed-Ended Collective Investment Scheme. PIP was a private investment vehicle which did not require a licence or registration. PGL was also the 100% owner of Providence Investment Management International Limited ("PIMIL"), which was the promoter and investment manager of PIF. PIMIL held a licence under the Protection of Investors Law.

39. LFS also held a licence under the Protection of Investors Law and, from 2014 undertook fiduciary activities licensed under the Fiduciaries Law. From the outset, LFS was the administrator for the PIF Scheme, providing the staff, compliance and back-office functions. It

also acted as the Administrator of PIMIL. In autumn 2014, LFS was brought "in house", with PIMIL becoming its 90% owner.

40. From the outset, the PIF Scheme was, like Providence US, promoted as offering an opportunity to enjoy high returns from debt factoring in Brazil by making loans only to associated companies engaged in that business. Investors were promised returns of between 9.5% and 14.25% with the interest and repayments of principal purportedly being paid from the returns on Brazilian factoring investments. The Key Terms document for the PIF Scheme, issued to investors, and Supplemental Particulars issued in late 2015 and revised in January 2016 contained false and misleading statements, notably that 100% of subscription monies would be loaned to factoring companies in Brazil.

41. In fact, from a very early stage, a significant proportion of the funds invested in the PIF Scheme was deployed to other companies within the Providence Group. In its subsequent investigation, the GFSC found that: "*The Scheme was poorly managed and administered from the outset. There were no effective controls to ensure that money was only applied in accordance with the Scheme Particulars*". Day to day cash flow was administered by an employee who had no accountancy or book-keeping qualifications and who administered the Scheme with very little oversight, reporting directly to Mr Buzaneli and transferring funds on his instructions to other entities in the Providence Group and otherwise. The GFSC made numerous findings of inadequate administration and management which are not challenged in this appeal.

42. In January 2014, Providence Global Fixed Income Fund SPC ("the Cayman Fund") was incorporated as an exempted segregated portfolio company in the Cayman Islands. Like the other Providence entities, this was promoted on the basis that it would give attractive returns, on what was described as a "reduced risk" basis, by lending funds to Brazilian debt factoring companies. The management shares in the Cayman Fund were held by Providence Management Holdings Ltd, a company controlled by PGL. In accordance with approvals granted under the Non-Guernsey Scheme Rules, PIMIL became the Investment Manager and LFS the sub-Administrator for the Cayman Fund.

43. Towards the end of 2014 a new director was appointed to LFS and an accountant taken on to clear a backlog of accounts for LFS clients. These two individuals began to identify and to bring to the attention of board members of LFS and PIMIL that there were serious deficiencies in book-keeping, compliance, corporate governance control and the management of investments. Mr Everitt, a director of PIMIL, drafted an Internal Review which identified a number of matters which required consideration and recommendations for action in relation to corporate governance and financial control.

44. In May 2015 an Audit Plan provided to LFS by external auditors raised many "grave concerns" about the payments made to other Providence companies, the control Mr Buzaneli had over those payments and the inherent conflict issues, as well as other issues around the security for loans and the absence of contracts. At the end of May 2015 Mr Everitt sent a letter to the GFSC regarding corporate governance and controls. His letter reassured the GFSC that no client monies had been placed in jeopardy and that remediation of the identified failings would be complete and reviewed by the auditors by the end of the year. As part of the remediation strategy, Mr Fuller was appointed a Director of PIMIL and LFS in August 2015.

45. In its subsequent investigation, the GFSC found that the planned remediation was either not completed or was insufficiently implemented, so that it was ineffective in rectifying the issues which had been identified. It found that Mr Buzaneli continued to direct payments from PIF to wherever he desired and that these payments were authorised without question.

46. In January 2016, the US Securities and Exchange Commission issued a "cease and desist" order to Providence US, requiring those companies to stop new subscriptions. Outside the US the Providence Group continued to solicit investments. On 7 June 2016 the SEC filed an emergency application in the US District Court for the District of Minnesota alleging that Providence US was engaged in an ongoing fraudulent and unregistered securities offering.

47. PIMIL informed the GFSC about the SEC action but gave the GFSC assurances that the situation had been misunderstood and that there was no connection between Providence entities in Guernsey and in the US other than common ultimate ownership. The GFSC was not informed that money invested in PIF was, in fact, being used by the Providence Group to make repayments to investors in Providence US or that PGL was repaying loans to Providence US.

48. In July 2016, PFI and PFIF filed for bankruptcy. The Minnesota Court made an order freezing the assets of those companies. The collapse of PFI and PFIF in the US was followed in Guernsey by the resignations of the directors of PIMIL and PIF. On 9 August 2016 the GFSC made an application to the Royal Court under the Protection of Investors Law. The Court appointed Administration Managers of PIMIL and PIF and subsequently made an order winding up PGL. Other companies, including LFS, went into voluntary liquidation on the same day.

49. Mr Buzaneli, Mr Ordoñez and Mr Rivera were subsequently prosecuted in the United States. Each of them pled guilty to one count of mail fraud, was sentenced to a period of imprisonment and was ordered to pay mandatory restitution of over $51 million. Mr Buzaneli and Mr Ordoñez admitted that they had fraudulently solicited, and caused others to fraudulently solicit, more than £37 million from European investors by falsely representing that money invested in Guernsey Funds (which can be identified as PIF and PIP) would be used to factor accounts receivables in Brazil. They admitted that the majority of the investors' money was not, in fact, invested in Brazilian factoring, but was instead used to pay interest and other repayments to investors and commission to brokers (as well as being diverted to other companies owned by them). Overall, Providence investors worldwide lost a total of more than £100 million.

50. The three Respondents and Mr Dewsnip were all involved in the management of entities within the Providence Group which were licensed under one or more of the repealed Regulatory Laws. There is no dispute that each of them was a "*relevant officer*" (as defined in section 11C(3) of the FSC Law).

    (i) Mr Dewsnip was a director of LFS from January 2012 until August 2015. He was involved with the project to establish Providence in Guernsey from the outset. He was a director of PIF and PIMIL from their incorporation until their collapse. He also served as a director of other Providence entities such as PGF and PIP. He was described as one of the "*Global Team Leaders*" of the Providence Group outside the US, with management responsibility for sales and marketing.

(ii) Mr Moroney was a manager of LFS, responsible for its financial controls at the time LFS became the Designated Manager of PIF and the administrator of PIF and PIMIL in 2012. He was not a director of any group company but performed functions on behalf of PGL and as a member of "*Group Management*" for the Providence Group in Guernsey from November 2014.

(iii) Mr Tattersall was a Certified Chartered Accountant. He acted as a consultant to Providence from October 2013. He was a director of PIMIL from August 2015 and a director of numerous other Providence companies. He was a member of the senior management team in Guernsey and had a wider role as a senior member of the management of the Providence Group outside the US. He was described as "Global Development Director" for the Providence Group. He was held out as Chief Finance Officer in promotional materials and on the Providence website (although he denied having been appointed to that role).

(iv) Mr Fuller had a long and distinguished career in the Guernsey financial services sector before, as part of the remediation plan, he was appointed as a director of PIMIL and LFS in August 2015. The SDM found that he acted as standing Chairman of PIMIL (although he denied that he had ever been appointed to that role). He was held out as part of the "*Providence Management Team*".

The GFSC investigation and decision

51. On 3 March 2016, the GFSC opened an investigation into the collapse of the Providence Group entities which were within its regulatory responsibility. In November and December 2016 its officers interviewed the three Respondents under section 27 of the Protection of Investors Law. On 10 April 2017, the GFSC served a draft Enforcement Report on the Respondents. Mr Fuller's lawyers (Mourant Ozannes), Mr Tattersall and Mr Moroney each responded in detail to the draft Enforcement Report. Further documents were provided on behalf of Mr Fuller and by Mr Tattersall. On 23 October 2017 the GFSC served a final Enforcement Report. This reflected amendments made as a result of the representations which had been received. The Enforcement Report identified nine individuals (including the three Respondents, Mr Dewsnip and Messrs Buzaneli, Ordoñez and Araujo) and eleven entities (including LFS, PIMIL, PIF, PIP and PGL) as the subject of the investigation. The Enforcement Division recommended, inter alia, the following sanctions:

(a) Mr Fuller: a financial penalty of £50,000; a prohibition order (and disapplication of the exemption in section 3(1)(g) of the Fiduciaries Law) for five years; and a public statement.

(b) Mr Tattersall: a financial penalty of £100,000; a prohibition order (and disapplication of the exemption in section 3(1)(g) of the Fiduciaries Law) for fifteen years; and a public statement.

(c) Mr Moroney: a financial penalty of £15,000 and a public statement;

(d) Mr Dewsnip: a financial penalty of £120,000; a prohibition order (and disapplication of the exemption in section 3(1)(g) of the Fiduciaries Law) for sixteen years; and a public statement.

52. On 24 November 2017, following the issue of the Enforcement Report, the GFSC appointed the SDM for the purpose of considering, hearing and determining enforcement proceedings involving the prospective imposition of sanctions on LFS, PIMIL and nine individuals, including the three Respondents and Mr Dewsnip.

53. Mr Moroney made a number of further representations in a letter dated 27 December 2017. Mourant Ozannes provided a further response on behalf of Mr Fuller and additional materials under cover of a letter to the SDM dated 2 February 2018. These ran to 845 pages and included an affidavit sworn by Mr Fuller, detailed comments on the Enforcement Report and a table of factual responses to the Enforcement Report, as well as further documents. The Enforcement Division wrote to the SDM on 20 March 2018 responding to certain of these matters, and provided additional documents.

54. On 17 April 2018 the Enforcement Division provided a Schedule of Unused Materials to each of the Respondents. This informed the parties that the Division also held some 246,000 emails obtained under a statutory notice from the Joint Administrators of PIMIL and that copies would be made available in electronic format for inspection on request. In May 2018 Mourant Ozannes requested additional disclosure. The Enforcement Division responded to that request. Following exchanges, the SDM required the Enforcement Division to provide him with sufficient information so that he could independently evaluate the reasonableness and adequacy of the searches which had been made. Following further procedure, he determined that the disclosure of unused material to date had been reasonable and sufficient for the proceedings to be procedurally fair.

55. In July 2018 the SDM issued procedural directions. These inter alia: (i) gave the Respondents an opportunity to comment on certain matters; (ii) offered the Respondents an opportunity to provide a supplemental witness statement or affidavit; and (iii) directed the Enforcement Division to provide a detailed and reasoned Memorandum setting out the Enforcement Division's case against each of the Respondents. In response to this invitation, Mr Tattersall and Mr Moroney each provided an affidavit.

56. In November 2018 the Memoranda envisaged in the SDM's directions were intimated to the Respondents. In December 2018 Mourant Ozannes wrote to the SDM on behalf of Mr Fuller, taking issue with the Enforcement Division's presentation of its case in the Memorandum and seeking an opportunity to put in representations in response. The SDM indicated that he would not be giving parties a formal opportunity to respond, that he was reviewing the material and evaluating the evidence independently. However, he advised that the Respondents were not precluded from drawing to his attention specific points in the Enforcement Division's case which were considered to be factually inaccurate or inconsistent with the evidence. In February 2019 Mourant Ozannes provided a written response to the Fuller Memorandum with additional documents. In May 2019 Mr Moroney provided a written response to the Moroney Memorandum.

57. In January 2019 the SDM issued a procedural direction giving Respondents an opportunity to comment on the interpretation of paragraph 11D(2)(g) of the FSC Law and/or the emoluments arising in respect of their position as a relevant officer, and an opportunity to respond to a schedule of emoluments produced by the Enforcement Division. Mr Tattersall and Mourant Ozannes for Mr Fuller responded to that direction, including providing information about their emoluments.

58. Following a further direction by the SDM, in March 2019 the Enforcement Division issued an updated unused materials schedule and electronic copies of all unused material (amounting to some 526.9 MB). In April 2019 Mourant Ozannes wrote to the SDM enclosing a Cross-Reference Table and 172 pages of additional documents. In June 2019 they again wrote making representations arising from their review of the unused material. In December 2019, in order to assist the Respondents with preparation, the SDM made available to them a comprehensive set of the Exhibits as they then stood, correspondence and other materials in electronic form.

59. On 16 March 2020, the SDM issued a draft Minded-to Notice to the Respondents, along with a further and updated set of documents. The draft Minded-to Notice was a substantial document, of 1,855 pages. The covering letter stated that the SDM intended to issue the Minded-to Notice on 29 August 2020, so that the 28-day period for representations would run from that date until 25 September 2020. The letter required the Respondents to indicate if they wished to make representations, to provide any further documents on which they wished to rely, and (if a financial penalty was proposed) to submit a Statement of Means and Assets. A number of Respondents (including the three Respondents to this appeal and Mr Dewsnip) indicated that they wished to make representations. The Enforcement Division sought a direction that the Respondents be required to file draft written representations by 31 July 2020; the SDM refused that application. On 31 July 2020, the GFSC's Enforcement Division produced a draft public statement, and this was issued to the parties. At the end of July and during August, Mourant Ozannes provided the SDM with 1301 pages of documents, and three witness statements, and Mr Moroney also provided further documents.

60. A final draft of the Minded-to Notice (which was 1,939 pages long) was issued on 24 August 2020, along with an updated set of electronic documents. The Minded-to Notice was issued on 29 August 2020. Mr Fuller, Mr Tattersall and Mr Moroney each made oral representations, by remote link, between 16 and 21 September 2020. Mr Fuller was legally represented; Mr Tattersall and Mr Moroney were not. In advance of the meeting, Mr Tattersall produced some additional documents. Following the oral representations, the Enforcement Division drew attention to a small number of documents which it considered relevant in the case of Mr Tattersall and Mr Moroney. Mourant Ozannes on behalf of Mr Fuller, Mr Tattersall and Mr Moroney each submitted written representations on 25 September 2020. Mr Tattersall, Mr Fuller and Mr Moroney provided information about their means. The SDM gave the Enforcement Division an opportunity to comment on the written representations but not to raise any new allegations. Following submission of the Enforcement Division's comments, Mourant Ozannes submitted further representations on behalf of Mr Fuller. The Respondents were given an opportunity to make additional representations arising from the GFSC's decision in another case; Mr Fuller, Mr Tattersall and Mr Moroney each responded to that opportunity.

61. The SDM issued the Decision on 4 March 2021. It is a very lengthy document. The substantive parts of the decision cover 2,017 pages, comprising 7,298 numbered paragraphs. The Decision states that the SDM considered the Enforcement Report and the supporting evidence and documents provided to him, as well as all of the documents and representations from the Respondents. An Annex contains the proposed public statement, which runs to 284 paragraphs. The SDM was exercising the powers of GFSC. Although in this judgment we will refer to findings made by the SDM we keep in mind that, in law, the Decision contains the decision and findings of GFSC.

62. The general findings of the SDM are summarised in paragraph 52 of the proposed public statement as follows:

> "*The Commission has found that:*
> - *Investors' money was not all invested in factoring in Brazil and investors were misled;*
> - *The Fund relied on new subscriptions to be able to pay dividends and make redemption payments to existing investors;*
> - *Unauthorised payments and transfers of investor monies were made at the behest of Mr Buzaneli;*
> - *Investments were not monitored;*
> - *Security over loans was not in place;*
> - *Proper accounting records were not kept;*
> - *Other records, such as agreements and contracts, were not in place;*
> - *Material interests and conflicts were not declared and managed;*
> - *AML/CFT controls were deficient;*
> - *The Commission was not informed of issues which should have been disclosed by the Individual Respondents;*
> - *The Commission was misled on numerous occasions by the individual Respondents (all except Mr Moroney);*
> - *Each of the Individual Respondents apart from Mr Fuller was, on one or more occasions, dishonest."*

63. The SDM made findings that LFS had breached numerous regulatory Laws and had failed to meet the minimum criteria for licensing as set out in Schedule 4 to the Protection of Investors Law and Schedule 1 to the Fiduciaries Law. Mr Fuller and Mr Dewsnip were directors of LFS for different periods, and Mr Moroney was a manager. The SDM made findings that they "*all share responsibility during the periods of their directorships for the contraventions and non-fulfilments of LFS which led to the ultimate collapse of PIF and other Providence companies, the significant losses to investors and the resulting damage to the reputation of the Bailiwick as a finance centre*".

64. The SDM also made findings that PIMIL had breached various regulatory Laws and failed to meet the minimum criteria for licensing set out in Schedule 4 to the Protection of Investors Law. Mr Fuller, Mr Tattersall and Mr Dewsnip were all directors of PIMIL for various terms, and a like finding was made that they shared responsibility for the periods of their directorships for the contraventions by PIMIL.

65. The SDM found that none of Mr Fuller, Mr Tattersall, Mr Dewsnip and Mr Moroney was a fit and proper person and that all of them, in consequence, failed to fulfil the minimum criteria for licensing applicable to them. He made detailed findings in respect of each of them. The findings in respect of Messrs Tattersall, Dewsnip and Moroney included findings of personal dishonesty.

66. The Minded-to Notice had contained proposed findings of dishonesty against Mr Fuller. In the event, the SDM did not make those findings and they were replaced in the Decision with findings of gross incompetence and lack of integrity. In particular, the SDM made a finding against Mr Fuller in the following terms: "*While he was a director, PIF continued to be promoted on the basis that PIMIL was monitoring that there were sufficient assets in the Factoring Companies and investors continued to subscribe on that basis, although Mr Fuller knew that PIMIL was not monitoring such assets so this was unfounded and untrue. Mr Fuller took no steps to stop PIF being promoted on these terms. The Commission found that Mr Fuller was not personally or deliberately dishonest, but was grossly incompetent and lacking in integrity and he became implicated from 18 November 2015 in the continued dishonest promotion and management of the PIF Fund*".

67. The SDM concluded that the conduct of Mr Fuller and Mr Moroney fell into the "*serious*" bracket, whilst the conduct of Mr Tattersall and Mr Dewsnip fell into the "*very serious*" bracket. Exercising the powers of the GFSC, he imposed sanctions on each of them as follows:

    (i) Mr Fuller:
        a. a discretionary financial penalty of £125,000 under section 11D of the FSC Law;
        b. a prohibition order for ten years under various of the repealed Regulatory Laws;
        c. disapplication of the exemption in section 3(1)(g) of the Fiduciaries Law (which allows an individual to act as a director of not more than six companies) for a ten year period;
        d. a public statement under section 11C of the FSC Law.

    (ii) Mr Tattersall:
        a. a discretionary financial penalty of £175,000 under section 11D of the FSC Law;
        b. unlimited prohibition orders under various of the repealed Regulatory Laws
        c. disapplication of the exemption in section 3(1)(g) of the Fiduciaries Law for an unlimited period; and
        d. a public statement under section 11 C of the FSC Law.

    (iii) Mr Dewsnip:
        a. an unlimited prohibition order under various of the repealed Regulatory Laws;
        b. disapplication of the exemption in section 3(1)(g) of the Fiduciaries Law for an unlimited period; and
        c. a public statement under section 11C of the FSC law.

    (iv) Mr. Moroney:
        a. a discretionary financial penalty of £45,000 under section 11D of the FSC Law;
        b. an unlimited prohibition order under various of the repealed Regulatory Laws;
        c. disapplication of the exemption under section 3(1)(g) of the Fiduciaries Law for an unlimited period; and

d. a public statement under section 11C of the FSC Law.

68. The discretionary financial penalties imposed on Mr Fuller and Mr Moroney were lower than the amounts of £155,000 and £85,000 which had been anticipated in the Minded-to Notice.

The appeal to the Royal Court

69. Mr Fuller, Mr Tattersall, Mr Dewsnip and Mr Moroney each appealed to the Royal Court. Each of them advanced as his primary case that the GFSC was wrong to impose sanctions at all, on the basis that the legal test for the imposition of sanctions had not been met on the facts. In the alternative, each of them argued that the sanctions imposed were disproportionately high and that the case should be remitted to the GFSC for reconsideration. The appeals were heard over seven days in February and March 2022. The four appellants were all legally represented.

70. The Bailiff's judgment, which runs to 706 paragraphs, was handed down on 14 August 2024. He rejected all of the general grounds of appeal advanced by the four appellants. He set aside some individual findings in respect of Mr Fuller, Mr Tattersall and Mr Moroney but upheld others. He declined to set aside the findings that each of these three individuals had failed to fulfil the minimum criteria for licensing. He set aside the sanctions imposed on Messrs Fuller, Tattersall and Moroney and remitted the case to GFSC for reconsideration of sanctions in light of his findings. He did not set aside the prohibition orders imposed on Mr Dewsnip but remitted the public statement to GFSC for reconsideration. He did not give any directions to GFSC.

71. On 15 August 2024 Royal Court ordered the GFSC to pay 50% of the costs of Mr Fuller and Mr Tattersall and two thirds of Mr Moroney's costs (all on the standard recoverable basis).

The Appeal and the Cross-Appeals

72. In its appeal to this Court, the GFSC challenges the Royal Court's decisions to set aside various findings against the four individuals mentioned. It does so on grounds which the GFSC's written submissions summarise as follows.

(i) The Royal Court erred in the test it adopted to determine integrity.

(ii) The Royal Court's decisions on certain specific dishonesty and integrity findings failed to address the SDM's decision on its own merits and were irrational.

(iii) The Royal Court was wrong, when determining sanctions, to attach legal significance to the decision not to investigate other individuals.

(iv) The Royal Court fell into error when defining the scope of issues relevant to seriousness in section 11D(2)(b) of the FSC Law.

(v) The Royal Court erred in its approach to the significance of parity between sanctions and/or the principle of comparative justice.

(vi) The Royal Court erred in its decision to give directions upon remittal of sanctions made against Mr Fuller.

73. The GFSC also appeals against the Royal Court's costs decision.

74. In their cross-appeals, Mr Fuller, Mr Tattersall and Mr Moroney challenge the compatibility of the decision-making process with Article 6 of the European Convention on Human Rights. They contend that the legislative regime is structurally incompatible with Article 6. In doing so, they take issue with the analysis of the statutory appeal to the Royal Court undertaken by the Court of Appeal in *Domaille v. Guernsey Financial Services Commission* [2024] GCA 003. They also contend that the procedure in fact followed in this case was not compatible with Article 6 and/or with customary law requirements of procedural fairness, and that there were inadequacies in the Royal Court's reasons. Mr Tattersall and Mr Moroney also rely on breaches of Article 6 and the customary law, in respect of: (i) the duration of the proceedings; and (ii) the independence of the Court of Appeal. Each of the Respondents contends: (i) that the Royal Court erred in declining to set aside the finding that he did not fulfil the minimum criteria for licensing; and (ii) that the Court did not assess the Decision by reference to the standard of Jurat unreasonableness.

75. Mr Fuller further contends, in very brief summary: (i) that the Royal Court fell into error in upholding certain findings of want of integrity which GFSC had made against him; (ii) that the Royal Court did not address contentions that GFSC had applied a concept of collective, as opposed to individual, responsibility for regulatory breaches or sufficiently taken into account that Mr Fuller was a non-executive director; and (iii) that the Royal Court erred in not considering whether the appeal should be allowed as a whole without a remit to GFSC given the extent of the criticisms which the Royal Court levelled at the Decision. Mr Tattersall and Mr Moroney further contend, in brief summary: (i) that the Royal Court misdirected itself as the correct legal tests to be applied; (ii) that the Royal Court did not analyse, or properly analyse the level of seriousness of their failings.

76. Although Mr Tattersall and Mr Moroney were separately represented, they filed a joint skeleton argument. At the oral hearing, the Advocates for the three Respondents very sensibly co-operated in the presentation of their respective cases, in order to avoid overlapping or repetitive submissions.

77. The Grounds of Appeal are wide-ranging. With a view to addressing the points taken by the various parties in a coherent and logical fashion we have organised the various issues which have been taken under the following headings.

(I) The nature of the appeal to the Royal Court

In this section we will deal both with the challenge advanced by the Respondents to the analysis in *Domaille* and their contention that the legislative scheme is structurally incompatible with Convention rights. These issues are focused in Fuller Ground of Appeal 1, Tattersall Grounds of Appeal 1A (primary argument) and 1D and Moroney Grounds of Appeal 1A (primary argument) and 1D.

(II) Material error of procedure

In this section we will deal with the Respondents' contentions that the procedure in fact followed in this case involved material errors of procedure contrary to Article 6 and customary law requirements of fairness. These issues are focused in Fuller Ground of Appeal 2, Tattersall Ground of Appeal 1A (alternative argument) and Moroney Ground of Appeal 1A (alternative argument)

(III) Delay

In this section we will deal with the Respondents' contentions that the duration of the proceedings is in breach of the reasonable time requirement of Article 6 and the requirements of customary law. These issues are focused in Tattersall Ground of Appeal 1B and Moroney Ground of Appeal 1B.

(IV) Inadequate reasons

In this section we will deal with the Respondents' contentions that the Royal Court judgment is inadequately reasoned. These issues are focused in Fuller Ground of Appeal 5, Tattersall Ground of Appeal 1C and Moroney Ground of Appeal 1C.

(V) Jurat unreasonableness

In this section we will deal with the Respondents' contentions that the Bailiff did not, in fact, apply the concept of Jurat unreasonableness. These issues are focused in Fuller Ground of Appeal 8, Tattersall Ground of Appeal 3 and Moroney Ground of Appeal 3.

(VI) Challenges to the Bailiff's conclusions on specific findings against the Respondents

In this section we will deal first with the GFSC's appeal against certain specific findings, advanced in Grounds of Appeal 1 and 2. We will then deal with Mr Fuller's appeals against specific findings, focused in Fuller Grounds of Appeal 3 and 4.

(VII) The Bailiff's findings that the Respondents did not meet the Minimum Criteria for Licensing

In this section we will deal with the Respondents' contention that the Bailiff should have set aside the SDM's findings that they did not fulfil the minimum criteria for licensing. These issues are focused in Fuller Grounds of Appeal 6 and 7, Tattersall Ground of Appeal 2 and Moroney Ground of Appeal 2.

(VIII) Sanctions

In this section we will deal with the grounds of appeal advanced by the GFSC and by the Respondents in respect of sanctions. These issues are focused in GFSC Grounds of Appeal 3, 4, 5 and 6, Tattersall Ground of Appeal 2 and Moroney Ground of Appeal 2.

(IX) Costs

In this section we will deal with the appeal by the GFSC and the cross-appeal by Messrs Tattersall and Moroney against the Royal Court costs judgment. These issues are focused in GFSC Ground of Appeal 7, Tattersall Ground of Appeal 4 and Moroney Ground of Appeal 4.

78. For the detailed reasons set out below, we have reached the following conclusions.

(a) We reject the Respondents' structural challenge to the compatibility with Article 6 of the legislative scheme, and to the analysis set out in *Domaille.*

(b) We sustain Mr Fuller's contention that the Royal Court erred in failing to hold that there had been a material error of procedure specifically in respect of the SDM's findings against Mr Fuller based on the content and manner of his representations. We otherwise dismiss the Respondents' contentions that the Royal Court erred in failing to hold that the procedure followed in this case was incompatible with Article 6 and/or was procedurally unfair by reference to customary law principles.

(c) We sustain the Respondents' contention that the duration of the proceedings was incompatible with Article 6 of the European Convention on Human Rights, specifically under reference to the duration of the proceedings in the Royal Court. The Royal Court will require to consider whether just satisfaction in respect of that breach can be adequately achieved by a declaration to that effect. Otherwise the case should be remitted to the GFSC with a direction that it should make an adjustment to the sanctions which it would otherwise have imposed (having reconsidered the case in light of the outcome of the appeal process) by way of just satisfaction.

(d) We reject the Respondents' contention that the duration of the proceedings would, at customary law, justify setting aside the Royal Court decision.

(e) We sustain Mr Fuller's contention that paragraph 332 of the Royal Court's judgment is inadequately reasoned. We otherwise reject the Respondents' contentions to the effect that the Royal Court judgment is inadequately reasoned. The Royal Court will require to reconsider the issue addressed in paragraph 332 of its judgment and provide a reasoned decision on that issue.

(f) We reject the Respondents' contentions that the Royal Court did not apply the concept of Jurat unreasonableness.

(g) In respect of specific findings which are challenged by GFSC, we sustain GFSC Grounds of Appeal 1, 2.1, 2.3 and 2.4. We dismiss GFSC Ground of Appeal 2.2 on the ground that it is superseded; and Ground of Appeal 2.5 on its merits. We dismiss Mr Fuller's Grounds of Appeal 3 and 4.

(h) We sustain the Respondents' contentions that the Royal Court erred in itself holding that they did not satisfy the minimum criteria for licensing rather than remitting that issue back to the GFSC. The Royal Court will require to consider in respect of each Respondent and in light of our analysis of the law, whether the findings which have survived appellate scrutiny are such that the GFSC would be bound to hold that the Respondent did not satisfy the minimum criteria for licensing. Otherwise, that question will require to be remitted to the GFSC for reconsideration in light of the outcome of the appellate process.

(i) We sustain GFSC Ground of Appeal 3. The Royal Court will require to consider in respect of each Respondent and in light of our analysis of the law, whether the findings which have survived appellate scrutiny are such that the GFSC would be bound to adhere to its assessment of seriousness. Otherwise, the question of seriousness will also require to be remitted to the GFSC for reconsideration in light of the outcome of the appellate process.

(j) We dismiss the GFSC's costs appeal, as it has been presented to us, and the costs appeals advanced by the Respondents.

79. The matter will require to return to the Royal Court, for further consideration before a remit to the GFSC. The matters which will require consideration by the Royal Court, as we perceive them, are as follows.

(a) The Royal Court will require to reconsider the issue addressed in paragraph 332 of its judgment and give a reasoned decision on that issue.

(b) The Royal Court will require to consider in the case of each Respondent, in light of the outcome of the appellate process, and our analysis of the law, whether the GFSC would be bound to hold that the Respondent did not satisfy the minimum criteria for licensing, and whether the GFSC would be bound to reach the same conclusion as regards the seriousness of the non-fulfilment. Otherwise, those questions will require to be remitted to the GFSC for reconsideration.

(c) The Royal Court will require to consider whether a declaration that there has been a breach of the Article 6 requirement that the Respondents' civil rights and obligations be determined within a reasonable time would be sufficient just satisfaction for that breach. If not, as part of its reconsideration of sanctions, the GFSC will require to make an appropriate adjustment to the sanctions which it would otherwise have imposed on the Respondents in order to make just satisfaction for that breach.

We do not for our part consider that there is any good reason why the case should not be remitted to the Bailiff, who is familiar with the case and therefore best placed to address these matters. Nor have we identified any reason why the case should not, when remitted back to the GFSC, be reconsidered by the same SDM, although that will be a matter for the Bailiff to determine, in light of any submissions which may be made to him in that regard.

THE NATURE OF THE APPEAL TO THE ROYAL COURT

80. We have set out the statutory grounds of appeal to the Royal Court from a decision of the GFSC provided for by section 11H of the FSC Law at paragraph 17 above. These grounds of appeal are, on the face of it, comprehensive, encompassing not only questions of law, but also the question of whether the decision was "*unreasonable*" and the question of whether there has been a "*material error as to the facts*".

81. In *Domaille v. Guernsey Financial Services Commission* [2024] GCA 003 the Court of Appeal explained the approach which the Royal Court should take to an appeal against a decision of the GFSC in the following terms:

> *"75. In assessing correctly the true scope of the Royal Court's function under section 106 it is convenient to start by identifying the framework within which the analysis needs to be conducted:*
>
> *(i) The Royal Court's jurisdiction in this context is entirely statutory.*
>
> *(ii) The requirements of fairness are always fact specific.*
>
> *(iii) Similarly, the question whether a person's rights under Article 6, ECHR, have been violated in any given case is again fact specific. It is often said that, where an administrative decision is made which engages Article 6, the review court must have 'full jurisdiction' – but that is a protean concept which does not necessarily demand that a single procedural model must be followed in all cases and in all circumstances.*
>
> *76. With these points in mind, two interim propositions can be advanced: (i) it cannot be suggested that the Royal Court is positively required (either by the rules of natural justice or by s. 6 of the Human Rights Law) to conduct a full, merits-based trial de novo under s. 106; (ii) the ultimate answer to the question whether the Royal Court is either required or entitled to conduct a full, merits-based trial de novo under s. 106 is to be found in a correct interpretation of the EP Law.*
>
> *77. Against that framework, and having considered the case-law in light of the relevant legislation, we consider that the following considerations must be kept clearly in mind:*
>
> *(i) Under the express statutory wording of s. 106(1), the Royal Court is exercising an appellate function. It is hearing an "appeal". It is not conducting a trial de novo.*

(ii) The Royal Court is hearing an appeal "against the decision" of the GFSC. It is not conducting an inquiry into the performance by the GFSC of its investigative function.

(iii) The true scope and limits of the Royal Court's role under s. 106 must be identified in light of the other procedural safeguards which are laid down by the EP Law and in the Enforcement Explanatory Note.

(iv) It is important to recognise the significance of the limited remedies available to the Royal Court pursuant to s. 106(6). The Royal Court has a finite range of options: it can set aside the GFSC's decision, or remit the matter to the GFSC with such directions as it thinks fit, or it can confirm the decision in whole or in part.

78. Taking these considerations into account, it is important not to be misled by the apparent breadth of the issues by reference to which an appeal can be brought under s. 106(3). Whilst the question whether a decision by the GFSC was ultra vires or was made in bad faith admits of only one correct answer, the question whether a decision was reasonable, or proportionate, or involved an error of fact is a matter of judgment on which different, but equally rational opinions could be formed by different decisionmakers on the basis of exactly the same material.

79. The function of an appellate court on these issues begins and ends with a determination of whether the GFSC's decision was reasonable or proportionate: if it was, then the GFSC's decision stands; if it was not, the Royal Court can only exercise the limited functions conferred on it under s. 106(6); but it cannot usurp the primary decision making function of the GFSC. Similarly, the fact that a successful appeal can be brought on the basis that there was a material error as to the facts does not mean that the Royal Court is to undertake its own primary, evidential decision-making function. Rather, its appellate mandate is to consider the evidence and to determine whether the GFSC's decision on the facts is materially 'wrong' in the usual appellate sense – i.e. that it is unsupported by any evidence or is perverse in the face of the overall weight of the evidence. If the GFSC's decision was not wrong, in this sense, then it stands; if it was wrong, then the GFSC's decision cannot stand; but in that situation, the Royal Court is again limited to the exercise of the powers under s. 106(6), and it cannot arrogate to itself a primary fact-finding function.

80. The conclusion is that the Royal Court's function under s. 106(1) is to hear an appeal by reference to all or any of the grounds listed in s. 106(3), and to exercise the powers conferred by s. 106(6) – no more, no less. It is not the Royal Court's function to conduct a full, merits-based trial de novo, or to assume the primary fact-finding function or the expert, evaluative, regulatory decision-making function of the GFSC."

82. An application for leave to appeal the decision in *Domaille* to the Judicial Committee of the Privy Council was refused, both by the Court of Appeal ([2024] GCA 037] and by the Judicial Committee. The judgment of the Court of Appeal in *Domaille* is a recent, and considered, analysis of the nature of the statutory appeal from a decision of the GFSC to the Royal Court. Although this Court is not bound to follow its own decisions, the interests of consistency and legal certainty will usually justify it in doing so, unless the Court has been presented with a good reason to depart from a previous Court of Appeal decision.

83. The Respondents invite us to depart from *Domaille* on three grounds. First, they say that the analysis of the Court of Appeal in that case ignored the well-established doctrine of "Jurat unreasonableness" (which is to be contrasted with "*Wednesbury* unreasonableness"). Secondly, they found on the legislative history of the provisions, to contend that, contrary to the approach

taken by the Court in *Domaille,* the statutory intent was the Royal Court should undertake a "full merits review". Thirdly, they contend that, if *Domaille* is correct the statutory scheme is, structurally, incompatible with Article 6 of the European Convention on Human Rights. We address each of these arguments in turn.

Jurat unreasonableness

84. The concept of "Jurat unreasonableness" can best be explained by referring to the Court of Appeal judgment in *Walters v. States Housing Authority* (1997) 24 GLJ 76. *Walters* concerned a statutory appeal to the Royal Court under section 56 of the Housing (Control of Occupation) Law 1994, which specified that it was for the presiding judge to decide questions of vires and "*for the Jurats to decide on the reasonableness of the authority's decision*".

85. Beloff JA, giving the judgment of the Court of Appeal, held that, under this provision, questions of vires, for the presiding judge, included the question of whether the decision was "*Wednesbury* unreasonable or irrational". If the judge concluded that the decision was not ultra vires in that sense, he should direct the Jurats that "*it was for them to decide whether the decision was unreasonable which … he should emphasise means something other than that they themselves would have come to a different decision if they were the Authority*".

86. Thus "Jurat unreasonableness" is not limited to – indeed, is conceptually different from – *Wednesbury* unreasonableness. As the debate developed before us, it became apparent that there was no dispute between the parties that an appeal to the Royal Court on the ground that *"the decision was unreasonable"* can indeed encompass "Jurat unreasonableness" in the sense explained in *Walters.* That had been explicitly decided by the Bailiff in *Bordeaux Financial Services (Guernsey) Ltd v. Guernsey Financial Services Commission,* Judgment 18/2016, paragraphs 24 et seq. The GFSC did not take issue with that proposition.

87. Like the statutory provision at issue in *Walters,* an appeal under section 11H of the FSC Law lies both on vires grounds and on the ground that the decision was "unreasonable". By contrast with *Walters,* there is no requirement in an appeal under section 11H (which by statute lies to a judge sitting without Jurats) to differentiate between the functions of the judge and the Jurats. Nevertheless, read against the background of the analysis of this Court in *Walters,* we agree with the Bailiff's analysis in *Bordeaux Financial Services (Guernsey) Ltd*, accepted by the parties in this case, that the statutory ground of appeal that "*the decision is unreasonable"* encompasses an appeal on the basis of "Jurat unreasonableness".

88. It does not appear that the Court in *Domaille* was directed to this particular feature of Guernsey law. Nevertheless, we do not consider that there is anything in the *Domaille* judgment which is inconsistent with recognition that an appeal on the ground that a decision of the GFSC is "unreasonable" may encompass "Jurat unreasonableness". The Court in *Domaille* observed (at paragraph 79) that the Royal Court must not usurp the primary decision-making function of the GFSC. Equally, the Court in *Walters* emphasised that an appeal on the ground of "Jurat unreasonableness" does not entitle the Royal Court to substitute the view which it would have taken had it been the primary decision-maker. What is important for present purposes is that an appeal on the ground that the decision was "unreasonable" is not limited to *Wednesbury* unreasonableness but can encompass Jurat unreasonableness.

89. At paragraphs 298 and 299 of his judgment in the present case, the Bailiff expressly recognised the relevance of "Jurat unreasonableness" to the appeal before him. He referred to *Walters* and to his own earlier decision in *Bordeaux Services*. The passage includes the following observations:

> *"298. … I have reminded myself about the proper approach to take to the grounds of appeal … I agree with Advocate Dawes that there is more to this appeal than what might be termed 'simple' judicial review. The assessment of what is or is not reasonableness goes further than what was formerly dealt with as Wednesbury unreasonableness or irrationality. … Accordingly there is a distinction between the legal question arising under para (a) in each appeal provision and para (b), which is whether 'the decision was unreasonable'. Although there is no other group of persons who determine that matter needing to be directed by the presiding judge, it is open to this Court to allow an appeal if it finds that the decision lacks the type of reasonableness that was previously for determination by the Jurats. If that were not the case, there would be no point in including para (b) in the appeal grounds. This is something more than the consideration of rationality, which falls within para (a). …"*

90. It is clear, then, that the Bailiff acknowledged that the available grounds of appeal included "Jurat unreasonableness". The focus of debate, on this issue, accordingly, came to be on whether the Bailiff had, in fact, followed through on this statement of the legal position. We will address this contention below.

The legislative history

91. Advocate Dawes contended before us that the legislative intent in enacting the right of appeal at issue in the present case was that the Royal Court should exercise a "*full review of the merits*". He showed us the Policy Letter which led to the enactment of the relevant provisions: Article 4 of Billet XIX of 2007. This contains the following passage:

> "*43. The Policy Council considers that the rights of appeal open to licensees and other persons affected by decisions of the Commission should be broadened to ensure that there is no reasonable doubt as to their Convention compatibility. The current grounds for appeal are that the Commission's decision was ultra vires (i.e. was made outside its powers) or was an unreasonable exercise of powers, rather than appeals necessarily involving a full review of the merits of the Commission's decision.*
> *44. The Policy Council is of the opinion that, where a right of appeal lies against a decision of the Commission, the review process should be broadened to ensure that aggrieved persons can have the Royal Court conduct a full review of the Commission's decision, rather than a more limited review of whether the decision was ultra vires or an unreasonable exercise of the Commission's powers.*
> *45. In order to comply with Convention rights pending the making of the legislative changes proposed in this Report, the Commission has since 2002 arranged for a non-statutory but independent tribunal, the Guernsey Financial Services Tribunal, to be available to review its adverse decisions. This system has operated on a voluntary basis, at the option of the person aggrieved by an adverse decision proposed by the Commission. Where the aggrieved person has taken up that option, the Tribunal has*

conducted a full review of the Commission's proposed decision and the Commissioners have considered the Tribunal's opinion before making a final decision.

…

47. Experience of the reviews conducted by the Tribunal has shown that they have required detailed and specialist knowledge of the type of financial services business in issue. For that reason, Mr Blair as Chairman of the Tribunal has been assisted by two lay assessors with the relevant experience in each case.

Proposed nature of appeal rights

48. It has always been clear that the review arrangements needed to be given a statutory basis and one option which has been considered would be to create a statutory Financial Services Tribunal to operate separately from the Royal Court. However, such a free-standing Tribunal would need its own infrastructure and staff and these would have be funded either by the finance sector or by taxpayers as a whole.

49. A more straightforward step would be for the decisions of the Commission to be reviewed by the Royal Court, with some of the features of the Tribunal incorporated into the Royal Court's jurisdiction for this purpose. This could provide persons aggrieved by decisions of the Commission with the type of full review currently undertaken by the non-statutory Tribunal without creating an additional statutory body and the need for an infrastructure outside that of the Royal Court. The Policy Council envisages that the Bailiff would sit with two lay assessors, selected by him from a panel appointed by him for their experience in relevant areas of financial services business. Whilst the Bailiff would be the sole judge of issues of law, he would be advised by the lay assessors on factual matters. The Bailiff would sit alone where no factual issues were engaged for advice or determination. …"

92. Advocate Dawes also referred us to the decision of the Lieutenant Bailiff (Sir Richard Collas) in *Chick v. Guernsey Financial Services Commission* [2020] GRC035. At paragraph 38, Sir Richard narrated certain submissions which the Appellant had advanced, which referred to a report of the IMF published in October 2003 assessing the supervision and regulation of the Guernsey financial services sector:

> "*The report assessed whether the GFSC's disciplinary processes complied with Article 6 of the Convention and stated: 'The GFSC has received clear legal advice that it should not be 'judge and jury' in its own cause'. Guernsey has therefore resolved to establish a financial services tribunal.' Instead of acting as then envisaged, the Commission initially established a shadow tribunal … until it was disbanded in 2009 when the GRSC introduced the Commissions Decisions Committee comprising three Commissioners, consistent with section 19(5) of the FSC Law but not compliant with the IMF's recommendation. Then in 2014 the Commission introduced the SDMs who are officers of the GFSC and, as such, do not comply with either Article 6 or section 19(5) of the FSC Law so that the IMF's recommendations remain outstanding.*"

Sir Richard observed (para. 56) that there "*is something unsatisfactory about a disciplinary system that possesses 'many of the hallmarks' of an independent and impartial tribunal but in which independence is inherently absent*" but he concluded that, by reason of the appeal to the Royal Court, the statutory regime was, overall, compatible with Article 6.

93. Advocate Dawes pointed out that the statutory provisions, as enacted, provided, as the Policy Letter had anticipated, for the Bailiff to sit with lay assessors. This, and the legislative history, disclosed, he said, that the Royal Court was intended to have a much greater role on appeal than was envisaged by the Court in *Domaille*. He fortified his submission by reference to the law of England & Wales. The submissions for Mr Tattersall and Mr Moroney also relied on the position in England & Wales, albeit in the context of their contention that Article 6 of the European Convention on Human Rights required the Court to be able to carry out "a full merits appeal on a de novo basis".

94. Pre-legislative materials such as the Billet can assist in the interpretation of statutory language. They can provide useful information about the context against which an enactment was passed, and the mischief which the statute was intended to address. But it is the language of the statute which falls to be interpreted and, ultimately, the question for the Court is how the statute itself, read in light of the relevant context, falls to be interpreted and applied.

95. It is clear from paragraphs 43 and 44 of the Policy Letter that the purpose of the proposed reform of the appeal provisions was, put broadly, to expand the statutory right of appeal so that the system would be compatible with the European Convention on Human Rights. That was to be achieved, firstly, by providing for new statutory grounds of appeal (see paragraph 43), and, secondly, by incorporating into the appeal to the Royal Court "*some of the features"* of the non-statutory Tribunal (see paragraph 49) so that it could exercise the "*type of full review"* undertaken by that Tribunal.

96. The Policy Letter refers to "*a full review*" (and, indeed, to a "*full review of the merits*") of GFSC's decisions (paragraphs 43 and 44). This is contrasted with the previous grounds of appeal which were limited to vires and reasonableness challenges. The term "*review*" does not suggest that what was envisaged was a hearing *de novo*. The phrase "*full review*" may be taken to suggest an appellate review which is not limited as regards the grounds or bases of challenge, whilst the phrase "*full review of the merits*" is capable of referring to an appellate review which extends beyond errors of law and excess of jurisdiction, to allow challenges to the reasonableness of the decision and on the basis of material error of fact. The language of the Policy Letter is at best ambiguous, and, in its use of the word "*review",* tends to suggest something other than a hearing *de novo*.

97. It is, further, clear from the Policy Letter that a key purpose of the statutory reform was to ensure that the system would be compatible with Convention rights. But that begs the question of what sort of review is necessary in order for the system to comply with Convention rights. The Court which handed down the decision in *Domaille* considered that its analysis was compatible with the Convention rights. If the Court was right in that view, then its analysis would be consistent with the high-level objective of the Policy Letter. If the Court was wrong, then we would be obliged to reconsider the interpretation of the provisions regardless of what might be taken from the Policy Letter. We will, accordingly, assess the compatibility with Article 6 of the approach taken in *Domaille* for ourselves in light of the submissions which we received. If that approach is indeed compatible with Article 6, then the policy objective of the Policy Letter has been achieved.

98. We do not consider that the provision in the legislation which allows the Bailiff to sit with assessors compels us to conclude that the statute envisages a full hearing *de novo*. The Bailiff is not obliged to sit with assessors, and, depending on the particular features of the case, the assistance of assessors might well be useful to the Bailiff in the context of an appellate review, for example in addressing grounds of appeal based on Jurat unreasonableness.

99. In England & Wales a decision by the Financial Conduct Authority to impose a prohibition order may be referred to the Upper Tribunal (Tax and Chancery Chamber). Section 133(4) of the Financial Services and Markets Act 2000 empowers the Tribunal to hear evidence relating to the subject matter of the reference whether or not that was available to the decision-maker at the time. The Court of Appeal of England & Wales has stated that this provision implies that "*it is not an appeal against the Authority's decision, but a re-hearing of the issues which gave rise to the decision*": *Financial Conduct Authority v. Seiler* [2024] EWCA Civ 852, para. 12. There is no equivalent language in the Guernsey statutory provisions which we have to consider. Looking at the issue simply as a matter of statutory interpretation, the absence of similar language in the Guernsey legislation, so far as it goes, tends to support the analysis of the *Domaille* court.

100. The Respondents contended that the reason why the Upper Tribunal had been given this type of jurisdiction was in order to ensure that the procedure would be compatible with Convention rights. The submissions advanced on behalf of Mr Tattersall and Mr Moroney relied on an opinion of Lord Lester of Herne Hill and Javan Herberg KC, which was annexed to the First Report of the Joint Committee on the Financial Services and Market Act, 1999. In that opinion, the authors expressed the view that the right to an independent and impartial court and the right to a fair trial would be satisfied by the right of appeal to the Tribunal but only to the extent that the appeal is: (a) de novo, full and with the burden of proof remaining on the FSA; and (b) the individual or commercial entity is not prejudiced by the first instance determination by the FSA.

101. We will address the question of whether the appeal rights, as explained by the Court in *Domaille* do satisfy the requirements of Article 6 in the next section of this judgment. It is a question which we must address on its merits. The fact that, in another jurisdiction, a different approach has been taken, motivated by a desire to ensure compliance with Convention rights, does not advance the issue one way or the other. If those responsible for that scheme were wrong in their assessment of what the Convention required (or, indeed, if they were simply taking a cautious approach), the comparison takes the Respondents nowhere. If they were right, that will be apparent from an analysis of the relevant law regardless of how the matter has been addressed in England & Wales.

102. We accordingly turn to the contention that the legislative scheme, at least as interpreted by the Court in *Domaille,* is not compatible with Article 6.

Compatibility with Convention rights

103. Article 6 of the European Convention on Human Rights provides:

"*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*"

The parties agree that the proceedings against the Respondents engage Article 6, although Advocate Dawes raised a preliminary question as to whether or not the proceedings involved the determination of a "*criminal charge*" or of "*civil rights and obligations*". The parties also agree that the GFSC is not an "*independent and impartial tribunal*" for the purposes of Article 6 and that the Royal Court is such a tribunal. The parties further agree that the system as a whole would be compatible with Article 6 if the Royal Court has "*full jurisdiction*", such that the proceedings taken as a whole satisfy the requirements of Article 6. The question of whether the Royal Court is, under the statutory scheme, able to exercise "*full jurisdiction*" was accordingly the central focus of the debate before us.

104. The submissions for Mr Tattersall and Mr Moroney advanced the contention that, properly considered, for a tribunal to have "*full jurisdiction*" in a case such as the present, it must be able to carry out a full merits appeal on a *de novo* basis and to be able to assess the credibility of the Respondents. Advocate Dawes, who undertook the principal responsibility at the oral hearing for advancing this part of the case for all three Respondents, advanced two principal submissions:

    (i) He contended that the grounds of appeal available before the Royal Court, as those had been interpreted by the Court of Appeal in *Domaille*, are such that, at least in a case such as the present one, the Royal Court cannot exercise "*full jurisdiction*" for the purposes of Article 6.

    (ii) He further contended that, in any event, the limits on the powers of the Royal Court as regards disposal – and, in particular, its inability to substitute its own decision for that of the GFSC – mean that the system was structurally incompatible with Article 6.

105. Advocate Dawes' first point was developed by reference, first to the contention, which we have addressed above, that *Domaille* did not take into account the concept of Jurat unreasonableness. He further submitted that the approach which the Court of Appeal in *Domaille* took to appeals against findings of fact deprived the Royal Court of "*full jurisdiction*", at least in a case such as the present one.

106. The written submissions for Mr Tattersall and Mr Moroney also advanced a contention that, on appeal from a decision of the Bailiff, the Court of Appeal is not an independent and impartial tribunal; and, in any event that, in such a case, the appellate process is vitiated by apparent bias. Although Advocate Greenfield did not press this submission during the oral hearing of the appeal, he made clear that he did not withdraw it. Since it is part of the Respondents' structural challenge to the compatibility of the statutory scheme with Article 6, we will address it in this part of our judgment.

107. The written submissions for Mr Tattersall and Mr Moroney criticised the Bailiff for not making a declaration under section 4 of the Human Rights (Bailiwick of Guernsey) Law 2000 that the

statutory scheme is incompatible with Article 6 of the European Convention on Human Rights. At the outset of the appeal hearing, we drew to parties' attention the entitlement of HM Procureur under section 5 of the 2000 Law to notice "*when the court is considering making a declaration of incompatibility"* and, thereafter, to be joined as a party. We invited submissions as to whether we should, having regard to these submissions, adjourn the appeal so that notice could be given to HM Procureur. The Respondents invited us to consider the merits of their contentions and, if we were then to find ourselves "*considering"* making a declaration of incompatibility, to give notice at that stage to HM Procureur.

108. Rather than discharge the appeal hearing, we were prepared to approach matters in that way and to hear the submissions of the parties on the point. In the event, as we explain below, we do not consider that there is any basis for making a declaration of incompatibility. However, in future, if a party envisages inviting a Court to make a declaration of incompatibility (as the Respondents explicitly did in this appeal), it is that party's responsibility to draw the matter to the Court's attention in good time so that notice may be given to HM Procureur in terms of section 5. This will enable her, if so advised, to be joined to the proceedings and thereafter participate in any hearing where that issue is under discussion. HM Procureur has responsibilities for compliance with the rule of law in Guernsey which give her an interest in any proposal that the Court should make a finding that primary legislation is not compatible with international human rights obligations binding on the Bailiwick. It would, in general, be highly unsatisfactory for the Court to hear argument from the parties on the Convention compatibility of a statutory provision, only to require to adjourn that issue to a further hearing to hear from HM Procureur, without her having heard the parties' primary submissions on the point.

The concept of "full jurisdiction"

109. There is no dispute that the present proceedings engage Article 6, that the GFSC is not an "*independent and impartial tribunal"* and that, in order to satisfy the requirements of Article 6, the Royal Court (which is such a tribunal) must be able to exercise "*full jurisdiction"*. In *Ramos Nuñes de Carvalho e Sá v. Portugal,* applications nos. 55391/13, 57728/13 and 74041/13, 6 November 2018, a Grand Chamber of the European Court of Human Rights explained the concept of "*full jurisdiction"* in this context in the following terms:

> "*176. The Court reiterates that, for the determination of civil rights and obligations by a 'tribunal' to satisfy Article 6(1) of the Convention, the 'tribunal' in question must have jurisdiction to determine all issues of fact and law relevant to the dispute before it …*
> *177. Both the Commission and the Court have acknowledged in their case-law that the requirement that a court or tribunal should have 'full jurisdiction' will be satisfied where it is found that the judicial body in question has exercised 'sufficient jurisdiction' or provided 'sufficient review' in the proceedings before it … Thus the requirement of full jurisdiction has been given an autonomous definition in the light of the object and purpose of the Convention, one that does not necessarily depend on the legal characterisation in domestic law.*
> *178. In adopting this approach the Convention organs have had regard to the fact that it is often the case in relation to administrative-law appeals in the member states of the*

Council of Europe that the extent of judicial review over the facts of a case is limited, and that it is characteristic of review proceedings that the competent authorities review the previous proceedings rather than taking factual decisions. It can be derived from the relevant case-law that it is not the role of Article 6, in principle, to guarantee access to a court which can substitute its own assessment for the administrative authorities. In this regard, the Court has placed particular emphasis on the respect which must be accorded to decisions taken by the administrative authorities on grounds of expediency and which often involve specialised areas of law ...

179. In assessing whether, in a given case, the extent of the review carried out by the domestic authorities was sufficient, the Court has held that it must have regard to the powers of the judicial body in question and to such factors as: (a) the subject-matter of the decision appealed against, and in particular, whether or not it concerned a specialised issue requiring professional knowledge or experience and whether it involved the exercise of administrative discretion and, if so, to what extent; (b) the manner in which that decision was arrived at, in particular, the procedural guarantees available in the proceedings before the administrative body; and (c) the content of the dispute, including the desired and actual grounds of appeal ...

180. In considering whether the legislative scheme, taken as a whole, provided a due enquiry into the facts, the Court must also have regard to the nature and purpose of the scheme. Indeed, in relation to administrative law appeals, the question whether the extent of judicial review afforded was 'sufficient' may depend not only on the discretionary or technical nature of the subject-matter of the decision appealed against and the particular issue that the applicant wishes to ventilate before the courts as being the central issue for him or her, but also, more generally, on the nature of the 'civil rights and obligations' at stake and the nature of the policy objective pursued by the underlying domestic law.

181. Whether the review carried out was sufficient will thus depend on the circumstances of a given case: the Court must therefore confine itself as far as possible to examining the question raised in the case before it and to determining if, in that particular case, the extent of the review was adequate ...

182. The Court has previously had occasion to examine situations in which the domestic courts were unable or refused to examine a key issue in the dispute because they considered themselves bound by the findings of fact or of law made by the administrative authorities and could not examine the relevant issues independently ... The case of Tsfayo falls into this category. In that case, the body whose decision was under judicial review was not merely lacking in independence from the executive but was also directly connected to one of the parties in the dispute ... The Court considered that the independence of judgment in relation to the finding of primary fact was liable to be impaired in a manner which could not be adequately scrutinised or rectified by judicial review. As the competent court had lacked jurisdiction to rehear the evidence and had therefore been unable to determine a crucial issue of fact, the Court found a violation of Article 6 on the ground that the central issue had not been determined by a tribunal that was independent of the parties. In other words, in that case, the impossibility of re-examining a decisive factual issue had prevented the appellate court from remedying the lack of independence from one of the parties to the dispute that had been found at first instance.

183. The Court has also been called on to examine cases in which the court in question did not have full jurisdiction within the meaning of the domestic law as such but had

examined point by point the applicants' grounds of appeal, without having to decline jurisdiction in replying to them or in scrutinising findings of fact or law made by the administrative authorities. In these cases, the Court examined the intensity of the domestic courts' review of the discretion exercised by the administrative authorities (see for instance … under the criminal limb of Article 6(1) of the Convention A Menarini Diagnostics S.r.l. v. Italy, no 43509/08, paras 63-64, 27 September 2011).
184. Furthermore, the court has considered it generally inherent in the notion of judicial review that, if a ground of appeal is upheld, the reviewing court must have the power to quash the impugned decision, and either take a fresh decision or remit the case to the same body or a different body (see Kingsley v. United Kingdom [GC], no. 35605/97, paras. 32 and 34, ECHR 2002-IV ...)."

110. Although this passage was directed primarily to *"the determination of civil rights and obligations"*, paragraph 183 indicates that the same approach may, at least in certain cases, fall to be taken to the determination of a "*criminal charge"*. In the present case, although Advocate Dawes invited us to take the view that the proceedings involved the determination of a criminal charge, he did not suggest that the characterisation of the proceedings as "*criminal"* for the purposes of Article 6 would alter the fundamental analysis. He accepted that the question would remain whether the Royal Court has exercised sufficient jurisdiction, in the circumstances, to render the proceedings as a whole Convention compliant, albeit that he submitted that if the proceedings were to be characterised as "*criminal*" for Article 6 purposes, that would require the reviewing court to exercise a more exacting scrutiny of the decision.

111. The concept of a "*criminal charge*" within the meaning of Article 6 of the Convention is an autonomous one. The established case-law of the Strasbourg Court identifies three criteria, derived from *Engel v. Netherlands,* which fall to be considered when assessing whether or not proceedings concern the determination of a "*criminal char*ge" in this context: the legal classification of the offence under national law; the nature of the offence; and the nature and degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative, although this does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge.

112. It is well-established that "*disciplinary proceedings as such*" do not engage the criminal limb of Article 6. In *Ramos Nuñes de Carvalho e Sá v. Portugal, supra,* the Grand Chamber referred (paragraph 123) to Strasbourg caselaw to that effect concerning lawyers, notaries, civil servants, doctors, members of the armed forces, liquidators and judges. *Ramos Nuñes* concerned disciplinary proceedings against a judge, which the Court characterised (paragraph 125) as "*purely disciplinary*". The rules in question were "*not aimed at the public in general but at a specific category*" and were "*designed to protect the profession's honour and reputation and to maintain public trust*". The potential sanctions available in the proceedings against the judge - a caution, a fine ranging from five to ninety days' pay, transfer, suspension from duty, disciplinary leave without pay, early retirement and removal from office – were all said by the Court to be "*purely disciplinary in nature*" (paragraph 126). Although the amount of the fine could be substantial, and therefore punitive, the severity of the sanction imposed on the applicant (a fine of twenty days' pay) "*did not bring the offence into the criminal sphere*".

113. As the cases to which Advocate Dawes referred us show, there is a strand of Strasbourg jurisprudence in which proceedings by regulators in the economic and financial sphere have been held to engage the criminal limb of Article 6. In *Medical Specialist Group LLP v. Guernsey Competition and Regulatory Authority* [2023] GLR 17 the Bailiff held that enforcement proceedings by the Guernsey Competition and Regulatory Authority are to be characterised as criminal (or quasi-criminal) for the purposes of Article 6. In his judgment, the Bailiff referred to *A Menarini Diagnostics s.r.l v. Italy,* application no. 43509/08, 29 September 2011 (the case referred to in paragraph 183 of *Ramos Nuñes de Carvalho e Sá*). In that case, the Strasbourg Court held that competition proceedings in Italy engaged the criminal limb of Article 6. Competition law, of course, applies to economic actors generally; it is not directed at "*a specific category*". Further, competition law proceedings are, by their nature, not disciplinary proceedings of the sort contemplated in *Ramos Nuñes de Carvalho e Sá.* They are directed to protecting the sound functioning of the economic market and not to protecting the honour and reputation of, and public trust in, a regulated profession.

114. *Dubus SA v. France,* Application No. 5242/04, 11 June 2009, on which Advocate Dawes particularly relied, shows that enforcement proceedings by a sectoral regulator may likewise involve the determination of a criminal charge notwithstanding that the regulatory regime applies only to entities and individuals engaged in the relevant regulated sector. *Dubus SA* concerned proceedings, described as "une proc**é**dure disciplinaire*"*, against an investment business by the French regulator, the Banking Commission. The Banking Commission had imposed, by way of sanction, "un blâme*"*. The Strasbourg Court rejected the French Government's argument that Article 6 was not engaged and held (as had the Conseil d'Etat) that the proceedings involved the determination of a criminal charge. The Court held that the third *Engel* criterion required to be assessed by reference not to the sanction actually imposed but to the powers available to the Banking Commission. These included the power to strike an entity off the list of establishments authorised to operate in France, and a financial penalty up to the "minimum capital to which the sanctioned legal entity is subject" – penalties which entailed significant financial consequences, and which could be characterised as criminal. In any event, the reprimand had reputational, and therefore financial, consequences for the applicant. The sanction imposed accordingly had "une coloration p**é**nale*"*.

115. In *Chick v Guernsey Financial Services Commission* [2020] GRC 035, the Lieutenant Bailiff (Sir Richard Collas) rejected a contention that enforcement proceedings brought by GFSC involved the determination of a "*criminal charge*", for the following reasons: (i) the legal rules in question applied not to the general public but to "*a professional group possessing special status namely those who are licensed by the GFSC to carry out certain regulated activities in financial services in the Bailiwick*"; (ii) the sanctions were "*classic disciplinary sanctions liable to be imposed on professional people*"; and (iii) the legal rules were "*not in the nature of those that are usually protected by the criminal law*", but "*are comparable to those in other jurisdictions which are considered to be disciplinary and regulatory in nature*". The Court of Appeal refused permission to appeal: [2020] GCA 078. The Court stated that the Lieutenant Bailiff had been correct to find that the criminal limb of Article 6 was not engaged.

116. *Dubus SA* was not before the Royal Court or the Court of Appeal in *Chick.* We are obliged by section 2 of the Human Rights (Bailiwick of Guernsey) Law 2000 to take that decision into account. Having done so, we conclude, like the Court in *Chick,* that the present proceedings are

disciplinary in character and for that reason, as the Grand Chamber explained in *Ramos Nuñes de Carvalho e Sá,* do not involve the determination of a criminal charge. The rules in question are "*not aimed at the public in general but at a specific category*". They are "*designed to protect the profession's honour and reputation and to maintain public trust*". The standard which falls to be applied – *"fit and proper person"* – and the relevance of concepts such as probity, competence, experience, soundness of judgment and integrity – are redolent of professional discipline. The considerations to be taken into account in assessing whether someone is a fit and proper person to fulfil regulated functions include (emphasis added) "*knowledge and understanding of the legal* ***and professional*** *obligations to be assumed or undertaken",* "***continuing professional education or development****".* There is also a reference to carrying on business with the "***professional skill*** *appropriate to the nature and scale of his activities.* Although the regime applies to entities, which may be licensed, as well as to individuals, developments in the regulation of the legal profession in the UK show that professional discipline may encompass entity regulation. The sanctions, although potentially severe, are, as Sir Richard Collas observed in *Chick, "classic disciplinary sanctions liable to be imposed on professional people".* As the Grand Chamber in *Ramos Nuñes de Carvalho e Sá* recognised, "removal from office" (of which a prohibition order is an analogue) is a standard sanction in professional regulation. The financial penalty which may be imposed is subject to a limit of £200,000, which, though a significant sum, is not, in the context of the regulation of the financial services sector, sufficient on its own, having regard to the other features of the regime to which we have referred, to justify characterising the proceedings as involving the determination of a criminal charge.

117. In any event, we do not consider that the characterisation of the proceedings, as involving the determination of a criminal charge or civil rights and obligations, affects the analysis which falls to be applied in relation to the Royal Court's powers of review. As the range of proceedings which are considered by the European Court of Human Rights to fall under the criminal limb of Article 6 has broadened to include cases, such as regulatory proceedings, which do not belong in the traditional categories of criminal law, the Court has also acknowledged that there are cases to which, though they fall within the criminal head of Article 6, the procedural guarantees ordinarily applicable to the determination of a criminal charge do not necessarily apply with their full stringency. The primary concern of the European Court of Human Rights is on the fairness of the proceedings as a whole in light of what, as a matter of substance, is at stake. Specifically, the Court has consistently held that the obligation to comply with Article 6 does not preclude a "*penalty*" (including a penalty which is treated, for Article 6 purposes, as criminal) being imposed by an administrative authority in the first instance, provided that if the authority does not itself satisfy the requirements of Article 6, its decisions are subject to subsequent control by a judicial body which does meet those requirements and has "*full jurisdiction*".

118. It follows that, in the context of a case such as the present one, the essential question is not whether the proceedings are characterised for Article 6 purposes as "*criminal*" or "*civil*", but is whether, in all the circumstances of the case – including the seriousness of what, as a matter of substance, is at stake for the Respondents - the reviewing court has "*full jurisdiction*", applying the various considerations to which the Grand Chamber referred in *Ramos Nuñes de Carvalho e Sá*. As the Grand Chamber observed (at paragraph 121), the two heads of Article 6 are not necessarily mutually exclusive. Indeed, in *Sigma Radio Television Ltd v. Cyprus,* applications

nos 32181/04 and 35122/05, 21 October 2011, a leading case on whether judicial review of a decision of a sectoral regulator (in that case, the broadcasting regulator in Cyprus) is sufficient to satisfy Article 6, the Court took the view (paragraph 126) that it did not need to determine whether the applicant's contention that the proceedings engaged the criminal limb of Article 6. It is implicit that the question of whether the reviewing court had "*full jurisdiction*" did not turn on the characterisation of the case as criminal or civil, but rather, as the Court in *Sigma Radio Television Ltd* explained in terms similar to the passage which we have quoted above from *Ramos Nuñes de Carvalho e Sá v. Portugal,* by reference to the substance of the matter.

119. We accordingly agree with the Bailiff's conclusion (expressed at paragraph 185 of the Royal Court judgment) that the level of scrutiny which falls to be applied by the Royal Court to a decision of the GFSC does not depend on the categorisation of the proceedings for the purposes of Article 6. In our own analysis, we have taken full account of the seriousness of what is at stake for the Respondents. Our analysis would have been the same if the proceedings were properly to be characterised as involving the determination of a criminal charge.

Does "full jurisdiction" require a de novo hearing?

120. Like the Court of Appeal in *Domaille*, we reject the contention that, in order to have "*full jurisdiction*", the Royal Court must, in a case such as the present one, be able to carry out a full merits appeal on a *de novo* basis. Paragraph 177 of the Grand Chamber decision in *Ramos Nuñes* states that:

> *"… the requirement that a court or tribunal should have 'full jurisdiction' will be satisfied where it is found that the judicial body in question has exercised 'sufficient jurisdiction' or provided 'sufficient review' in the proceedings before it"*

Further, at paragraph 178, the Court stated:

> "*… it is not the role of Article 6, in principle, to guarantee access to a court which can substitute its own assessment for the administrative authorities. In this regard, the Court has placed particular emphasis on the respect which must be accorded to decisions taken by the administrative authorities on grounds of expediency and which often involve specialised areas of law …"*

121. As we have explained above, this analysis applies to a case such as the present, even if what is at issue falls to be characterised, for Article 6 purposes, the "*determination of a criminal charge*". It follows that, at the level of principle, Article 6 does not require the reviewing Court to rehear the case *de novo.* The Court of Appeal in *Domaille* was correct to reach that conclusion. That conclusion is reinforced, in the context of the present case, by considering the factors mentioned by the Grand Chamber in *Ramos Nuñes* at paragraphs 179 and 180. We discuss these considerations below.

Can the Royal Court exercise "sufficient review" of factual findings?

122. In the first part of Advocate Dawes' attack on the structural compatibility of the regime with Article 6, he advanced two criticisms of the Court of Appeal's analysis in *Domaille.* He submitted that the Court of Appeal in that case ignored the well-established doctrine of "Jurat unreasonableness" (which falls to be contrasted with "*Wednesbury* unreasonableness"). He further submitted that the approach which the Court of Appeal in *Domaille* took to an appeal against findings of fact deprived the Royal Court of "*full jurisdiction*", at least in a case such as the present one.

123. For the reasons we have already explained, the first of these criticisms proceeds on a false premise. The statutory grounds of appeal do encompass Jurat unreasonableness as, in the present case, the Bailiff recognised. We require, though, to address Advocate Dawes' second criticism, which challenges the approach which the *Domaille* court took to appeals against findings of fact. Advocate Dawes drew our attention to *Bryan v. United Kingdom* (1995) 21 EHRR 342*, Tsfayo v. United Kingdom* (2009) 48 EHRR 18 and *Sigma Radio Television Ltd, supra*.

124. In *Bryan*, the Strasbourg Court held that the English High Court's powers in a statutory appeal of a planning inspector's decision were sufficient to amount to "*full jurisdiction*" for the purposes of satisfying Article 6. The Court observed:

> "*45. … in assessing the sufficiency of the review available to Mr Bryan on appeal to the High Court, it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal …*
> *47. In the present case there was no dispute as to the primary facts. Nor was any challenge made at the hearing in the High Court to the factual inferences drawn by the Inspector … The High Court had jurisdiction to entertain the remaining grounds of applicant's appeal, and his submissions were adequately dealt with, point by point. These submissions as the Commission noted, went essentially to questions involving 'a panoply of policy matters such as development plans, and the fact that the property was situated in a Green Belt and a Conservation Area."*

125. The Court noted that if there had been a dispute of fact (or as to the inferences to be drawn), the High Court had power to satisfy itself that the findings were not perverse or irrational (paragraph 47):

> "*Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of law such as the one at issue, particularly when the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6(1). … Indeed, in the instant case, the subject matter of the contested decision by the inspector was a typical example of the exercise of discretionary judgment in the regulation of citizens' conduct in the sphere of town and country planning."*

126. By contrast, in *Tsfayo* the Court held that the inability of the High Court in a judicial review to substitute its decision for a Housing Benefit Review Board on the critical factual question upon which its decision turned resulted in a breach of Article 6. The Strasbourg Court stated (at paragraph 48 of the judgment):

"*The applicant had her application refused because the HBRB did not find her a credible witness. Whilst the High Court had the power to quash the decision if it considered, inter alia, that there was no evidence to support the HBRB's factual findings, or that its findings were plainly untenable, or that the HBRB had misunderstood or been ignorant of an established and relevant fact, it did not have jurisdiction to rehear the evidence or to substitute its own views as to the applicant's credibility. Thus, in this case, there was never the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute".*

127. In *Sigma Radio Television Ltd,* the Court (Fifth Section) stated:

"151. … even where an adjudicatory body, including an administrative one as in the present case, which determines disputes over "civil rights and obligations" does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are "subject to subsequent control by a judicial body that has "full" jurisdiction and does provide the guarantees of Article 6 § 1 ….
152. Both the Commission and the Court have acknowledged in their case-law that the requirement that a court or tribunal should have "full jurisdiction" will be satisfied where it is found that the judicial body in question has exercised "sufficient jurisdiction" or provided "sufficient review" in the proceedings before it …
153. In adopting this approach the Convention organs have had regard to the fact that it is often the case in relation to administrative law appeals in the Member States of the Council of Europe, that the scope of judicial review over the facts of a case is limited and that it is the nature of review proceedings that the reviewing authority reviews the previous proceedings, rather than taking factual decisions. It can be derived from the relevant case-law that it is not the role of Article 6 of the Convention to give access to a level of jurisdiction which can substitute its opinion for that of the administrative authorities. In this regard, particular emphasis has been placed on the respect which must be accorded to decisions taken by the administrative authorities on grounds of "expediency" and which often involve specialised areas of law …
154. In assessing the sufficiency of a judicial review available to an applicant, the Court will have regard to the powers of the judicial body in question … and to such factors as (a) the subject-matter of the decision appealed against, in particular, whether or not it concerned a specialised issue requiring professional knowledge or experience and whether it involved the exercise of administrative discretion and if, so, to what extent; (b) the manner in which that decision was arrived at, in particular, the procedural guarantees available in the proceedings before the adjudicatory body; and (c) the content of the dispute, including the desired and actual grounds of appeal …
155. Whether the review carried out is sufficient for the purposes of Article 6 will very much depend on the circumstances of a given case: the Court will confine itself as far as possible to examining the question raised in the case before it and to determining if, in that particular case, the scope of the review was adequate.
156. The Court has held in a number of cases, where the court in question did not have full jurisdiction as such but examined the issues raised before it concerning the adjudicatory body's decision, that the judicial review in the case was sufficient and

that the proceedings complied with Article 6 § 1 of the Convention. This has been the case, for example, where upon judicial review the applicants' submissions on their merits or grounds of appeal were examined point by point, without the court having to decline jurisdiction in replying to them or in ascertaining various facts ... Similarly, in the case of Crompton ... the Court held that there had been no violation of Article 6 § 1 as the High Court had examined the central issue in the case before it.
157. Where, however, the reviewing court is precluded from determining the central issue in dispute, the scope of review will not be considered sufficient for the purposes of Article 6 (see Tsfayo, ... § 48). The Court has therefore found violations of Article 6 § 1 in cases where the domestic courts considered themselves bound by the prior findings of administrative bodies which were decisive for the outcome of the cases before them, without examining the issues independently .... In addition the Court has found a violation of Article 6 where a ground of challenge has been upheld by the reviewing court but it was not possible to remit the case for a fresh decision by the same or a different body ..."

128. Advocate Dawes' submission was that the present case did not depend on policy judgments. Rather, he submitted, at the heart of the decision were factual assessments and evaluations of a wide-ranging kind with consequences of the utmost seriousness for the individuals concerned. He pointed out that, as the Bailiff observed in his judgment, there were in this case a "*mass of findings on a mass of issues*". He reminded us of the seriousness of what was at stake for the Respondents. He urged us to conclude that the limitations on the appeal to the Royal Court, particularly as the right of appeal had been explained in *Domaille,* meant that the Court was unable to decide the "*ultimate issue*". Under reference to paragraph 157 of *Sigma Radio Television Ltd, supra,* this was, he contended, fatal to the compatibility of the system with Article 6.

129. We reject these submissions. In *Ramos Nuñes, supra,* the Grand Chamber stated (at para. 179):

"In assessing whether, in a given case, the extent of the review carried out by the domestic authorities was sufficient, the Court has held that it must have regard to the powers of the judicial body in question and to such factors as: (a) the subject-matter of the decision appealed against, and in particular, whether or not it concerned a specialised issue requiring professional knowledge or experience and whether it involved the exercise of administrative discretion and, if so, to what extent; (b) the manner in which that decision was arrived at, in particular, the procedural guarantees available in the proceedings before the administrative body; and (c) the content of the dispute, including the desired and actual grounds of appeal ..."

130. In its judgment in *Ramos Nuñes*, the Grand Chamber expanded on what the Chamber had said at paragraph 157 of *Sigma Radio Television Ltd* and explained the decision in *Tsfayo* in the following terms:

"182. The Court has previously had occasion to examine situations in which the domestic courts were unable or refused to examine a key issue in the dispute because they considered themselves bound by the findings of fact or of law made by the administrative authorities and could not examine the relevant issues independently ...

The case of Tsfayo falls into this category. In that case, the body whose decision was under judicial review was not merely lacking in independence from the executive, but was also directly connected to one of the parties to the dispute (see Tsfayo, ..., § 47). The Court considered that the independence of judgment in relation to the finding of primary fact was liable to be impaired in a manner which could not be adequately scrutinised or rectified by judicial review. As the competent court had lacked jurisdiction to rehear the evidence and had therefore been unable to determine a crucial issue of fact, the Court found a violation of Article 6 on the ground that the central issue had not been determined by a tribunal that was independent of the parties. In other words, in that case, the impossibility of re-examining a decisive factual issue had prevented the appellate court from remedying the lack of independence from one of the parties to the dispute that had been found at first instance."

131. As that passage reminds us, the judgment of the European Court in *Tsfayo* drew attention to a number of features of that case which, taken together, justified the conclusion that there had been a breach of Article 6. The decision under consideration in *Tsfayo* depended on a "*simple issue of fact*". Determining that issue did not require any specialist knowledge or expertise. Nor, unlike certain other cases to which the Court referred, could the factual findings be said to be "*merely incidental to the reaching of broader judgments of policy or expediency*". In contrast to those other cases, the decision-making body was not merely lacking in independence from the executive but was "*directly connected*" to one of the parties: the Board included five Councillors from the local authority which would require to make the payment at issue. The safeguards built into the Board's procedure were "*not adequate*" to overcome the "*fundamental lack of objective impartiality*". The applicant's claim had been refused because the Board did not find the applicant to be a credible witness on the critical and simple issue of fact on which the decision turned. Given the limits on the powers of the Court in a judicial review "*there was never the possibility that the central issue would be determined by a tribunal*" which was independent of the parties to the dispute.

132. The need to attend closely to the nature of the decision in question and to the way in which it was reached is emphasised by contrasting *Tsfayo* with *Fazia Ali v. United Kingdom*, Application no. 40378/10*,* 20 January 2016, to which we were referred by Advocate Hill. *Fazia Ali* concerned the decision of a Homelessness Review Officer, employed by a local authority, which upheld a decision that the applicant's refusal of an offer of accommodation had discharged the local authority's duty to house her. The Officer found that the applicant had been sent an offer letter, and there was no reason to believe that she had not received the letter. The applicant appealed to the County Court on the ground that the letter of offer had never arrived. The applicant submitted that the Court should hear evidence on the matter; but the Court declined to do so. In contrast to *Tsfayo,* the European Court of Human Rights held that there was no breach of Article 6.

133. In distinguishing the circumstances from those in *Tsfayo,* the Court noted that the decision of the Homelessness Review Officer had been attended with "*a number of significant procedural safeguards*": the Officer was senior in rank to the original decision-maker, the applicant was entitled to make representations which the Officer was obliged to consider, the applicant was entitled to be represented, the Officer was obliged to give reasons for any adverse decision, and the applicant was entitled to be informed of her right of appeal. Whilst on appeal the Court did not have jurisdiction to conduct a full rehearing of the facts, it could carry out a "*certain review*"

of the facts and the procedure by which the factual findings had been arrived at. In particular, the applicant could argue that the Officer had taken into account irrelevant considerations and/or acted under a fundamental mistake of fact, that the Council had failed to make adequate inquiries to entitle it to reach a lawful decision, that the decision was one which no rational Council could have made, that it fettered its discretion and that it acted in breach of natural justice.

134. We have concluded, taking fully into account the seriousness of what was at stake for the Respondents, that, having regard to the subject-matter of the decision appealed against and the manner in which it was arrived at, the statutory grounds of appeal, as explained by this Court in *Domaille* (but with the rider that an appeal on the basis that the GFSC's decision was unreasonable encompasses Jurat unreasonableness) allow the Royal Court to exercise "*full jurisdiction*" in the sense required for the process as a whole to be compatible with Article 6. For the reasons we have explained, that is the position whether or not the proceedings are treated as falling within the civil or the criminal limb of Article 6

135. We are concerned here with a decision by the statutory regulator charged with supervision of the Guernsey financial services sector. The legal regime requires the regulator to apply to the specific context of the Guernsey financial services sector broadly framed standards such as "*fit and proper person*", "*probity, competence, experience and soundness of judgment*", "*prudence and integrity"* and *"professional skill appropriate to the nature and scale of his activities".* These standards call for an evaluative judgment, applied to the particular context of the financial services sector. The factual findings which the GFSC makes are incidental to, or stepping stones towards, those evaluative judgments. Indeed, in his Grounds of Appeal before the Royal Court, Mr Fuller made the point that, in the present context, "*the dividing line between error of fact and error of evaluation is often a fine one".* The statutory regime also calls on the GFSC to exercise a discretion when determining the appropriate sanction.

136. The way that the decision was reached in this case was attended with significant procedural safeguards. The GFSC acknowledges that it is required to follow principles of natural justice and fairness. It has committed itself to an "overriding objective" to "*... deal with matters justly, including (so far as practicable) ... ensuring parties are on an equal footing ... and ... ensuring that the matter is dealt with expeditiously and fairly."* It put its decision-making function in this case in the hands of a "*senior decision-maker*". That built into the decision-making process a separation of the decision-making function (albeit not structural independence) from the investigatory work of the Enforcement Division. The individual to be appointed as senior decision-maker from the panel was to be selected by the President of the Panel and not directly by the GFSC itself.

137. In the present case the senior decision-maker was an experienced QC from England & Wales, a person whom one may take to be well-equipped by professional training and experience to assess evidence, to draw inferences from primary facts, to apply evaluative standards and to exercise independent judgment. As this Court observed in *Robilliard,* in the passage which we have quoted above, the senior decision-maker has a quasi-judicial role. That person must not only review the material provided by the Enforcement Division but make his or her own enquiries and may make findings only if satisfied to the appropriate standard of proof.

138. Further, the GFSC's published procedures provide for full disclosure of relevant material to Respondents and give Respondents an opportunity to respond to the allegations against them, with the benefit, if so advised, of legal representation. Those procedures were followed in the present case. Further, in the present case, the statutory timescales were significantly varied, and an additional step built into the process (in the shape of the draft Minded-to Notice), in order to give the Respondents a fair opportunity to respond to the allegations against them. The Respondents have the benefit of a very detailed reasoned decision, which may be, and has been, scrutinised on appeal.

139. The mere fact that the SDM has rejected evidence or explanations provided by a Respondent on a specific issue does not mean that there has not been due enquiry into the facts or that the Royal Court could not exercise, or that the Royal Court has not exercised, sufficient review of the decision-making process for the purposes of ensuring that the system is compatible with Article 6. The available grounds of appeal are comprehensive and include Jurat unreasonableness as well as material error of fact. As the Bailiff observed at paragraph 170 of his judgment, under reference to his earlier decision in *Y v Guernsey Financial Services Commission,* unreported, 29 November 2018, the Royal Court: *"is empowered … 'to look at anything that an appellant wishes to raise about the decision-making process of the GFSC and the decision reached'."*

140. The Respondents advanced a submission that there is no reason for the Royal Court to defer to a senior decision-maker who, so it was said, has no particular knowledge of Guernsey and its financial services sector. We consider that the language of "deference" is, in this context, inapt. The approach which falls to be taken, on appeal, to a decision of the GFSC as that was explained by the Court of Appeal in *Domaille* flows from the nature of the statutory appeal which is provided against the reasoned decision of the regulator, rather than by reason of any theory of "deference". In any event, as the Bailiff recognised in his judgment (at paragraphs 185 to 187), the approach articulated in *Domaille* does not exclude the Court from applying to decisions of the GFSC an "*enhanced level of scrutiny*" appropriate to the seriousness of what is at stake for those involved. The Bailiff made clear that he would apply that "*enhanced level of scrutiny"* to the Decision in this case and his conclusions disclose that he did so.

141. There is nothing in the *"content of the dispute, including the desired and actual grounds of appeal …"* in this case which calls for a different conclusion. Advocate Dawes did not point us to specific findings or specific grounds of appeal which might have given content to his argument that the Bailiff could not, in light of *Domaille,* apply sufficient scrutiny to the Decision to satisfy the requirements of Article 6. That the decision involved a "*mass of findings on a mass of issues"* and resulted in findings about integrity and dishonesty does not undermine the validity of the approach to findings of fact articulated in *Domaille*. The factual findings made by the SDM were incidental to the evaluative judgments which the regulator was charged with making. Indeed, Mr Fuller's written submissions before the Royal Court acknowledged that *"… in reality the Decision and Sanctions turn on the SDM's evaluation of facts which are, for the main part, not seriously in dispute".*

The Court's powers of disposal

142. The other limb of the Advocate Dawes' attack on compatibility of the system with Article 6 focused on the Royal Court's powers of disposal. The Royal Court has power to:

> *"(a) set the decision of the Commission aside and, if the Court considers it appropriate to do so, remit the matter to the Commission with such directions as the Court thinks fit, or*
>
> *(a) confirm the decision, in whole or in part."*

The Royal Court does not have power to substitute a different decision of its own for the decision of the GFSC. Advocate Dawes submitted, under reference to *Kingsley v. United Kingdom,* that this means that the system is structurally incapable of satisfying the requirements of Article 6.

143. We reject this submission. At paragraph 184 of its judgment, the Grand Chamber in *Ramos Nuñes de Carvalho e Sá v. Portugal, supra* stated:

> *"Furthermore, the court has considered it generally inherent in the notion of judicial review that, if a ground of appeal is upheld, the reviewing court must have the power to quash the impugned decision, and either take a fresh decision or remit the case to the same body or a different body (see Kingsley v. United Kingdom [GC], no. 35605/97, paras. 32 and 34, ECHR 2002-IV ...)."*

As we read this passage, Article 6 will be satisfied if the reviewing court has power to remit the case to the same body or to a different body. The phrase "*either take a fresh decision or remit the case to the same body or a different body"* should be read disjunctively rather than conjunctively. The reviewing court must be able to do one or other of these things; it does not require to have the power to do both.

144. That reading is supported by the reference to the practice of States party to the Council of Europe earlier in the judgment. It is also supported by the reference to *Kingsley v. United Kingdom,* which was also a decision of the Grand Chamber. *Kingsley* concerned a decision of the Gaming Board of Great Britain. The applicant challenged that decision by way of judicial review on the ground of bias. The judge found that there was apparent bias, but no real danger of injustice, and in any event, concluded that the decision had to stand because of the doctrine of necessity. The Court of Appeal refused permission to appeal. The Court proceeded on the assumption that the applicant had an arguable case on bias, sufficient to justify leave, but likewise held that the decision had to stand because, by statute, it had to be made by the Board.

145. The European Court held that there had been a breach of Article 6. The Grand Chamber approved the view of the Chamber that: "*... it is generally inherent in the notion of judicial review that, if a ground of challenge is upheld, the reviewing court has power to quash the impugned decision, and that either the decision will then be taken by the review court, or the case will be remitted for a fresh decision by the same or a different body. Thus, where, as here, complaint is made of a lack of impartiality on the part of the decision-making body, the concept of 'full jurisdiction' implies that the reviewing court not only considers the complaint but has*

the ability to quash the impugned decision and to remit the case for a new decision by an impartial body".

146. It is evident from the final sentence of the passage we have just quoted from the judgment of the Grand Chamber that it would have been sufficient if the reviewing court had "*the ability to quash the impugned decision and to remit the case for a new decision by an impartial body".* It is, in any event, inherent in decisions such as *Bryan*, which are concerned with judicial review in the United Kingdom, that the power of a reviewing court to quash or to quash and remit will generally be sufficient to satisfy the requirements of Article 6. There is no general requirement that the reviewing court must be able to take the substantive decision for itself. The reason there was a finding of breach in *Kingsley* was not because the powers of the Court in a judicial review are not generally adequate to satisfy Article 6, but because the ground of challenge in that particular case was actual or apparent bias and the reviewing court had concluded that the decision should stand because there was no other body to which it could be remitted. The mere fact that the body to which a remit is made does not itself satisfy Article 6 in other ways does not create a structural problem where the reviewing court is able to exercise "*full jurisdiction".*

147. In the present case, the Royal Court not only had the power to quash the Decision and remit. It had the power simply to quash the Decision; and it had power to confirm the decision, in whole or in part. These powers, in combination, would allow the Royal Court to confirm part of the Decision and to quash (or, indeed, to quash and remit) the remainder. Further, on a remit, the Royal Court has power to give "*such directions as the Court thinks fit".* This power is unqualified and allows the Court to give the GFSC any direction which it "*thinks fit"*. Advocate Dawes suggested that the Commission would not require to follow such a direction. We reject that suggestion. It is implicit in the concept of "*directions*" given by a Court on a remit to an administrative body that the latter must comply with those directions. The powers of the Royal Court are quite sufficient, in combination with the wide-ranging grounds of appeal which are available, to allow the Court to exercise "*sufficient jurisdiction"* for the purposes of Article 6.

148. Nor is this a case, like *Kingsley,* where the body to which the remit would necessarily have to be made is affected by bias. The GFSC is not an independent tribunal so as, itself, to satisfy Article 6. That does not mean that it is biased. The Respondents advanced a contention that the matter had been prejudged. We address that contention below and reject it.

149. The Respondents advanced an argument which was founded on the Baxter Review. This was a review of the GFSC's exercise of its regulatory responsibilities in respect of the Providence Group. It is described in the Royal Court's judgment at paragraphs 277 to 291. The Baxter Review found that there had been regulatory failings on the part of the GFSC and that if the GFSC had followed its own procedures this could have resulted in earlier regulatory intervention in the affairs of the Group. The fact that the GFSC has faced up to its own regulatory failures does not, in our view, compromise its ability to exercise its statutory responsibilities in relation to the entities and individuals which it regulates. In any event, the practical independence of the SDM is a safeguard against any apprehension that the GFSC's decision-making might be affected by such considerations.

150. Advocate Dawes also advanced a contention that the SDM exhibited hostility to Mr Fuller and that this created a perception of bias. We address that contention below and reject it too. But even if it were well-founded, this would not create any structural incompatibility with Article

6. If there were to be a basis for concluding that the SDM had exhibited bias (and we have seen nothing to support such a conclusion), it would be open to the GFSC, in the event of a remit, to appoint a different SDM.

The impartiality and independence of the Court of Appeal

151. The written submissions for Mr Tattersall and Mr Moroney advanced a contention that the Court of Appeal is not, in a case where the Bailiff has dealt with the appeal in the Royal Court an independent and impartial tribunal. Since this goes to the structural compatibility with Article 6 of what has been done, it is convenient to address that contention at this stage. The submission was advanced on two bases: first, it was said that the Court of Appeal, when hearing an appeal against a decision of the Bailiff, is not structurally independent; and, secondly, it was said that, in such a case, there is apparent bias.

152. Mr Tattersall and Mr Moroney rely on section 10 of the Court of Appeal (Guernsey) Law 1961, which specifies that the Bailiff is, by virtue of his office, the President of the Court of Appeal. They rely also on section 8, in terms of which it is the Bailiff who convenes the Court. The Bailiff is accordingly, they submit, "*in a senior position to*" the other judges of the Court. Further, the Bailiff advises the Lord Chancellor as to the recommendations to be made to His Majesty for appointments to the Court. On their own, or in combination, these Respondents submit, these factors are sufficient to vitiate the objective impartiality of the Court of Appeal in this case, and (it must follow) in any other case involving an appeal against a decision of the Bailiff. They rely on *Ramos, supra, McGonnell v. United Kingdom, Porter v. Magill* [2002] 2 AC 357, *Dring v. Cape Intermediate Holdings Ltd* [2020] AC 629 and *Lawal v. Northern Spirit Ltd* [2003] UKHL 35.

153. We reject these contentions.

154. In terms of section 2(2) of the Court of Appeal (Guernsey) Law 1961, ordinary judges of the Court of Appeal are appointed by the Sovereign. No one may be appointed as an ordinary judge who does not satisfy the qualifications set out in section 3, namely judicial office in the Commonwealth or at least ten years' practice at the bar in Guernsey, England & Wales, Scotland, Northern Ireland, Jersey or the Isle of Man. Although the Bailiff has a role in advising the Sovereign, through the Lord Chancellor, on the appointment of ordinary judges, once appointed, an ordinary judge of the Court of Appeal retains office for the duration of the appointment during good behaviour: section 4(1). On appointment, the judges of the Court take the judicial oath specified in Schedule 1 to the Court of Appeal Law. Thus, each ordinary judge is an experienced lawyer, who holds an independent office, with tenure, to which the judge has been appointed by the Sovereign; and takes an oath inter alia to "*administer good and concise justice to all without respect of persons".*

155. Whilst section 10(1) specifies that the Bailiff is President of the Court of Appeal, it is apparent from the terms of section 10(2) (to which section 10(1) is expressly subject) that this means no more (and no less) than that the Bailiff presides over any sitting of the Court of Appeal in which he participates. Section 10(2) provides for another member of the Court to preside over the sitting in any case where the Bailiff is unable to act. By reason of section 10(3), this includes any case where the Bailiff considers it undesirable or inconvenient to sit in the Court of Appeal. Unsurprisingly, section 8 makes clear that the Bailiff may not sit as a member of the Court of

Appeal when it is hearing an appeal against his own decision. Whilst, in terms of section 8, the Bailiff convenes the Court, that does not affect the structural independence from the Bailiff of any bench of the Court of Appeal of which he is not a member.

156. The test for apparent bias is whether "*the fair-minded and informed observer, having considered the facts would conclude that there was a real possibility"* of bias (*Porter v. Magill* [2001] UKHL 67). The fair-minded and informed observer, as has often been observed, is neither unduly cynical nor unduly complacent, and will be aware of all the circumstances which bear on the question. In the present case, these include the features of the appointment and tenure of the ordinary judges to which we have already referred. In addition, the fair-minded and informed observer would be aware that in practice, ordinary judges of the Court of Appeal are senior silks from the UK or hold, or have held, judicial office in the UK or one of the other Crown dependencies. In the present case, by way of example, the Court comprises the Bailiff of Jersey (who, by virtue of his seniority as a member of the Court of Appeal of Guernsey is President of the Court for the purposes of this case), a former Lord Advocate from Scotland and a senior Chancery silk who also sits as a Deputy High Court Judge in England & Wales.

157. The very fact that the ordinary judges of the Court spend most of their time engaged in professional activities as judges or advocates outside Guernsey is an additional consideration which the informed observer would take into account. The informed observer would know that ordinary judges do not sit in the Court of Appeal of Guernsey full time. Their work in the Court of Appeal generally forms only a small element of their professional activities. It may be inferred that they are not dependent financially on that work. As a matter of practice, they are usually allocated to sittings by reference to their availability well in advance of it being known which cases will be heard in any particular sitting. All of these considerations would reinforce the conclusion which the fair-minded and informed observer would take from the structural considerations to which we have already referred that, in the context of an appeal against a decision of the Bailiff, there is no real possibility of bias.

Compatibility of the regime with Article 6: conclusions

158. For all these reasons, we reject the contentions that the regime is not compatible with Article 6. It follows that we reject the submission, advanced on behalf of Mr Tattersall and Mr Moroney, that the Royal Court erred in declining to rule on the claim for a declaration of incompatibility. There is, in these circumstances, no requirement for us to give notice to HM Procureur in terms of section 5 of the Human Rights Law.

MATERIAL ERROR OF PROCEDURE

159. We turn now to the contentions, advanced on behalf of each of the Respondents, that, even if the regime is not structurally incompatible with Article 6, the procedure which was followed in this case was incompatible with Article 6 and/or was procedurally unfair by reference to customary law principles. Each of the Respondents appealed against the Decision inter alia on the basis of material error of procedure. The Royal Court rejected that Ground of Appeal. The Respondents contend that it erred in doing so. Mr Tattersall and Mr Moroney go further and contend that the procedure as a whole, including the process before the Royal Court, has breached their rights under Article 6 and/or has been procedurally unfair at customary law.

160. The Bailiff dealt with the "material error of procedure" appeal at paragraphs 188 to 243 of his judgment. He was critical of aspects of the GFSC's decision-making process; but concluded that the process was not materially flawed. The Bailiff was particularly *"critical of the format of the Decision (and so also the steps prior to reaching that stage as they apply to the Minded-to Notice)"* (paragraph 225). He said the following:

> "*218. … the inclusion in a single document of the findings made in respect of LFS and PIMIL, as well as the nine individuals, makes it difficult to digest. The Minded-to Notice contains nearly 700 pages summarising the factual position, with the core findings (section E) covering very roughly 75 pages. This is even before the SDM tackles each of the entities and individuals separately. As I have found in reviewing the Decision, it is easy to get lost and there is a sense at times of unnecessary repetition. Because I have found it an exceedingly time-consuming exercise to keep reminding myself about what is contained in the Decision, I can well understand how the Appellants will have struggled to grasp what the basis of the findings in respect of each of them was supposed to be."*
> …
> *220. … If I have regard to my own experience in trying to get to grips with what the SDM chose to set out in this single document, the initial reading of the material contained in the Decision took many days to complete. It is not an easy read. Whilst I recognise that it purports to be an exhaustive analysis of the events that results in the collapse of the Providence Group and then proceeds, again over very many pages, to make findings resulting in the sanctions imposed against both LFS and PIMIL plus the individuals mentioned … I somehow doubt that it needed to be as long as it is.*
> *221. The SDM's decision to separate each of those investigated into discrete sections in the Minded-to Notice and then the Decision made it difficult for me to understand quite how each set of findings had been reached. I was left with the impression after reading it for the first time, and this increased each time I have had to re-visit the Decision … that a simpler approach could have been adopted that would still have been consistent with the statutory regime. … If nothing else, this has been a hugely time-consuming exercise and it has not made my task as easy as it might have been had the Decision been drafted more succinctly.*
> *222. I also wonder why the SDM felt it incumbent on him to set matters out in the minutest detail. … I fear that the GFSC, acting through the SDM, has lost sight of what this process is meant to involve and has approached it instead in a much more complicated way than would have been ideal.*
> …
> *224. I accept that there was a requirement to find the facts so as to support the sanctions that then fell to be imposed as a result of them. I am not persuaded that it was strictly necessary for the SDM to describe the full factual background in the manner that he did, even in respect of LFS and PIMIL, which were then controlled by insolvency practitioners who were not likely to challenge what was said against those entities. Similarly, the level of detail relating to some of those individuals being investigated were unlikely to result in any challenge, given their circumstances and lack of engagement in the process. …"*

161. Although the Bailiff criticised the length and form of the Decision, he rejected the material error of procedure appeals. Whilst he had "*some sympathy"* with the proposition that "*the length*

and structure of the way everything was put into a single document has hampered the ability of the [Respondents] to comment effectively on what is said against them" (paragraph 214), he did not consider that this could be said to amount to a material procedural error. He observed (paragraph 225): "*In particular, because there has been compliance with the statutory requirements, I do not accept that it can be said that the GFSC has fallen into procedural error".* He considered that the "*extra detail"* provided did not amount to a material procedural error.

162. Likewise, whilst the Bailiff took the view that it was "*unsatisfactory*" for the GFSC to have to introduce extra-statutory steps into the procedure, he concluded that these steps were "*designed to afford the person who is being investigated every opportunity to comment on the case being made against him."* The insertion of additional steps, effectively as further procedural safeguards, did not mean that there had been material errors of procedure.

163. The Bailiff rejected a contention that the changes made to the public statement, as compared with the draft which had been intimated to the Respondents, required another round of the Minded-to Notice procedure. The changes involved no increase in the sanctions (indeed, there was a decrease in the sanctions imposed on Mr Fuller and Mr Tattersall) and, with the exception of Mr Fuller, the changes made to the public statement were relatively minor. Whilst the Bailiff had sympathy with the proposition that the revised findings proposed against Mr Fuller should have been put to him for his comment, he was "*not persuaded that it amounts to a contravention of the statutory regime for the GFSC to have proceeded in the manner the SDM did"* (paragraph 200). He took the view that revising the outcome in a manner which "*explains matters in a way less adverse"* to the Respondent, or "*revising the outcome in such a way that the sanctions are no more severe"* did not require the GFSC to repeat the Minded-to Notice process. He took this to follow from sections 11E and 11F of the FSC Law (paragraph 201).

164. The Bailiff also rejected a contention that the earlier stages of the procedure had prejudged the Decision. The procedure which had been followed reflected the statutory scheme, which envisaged that the GFSC would give notice of its intended decision and permit representations thereafter. The opportunity to make representations was clearly designed to allow the person concerned to seek to persuade the GFSC to revise its conclusions. He observed (para. 242): "*Whilst it might be unrealistic to suppose that a complete volte face might follow, and the case against the person making the representations being dropped, I find that the fact that this is a scheme that has been approved by the legislature means that following it cannot amount to a material error of procedure …".* At the same time, he noted that the SDM had, in fact, materially revised the findings in relation to Mr Fuller, which he regarded (para. 234) as "*demonstrating that the SDM was prepared to adjust his conclusions as a result of the written and oral representations made".*

165. The Bailiff further rejected a contention that the SDM had not acted quasi-judicially because he had not engaged in a sufficient evaluation of the witnesses. Whilst the procedure allowed for oral representations, it did not, in his view, require the type of evaluation of witnesses which would occur in adversarial proceedings with the testing of evidence through cross-examination.

166. It will be apparent that, for the most part, the Bailiff tested the contentions about material procedural error against the requirements of the statute. But at particular points in the analysis (see paras. 216, 235-236), he also referred to the "right to a fair trial" or to "procedural fairness",

both under Article 6 and more generally. We shall address, first, the question of the compatibility of the procedure which was followed with the statutory requirements and then turn to the question of the compatibility of that procedure with the requirements of a fair process at customary law and under the Convention.

Compatibility with the statutory requirements

167. The first consideration, when assessing whether there has been a material error of procedure, is to consider whether there has been any material breach of the procedural requirements of the legislation. Advocate Dawes renewed before us the contention that the multiple stages adopted in this case had no statutory basis. In our view, the Bailiff was right to reject the contention that this, of itself, involved a material error of procedure. The procedure which was adopted in this case added significantly to the statutory procedure, by disclosing to the Respondents a draft Enforcement Notice and a draft Minded-to Notice. Whilst these steps were not envisaged in the statutory provisions, there is nothing in the statute which prohibits such steps being taken. Equally there is nothing in the statute itself which requires (or indeed permits or prohibits) the GFSC's decision-making power to be put in the hands of a senior decision-maker; or which requires, for example, disclosure to Respondents of relevant documents. There can be no objection to the statutory procedures being supplemented in these ways, which enhance the overall fairness of the procedure adopted.

Compatibility with the principles of fairness at customary law

168. Compliance with the procedural requirements specified in the statute does not exhaust the requirements of procedural fairness. As the GFSC acknowledges in its Guidance Note, it is obliged to act fairly and in accordance with the rules of natural justice. Whilst the compatibility of the proceedings with Article 6 of the Convention falls to be addressed by reference to the proceedings in their totality (including the appeal to the Royal Court and to this Court), if the GFSC were to have failed in a material fashion to comply with the principles of natural justice or fairness at customary law, or were to have acted in such a way that the process were to be irredeemably incompatible with Article 6 in a way which could not be corrected by the Royal Court, that would amount to a material error of procedure.

169. Encouraged, no doubt, by the Bailiff's critical comments, the Respondents renewed their contentions that the scale and format, successively of the draft Minded-to Notice, the Minded-to Notice and the Decision itself amounted to a material error of procedure. Advocate Dawes submitted that the size of the Decision was "*so oppressive and disproportionate as to amount to a material procedural error".* He contended that it made an effective appeal "*impossible".* The cost and burden of dealing successively with the draft Minded-to Notice, the Minded-to Notice and the Decision was "*itself so oppressive as to amount to a breach of natural justice and unfairness to the point of material procedural error".* He pointed out that no costs were recoverable in respect of those stages.

170. Advocate Dawes also contended that the case against the Respondents "*changed over time".* The Respondents were entitled, he said, to have GFSC's 'best case' put to them at the outset, without "*the goalposts thereafter shifting with each iteration of the non-statutory notices/decision".* It was wrong that Mr Fuller should face, for the first time in the Decision

itself, allegations of being "*implicated"* in dishonesty or of gross incompetence, or findings of a lack of integrity because of the representations made by him or on his behalf. Under reference to the number of pages of each document from the Final Enforcement Report (88 pages) to the Decision he contended that "*it follows that the case against the appellants was added to substantially at each stage".* The Respondents, he said, "*faced what amounted to a draft judgment of almost 1,850 pages before having any opportunity to put their cases to the SDM at an oral hearing".*

171. The contention that the SDM failed to act quasi-judicially was also renewed before us. Advocates Greenfield and Bamford, on behalf of Mr Tattersall, and Advocate Le Tissier on behalf of Mr Moroney, contended that at the heart of the investigation were issues of fact, upon which the SDM's view of the credibility of those two Respondents was critical. Despite that, the SDM made no evaluation of their credibility. Although there was an opportunity for oral "representations", the SDM did not even put to them allegations of dishonesty, "*as would ordinarily be expected in an adversarial procedure"* where their evidence would be tested by cross-examination. The unfairness in the case of Mr Tattersall and Mr Moroney, was compounded, so it was said, by the fact that they were not legally represented. Mr Moroney had no legal representation until after the Decision was made; apart from a short period before December 2016, Mr Tattersall was not legally represented until after the Decision was made.

172. In responding to these submissions, Advocate Hill observed that: "*[j]ury points about the number of pages and footnotes are no substitute for careful analysis of what the decision states in respect of each Respondent to the decision-making process".* The Decision contained an overview of the entire operations relevant to the case set out in chronological order, and a section of core findings, following by a dedicated self-contained section in relation to each Respondent. His submission was that the Decision was "*intelligible, certainly to professional persons in the financial sector".* It demonstrates that the essential issues that have been raised by the parties have been addressed and how the issues have been resolved. While long and detailed, it was adequate as matter of law. He resisted the proposition that Mr Tattersall and Mr Moroney, in effect, were entitled to be cross-examined.

The size and complexity of the draft Minded-to Notice, Minded-to Notice and Decision

173. We do not consider that the size and complexity successively of each of the draft Minded-to Notice, the Minded-to Notice and the Decision, or these in combination, was, in and of itself, procedurally unfair. The collapse of the Providence Group called for a full investigation by the GFSC. It would have been artificial to carry out separate investigations into particular companies and individuals within the Group. It was reasonable to proceed on the basis that the role and responsibility of each of the entities and individuals under investigation could only be assessed against the background of, and in the context of, the history of the Group as a whole. Whilst the Enforcement Notice was a comparatively brief document, the SDM was charged with assessing the documentary and other material for himself, and indeed with undertaking any further investigation which he considered appropriate. In this case, he considered that he needed to examine in detail the history of the Group's operations in Guernsey and the role of the various individuals against whom enforcement proceedings were taken, and to make specific and detailed findings. That was an intelligible decision and we do not criticise him for it. Had he not approached matters in that way, he would no doubt have been criticised for undertaking an analysis which was insufficiently rigorous.

174. The Decision adopts a logical structure. The first 700 pages comprise, largely, a chronological analysis of the activities of the Providence Group in Guernsey. That is followed by a Chapter setting out the regulatory framework, and then a Chapter setting out the SDM's core findings. There then follow separate Chapters, each dealing with one of the entities and individuals against whom enforcement proceedings were taken. Unsurprisingly, those Chapters build on, and to some extent cross-refer to and duplicate, findings in the earlier sections of the Decision. The Chapters are subdivided and there is a contents page which aids navigation. The text is widely spaced and set out in short numbered paragraphs. Nevertheless, the result is, on any view, an exceptionally lengthy document. The essential issues could no doubt, as the Bailiff observed, have been dealt with much more succinctly, although we are less inclined than the Bailiff to be critical of the approach taken by the SDM. Specifically, we do not agree with the Bailiff that the SDM could, consistently with his responsibilities, have short-circuited his analysis of particular companies and individuals simply on the basis that they might be unlikely to challenge the Decision. In any event, we do not consider that the Bailiff erred, notwithstanding his strictures on the form and length of the Decision, in declining to hold that there had been a material error of procedure. We reject the contention that the SDM's decision to draft the Minded-to Notice and, subsequently, the Decision in the way that he did was inherently "*oppressive*" so as to amount to a material error of procedure.

175. Nor do we consider that the fact that the Respondents were faced, first with a draft Minded-to Notice, followed by a Minded-to Notice and, ultimately, a Decision, each one of considerable length, was inherently oppressive. The scale of the case, and the length of these documents, undoubtedly gave rise to a need to make special arrangements to ensure that the Respondents had a fair opportunity to consider the proposed findings and to make representations. That was done. The SDM provided the Respondents with a complete set of documents in December 2019, and this was subsequently updated. The SDM issued the draft Minded-to Notice in March 2020, with intimation that the Minded-to Notice would not be issued, initiating the 28-day statutory period for representations, until 29 August. Although the draft Minded-to Notice was a lengthy document, the Respondents were given over five months to assimilate it before receipt of the Minded-to Notice. The Respondents were individuals with substantial professional experience in the financial services sector. The draft Minded-to Notice contained a separate Chapter on each Respondent, containing the proposed findings in respect of him; such that those findings could readily be identified. The proposed findings in the draft Minded-to Notice affecting each Respondent concerned matters in which he had been personally involved, and to which he could accordingly be expected to be in a position to respond, given sufficient notice and access to the relevant documents. In our view, the disclosure to the Respondents of the draft Minded-to Notice, in good time before the final Minded-to Notice was issued, gave the Respondents a fair opportunity to consider the provisional findings which the SDM indicated he was minded to make; and to consider written and oral representations. Each of the Respondents availed himself of the opportunity to make oral and written representations. We do not consider that the scale of the exercise was inherently oppressive.

176. Whilst we recognise the burden that responding to the proceedings before the GFSC, without the benefit of legal representation, will have placed on Mr Tattersall and Mr Moroney personally, we do not consider that this has resulted in inherent unfairness or a material error of procedure. Mr Tattersall and Mr Moroney are clearly intelligent men who have held responsible positions in the financial services sector. As we have observed, the findings relevant to them in

the draft Minded-to Notice necessarily concerned activities in which they had been personally involved and upon which, accordingly, they should, given sufficient time and access to the documents, have been able to comment. The argument that they were disadvantaged by the absence of legal representation was advanced in the abstract, without identifying any specific issue or issues which it was said to have been beyond them to address unaided. We were not taken, in support of the argument, to the transcripts of their oral representations or to the detailed written representations which they submitted to the SDM. A consideration of these does not suggest that either of them was, in fact, disabled, without legal representation, from responding to the proposed findings. They have, of course, each had the benefit of skilled legal representation for their appeals to the Royal Court and before the Court of Appeal.

Changes in the proposed findings/findings

177. We do not consider that any changes which were made to the case which the Respondents had to meet, as between the Enforcement Notice and the draft Minded-to Notice, involved unfairness. Subject to the very limited provisions of the statute, the procedure to be adopted is a matter for the GFSC. The role of the SDM, on behalf of the GFSC, is, as the Court of Appeal in *Robilliard* explained, an investigative one. It was the SDM's responsibility to assess the material which had been made available to him by the Enforcement Division, to reach his own conclusions, and to direct such further investigations as he considered appropriate. That process is liable to result in a Minded-to Notice which may differ, potentially materially, from the terms of the Enforcement Notice. There is, in our view, no reason why the changes at that stage may only be to the benefit of those under investigation, provided that they are afforded a fair opportunity to make representations on any proposed adverse findings before the GFSC, through the SDM, reaches a decision. The time which was allowed in this case, and the procedure followed, provided the Respondents with such an opportunity.

178. Changes in the content of the Decision as compared with the Minded-to Notice raise different considerations. It is the Decision which has legal effect; and the essential question is whether there has been a material error of procedure in the way that the Decision has been arrived at. It is inherent in the statutory process (which provides for representations in response to the Minded-to Notice) that the Decision may differ from the Minded-to Notice. The SDM is obliged to approach any representations on the proposed findings in the Minded-to Notice with an open mind. We do not associate ourselves with the Bailiff's scepticism about the likelihood of a "*volte face"*. The matter is put into the hands of a SDM who, by reason of professional background and training, should be well able to revisit preliminary conclusions in light of further information or representations. In the present case, the SDM explains at paragraph 5008 that he did just that. His decision not to make the findings of dishonesty against Mr Fuller which the Minded-to Notice had anticipated is demonstrative that he did indeed approach the representations on the Minded-to Notice with an open mind.

179. There can be no objection to the SDM, in light of the representations received in response to the Minded-to Notice omitting adverse findings, or "reducing" findings (for example by changing a finding of dishonesty to a finding of want of integrity or want of probity), or imposing a lower sanction than that which had provisionally been indicated in the Minded-to Notice. Nor can there be any objection to the SDM, in light of the representations received, amending the way in which he discusses a particular issue upon which a Respondent has had a

fair opportunity to make representations. Indeed, we do not consider that there is any objection in principle to the SDM increasing the proposed sanction, in light of further consideration of the case as a whole, provided that in doing so reliance is not placed on an allegation which the Respondent has not had a fair opportunity to answer. But it would not be consistent with the rules of natural justice for the SDM to make adverse findings against a Respondent in the Decision on a wholly new matter upon which that Respondent has not had any opportunity to make representations.

180. Advocate Dawes noted that the Decision was 280 pages longer than the Minded-to Notice; and contended that "*it follows that the case against the appellants was added to substantially at each stage".* We reject that submission. As Advocate Hill pointed out, reference to the number of pages, or footnotes, does not advance any argument of substance. If the contention is to be advanced that there were adverse findings in the Decision upon which a particular Respondent did not have a fair opportunity to make representations, that contention requires to be particularised so that the Court can adjudicate on it. In fact, Advocate Dawes did identify and attack certain specific parts of the Decision on the basis that these had not been included in the Minded-to Notice, and we require to address those contentions. If this attack were to be well-founded that would require us to overturn, to that limited extent, the Royal Court's conclusion rejecting the material error of procedure case.

Finding of gross incompetency and want of integrity

181. First, Advocate Dawes took issue with the finding that: "*While* [Mr Fuller] *was a director, PIF continued to be promoted on the basis that PIMIL was monitoring that there were sufficient assets in the Factoring Companies and investors continued to subscribe on that basis, although Mr Fuller knew that PIMIL was not monitoring such assets so this was unfounded and untrue. Mr Fuller took no steps to stop PIF being promoted on these terms. The Commission found that Mr Fuller was not personally or deliberately dishonest, but was grossly incompetent and lacking in integrity and he became implicated from 18 November 2015 in the continued dishonest promotion and management of the PIF Fund*". The SDM had substituted this finding for a finding of personal dishonesty which had been proposed in the Minded-to Notice. In our view, when the SDM accepted, in light of Mr Fuller's representations, that he was not dishonest, he was entitled to substitute an alternative characterisation of Mr Fuller's involvement without seeking further representations from him.

Findings in relation to manner of Mr Fuller's representations

182. Second, Advocate Dawes took issue with the appearance in the Decision, for the first time, of criticisms of Mr Fuller for the manner and content of his representations before the GFSC. Although in his written submissions, Advocate Dawes referred only to paragraph 5045, we were shown, in the context of the GFSC's Ground of Appeal 2.2, three passages in which such criticisms appear, and we proceed on the footing that the same point applies to each of these passages.

183. At paragraphs 4976 to 4984 of the Decision, the SDM criticised the volume and manner of Mr Fuller's representations. He noted that, "*on too many occasions … it became clear (but only on*

close consideration) that Mr Fuller was making factual representations which go beyond or are contradicted by the contemporaneous evidence or his own evidence elsewhere". He gave a number of what he characterised as "*egregious examples".* He concluded the passage by stating: *"The manner of those representations means that Mr Fuller has not been fully cooperative with the decision-making process and the Commission has taken his conduct in this regard into consideration on the question of whether he is to be regarded as a 'fit and proper' person to perform functions in relation to controlled investment business."* A footnote stated that, in the event, the SDM would have reached the decision that it was necessary and appropriate to impose Prohibition Orders on Mr Fuller without having regard to this aspect of the case, and that this did not change his decision as to the appropriate period of prohibition. He states: *"The effect of taking this aspect into account was however confirmatory".*

184. Paragraph 5045 of the Decision is in the following terms:

> *"The Commission's own internal processes, and questions of what the Commission could or might have done, are irrelevant to the state of Mr Fuller's knowledge at the time when he accepted his appointment as director. Mr Fuller's representations on this point are rejected, and the Commission regards the manner in which Mr Fuller has sought to develop this point as an artificial tactic intended to shift the focus from his conduct onto that of the Commission. It regards these representations as themselves indicating poor judgment and lack of integrity."*

This finding relates to a submission advanced by Mr Fuller that he had been materially misled by the GFSC regarding the risks posed by Providence entities and that, but for that, he would not have accepted directorships in those entities. The Decision explains why the SDM took the view that this submission (which was advanced only after the GFSC had disclosed a document called the "Baxter Review", an internal review which criticised in various respects the approach which the GFSC itself had taken to the supervision of the Providence entities) was not a true representation of Mr Fuller's thinking at the time when he took up the appointments.

185. Paragraph 5112 of the Decision is in the following terms:

> "*The Commission … regards as problematic the extent to which Mr Fuller has subsequently sought to play down the extent of his responsibilities in that regard, and the manner of his representations on this aspect which the Commission regards as reflecting adversely on Mr Fuller's integrity and the question of whether he is a 'fit and proper' person."*

This finding relates to a submission advanced on behalf of and by Mr Fuller that he had never been a "*standing*" Chairman of PIMIL and LFS but had simply been appointed ad hoc for individual meetings. The section sets out in detail why that submission was, in the view of the SDM (and in light inter alia of correspondence with the GFSC which Mr Fuller had signed as "Chairman"), "*disingenuous … and fundamentally misconceived*".

186. The Royal Court sustained Mr Fuller's appeal against paragraphs 5045 and 5112, on the substantive ground that it was wrong to criticise Mr Fuller for the manner of his representations. That conclusion is the subject of the GFSC's Ground of Appeal 2.2. Regardless of the merits or otherwise of the point which GFSC takes in that Ground of Appeal, we consider that it was a

material error of procedure for the SDM not to give Mr Fuller notice that he was minded to make these adverse findings about his judgment and integrity, and to give him an opportunity to make representations before doing so.

187. It was, of course, open to the SDM to make an assessment of Mr Fuller's representations and to reject those representations without warning him that he was minded to do so. There could have been no objection, in that context, to the SDM making observations about the credibility and reliability of the representations. But if the SDM proposed to make new and unheralded adverse findings of want of integrity and poor judgment on the basis of the manner of those representations, fairness required that Mr Fuller be given an opportunity to comment on those allegations, even if these were regarded by the SDM as merely "*confirmatory".* This would not have required lengthy further procedure; it would have sufficed that the SDM intimate to Mr Fuller the specific additional findings which he was minded to make and the general basis for his provisional view, so that Mr Fuller had a fair opportunity to comment before the SDM reached a final view. For this reason, we consider that the Royal Court erred in law by not sustaining Mr Fuller's Ground of Appeal in respect of material error of procedure in relation to these findings.

Involvement in management of sales team

188. Third, Advocate Dawes criticised footnote 4540 in the Decision which is in the following terms:

> *"The Commission bears in mind that Mr Fuller was involved both in the development of Providence CEIC which was looking to raise initial capital of £300 million and in the improved leadership and management of the sales team with a view to increasing the amount raised from investors. While the figure for losses suffered as a result of the collapse in August 2016 is one indicator of relative seriousness (as is the number of investors who suffered losses) the figure is to some extent adventitious."*

Advocate Dawes took issue with the reference to Mr Fuller being "*involved in the management of the sales team*" which he stated was an "*allegation"* which had appeared for the first time in the Decision. He referred also to a comment in paragraph 5569.3 (which is concerned with the relative seriousness to be attributed to the actions of Mr Everitt, Mr Parry and Mr Dewsnip and which makes the point that the conduct of these individuals was "*substantially more serious"* than that of Mr Fuller) that Mr Dewsnip was playing a somewhat diminished role in the last months "*with Mr Fuller taking on some of his responsibilities for strategic management of the sales function".* Advocate Dawes states that the contemporaneous documents show that it was Mr Dewsnip who was responsible for managing sales, reporting to a Mr Jenkins, the member of the Executive Committee responsible for sales.

189. What the SDM states in footnote 4540 is that Mr Fuller was "*involved … in the improved leadership and management of the sales team"* and had some *"responsibilities for strategic management of the sales function".* Factual foundation for that statement appears at paragraphs 1517-1520 of the Decision, which records that, following a dinner between Mr Fuller and Mr Buzaneli in May 2016 at which they discussed "*increased involvement at an executive level"* and that Mr Fuller "*does appear to have become involved with the planning of sales targets and to have engaged with the management team in Guernsey as envisaged".* There are footnoted references to documents. The same passage appeared at paragraphs 1504-1507 of the draft

Minded-to Notice; and Mr Fuller accordingly had more than five months in which to consider any representations which he wished to make in response. In these circumstances, we do not consider there to be any merit in Advocate Dawes' point about footnote 4540.

Bias and prejudgment

190. Advocate Dawes contended that there was a consistent sense that the SDM was hostile to Mr Fuller, and that this created a perception of bias. We reject that contention. It is evident from the Decision that the SDM formed an adverse view of Mr Fuller's approach to the proceedings against him. For example, at paragraphs 5089 to 5117 of the Decision, where the SDM discusses Mr Fuller's evidence about his status as Chairman, he considered "*as problematic the extent to which Mr Fuller has subsequently sought to play down the extent of his responsibilities*" (paragraph 5112). He found Mr Fuller's explanations to be "*unconvincing, lacking in credibility and inconsistent with the contemporaneous evidence*" (paragraph 5109). These were views which he was entitled to reach, and the SDM provides detailed reasons which on the face of it support his conclusions.

191. In the Grounds of Appeal, reference is specifically made to paragraphs 4976 to 4984, where the SDM addressed the approach which Mr Fuller had taken to the proceedings against him. In particular, the Grounds of Appeal refer to the SDM's description of the reliance placed by Mr Fuller on the Baxter Review as an "*artificial tactic intended to shift the focus from his conduct onto that of the Commission"* and findings that these representations themselves indicated poor judgment and a lack of integrity. Following the disclosure of the Baxter Review in March 2019, Mourant Ozannes, on behalf of Mr Fuller wrote to the SDM asserting that "*But for the Commission's failures Mr Fuller would not have accepted the roles as a director of LFS and PIMIL."* The SDM rejected that contention. He was critical of the representation to that effect. He gives reasons which on the face of it provide support for the views which he expressed.

192. We have concluded above that the SDM should not have made findings that the representations advanced on Mr Fuller's behalf indicated poor judgment and a lack of integrity without giving him an opportunity to respond to those findings. But we do not draw any conclusion from that procedural error that the SDM's views on these matters were affected by bias. Nor does the SDM's reasoning on these matters, or his conclusions (short of those findings) provide any basis for a finding that he was biased. These were not gratuitous observations: the SDM had to address these issues and was entitled to deal with them (short of making new findings) as he did. Indeed, the fact that the SDM did not make the findings of dishonesty about Mr Fuller which had been anticipated in the Minded-to Notice is demonstrative that he retained an open mind and was approaching the material before him without preconception or bias towards Mr Fuller.

193. We also reject the contention that the matter was prejudged. We have set out above the lengthy procedure before the GFSC. The very fact that the approach taken by the SDM was so different from that of the Enforcement Division is demonstrative that he approached matters with practical independence. Further, there is evidence that he remained open to persuasion throughout, not only in the changes he made in the Minded-to Notice in respect of the findings against Mr Fuller, but also in his reduction at that stage in the financial penalties imposed on Mr Moroney as well as on Mr Fuller.

Alleged failure to act quasi-judicially

194. The contention advanced on behalf of Mr Tattersall and Mr Moroney that the SDM failed to act quasi-judicially was (as it was put in their joint written skeleton) that, "*at the heart of the GFSC investigation were issues of fact concerning personal dishonesty to which the GFSC's view of the credibility of AT and BM was critical … Despite this, there was no adequate opportunity for AT and BM's credibility in relation to these allegations of personal dishonesty to be tested".* The essential point being made on their behalf was that there was no oral evidence or cross-examination, nor any substitute for cross-examination. They point out that the oral hearing before the SDM was an opportunity for oral representations or submissions, rather than for the provision of oral evidence. Certain allegations were, they point out, not even raised with Mr Tattersall and Mr Moroney at the oral hearing. Thus, they say, "*an investigation which self-evidently required the testing of the credibility of witnesses such as AT and BM did not do so".*

195. Mr Tattersall relies, in this context, on three of the findings against him: (i) that he was "*personally dishonest … in permitting himself to be held out as 'Group Chief Financial Officer' when he knew he had not been appointed to that position"* (Decision, paragraph 6568.1) ("the AT Holding Out Allegation"); (ii) that he was "*personally dishonest … in representing to the Commission that he had not been aware that the Collas Crill Report had been finalised or of its findings and recommendations"* (Decision, paragraph 6568.2) ("the AT Collas Crill Allegation"; and (iii) that he was "*personally dishonest … in permitting and failing to prevent the continued promotion of PIF and use of the January 2016 Revised Particulars and the May 2016 Revised Particulars which provided that 'The Investment Manager monitors that there are sufficient assets in the Factoring Companies to repay the loans from the Fund' when he knew that not to be the case"* (Decision, paragraph 6568.4) ("the AG Scheme Particulars Allegation"). Mr Moroney relies on findings of dishonesty against him in respect of his authorisation, as a signatory, of payments in breach of the Scheme Particulars ("the BM Transfer Signatures Allegation").

196. We reject the submission. It, in effect, proceeds on a misapprehension that, at least in respect of findings of dishonesty and want of integrity, an investigative proceeding such as that before the GFSC cannot operate fairly. As the Court of Appeal explained in *Robilliard,* the proceedings before the GFSC are investigatory in nature. The obligation on the SDM to act quasi-judicially is no more, but equally no less, than the requirement to conduct that investigation fairly, and conscientiously to apply the approach to making findings described by the Court of Appeal in *Robilliard.* That is achieved by giving Respondents fair notice of the allegations against them so that they can make representations, by receiving those representations, and by assessing them fairly in the context of the other material available to the decision-maker. A decision-maker may choose to put particular allegations to a Respondent during an oral hearing, in order to make sure that he has the individual's response on a particular point, but there is no obligation on him to do so in respect of every allegation, even an allegation which involves an imputation of dishonesty, provided that the individual has had a fair opportunity to respond to the allegation.

197. Two propositions appear to underpin the submission. The first is that a finding of dishonesty necessarily involves an assessment of credibility. The second is that it is impossible to make any assessment of credibility (or at least to do so fairly) without the position being "*tested"* at an oral hearing, by cross-examination or some substitute for cross-examination. Neither of these

propositions is necessarily true. Depending on the circumstances, findings about the state of knowledge of an individual may be capable of being made on the basis of documents. Equally, findings about things said or done by that individual may be evident from documents. Conclusions that, in light of the things known to the individual, things said or done by him were dishonest may, in such circumstances be arrived at by reference to the documents alone.

198. What is required, in the context of a procedure such as that before the GFSC, is that the individual should have a fair opportunity, whether in writing or orally, to respond to the allegations of dishonesty or want of integrity. If an explanation is proffered, whether in writing or orally, the decision-maker must fairly assess that explanation. The decision-maker may be justified in rejecting the explanation provided, indeed, in finding the *explanation* lacking in credibility, including by reference to documents or by reference to its intrinsic plausibility. That is possible without making any assessment of the witness' general credibility, although where the explanation has been proffered at an oral hearing, the decision-maker's view may properly be informed by the decision-maker's response to the demeanour of the witness and the content of what is said, without the matter requiring to be the subject of cross-examination in the manner of an adversarial trial. In the context of the GFSC procedures, provided that a Respondent has had a fair opportunity to comment on an allegation of dishonesty and to provide any explanation in answer to the allegation, the decision-maker is not obliged to put the point to the Respondent during the oral hearing.

199. Each of the findings founded upon in the context of this argument appeared as proposed findings in the draft Minded-to Notice. Mr Tattersall and Mr Moroney had a fair opportunity to respond to those findings. The fact that the SDM rejected explanations which they provided does not mean that there has been any unfairness in the procedure adopted. We accordingly reject these submissions.

DELAY

200. The GFSC opened its investigation into the collapse of the Providence Group on 3 March 2016. In November and December 2016 officers of the GFSC interviewed the Respondents under section 27 of the Protection of Investors Law. On 10 April 2017 the GFSC served a draft Enforcement Report on the Respondents. On 23 October 2017 it served its final Enforcement Report. On 24 November 2017 the SDM was appointed. He ultimately issued his Decision on 4 March 2021. The aggregate duration of the GFSC investigation was accordingly almost exactly five years. The appeals were heard in the Royal Court in February and March 2022. The Royal Court judgment was handed down on 14 August 2024. This was more than two years and five months after the conclusion of the hearing. Mr Tattersall and Mr Moroney describe this as "*excessive delay"*, which, in the context of what they characterise as an "*excessively lengthy"* GFSC process, they contend to be both a breach of Article 6 and, indeed, unlawful at customary law.

Article 6

201. Article 6 provides that:

> *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing* ***within a reasonable time*** *by an independent and impartial tribunal established by law."*

202. Advocate Greenfield contended that time started to run for the purposes of Article 6 on 3 March 2016. In the alternative, he relied on the interviews in November and December that year. He also referred to a restraint order obtained in August 2017 at the instance of Guernsey Police in respect of Mr Tattersall's home. Advocate Hill, for the GFSC, contended that the earliest point when it could be said that the determination of the Respondents' civil rights and obligations began was when, in accordance with the statutory scheme, the Respondent served a notice in writing of his decision to which the Respondents could respond – ie the date of the Minded-to Notice. Only at that point, he said, was the statutory scheme engaged. However, he accepted that, substantively, the appropriate date would be the date of the draft Minded-to Notice (ie 16 March 2020). In the alternative, he submitted that the period began when the SDM was appointed (24 November 2017).

203. We were not favoured with any citation of authority on the approach which we should take to the starting point for Article 6 purposes in the context of a regulatory procedure such as this. For our own part, we proceed on the basis that the earliest point at which time could be said to start to run is the issue of the draft Enforcement Notice. This was the point at which the GFSC formally intimated the "case" against the Respondents, and its view that sanctions should be imposed on them. From that point, it could fairly be said that, as a matter of substance, there was a "*dispute"* as to the Respondents' civil rights and obligations.

204. The reasonableness of the length of the proceedings falls to be assessed by reference to the particular circumstances of the case and in light inter alia of the complexity and the conduct of the participants to the proceedings. The case was undoubtedly a complex one. It involved a substantial fraud perpetrated over more than five years in a number of jurisdictions. The proceedings before the GFSC involved eleven different persons, legal and natural; and the role of each of them in what had happened. There was substantial documentary material. The SDM had to consider and evaluate the very considerable volume of material which was available. He had to give the Respondents a fair opportunity both to consider that material for themselves, and the case against them. We have described earlier in this judgment the steps which were taken in that regard and the course of the procedure before the GFSC. We do not consider the duration of the GFSC's investigation to be, on the face of it, excessive or unreasonable given the circumstances.

205. The period between the issue of the Decision and the hearing of the appeal in the Royal Court is also unexceptional. However, as the Bailiff rightly recognised, the time which it then took to produce the judgment was very far from ideal. In the circumstances, we have concluded that there has been a breach of the reasonable time requirement under Article 6 specifically by reason of the time which elapsed between the hearing in the Royal Court and the issue of the Royal Court's decision.

206. We have great sympathy with the challenge which the Bailiff faced. He had before him an appeal against an exceptionally lengthy decision from the SDM. The length of that decision reflected the complexity of the background circumstances. There were four Appellants in the Royal Court and the position of each of them had to be considered separately. The range and complexity of the issues put before the Bailiff is indicated by his summary of the pleaded cases at paragraphs 27 to 82 of his judgment. The Bailiff noted (at paragraphs 294 and 427) that Mr Fuller and Mr Tattersall each chose to challenge every finding made against them. In the event,

the Bailiff's own judgment comprises 706 paragraphs over 177 pages. Having had to engage with the same body of material, in this appeal, it is not a surprise that it took materially longer than usual for the Royal Court to issue its judgment.

207. We also recognise the legal developments whilst the case was pending which contributed to the unusually long time which it took the Royal Court to issue its judgment. As the Bailiff explained at paragraphs 4 and 112ff of the judgment, whilst he still had the case under consideration, judgments were handed down in *Domaille v. Guernsey Financial Services Commission, supra,* first on 18 April 2023 by the Lieutenant Bailiff (prompting a letter from Advocate Dawes to the Court), then on 28 July 2023 by Mountfield JA granting leave to appeal and finally, on 18 January 2024, by the Court of Appeal. Meantime, on 22 August 2023, the Court of Appeal had also handed down its judgment in *Robilliard v. Chairman of the Guernsey Financial Services Commission, supra*. It is apparent from paragraphs 112 to 148 of the judgment that, in circumstances where the Bailiff had not yet by then issued his decision, this had a material impact on the subsequent course of events.

208. We acknowledge that, once it became apparent that the legal issues in these cases could have a material impact on the approach to be taken in this case, it was intelligible to defer finalising the judgment in the present case whilst those legal issues were clarified; and the time reasonably taken in that regard falls to be taken into account when assessing whether there has been a breach of the reasonable time requirements. However, the Lieutenant Bailiff's judgment in *Domaille* was issued more than a year after the hearing of the appeal in the present case; and it was more than six months from the issue of the Court of Appeal's judgment in *Domaille* before the Royal Court issued its judgment. Even making an allowance for that intervening factor, and for the complexity of the case, the period of almost two and a half years from hearing to judgment was too long.

209. Our conclusion that this has resulted in a breach of Article 6 does not necessarily imply personal criticism of the Bailiff. In a small jurisdiction, such as Guernsey, the entire burden of the first instance work of the Royal Court falls on a handful of individual judges. The production of judgments may be difficult to accommodate whilst also dealing with ongoing judicial work. Large and complex cases may have a disproportionate effect. We are also aware that the Bailiff has other necessary demands on his time. But it was not suggested that there was any unusual or unexpected demand on the judicial system of Guernsey which caused or contributed to the delay in this case. That being so, these considerations are not a relevant justification for the system to fail to deliver a determination of the parties' civil rights and obligations within a reasonable time. The system should be resourced and managed in a manner which enables Guernsey to meet its international obligations under Article 6.

210. A finding that there has been a breach of the reasonable time requirement does not, as such, justify terminating the proceedings. There is a strong public interest in the appropriate regulatory response to failings within the Guernsey financial sector. As long as just satisfaction for the particular breach – namely, the duration of the proceedings – can be given in some other way, it would be disproportionate to bring the proceedings to an end simply by reason of delay.

211. Advocate Hill submitted that, in the event of a breach of the reasonable time requirement of Article 6, the sole remedy available to the Respondents would be a separate claim for damages

under the Human Rights (Bailiwick of Guernsey) Law 2000. We do not agree. Under section 8(1) of the 2000 Law, if the Court finds an act of a public authority to be unlawful under section 6, "*it may grant such relief or remedy, or make such order, within its powers, as it considers just and appropriate".* It is well-established that the appropriate response to a breach of the reasonable time requirement, in the context of criminal proceedings, may be a reduction in the sanction or punishment imposed. We see no reason why the same should not apply to regulatory proceedings such as the present. If that would be sufficient to provide just satisfaction, there is no good purpose to be served by insisting on separate proceedings being raised.

212. In some cases, a finding of breach will itself be sufficient just satisfaction. Where that is not so, a question arises as to how the appropriate reduction in sanction is to be made. The Court has no power itself to alter the sanction imposed by the GFSC, but it can, through its power of direction, require the GFSC to reduce the sanction in a manner which would provide just satisfaction for any breach of the reasonable time requirement of Article 6. Indeed, even if the Court has not issued such a direction, the GFSC, as a public authority, is obliged to act compatibly with Convention rights and would require to be open to a submission that this required a reduction in sanction to afford just satisfaction for delay in breach of Article 6.

213. We have not heard submissions on the question of whether, in this case, a finding of breach would be sufficient just satisfaction for the breach of Article 6 in this case. When the case returns to the Royal Court it will require to address that question. If it takes the view that such a finding would not be sufficient to provide just satisfaction for the breach, the Court will require to direct the GFSC to make an appropriate reduction in the sanction to afford just satisfaction for that breach.

Customary Law

214. In their written submissions, Advocates Greenfield, Bamford and Le Tissier referred us to *Goose v. Wilson Sandford* 1998 TLR 85, *Bank St Petersburg PJSC v. Arkhangelsky* [2020] EWCA Civ 408 and *Cobham v. Frett* [2001] 1 WLR 1775 in support of a contention that, in light of the time which it took for the Royal Court to issue its judgment, there had been a breach of "*the common law requirement to produce a judgment without unreasonable delay".* They contended that the judgment as a whole is "*unsafe".* They invited us, in the interests of finality, to allow the appeal and to decline to remit the matter to the Royal Court or the GFSC.

215. The cases to which we were referred do not support the conclusion that an appeal can, as a matter of common law (or Guernsey customary law), be allowed simply on the basis of delay in the production of a judgment. Indeed, in *Bank St Petersburg PJSC, supra*, Vos C noted (at paragraph 81), under reference to *Bond v. Dunster Properties Ltd* [2011] EWCA Civ 455, that "*delay, by itself, is not a ground for allowing an appeal".* Rather, the authorities support the conclusion that, as Vos C put it at paragraph 80, under reference to *Goose, supra*: "*delay is a factor to be taken into account when the appellate court is considering the judge's findings and treatment of the evidence".*

216. These points are illustrated by *Cobham.* This decision of the Judicial Committee of the Privy Council concerned a judgment of the High Court of the British Virgin Islands which had been issued 12 months after completion of the trial. The Court of Appeal held that, by reason of the delay between the conclusion of the trial and the judgment and certain errors in the judgment,

it was entitled to disagree with the judge's evaluation of the evidence and to substitute its own conclusions. Judicial Committee held that there was no legitimate basis on which the Court of Appeal could assert the right to disagree with the judge's evaluation of the evidence and allowed the appeal. Lord Scott observed, at pages 1783-1784:

> "*It can be easily accepted that excessive delay in delivery of a judgment may require a very careful perusal of the judge's findings of fact and of his reasons for his conclusions in order to ensure that the delay has not cause injustice to the losing party."*

However:

> *"if excessive delay … is to be relied on in attacking a judgment, a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant."*

217. Having regard to the mixed success before the Royal Court, it is not at all clear who should be regarded as the "*losing party"*. But that does not detract from the basic point made by the Judicial Committee. In effect, either party in the present case could properly invite us to consider the impact of delay on the Royal Court judgment. Each of the three cases to which we were referred concerned a substantial delay after a hearing of evidence. The present case did not involve a delay following a hearing of evidence, but a statutory appeal which fell to be decided by the Bailiff by reference to the papers. The particular issues which fall to be considered where there is a substantial delay following a hearing of evidence, which were discussed in *Goose* and *Cobham,* accordingly do not arise in this case. Nevertheless, we recognise that delay may also affect cases which do not depend on evidence; and in light of the time which it took for the Royal Court judgment to be issued, we have scrutinised it with care.

218. The Royal Court's judgment is lengthy and is not always easy to follow. It is dense and discursive and sometimes elliptical. In part at least, all of that is, no doubt, because of the nature of the subject matter, the scale of the Decision, the volume of underlying material to which the Court was referred and the issues with which the Court had to deal. It was, after all, dealing with a root and branch challenge mounted by the Respondents to every finding in a lengthy and complex Decision. We have considerable sympathy with the challenge which the Bailiff faced in dealing with the issues advanced before him within a reasonable compass. Nevertheless, it seems to us that the passage of time, coupled with the need to revisit the case in light of *Domaille* and *Robilliard,* may well have affected the form which the judgment took.

219. It does not follow that the Royal Court's judgment is "*not safe"* or that it would be unfair to allow it to stand on that account. Both the GFSC and the Respondents have advanced challenges to particular aspects of the judgment. These include challenges, which we will address in the next section of this judgment, to the quality of the Court's reasons. We have been able to adjudicate on all of the challenges to the Royal Court's decision on their merits. In these circumstances, we reject the Respondents' reliance on delay as a basis for inviting us to hold that the Royal Court judgment as a whole is unsafe.

INADEQUATE REASONS

220. Mr Tattersall and Mr Moroney criticised the quality of the Royal Court's reasoning, as part of their case that there has been a breach of Article 6 and/or of the customary law procedural requirements. This is Ground of Appeal 1C in each of their Notices of Appeal. They advanced these submissions in the context of the submissions on delay to which we have just referred. In their written submissions, Advocates Greenfield, Bamford and Le Tissier referred us to *Ruiz Torija v. Spain,* 9 December 1994, Series A no 303-A, *Ramos Nunes de Carvalho, supra, English v. Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, *Harris v. CDMR Purfleet Ltd* [2009] EWCA Civ 1645 and *South Buckinghamshire District Council v. Porter (No. 2)* [2004] 1 WLR 1954. They criticised certain specific passages of his judgment and contended that these failed to satisfy the requirements of reasons which are set out in the caselaw.

221. Mr Fuller, for his part, advanced a free-standing Ground of Appeal (Ground 5) to the effect that the Royal Court's judgment was insufficiently reasoned and/or lacked clarity. Advocate Dawes contended that the Court did not stand back and draw together the threads of the multiple errors which he had identified and ask itself whether the Decision was safe as a whole. Mr Fuller's Notice of Appeal referred to five specific points in the Royal Court's judgment where, so it was said, the reasoning is inadequate.

222. The GFSC did not respond to these Grounds of Appeal, either by way of a Respondents' Notice or in its responsive written submissions.

223. The requirement to give a reasoned judgment serves a number of important purposes. Primary amongst them is to communicate to the parties what the judge has decided and the essential reasons for his decision. As the Court of Appeal of England & Wales put it in *English, supra,* at paragraph 16, "*... justice will not be done if it is not apparent to the parties why one has won and the other has lost".* That is not to say that the requirement to give reasons does not serve other purposes. It should focus the mind of the judge on the issues which require to be decided. The resulting decision is more likely to be soundly based than a decision which is unreasoned. The giving of reasons allows the parties to consider whether or not they have a basis for challenging the decision on appeal. And a reasoned judgment enables an appellate court to exercise its functions.

224. A reasoned judgment also has a constitutional value. It allows the parties and (where the judgment is published) the wider interested public to understand why a judicial decision has been made, and to scrutinise and indeed to criticise the reasons for the decision. The requirement to produce a reasoned judgment is the principal mechanism of judicial accountability and is an important protection against arbitrariness. It adds to the accumulated corpus of decided law. As well as playing an important part in explaining, clarifying and developing the law, the requirement for judges to give reasoned decisions (and, as a general rule, to publish them) enhances public confidence in the transparency and rigour of the administration of justice and helps to secure acceptance of the role of the courts in making decisions which are of significance to the parties and to society at large.

225. Although a reasoned judgment serves these various functions, in the context of an appeal on the basis that the reasons are inadequate the focus of the Court is on the primary purpose of a reasoned judgment – namely, that it should communicate to the parties why the judge reached the decision that he did. In *English, supra,* the Court of Appeal stated (at paragraph 26) that

where permission has been granted to appeal on the grounds that a judgment does not contain adequate reasons:

> "*the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed. … If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing or to direct a new trial."*

226. *Harris, supra,* shows that a judgment which is not "*comprehensible to the first-time reader"* may nevertheless survive a challenge to the adequacy of the reasons. In that case, Smith LJ observed*:*

> *"It is always desirable that a judgment should be comprehensible to the first-time reader. This judgment was not. However, that is not the test of the adequacy of the judge's reasons. The adequacy of the reasons must be tested in the context of the knowledge and understanding of those who were present at the trial."*

The point may be further illustrated by reference to the decision in *English*. On first impression, the Court of Appeal considered that "[*t]he judgment gave little indication of the process of reasoning that led to the result*". However, by the end of counsel's submissions the Court was confident that it had identified the reason for the decision. Even though it had taken the appellate process and the assistance of counsel to enable the Court of Appeal to identify the judge's reasoning, the Court concluded that the appeal should be dismissed.

227. These considerations are germane to the present case. As the decisions in *English* and *Harris* make clear, the fact that the quality of the reasoning in a judgment, or even its intelligibility to the first-time reader, may be open to criticism does not mean that it is inadequately reasoned. It is necessary to read the Royal Court judgment in the context, in particular of the Decision which was under appeal and the submissions which were advanced before the Court. If, following that process, it is possible to discern the reason for the Court's decision, that will satisfy both the customary law and Article 6 requirements for reasons.

228. In respect of legal issues which were argued before the Royal Court and which have been renewed before us, we are required to reach our own view, and are able to do so, without recourse to the Royal Court's reasoning. It would be an academic exercise to address the criticisms advanced by Mr Tattersall and Mr Moroney of the adequacy of the reasoning in the sections of the Royal Court's judgment which deal with "Human Rights" (paragraphs 149 to 187) and "Procedural matters" (paragraphs 188-243). These deal with legal issues which have been renewed before us; and we have ourselves concluded that the Bailiff was right to reject the arguments which were addressed in those parts of the judgment.

229. We turn to consider the specific passages in the Royal Court judgment which were criticised by the Respondents. As we have already observed, we do so with considerable sympathy for the challenge which the Bailiff faced in assimilating and responding to the wide-ranging appeals which had been brought before him. If he has dealt with some points succinctly that does not mean that the reasoning is inadequate.

Mr Fuller

230. **Paragraphs 308 and 309**. These paragraphs of the Royal Court judgment are part of a discussion of the manner in which the SDM dealt with Article 37 of the *Loi relative aux Preuves.* The Royal Court considered that the SDM had fallen into error, but that this was not a material error of law inasmuch as the question was whether each individual finding had been properly justified in light of Article 37. Mr Fuller advances two criticisms. The first is that at paragraph 308 the Royal Court "*refers to the SDM seeming to stray beyond what was being put to him without finding either way".* Since, in the following paragraph, for the reasons set out there the Royal Court explains why, even though the Court considered that the SDM's error was not a material error of law, there was no need for the Royal Court to make a "*finding either way".* The point has no merit. The second criticism is that the Royal Court held at paragraph 309 that the Decision had "*fallen into error without giving reasons".* This point too has no merit. The reasons for the holding that the Decision had fallen into error are given in paragraph 308, namely that the SDM did not accept that there is a presumption of good faith, capable of being rebutted. We reject the challenge to these passages.

231. **Paragraph 332**. This paragraph appears in a section of the judgment which addresses the challenge to the SDM's findings on Mr Fuller's probity, competence and soundness of judgment. Those findings of the SDM appear at paragraphs 5295 to 5467 of the Decision. They are introduced with a statement (at paragraph 5297) that the GFSC finds "*for the following reasons"* that Mr Fuller "*failed to act with the necessary care and skill to be expected of a director of a licensee, and in particular with the care and skill commensurate with his level of knowledge and experience. He was incompetent, and in key respects grossly incompetent. The Commission also finds that, in the instances set out below, Mr Fuller failed to act with the integrity required of a director of a licensed fiduciary".* There then follow findings under a series of headings. The first three of these are concerned with failures to acquire and maintain a sufficient knowledge and understanding of the businesses of LFS and PIMIL, Cayman Fund and PIP. It is these three sections of the Decision which are addressed at paragraph 332 of the judgment.

232. Each of those three sections of the Decision refers back to, and builds on, the discussion earlier in the Decision. For example, the first section (failures to acquire and maintain a sufficient knowledge and understanding of the businesses of LFS and PIMIL), which is dealt with at paragraph 5298 of the Decision, refers back to paragraphs 5192 to 5199 where the SDM makes findings that Mr Fuller ought to have asked certain questions and asked to see certain documents (see in particular paragraphs 5192 and 5199). Those findings are, in turn, made in the context of findings that Mr Fuller was on notice of failings on the part of the companies of which he was a director (see in particular paragraphs 5191, 5196, 5197 and 5198). The logic of the Decision is as follows: (i) Mr Fuller was aware of or on notice of certain failing on the part of the companies of which he was a director (eg paragraphs 5191, 5196, 5197, 5198); (ii) that being the case, he should have asked certain questions and asked to see certain documents (eg paragraphs 5192, 5199); (iii) his failure to do so was a failure to act with the necessary care and skill and competence and involved a want of integrity (paragraphs 5297-8). A similar logic can be applied to the other two headings dealt with in paragraph 332 of the Royal Court judgment (Cayman Fund and PIP).

233. Regrettably, we are unable to discern from paragraph 332 of the judgment what the Royal Court made of these findings. The paragraph is in the following terms:

> "*The first three headings used in the Decision (failure to acquire and maintain knowledge and understanding of the businesses of LFS and PIMIL, Cayman Fund and PIP) do not appear to contain any actual findings directed at probity, competence, experience and soundness of judgment. This is slightly surprising, given that at para. 5298, dealing with the first of these matters, it is stated that [Mr Fuller] did not acquire sufficient knowledge and understanding of the businesses of LFS and PIMIL. There is a cross-reference to paragraphs 5192 to 5199. These paragraphs set out the types of issue that the SDM regards as being incumbent on [Mr Fuller] to have inquired about. By way of just one example, para. 5195 states:*
>
> > *'Mr Fuller says he requested copies of previous meeting minutes. He has not said that he asked to see the board packs from the meetings prior to his appointments, and it appears that he did not go into that level of detail.'*
>
> *Whilst there is not finding that he acted incompetently, there is a finding of acting without the required diligence in para. 5469.1. However, there is no assessment as to whether a newly appointed director of a licensee ought to have done more than seek copies of previous board minutes. If there was nothing on the face of those board meeting calling for further enquiry, it is arguable that that would suffice. However, if there was something warranting further enquiry, then the failure to make further enquiries can be said to be an instance of not being sufficiently diligent."*

The Royal Court's judgment then moves on to the next heading (the September 2015 presentation).

234. The paragraph accordingly starts by raising a question (without answering it) as to whether there are findings "*directed at probity, competence, experience and soundness of judgment"* in respect of these matters, without referring to paragraph 5297 which introduced the relevant section of the Decision and which we have quoted above. The paragraph then considers only the first of the three headings of the Decision which it bears to be addressing (namely failure to acquire and maintain knowledge of the businesses of LFS and PIMIL). In respect of that heading, it notes that there is a cross-reference to earlier paragraphs which *"set out the types of issue that the SDM regards as being incumbent on [Mr Fuller] to have inquired about"*. From those paragraphs, the judgment focuses on just one (paragraph 5195) and poses a question about it, without reaching any conclusion one way or the other. It does not refer to other paragraphs (notably paragraphs 5192 and 5199) which make specific findings that Mr Fuller should have asked for other documentation, and which, on the face of it, appear to be founded on equally specific findings that Mr Fuller had been put on notice of failings which should have led him to make inquiry.

235. The judgment does not state what conclusion the Royal Court reached in respect of the challenge to the three sections of the Decision to which this paragraph is directed. Nor can we infer that conclusion from other parts of the judgment. And because of the focus on paragraph 5195 of the Decision, we are unable to discern what the Royal Court made of the reasoning of the Decision on these matters which we have set out above. We accordingly sustain the

challenge to this paragraph. The consequence is that the Royal Court will require to reconsider the issues addressed in this paragraph and issue a reasoned decision on them.

236. **Paragraph 336**. This passage deals with Mr Fuller's challenge to findings at paragraphs 5320 to 5323 in relation to record-keeping. The Royal Court states explicitly that it is satisfied that these were conclusions that the SDM was entitled to reach. The reasoning is somewhat obscure. However, it seems to us that we are entitled to read this passage of the Royal Court judgment in the context of the relevant paragraphs in the Decision to which it refers. Amongst other things, these record that Mr Fuller was on notice of "*continued and salient failures in this regard"* (paragraph 5321) and, in any event was on notice that transfers were not being contemporaneously documented from the time he saw the Collas Crill report (paragraph 5322.6). In these circumstances, it seems to us plain that the Royal Court was right to reject the challenge to this finding.

237. **Paragraph 347**. This paragraph is concerned with the finding of lack of integrity in respect of compliance with the Scheme Particulars. The Royal Court's judgment states that it is unclear whether the finding attached to Mr Fuller personally or whether it was a consequence of a finding in respect of PIMIL's responsibility under the Principles. The judgment then goes on to state that "*for present purposes I will infer that it attaches to him personally".* The judgment quotes paragraph 126 of *Domaille.* Mr Fuller's criticism of this paragraph is not spelled out, but we infer that the complaint is that the Royal Court did not reach a conclusion as to whether the finding in question did attach to Mr Fuller personally but proceeded "*for present purposes"* to infer that it did. Although somewhat infelicitously expressed, we read this statement as expressing a conclusion that the finding in the Decision did attach to Mr Fuller personally. We are fortified in that view by revisiting the relevant paragraphs of the Decision (paragraphs 5332 to 5339), where the SDM made findings which justified a finding of want of integrity in relation to these matters. Mr Fuller was personally aware of the terms of the Scheme Particulars, including terms to the effect that the investment manager monitors that there are sufficient assets in the Factoring Companies to repay the loans from the Fund (paragraph 5334). He was also aware that there was inadequate information for PIMIL to perform an effective investment management role (paragraph 5335). The Decision makes clear in footnotes 4288 and 4289 that these were findings of actual knowledge. On that footing, the Royal Court was right to infer that the finding attached to Mr Fuller personally.

238. **Paragraph 358**. In this paragraph, the Royal Court notes that findings made by the SDM in relation to the way in which failings on the part of Mr Fuller contributed to failings on the part of PIMIL and LFS to act with the requisite skill, care and diligence duplicated findings made elsewhere against him. The Royal Court recognises that this is acceptable in the context of determining whether Mr Fuller meets the minimum criteria for licensing, but observes that it would be troubling if there were to be double counting "*when determining the seriousness of the departure from the minimum criteria for licensing".* It is tolerably clear what the Royal Court is saying here; and we are entitled to proceed on the basis that, when the Royal Court came to assess the proportionality of the sanctions, it kept the point which it had made in this paragraph in mind.

239. **Paragraph 365**. This paragraph addresses a finding that Mr Fuller was lacking in integrity by reason of his willingness to accede to a proposal to backdate a "bump" in the interest rate on an investment which Mr Fuller had made in the PIF Scheme. The criticism is that the paragraph

concludes: "*I am inclined to view this finding as one that was not, in the circumstances in which it was made, open to the GFSC".* The criticism is that the phrase "*I am inclined to view"* leaves it uncertain what conclusion the Royal Court had reached. We do not consider that there is any real doubt that the Royal Court was holding that the GFSC was not entitled to make that finding. Indeed, the GFSC's first Ground of Appeal proceeds on that understanding of the paragraph. There is no merit in the point.

240. **Paragraph 368**. This is a paragraph in which the Royal Court summarises the position. It states: "*Although I have determined that some of the findings made on probity, competence, experience and soundness of judgment should not have been made, the majority of the findings are, in my view, capable of having been made."* The criticism is that there is a lack of clarity as to the findings which it is said "*should not have been made"* and those which, on the other hand, were "*capable of being made".* We reject that criticism. The Royal Court's conclusions in respect of individual findings had been set out in the previous paragraphs of the judgment. There was no obligation on the Court to specify the findings to which it referred in this paragraph.

Mr Tattersall

241. **Paragraphs 428, 430, 435 and 450.** Mr Tattersall contends that these paragraphs do not give adequate or clear reasons as to whether the Royal Court concluded that the GFSC had found dishonesty and, if so, whether the finding was being set aside. We reject those criticisms.

242. At paragraph 428 the Royal Court notes that Mr Tattersall had, in his submissions, concentrated on seven specific findings of dishonesty, which were listed by the SDM at paragraph 6568 of the Decision. This was in the part of the Decision where the SDM assessed the seriousness of the contraventions and non-fulfilments which he had found in respect of Mr Tattersall. The Royal Court noted that there were other findings of dishonesty and went on in the following paragraphs to describe these, before at paragraph 436 stating: "*I will now turn to deal with each of the dishonesty findings summarised in para. 6568 on the basis that these are the matters on which Advocate Greenfield concentrated".*

243. It is plain from the terms of the passages quoted from the Decision at paragraph 430 of the Royal Court judgment that this contained a finding of dishonesty. Further, it is apparent from the terms of paragraph 435 of the Royal Court judgment that, whilst the Bailiff considered it odd that these findings of dishonesty had not been included in those summarised at paragraph 6568, since it followed that they did not appear to have been relied on by the GFSC when considering the sanctions to impose "*I am minded to take the same approach as the parties have to disregard them".* In effect, the Bailiff appears to have taken the view that, since these findings, though findings of dishonesty, had not apparently been taken into account by the GFSC in determining the seriousness of Mr Tattersall's failings, and Advocate Greenfield had "*concentrated"* on the seven findings of dishonesty which were listed at paragraph 6568 of the Decision, he did not require to adjudicate upon each of them. That was an approach which he was entitled to take.

244. Paragraph 450 of the Royal Court judgment is concerned with one of the findings which is listed in paragraph 6568 of the Decision. This concerned a finding at paragraph 6372 that, in representing to the GFSC at interview that he had not been aware that the Collas Crill report had been finalised and in his response to the Draft Report and in his Affidavit that he was

unaware of its findings and recommendations, was dishonest. It is clear from the final sentence of paragraph 450 of the judgment that the Royal Court was not setting that finding aside. The reasons for that conclusion are adequately set out in the preceding sentences.

245. **Paragraph 496.** This paragraph is part of a passage, starting at paragraph 486 of the Royal Court judgment, which addresses findings relating to the continued use of PIP promissory notes. The finding in question is at paragraph 6475 of the Decision and is in the following terms:

> "*Mr Tattersall was a senior member of group management and was aware of how funds were being managed and used within the group. It is therefore likely that Mr Tattersall was aware throughout that PIP cells were not being managed on the basis on which they were offered and that investors were investing on a false basis. The continued use of promissory notes in these terms knowing that their terms would not be applied reflected a serious lack of integrity and was in fact dishonest".*

At paragraph 494 of the Royal Court judgment, the Bailiff sets aside the finding of dishonesty. At paragraph 495, he goes on to consider the finding of lack of integrity. Mr Tattersall contends that the Bailiff did not adequately explain whether or not there was a finding of lack of integrity and if so, the basis for that conclusion. There is no merit in the point. The judgment states in terms: "*I am satisfied that there is evidence of the role [Mr Tattersall] played which supports a finding of lack of integrity".* The judgment briefly refers to findings that Mr Tattersall prepared drafts of the promissory notes for others to authorise and, as such, played a part in the promissory notes which were ultimately executed and did not reflect the terms on which cells in PIP could be used. There is a clear finding at paragraph 6475 of the Decision that, as a senior member of group management aware of how funds were being used and managed within the group, it is likely that Mr Tattersall was aware that PIP cells were not being managed on the basis on which they were offered. This is quite sufficient to support, at the very least, a finding of want of integrity.

246. **Paragraph 559.** This paragraph appears in the section of the Royal Court judgment where the Bailiff addresses Mr Tattersall's sanctions appeal. The contention is that this paragraph does not give an adequate or clear reason as to whether Mr Tattersall's conduct was "serious" or "very serious". The Bailiff states: "*Just because a relevant officer is found to be dishonest does not mean that it places that person into the very serious category. The actual findings made must be looked at individually and collectively. As I have commented, the finding in para. 6430 is serious but I am not persuaded that the cumulative effect of all the findings necessarily justifies that conclusion that [Mr Tattersall's] conduct was very serious, however much deference I should give to the GFSC".* Reading this passage in context, it seems to us to be reasonably clear that the Bailiff was disagreeing with the SDM's conclusion that Mr Tattersall's conduct was "*very serious*" and was characterising it as "*serious*".

Mr Moroney

247. **Paragraph 655.** This paragraph appears in a passage of the Royal Court judgment which addresses a finding of dishonesty by reason of the authorisation of payments which Mr Moroney knew to be in breach of the relevant PIF Scheme Particulars. The paragraph states: "*... Advocate Le Tissier highlights that the professional advisers did not advise that this involved dishonesty, but that is not, in my view, relevant to whether or not there can be such a*

finding, but may be relevant if the finding is upheld when it comes to considering the appropriate sanctions". The complaint is that the Bailiff does not give adequate reasons for finding that the absence of advice was not relevant to whether or not there could be a finding of dishonesty. We reject that criticism. The Bailiff goes on in paragraph 656 of the judgment to address the *Ivey* criteria. He notes that he had already held that the first limb of *Ivey* – in respect of Mr Moroney's knowledge that the payments were not in accordance with the Scheme Particulars - was established. He had made that finding at paragraph 652 of the judgment. Against that background, there was no need for the Bailiff to do more than express his view that the absence of advice from the professional advisers was irrelevant.

248. **Paragraphs 656 and 660.** Mr Moroney contends that the Bailiff fails to give adequate reasons for "not ascribing weight to" the failure of the GFSC to identify in respect of each finding of dishonesty (namely the two findings at paragraphs 656 and 660):

> "*any information concerning the details of [Mr Moroney's actions], such as: how many transfers were co-signed by [him], the value of those transfers, who the co-authorisers of the transfers were, on whose instructions [he] was acting. As a consequence no proper or meaningful evaluation is apparent of BM's actions."*

The two findings in question concerned the authorisation of payments which Mr Moroney knew to be in breach of the Scheme Particulars, and authorisation of transfers from the PIF/PIP dealing account originating from investments in PIP cells, knowing that this was in breach of the Promissory Notes. There is in our view no merit in the complaint. There are findings at paragraphs 7071 to 7075 of the Decision that throughout the relevant period (over four years) Mr Moroney was one of the authorised "A" signatories on the LFS and PIF bank accounts and that "*on numerous occasions"* he personally approved transfer instructions. At interview he said he would have signed "*quite a lot"* of these payments. At paragraph 7090 of the Decision, there is a finding that on each occasion that Mr Moroney approved a payment as an "A" signatory, he saw the list of payees and knew when money was not being paid to one of the Brazilian Factoring Companies.

249. Notably, at paragraph 7092 of the Decision the SDM makes the following finding:

> "*Although Mr Moroney will himself have authorised many of the transfers, he kept no record himself of the payments which were so authorised. He maintains that it would not have been reasonable to expect an authoriser in his position to keep a record of the transactions they were authorising; he says 'there was an assumption that they would have been book-kept' and that pre-2015 he 'wouldn't have been aware that these transactions were not being recorded on the book-keeping system'. He did nothing himself to ensure or check that they were being recorded on that system."*

In these circumstances, it hardly lies in Mr Moroney's mouth to criticise the Bailiff (or the SDM) for not making specific findings about the number, value and other details of the transfers.

250. Mr Moroney also contends that the Royal Court failed to give adequate reasons in support of its consideration of whether the GFSC's findings of dishonesty made against Mr Moroney were *Walters* unreasonable. We will address that contention in the context of considering the Grounds of Appeal on that issue.

251. Mr Fuller also criticises, under this head, the Royal Court judgment on the basis that it does not "*stand back and draw together the threads of the multiple errors identified and criticisms made of the Final Decision and the SDM and ask himself whether the Final Decision is safe as a whole".* We reject this contention. The Royal Court's function was to determine each of the Grounds of Appeal brought before it on its merits. The Royal Court sustained many of the findings which the SDM had made against Mr Fuller; and rejected others. The Court was not obliged to go on to consider explicitly whether the Decision was "*safe as a whole".*

252. We accordingly sustain Mr Fuller's fifth Ground of Appeal so far as it concerns paragraph 332 of the Royal Court judgment. We otherwise dismiss Mr Fuller's fifth Ground of Appeal and Grounds of Appeal 1C for each of Mr Tattersall and Mr Moroney.

JURAT UNREASONABLENESS

253. As we have explained above, it is a matter of agreement before us that an appeal on the ground that the decision is unreasonable may encompass Jurat (or *Walters*) unreasonableness as well as *Wednesbury* unreasonableness. The Royal Court understood that. At paragraphs 298 and 299 of its judgment, the Court "*reminded"* itself "*about the proper approach to take to the grounds of appeal …"* before explaining that the "*assessment of what is or is not reasonable goes further than what was formerly dealt with as Wednesbury unreasonableness, or irrationality".* The Royal Court went on to explain Jurat (or *Walters*) unreasonableness in terms which no party has criticised.

254. Each of the Respondents nevertheless relied before us on Jurat unreasonableness. Mr Fuller contended (in Ground of Appeal 8) that the Court "*failed to address"* this issue or overlooked it. The point is made in the most general terms and the written submissions did not point us to any passages in the Royal Court's judgment in order to seek to justify the contention. Mr Tattersall and Mr Moroney contended (in Ground of Appeal 3) that, although the Bailiff had correctly directed himself on the point, he did not in fact assess rationality on that basis. They pointed out that the point is expressly addressed in the Royal Court judgment only at paragraph 351. Advocate Hill, for the GFSC, contended that it was evident that throughout its detailed evaluation of the case, the Royal Court had adopted a broader approach to the review of the facts and that this demonstrated that the Court was assessing the Decision by reference to Jurat unreasonableness.

255. The starting point for consideration of these arguments is the Royal Court's explicit statement about Jurat unreasonableness at paragraphs 298 and 299 of its judgment. In that passage, the Court reminded itself about the proper approach. We are entitled to proceed on the assumption that the Court did what it said it was going to do, unless we are shown convincing evidence that this was not in fact the case. As the written submissions for Mr Tattersall and Mr Moroney pointed out, the Royal Court judgment referred to the point again, explicitly, at paragraph 351. In relation to the particular issue under discussion at that point, the Bailiff stated that "*having directed myself in accordance with the principles accepted in Bordeaux Services, I would find that this was within the range of responses open to the GFSC".* The formulation "*within the range of responses open to the GFSC"* is not inconsistent with the concept of Jurat unreasonableness as it was explained in *Walters*. Beloff P, in his decision in *Walters*, recognised that the primary decision-maker must be accorded a margin of judgment. The same formulation

or similar forms of words are used throughout the Royal Court's judgment in the present case, and it may be inferred that when the Royal Court used that language it had in mind the test which it had directed itself to apply. Indeed, as Advocate Hill submitted, it is evident throughout the judgment that the Royal Court took a broader view of its remit in assessing the findings made by the SDM than would follow from *Wednesbury* principles.

256. We accordingly dismiss Mr Fuller's Ground of Appeal 8, Mr Tattersall's Ground of Appeal 3 and Mr Moroney's Ground of Appeal 3.

CHALLENGES TO SPECIFIC FINDINGS BY THE ROYAL COURT

257. We turn now to address Grounds of Appeal advanced by the GFSC and by Mr Fuller against certain specific findings of the Royal Court. In order to put these Grounds of Appeal in context, we proposed first to summarise the key findings of the Royal Court in respect of each of the Respondents (and Mr Dewsnip) and the challenges which are advanced to those findings.

Mr Fuller

258. In respect of Mr Fuller, the Royal Court set aside the following findings which had been made by the SDM:

(a) findings of poor judgment and lack of integrity arising from the manner of Mr Fuller's representations to the GFSC (paragraph 328);

(b) a finding of want of integrity in respect of an approach made to politicians in 2016 (paragraphs 362-4); and

(c) a finding of want of integrity in respect of a proposal to backdate a "bump" on his account (paragraph 365).

The Royal Court also set aside a finding of "gross" incompetence (though not findings of incompetence and want of integrity) in respect of compliance with the Scheme Particulars (paragraphs 345, 346).

259. In this appeal the GFSC challenges the Royal Court's decisions in relation to Mr Fuller's representations to the GFSC, interaction with politicians and backdating, in Grounds of Appeal 2.2, 2.1 and 1 respectively. We have concluded above that the SDM's findings of poor judgment and lack of integrity arising from the manner of Mr Fuller's representations to the GFSC should not have been made without giving him an opportunity to respond to those allegations. We accordingly agree with the Royal Court, albeit for different reasons, that those findings fall to be set aside. In these circumstances, the GFSC's Ground of Appeal 2.2 is superseded. For the reasons we set out below, we sustain Grounds of Appeal 2.1 and 1.

260. Although we have held that the findings of poor judgment and lack of integrity arising from the manner of Mr Fuller's representations should not have been made, the SDM made clear that these findings did not affect his decisions to make a prohibition order or as to its duration (paragraph 4984 of the Decision, fn 3840). However, the SDM did not explicitly mention in

that regard the discretionary financial penalty, so we cannot say that the setting aside of those findings would have had no practical impact on the SDM's conclusions.

261. For his part, Mr Fuller contends before us, on various grounds, that all the findings against him which were sustained by the Royal Court should be set aside. We have already dealt with his submissions in support of that contention based on compatibility with Article 6, material procedural error, inadequate reasons and failure to apply the Jurat unreasonableness test. We have concluded that the passage in paragraph 332 of the Royal Court judgment in respect of the SDM's findings at paragraphs 5298 to 5302 of the Decision is inadequately reasoned. We have accordingly sustained Mr Fuller's appeal in respect of that passage of the judgment.

262. Mr Fuller's third Ground of Appeal challenges the Royal Court's decision upholding two specific findings of want of integrity: one in relation to a company called Cornhill (paragraph 356 of the Royal Court judgment); the other in relation to the Revised Scheme Particulars (paragraph 348 of the Royal Court judgment). He also advances some general criticisms of the Royal Court's approach to the assessment of integrity. In his written submissions he takes issue with certain other findings, at paragraphs 334 and 367 of the Royal Court judgment. For the reasons we set out below, we dismiss this Ground of Appeal.

263. Mr Fuller's fourth Ground of Appeal also renews contentions which he had advanced before the Royal Court in respect of two matters: (i) a contention that the SDM had erroneously applied a concept of collective responsibility for regulatory breaches; and (ii) a contention that the SDM had failed to consider what was reasonably required of a newly appointed non-executive director and had applied a standard of "*perfection".* For the reasons set out below, we dismiss this Ground of Appeal.

Mr Tattersall

264. The SDM made seven specific findings of dishonesty in respect of Mr Tattersall. These were set out in paragraph 6568 of the Decision. As the Royal Court observed (paragraphs 428 to 434 of the Royal Court judgment), there are certain other passages of the Decision in which the SDM appeared to make findings of dishonesty. It would appear that before the Royal Court the parties focused on the seven findings at paragraph 6568 of the Decision and the Royal Court addressed each of these.

265. In relation to Mr Tattersall, the Royal Court set aside: (i) a finding of dishonesty in respect of the promotion of the Cayman Fund (paragraphs 467 to 472 of the Royal Court judgment); and (ii) a finding of dishonesty in respect of the continued use of PIP promissory notes (paragraphs 486 to 494 of the Royal Court judgment). The Court also set aside a finding of dishonesty in respect of the preparation of false and inflated valuations for PGL's assets and substituted a finding of incompetence (paragraphs 474 to 485 of the Royal Court. judgment).

266. The Royal Court also addressed other findings of want of integrity and incompetence which the SDM had made in respect of Mr Tattersall. It set aside: (i) a finding of want of integrity in respect of the approach to politicians (paragraph 515 of the Royal Court judgment); and (ii) a finding of want of integrity in respect of the proposal to backdate a "bump" for Mr Fuller (paragraphs 516 and 517 of the Royal Court judgment).

267. In this appeal the GFSC challenges the Royal Court's decisions in respect of the finding of dishonesty in respect of the Cayman Fund, and the findings of want of integrity in respect of the approach to politicians and the backdating proposal. These are addressed in the GFSC's Grounds of Appeal 2.3, 2.2 and 1 respectively. For the reasons we set out below we sustain each of these Grounds of Appeal. That nevertheless leaves in place certain findings by the Royal Court setting aside other findings of dishonesty against Mr Tattersall which had been made by the SDM.

268. For his part, Mr Tattersall contends, on various grounds, that all the findings against him which were sustained by the Royal Court should be set aside. We have dealt with the contentions advanced on his behalf in support of that contention based on compatibility with Article 6, material procedural error, inadequate reasons and failure to apply the Jurat unreasonableness test. We have rejected all of those contentions.

Mr Dewsnip

269. The SDM made eight findings of dishonesty in respect of Mr Dewsnip (paragraph 6045 of the Decision). The Royal Court set aside certain findings of dishonesty against him including findings in respect of: (i) the signature of solvency certificates in support of dividends to be paid from PIF (paragraphs 576 to 583 of the Royal Court judgment); and (ii) the promotion of the Cayman Fund (paragraphs 597 to 600 of the Royal. Court judgment). The GFSC challenges those particular decisions of the Royal Court in Grounds of Appeal 2.3 and 2.4 respectively. For the reasons we set out below we sustain those Grounds of Appeal.

Mr Moroney

270. The SDM made certain findings of lack of integrity, lack of competence, poor judgment and want of diligence in respect of Mr Moroney. He made a finding that Mr Moroney was objectively dishonest in respect of his preparedness to approve bank transfers even when he knew they were not in accordance with the Scheme Particulars or the PIP Promissory Notes. He also made a finding that Mr Moroney demonstrated a lack of integrity and want of probity and "was on at least some occasions objectively dishonest" in his dealings with creditors.

271. The Royal Court focused on the findings in relation to dishonesty. It set aside the finding that Mr Moroney was "*on at least some occasions objectively dishonest"* in his dealings with creditors (paragraphs 661 to 670 of the Royal Court judgment), although it upheld the finding of lack of integrity in that regard. The GFSC challenges that decision in Ground of Appeal 2.5. For the reasons we set out below we dismiss that Ground of Appeal.

272. For his part, Mr Moroney contends, on various grounds, that all the findings against him which were sustained by the Royal Court should be set aside. We have already dealt with the contentions based on compatibility with Article 6, material procedural error, inadequate reasons and failure to apply the Jurat unreasonableness test. We have rejected all of those contentions.

Findings of want of integrity: general observations

273. We recall that the regulatory regime requires that "*every person who is, or is to be, a director, controller, partner or manager of the applicant or licensee, is a fit and proper person to hold that position".* Further, in *"determining whether a person is a fit and proper person to hold a*

licence or a particular position, regard shall be had to" among other things "*his probity, competence, experience and soundness of judgment for fulfilling the responsibilities of a licensee or (as the case may be) of that position …".* Separately, the regulatory regime requires that "*[t]he business of the applicant or licensee is or, in the case of a person who is not yet carrying on business regulated by this Law, will be carried on" inter alia "with prudence and integrity".*

274. In the Decision, the GFSC made findings against the individual Respondents of a want of "*integrity*". Mr Fuller's third Ground of Appeal, which was primarily focused on two particular findings which we will address below, criticised these references, on the footing that whilst it is a requirement that the business of a licensee be carried on inter alia with "*integrity",* when considering whether an individual is a fit and proper person to hold a particular position in licensed entity, regard is to be had inter alia to "*probity".* In his written submissions, Advocate Dawes suggested that this invited a question as to whether the SDM had misunderstood the regulatory system. Although he recognised that in *Guernsey Financial Services Commission v. Domaille* [2024] GCA 003 at paragraph 116, the Court of Appeal had treated the two concepts as interchangeable, he noted that in *Robilliard v. Chairman of the Guernsey Financial Services Commission* [2023] GCA 035 the Court had treated a want of integrity as a lesser matter than a want of probity.

275. The proposition that there is a difference between the concepts of "*integrity"* and "*probity"* was not developed. On the contrary, Advocate Dawes expressly accepted during the oral hearing that they are interchangeable. Accordingly, like the Court of Appeal in *Domaille*, we proceed on that footing. In any event, a finding of want of integrity is demonstrably relevant to whether an individual is a "*fit and proper person"* to be a director, controller, partner or manager of a regulated entity in the financial services sector. Whilst "*integrity*" may not be explicitly referred to in paragraph 1 to Schedule 4 to the Protection of Investors Law (and the equivalent provisions in the other Regulatory Laws) as one of the considerations to be taken into account when determining whether an individual is a fit and proper person to exercise regulated functions, neither is honesty (other than through paragraph 1(2)(c)). These are both plainly highly relevant to determining whether an individual is a fit and proper person to hold a responsible position in a regulated entity. That suggests that the list of considerations set out in paragraph 1 is not exhaustive. In any event, dishonesty and want of integrity may be regarded as going to the "*probity … and soundness of judgment*" of an individual, when assessing whether the individual is a fit and proper person.

276. We adopt the analysis of the law in relation to the concept of integrity set out in the *Domaille* judgment*, supra,* at paragraphs 117 to 126. It suffices to mention the following points.

277. First, there is a distinction between dishonesty and want of integrity. It is possible for a person to lack integrity without being dishonest. "*In professional codes of conduct, the term 'integrity' is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members … The underlying rationale is that the professions have a privileged and trusted role in society. In return they are required to live up to their professional standards": Wingate v. Solicitors Regulation Authority* [2018] EWCA Civ 336, para. 97.

278. Second, the approach which falls to be taken to assessing integrity is consistent with the approach to assessing dishonesty articulated by the UK Supreme Court in *Ivey v. Genting Casinos (UK) Ltd* [2018] AC 391. That test is solely objective. In *Ivey,* the Supreme Court held that, in order to justify a finding of dishonesty, the fact-finding tribunal must first establish the actual state of the individual's knowledge or belief of the facts. Once that has been established, the question of whether his conduct was honest or dishonest is to be determined by applying the objective standards of ordinary decent people. There is no requirement that the individual appreciate that what he has done is, by those standards, dishonest.

279. Third, similarly, in order to justify a finding of want of integrity against an individual, the fact-finding tribunal must determine the state of the individual's knowledge or belief of the facts; but the test for want of integrity is an objective one to be applied in light of the findings about the individual's knowledge or belief of the facts. *"Integrity"* connotes "*moral soundness, rectitude and steady adherence to an ethical code": Newell-Austin v. Solicitors Regulation Authority* [2017] EWHC 411 (Admin), para. 47. It is not necessary for there to be any finding that the individual knew or believed that they were doing something wrong.

280. Against that background, we turn to address the various Grounds of Appeal.

GFSC Ground of Appeal 1: backdating

281. The SDM made a finding that Mr Tattersall had made a proposal to Mr Fuller to backdate a "bump" in the interest rate on an investment which Mr Fuller had made in the PIF Scheme. The Decision quoted (at paragraph 5455) an email from Mr Tattersall to Mr Fuller which stated:

> "*We will also need to calculate the bump in your return to the family rate that you've had on your existing holdings. From memory I think we agreed to back date this to 1 January 2015 but we can agree the figures and process when I see you."*

It also quoted Mr Fuller's reply:

> "*I am happy with the back dating to 1 Jan. 2015."*

282. On the evidence available to the SDM, no record was in fact backdated and no additional backdated amount was paid to Mr Fuller or credited to his account. Nevertheless, the SDM regarded it "*as reflecting adversely on Mr Fuller's integrity that he was content with such a proposal, or with it being characteristic of the business and accounting practices of a company of which he was a director"*. It also held, as regards Mr Tattersall that he "… *was proposing to backdate the interest rate on existing investments which had been held in PIF, and treat Mr Fuller preferentially; both of which reflect adversely on his integrity."*

283. The Royal Court concluded (at paragraph 365 of its judgment) that "*in the absence of anything coming of the exchange"* this was not a finding which was open to SDM. The Bailiff observed:

> "*… this is more akin to an attempt to affect his [ie Mr Fuller's] integrity than capable of being an actual finding that there was a want of probity. I take the view that the starting point needed to be by reference to the analysis of integrity now found in*

Domaille. If so, it really ought to be not meeting higher standards expected of a professional, where there are actual consequences of not meeting those standards."

284. The GFSC challenges the Royal Court's conclusion that the finding of want of integrity was not open to the SDM. Advocate Hill contended that the reference to "*actual consequences"* disclosed that the Royal Court misunderstood the relevant legal test. A requirement that there be "*actual consequences"* would be flawed in the regulatory context, because it would allow someone to remain licensed simply because the regulator cannot prove that conduct which disclosed a want of integrity had *"actual consequences".* The conduct in question, argued Advocate Hill, was Mr Tattersall's proposal and Mr Fuller's acceptance of it. He contended that, if the Royal Court had applied the test correctly, it would have concluded that all that was relevant to the assessment of whether the conduct of Mr Tattersall and Mr Fuller exhibited a want of integrity was their state of knowledge at the time, and, having regard to that state of knowledge, whether the conduct amounted to a want of integrity. The SDM's finding disclosed something more than "*mere contemplation"* of behaviour; there was a proposal by Mr Tattersall, to which Mr Fuller agreed. The fact that nothing ultimately came of the exchange did not, in these circumstances, bar a finding of want of integrity.

285. Advocate Dawes, on behalf of Mr Fuller, accepted that "*as a matter of law, actual consequence is not required for a finding of want of integrity".* However, he contended that the GFSC's argument focused too narrowly on a single phrase in the Bailiff's judgment. He observed that there is an important distinction to be drawn between "*merely contemplating an action and steps taken sufficient for a finding of want of integrity to be made. The mere contemplation of an action is not, it is submitted, sufficient for a finding of want of integrity and the reality here is that matters did not proceed beyond that stage".*

286. Advocate Dawes also took issue with the underlying analysis in the Decision. The Decision had focused on "*integrity",* when the relevant criterion was in fact "*probity*". The SDM had not gone through the requisite two-stage analysis. Mr Fuller had put forward two witness statements and an email from experienced fund professionals in support of the proposition that what was proposed was unexceptional and standard practice. The SDM, whose qualification to assess standards in an industry of which he had no experience was in doubt, had rejected that evidence even though there was no contrary evidence.

287. We agree with the GFSC that the Royal Court erred in law. The Court correctly stated that the starting point required to be the analysis of integrity now found in *Domaille.* But the Court then went on to characterise this in the following way. "*... it really ought to be not meeting the higher standards expected of a professional where there are actual consequences of not meeting those standards".* The reference to "*actual consequences"* falls to be read along with the Court's characterisation of what happened as "*more akin to an attempt to affect his integrity than capable of being an actual finding that there was a want of probity".* The Court went on to observe that "*in the absence of anything coming of the exchange"* the finding in question was not open to the GFSC. It appears to us, in light of these passages, that the Court was indeed proceeding on the basis that "*actual consequences"* were a necessary precondition to a finding of a want of integrity or probity.

288. Advocate Dawes correctly accepted that "*actual consequences"* are not required, as a matter of law, for a finding of want of integrity. The Court in *Domaille* concluded (paragraph 122) that there is:

> *"... no real difference between the Ivey approach in determining dishonesty and the correct approach to assessing probity. We agree with the decision in Newell-Austin v. Solicitors Regulation Authority [2017] EWHC 411 (Admin) where Morris J held that integrity connotes moral soundness, rectitude and steady adherence to an ethical code ... and went on to explain that, while the test for lack of integrity was objective, the state of a person's knowledge was nevertheless relevant to determining whether they had acted without integrity."*

289. We do not accept Advocate Dawes' submission that the mere contemplation of a particular course of action cannot, as a matter of principle, justify a finding of want of integrity or probity (although, in the absence of some overt act, there will likely be no evidence that the course of action has been contemplated). The very fact that an individual is prepared to contemplate a particular course of action which would, objectively, involve a want of "*moral soundness, rectitude and steady adherence to an ethical code"* might, depending on how far the individual takes matters, justify a finding of want of integrity or probity. If the individual, having contemplated such a proposal, decides not to act on it, that might well, depending on the circumstances, justify concluding that they have, in fact, acted with integrity or probity. But that is not what happened in this case, where Mr Tattersall made the proposal and Mr Fuller agreed to it. As Advocate Hill contended, this was not "*mere contemplation"* of a course of action. Whilst the proposal was not implemented, we were shown no evidence that this was because either Mr Tattersall or Mr Fuller had concluded, on reflection, that it would have been improper to carry it through.

290. Advocate Dawes sought to impugn the analysis of this issue in the Decision. It is not, in our view, open to him to do so in this appeal. The appeal before us is an appeal against the Royal Court's decision. The issues in the appeal are focused by the parties' Notices of Appeal. The Royal Court's finding in relation to this matter was based on the error of law to which we have referred. The Court does not address any alternative argument in its judgment; and neither Mr Fuller's Notice of Appeal nor his Rule 5.2 Notice contains any contention that the Royal Court erred in that regard.

291. We accordingly sustain the GFSC's first Ground of Appeal.

GFSC Ground of Appeal 2.1: interaction with politicians

292. This Ground of Appeal challenges the Royal Court's treatment of findings made by the SDM against Mr Fuller, Mr Tattersall and Mr Dewsnip in relation to an approach which was made to the Chief Minister, and a meeting with a senior civil servant, in late June 2016. The background to those events was the SEC action in the United States on 7 June 2016 and a decision by the GFSC to impose conditions on PIP and PIF, which prevented those entities from establishing new cells or carrying on new business.

293. The SDM found that from about 24 June 2016, Mr Fuller, Mr Tattersall, Mr Dewsnip and others (notably Mr Everitt) embarked on a strategy to bring political pressure to bear on the GFSC

with a view to persuading the GFSC to change its decision not to lift or vary these conditions, or at least to buy time to explore other options before the Commission took more intrusive enforcement action. Specifically, Mr Everitt sent an email to the Chief Minister on 26 June 2016, with a view to setting up a meeting. Mr Fuller and Mr Everitt subsequently attended a meeting with a Mr Walker, the senior civil servant responsible for dealing with the GFSC. The email was copied to Mr Fuller.

294. The Decision contains the following findings.

(i) Mr Fuller acknowledged to the SDM at interview that the email of 26 June 2016 contained inaccurate information. The SDM found that: "*he did not correct this at the time, and went ahead with the meeting with Mr Walker [on behalf of the Chief Minister] notwithstanding that it was proceeding on a premise Mr Fuller himself must have recognised at the time to be false".*

(ii) In advance of the meeting with Mr Walker, the directors (including Mr Fuller, Mr Tattersall and Mr Dewsnip) had a telephone meeting in which they agreed that Mr Fuller and Mr Everitt would take a "*line"* at the meeting with Mr Walker to the effect that Providence's business model had been discussed with the GFSC four years previously but that the GFSC's risk appetite had changed. The SDM concluded that this was "*a misrepresentation of the position and implied that there would be no acknowledgement of the issues which had been identified as of legitimate concern to the Commission and had led to the imposition of the conditions ..."* The SDM found that: "*Given the state of their knowledge ... none of the directors who participated in that telephone call can honestly or reasonably have believed that the Commission had four years previously approved the business model which had been and was being operated by Providence. Their collective agreement was to approach Mr Walker on a basis they knew to be false."*

(iii) Following the meeting with Mr Walker, Mr Fuller emailed his fellow-directors confirming that: "*We took the line we discussed this afternoon."*

295. The SDM found that, at this time, the Providence companies in Guernsey "*were unable to pay all their debts as they fell due and were coming under significant pressure from creditors, including employees".* He also found that Mr Fuller was aware of the financial position.

296. The Decision contains the following analysis:

"*1790. It is fundamental in democratic society that citizens, including directors of regulated companies, are free to discuss their affairs with elected politicians and civil servants. That necessarily includes the right to complain about and criticise actions of the Commission. The mere fact of an approach to a politician or a civil servant, even in the context of a regulatory investigation, would not of itself necessarily be improper or reflect adversely on the probity of the directors concerned.*
1791. However, it is clear ... that [Mr Fuller] and Mr Everitt and the other directors who had agreed the 'line' to be taken at the meeting with Mr Walker were not merely wishing to draw matters to the attention of politicians in this case. They were hoping

to influence the course of Commission's regulatory investigation and decision-making by enlisting the support of politicians, with the immediate objective of opening a channel for communications, if they could, with the Commission's Director General (which would imply going over the heads of the Commission's officers who were directly involved in the investigation). …

1792. Moreover, the 'line' they agreed to adopt, and which from the contemporaneous and later evidence was pursued at the meeting with Mr Walker, was a false, incomplete and potentially deceptive one.

1793. It was simply untrue that the business model had been described to the Commission four years previously and had not changed. …

1794. It was also misleading to suggest that the Commission's 'risk appetite' had changed …

1795. At the same time, following the agreed 'line' meant that Mr Walker – and through him senior politicians – were being asked to support Providence without being made aware of salient and material features of their circumstances, including:

1795.1. that PIF (and other vehicles in the group) were reliant on money from new investors to pay dividends and redemptions;

1795.2. that in the absence of confirmations regarding future cashflows from other parts of the group … PIF's solvency was 'unclear';

1795.3. that PIF was about to be in default of its statutory obligation to file accounts but did not have auditors appointed.

1796. In the circumstances of this case, therefore, it is the manner in which the approach was made which demonstrates a lack of integrity and is to be taken into account in assessing the probity of the individual directors, together with their subsequent conduct in the course of the Commission's investigation."

297. Against that background, the SDM reached the following conclusions in relation to Mr Fuller, Mr Tattersall and Mr Dewsnip:

(i) Mr Fuller:

"*5448. At the meeting with Mr Walker, Mr Fuller and Mr Everitt took the line … that Providence's business model had been discussed with the Commission four years previously and had not changed but the Commission's risk appetite had changed. This was a misrepresentation as Mr Fuller was aware. Neither manner in which the business of PIF was being conducted, nor the financial circumstances of PIF and other Providence companies, were disclosed to Mr Walker. His support and that of senior politicians was sought on a false basis.*

5449. That reflects adversely on Mr Fuller's integrity.

5450. When he was interviewed, Mr Fuller said that his only real expectation was to obtain Mr Walker's advice … In his Responses to the Draft Report he asserted that the purpose of the meeting was 'to discuss States policy and risk appetite'. In his response to the Fuller Memorandum, the meeting is characterised as 'a meeting regarding change in risk appetite'.

5451. From contemporaneous email correspondence … and from Mr Fuller's own account when interviewed … and in his Affidavit, the purpose of the meeting was to seek an intervention by politicians to open a new line of communication with the Commission, if possible with the Director General, and buy time for the Providence

companies which had a significant problem with the business model for PIF and understood at the time that they had a liquidity problem.
5452. The Commission regards Mr Fuller's characterisation of the meeting as only to obtain advice and only to discuss changes in risk appetite as disingenuous and also reflecting adversely on his integrity."

(ii) Mr Tattersall:

"*6410. Mr Tattersall has represented the conversation in which he participated [ie the telephone meeting on 28 June 2016] 'concerned speaking to political contacts to reopen the most effective communication channel with the Commission with a view to trying to agree a way forward for the benefit of investors'. Had the conversation been limited to that topic, it would have been unexceptionable. However, Mr Fuller recorded in his email reporting after the meeting to those who had been on the call that he and Mr Everitt 'took the line that we discussed in our call this afternoon'. That was the 'line' summarised in the preceding paragraph. It was a misrepresentation, as Mr Tattersall was aware. ...*
6411. The Commission regards Mr Tattersall as having been party to an attempt to enlist the support of Mr Walker and of senior politicians on a false basis. That reflects adversely on Mr Tattersall's integrity."

(iii) Mr Dewsnip:

"*5902. Mr Dewsnip was party to an attempt to enlist the support of Mr Walker and of senior politicians on a false basis. That reflects adversely on Mr Dewsnip's integrity."*

298. The Royal Court set aside the SDM's finding against Mr Fuller of want of integrity in relation to this matter. The Court made the following observations:

"362. *... one of the consequences of the GFSC using SDMs who have no real idea as to how the Bailiwick works is that they may not appreciate the closeness that those in the financial services sector have to some elected members. That is a factor that I believe has to be taken into account.*
363. I take the view that one of the many benefits of the smallness of the community is that people should not be judged by the standards that might be relevant in larger places. Whilst the GFSC is an independent regulator, there will always be a relationship with one or more of the Committees of the States of Guernsey. As a result, I consider that anyone who wishes to address the consequences of what might be happening should be able to raise matters with one or more of the elected members. ... In circumstances where the wheels were coming off the Providence project, I think it was inevitable that those who had existing relationships with the more senior politicians would see what, if anything, was capable of being done. In other words, making the approach and thereby securing a meeting with a civil servant would be the type of action that anyone able to pursue those personal relationships would do. In the event nothing came of it. I think that is important. As it is put in para. 5451, 'the purpose ... was to seek an intervention by the politicians to open a new line of communication ... and buy time for the Providence companies'. I take the view that this is an accurate summary of what took place and so question whether there was an effective basis for a finding of want of integrity.

364. … I take the view that using whatever contacts are available to any person working in the financial sector is understandable and should not result in a finding of want of integrity. …"

299. The GFSC contends that the Royal Court was plainly proceeding on a misunderstanding of the SDM's findings. The findings of want of integrity were based not on the fact of approaching politicians and senior civil servants (as the Royal Court appears to have understood), but because the approach had been made on a knowingly false and misleading basis. Given the findings in that regard, the absence of actual consequences could not justify the Royal Court's conclusion that the SDM should not have made a finding of want of integrity. That conclusion, in the circumstances, involved an error of law. The observation that "nothing came of it" indicates that the Court was proceeding on the same error of law as was disclosed in the finding challenged in Ground 1.

300. Mr Fuller's written submissions attack the SDM's findings of fact. They do so in order to advance the contention that the Royal Court, applying a *Walters* unreasonableness test, was entitled to re-evaluate the evidence and to disagree with the SDM's conclusion. Mr Tattersall's submissions are that the Bailiff did not proceed on the basis of any misapprehension as to the facts. Rather, for the contextual reasons set out in paragraph 363 of the Royal Court judgment, including but not limited to the absence of actual consequences, the Bailiff disagreed with the SDM's characterisation of what had happened. A decision-maker is entitled to take into account, in a fact-sensitive inquiry, the absence of actual consequences.

301. We agree with the GFSC. It is plain, when the Decision is read as a whole, that the SDM accepted that the mere fact of an approach to politicians or senior civil servants would not, of itself, justify a finding of want of integrity. That is apparent from paragraph 1790 of the Decision, which we have quoted above. The SDM's findings of want of integrity were based on the manner of the approach and not simply on the fact that an approach had been made. Specifically, those findings were based on findings that the approach had been made on a knowingly false and misleading basis. The Bailiff does not hold that the SDM was not entitled to make primary findings to that effect. The Bailiff's conclusion as regards the purpose of the approach, mentioned at paragraph 363 of his judgment, does not affect those findings. Regardless of whether or not the approach to the Chief Minister had any consequences, the SDM was accordingly entitled to find that the approach, made on a knowingly false and misleading basis, involved a want of integrity on the part of Messrs Fuller, Tattersall and Dewsnip. The Royal Court's conclusion to the contrary proceeds on a patent misunderstanding of the SDM's findings. In any event, faced with findings that the approach was made on a knowingly false and misleading basis, the Royal Court, if it had directed itself properly in law, could not have taken the view (whether on a *Waters* unreasonableness basis or otherwise) that the SDM was not entitled to conclude that these events disclosed a want of integrity.

302. We recognise that in a small community such as Guernsey, those involved in the financial services sector may well have contact with politicians and senior civil servants. However, that does not mean that they should not be judged by the same standards of integrity as would apply in larger jurisdictions. If anything, the potential closeness of the community may demand particular scrupulousness on the part of all of those concerned in order to avoid any abuse, or any perception of the abuse, of existing relationships. The small size of the Guernsey community cannot justify treating an attempt to secure political support, on a knowingly false

and misleading basis (which is what the SDM held had happened in this case), as anything other than lacking in integrity.

303. We accordingly sustain the GFSC's Ground of Appeal 2.1.

GFSC Ground of Appeal 2: Mr Fuller's representations to the GFSC

304. This Ground of Appeal challenges the Royal Court's treatment of findings by the SDM that aspects of Mr Fuller's representations to the GFSC reflected a want of integrity. We have referred to those findings above and have concluded that the Royal Court erred in not concluding that these findings were vitiated by a material error as to the procedure. This Ground of Appeal is accordingly academic; and since the SDM's findings were made without giving Mr Fuller a fair opportunity to comment on them, it would not be appropriate for us to address the substance of the GFSC's argument.

305. In these circumstances, we dismiss the GFSC's Ground of Appeal 2.2.

GFSC Ground of Appeal 2.3: the Cayman Fund

306. Ground of Appeal 2.3 challenges the Royal Court's treatment of certain findings of dishonesty against Mr Tattersall and Mr Dewsnip in relation to the Cayman Fund.

307. In relation to Mr Tattersall, the SDM made the following findings:

> "*6431. While Mr Tattersall was a director of PIMIL, PIMIL continued in its failure to carry on the restricted activity of management in accordance with the principal documents for the Cayman Fund, and failed properly to perform its role of Investment Manager of the Cayman Fund [paras. 3249-3256].*
> *6432. Mr Tattersall failed to take sufficient steps to ensure that PIMIL was effectively performing its role as Investment Manager of that Fund.*
> *6433. Mr Tattersall was aware throughout that the Cayman Fund was not being managed on the basis on which it was promoted, and that investors were investing on a false basis. This was dishonest."*

308. The Royal Court set aside the finding of dishonesty at paragraphs 6433. It did so because it did not consider that paragraphs 6431 and 6432, and the material to which those paragraphs specifically cross-referred, provided a basis for that finding, which it characterised as an "*assertion*": see paragraph 417 of the Royal Court judgment.

309. In relation to Mr Dewsnip the SDM made similar findings:

> "*5933. Similarly, while Mr Dewsnip was a director of PIMIL, PIMIL continued in its failure to carry on the restricted activity of management in accordance with the principal documents for the Cayman Fund, and failed properly to perform its role of Investment Manager of the Cayman Fund [paras. 3249-3256].*
> *5934. Mr Dewsnip failed to take sufficient steps to ensure that PIMIL was effectively performing its role as Investment Manager of that Fund.*

5935. Mr Dewsnip was aware throughout that the Cayman Fund was not being managed on the basis on which it was promoted, and that investors were investing on a false basis. This was dishonest."

310. As with Mr Tattersall, the Royal Court looked at the explicit cross-references from these paragraphs to other parts of the Decision and did not find any reference to Mr Dewsnip there. The Court concluded that there had been a failure to address satisfactorily the first limb of the *Ivey* test; and that there was accordingly no proper basis for the finding of dishonesty: see paragraphs 598-600 of the Royal Court judgment.

311. Advocate Hill, on behalf of the GFSC, pointed out that the SDM had, in fact, set out findings about Mr Tattersall's knowledge in a section entitled "*Mr. Tattersall's knowledge and understanding"* (paragraphs 6245-6280 of the Decision), in which he made findings material to the finding of dishonesty in relation to the Cayman Fund. In that section, he had made a specific finding in relation to the Cayman Fund which was supported by evidence. The SDM had made similar findings about Mr Dewsnip's knowledge and understanding at paragraphs 5767-5777 of the Decision. In confining its attention to the paragraphs to which there was a specific cross-reference at paragraphs 6431-3 and 5933-5 of the Decision, the Royal Court, so it was argued, had plainly failed to review the SDM's decision as a whole and to identify the basis for the findings under challenge. In any event, the conclusion was irrational when there were detailed findings of fact about Mr. Tattersall's knowledge.

312. Advocates Greenfield and Bamford, on behalf of Mr Tattersall, submitted that the Royal Court had made no error of law. The Royal Court was entitled to proceed on the footing that the passages specifically cross-referenced by the SDM were those upon which the SDM relied. In any event paragraph 6433 was concerned with the period when Mr Tattersall was a director of PIMIL (ie from August 2015), whereas the other parts of the Decision upon which the GFSC relied related to a period of time before August 2015. Any error of reasoning was on the part of the SDM not the Royal Court.

313. We do not accept the submission advanced on behalf of Mr Tattersall that the findings at paragraphs 6245-6280 of the Decision were relevant only to the period prior to his appointment as a director of PIMIL. They comprise findings which justified the conclusion that (para. 6273), as Mr Tattersall had admitted, at "*the time of his appointment as a director of PIMIL … he was on notice of the very serious issues going to the heart of the operation of the PIF Fund*". As the SDM recognised, the fact that he was already on notice of "*very serious issues*" was directly relevant to his conduct after his appointment as a director.

314. Specifically, there is a finding (at paragraph 6259 of the Decision) that Mr Tattersall knew well before February 2015 "*that it was the deliberate strategy of the Providence Group that 100% of money raised from investors in PIF cells would not be transferred to a factoring business in Brazil*". The SDM rejected Mr Tattersall's submission that he was unaware that this strategy was in breach of the Scheme Particulars (para. 6263 of the Decision). The SDM made a finding that throughout the period of Mr Tattersall's directorship he was aware that investors had subscribed for shares in PIF cells on the basis and in the expectation that their money would be used to finance debt factoring in Brazil (para. 6279 of the Decision). The SDM made a further finding that:

"Mr Tattersall is similarly taken to have been familiar with the terms on which cells of the Cayman Fund were promoted and to have been aware that investors in the Cayman Fund had subscribed and were subscribing on the basis and in the expectation that their money would be used to finance debt factoring in Brazil."

None of these findings was overturned by the Royal Court. They are findings which supported the finding of dishonesty made at paragraph 6433 of the Decision. It is trite that a decision requires to be read as a whole. The mere fact that the SDM did not specifically cross-reference those findings does not mean that they should not be taken into account when assessing whether the SDM was entitled to make the finding of dishonesty which is under challenge. The Royal Court accordingly erred in setting that finding aside. There was a similar finding in respect of Mr Dewsnip and we are likewise satisfied that the Royal Court erred in setting aside the finding of dishonesty against Mr Dewsnip recorded at paragraph 5935 of the Decision.

315. We accordingly sustain the GFSC's Ground of Appeal 2.3.

GFSC Ground of Appeal 2.4: signature of solvency certificates

316. Ground of Appeal 2.4 challenged the Royal Court's treatment of a finding of dishonesty against Mr Dewsnip in relation to the signature of solvency certificates. At paragraphs 5806ff of the Decision, the SDM made the following findings:

"*5806. On 13 occasions between January 2013 and 31 December 2014, Mr Dewsnip is recorded as having attended a meeting of the PIF Board which approved a resolution to pay a dividend purportedly on the basis that there was a 'surplus' in the PIF cells. On one of those occasions he signed the relevant pro-forma minute as Chairman of the meeting. …*

5807. At those times, none of the loans which had been made to BPA or PFM had fallen due for repayment under the contractual terms, and no money had been received from PFM to produce a surplus in any PIF cell …

5808. In his capacity as a director of PIF, Mr Dewsnip signed Solvency Certificates which were required to support each dividend declaration. It is unclear whether he did so at the time of the original meetings. In the course of PwC's audit of PIF, PwC discovered that the Solvency Certificates were missing and fresh Solvency Certificates were created at that time …

5809. The Solvency Certificates were in identical terms and each included the following statement …:

> *'Each of the cells had received subscription monies from shareholders in exchange for their shares. All of the money raised in these subscriptions is invested by the Company into underlying investments that pay a gross fixed return of 24% per annum'.*

5810. These statements were untrue …:

5810.1 The only contracts governing loans between PIF and BPA or PFm were the 8 Agreements which Mr Dewsnip has drawn to the attention of the Commission and which did not provide for a return of 24%; and, in any event

5810.2 not all the money raised from subscription for cells in PIF had been invested in 'underlying investments that pay a gross fixed return of 24% per annum'.

5811. Signing Solvency Certificates containing statements which Mr Dewsnip knew to be untrue was dishonest… (Mr Dewsnip was at best reckless at the original dates when the resolutions were passed because he had no objective basis on which to believe the statement that all the money had been invested in such 'underlying investments'; the certificates had to be produced or re-produced at the time of the audit because the originals were not located, and by that time Mr Dewsnip knew that the statement was untrue, but still signed them.)"

317. The Royal Court concluded (para. 579 of its judgment) that there was no "*finding, even on the balance of probabilities, relating to the first limb of" Ivey.* The Court observed (paras. 580-581):

> "*It is possible that para. 5811 purports to refer not to when the original solvency certificates were signed but rather to them being recreated at the time of PwC's audit. … If that were to be the case, then there should, in my view, have been greater clarity to focus on the Third Appellant's state of knowledge at that time. … On the basis that there is an acceptance that even these later recreated certificates were backwards looking, I am not persuaded that it would be appropriate to infer that the dishonesty finding relates to anything other than what the Third Appellant's knowledge or belief was at the time of signing the original certificates … Accordingly, I consider that the relevant date for establishing knowledge or belief subjectively had to be in 2013 and 2014."*

318. Advocate Hill, on behalf of the GFSC contended that there is no real room for doubt as to the SDM's findings. The finding at paragraph 5811 of the Decision makes clear, so he said, that it was Mr Dewsnip's signature of the certificates during the PwC audit, when he knew they were false, which justifies the finding of dishonesty. Paragraph 5811 contained clear findings about the state of Mr Dewsnip's knowledge.

319. We agree. The Royal Court appears to have taken the view that, even if the relevant date was the signature of the certificates during the PwC audit, these certificates were "backward looking" and that it was Mr Dewsnip's knowledge at the time to which the certificates related (when, putatively, the original certificates, if there had been any, would have been signed) (and when Mr Dewsnip's state of knowledge would have been "*at best reckless")* which was relevant. If that was the Royal Court's view, we do not consider that this was an approach which was sound in law. There does not appear to be any real doubt, given the findings made by the SDM, that when Mr Dewsnip signed the certificates, during the audit, he knew that they were not true. It was dishonest for him to sign them at that time, with that state of knowledge, even though the intention was to rectify the absence of certificates from an earlier date.

320. We accordingly sustain the GFSC's Ground of Appeal 2.4.

GFSC Ground of Appeal 2.5: Mr Moroney's statements to creditors

321. Ground of Appeal 2.5 challenges the Royal Court's treatment of a finding which the SDM made against Mr Moroney (at paragraph 7225 of the Decision) in the following terms:

> *"Mr Moroney … demonstrated a significant lack of integrity and want of probity, and was at least some occasions objectively dishonest in his dealings with creditors over a period of at least 6 months from the end of 2015, in that he was prepared to make statements to creditors regarding the prospect that they would be paid when there was no reasonable or objective basis for him to be certain that the statement he was making was true"*

322. This finding was made against the background of the SDM's examination of the primary factual material at paragraphs 7159 to 7202 of the Decision, which concluded with a finding in the following terms (paragraph 7202 of the Decision):

> "*Mr Moroney was prepared to make, and on occasions did make, statements indicating that PWGL and other companies were or would in the near future be in a position to make payments in respect of debts which were about to fall due for payment or which were overdue when he did not immediately have access to available funds from which to make such payments, and when there was no reasonable or objective basis for him to be certain that the statement he was making was true … Mr Moroney was therefore at least reckless as to the truth of the statements he was making on which he was expecting third party creditors to rely … this conduct fell short of the high standard of integrity and the standards of diligence, probity and competence which are required of the manager of a licensee."*

This summary of the body of evidence which had been discussed in the preceding paragraphs does not include the reference to "*objective dishonesty"* which appears in paragraph 7225 of the Decision.

323. In the course of his analysis, the SDM also referred to a statement by Mr Moroney in his written representations: "… *it got to the stage that if I believed £40,000 was needed for creditors by a certain date, I told Mr Buzaneli £50,000 was needed and factored in received £25,000 to manage the situation."* The SDM observed (at paragraph 7171 of the Decision): "*Mr Moroney does not believe that this was lying to Mr Buzaneli, although it clearly was, and that also reflects adversely on Mr Moroney's integrity".*

324. The Royal Court upheld the finding at paragraph 7225 of the Decision, insofar as it concerned a lack of integrity, but overturned the finding of dishonesty. The Royal Court stated (paras. 668 to 670 of its judgment):

> *"668. It is apparent that there were difficulties in settling creditors in 2016. It is also clear from the facts found that this was a part of [Mr Moroney's] responsibilities. Whilst he was placed in a difficulty position, I am further satisfied that he was making promises to creditors when it was unclear to him whether he would be able to fulfil those promises. At the end of para. 7192 it is stated that he 'regarded this as a reasonable business practice, even in the context of a licensed entity.' As a professional person, the standards expected of him to meet the minimum criteria for licensing, especially as they relate to probity, mean that he had to wonder whether or not he was acting without appropriate levels of propriety.*

669. I take the view that this issue falls into two parts. The first is whether or not, with the knowledge or believe that [Mr Moroney] had at the time, this was failing to meet the high standards expected of him in his capacity as a manager. The second stage is to consider how much of a failing this was given everything that was going on in the Providence entities at that time and whether this meant that he was simply doing his best to manage a difficult situation. Because of the split between these two considerations, I am satisfied that it was open to the GFSC to conclude that the manner in which [Mr Moroney] was dealing with creditors fell short of the standards expected of him. To that extent, I am satisfied that there could be a finding of lack of integrity or want of probity over that period. …

670. I question whether the second limb of the test [in Ivey] has been adequately addressed. The first limb from Ivey is to consider the facts found. The facts as I have just described them satisfy me that [Mr Moroney] had sufficient knowledge or belief in the situation to lay the foundation for a finding of dishonesty. However, whilst the SDM reaches the conclusion that at least on some occasions, but without identifying them, this was objectively dishonest, even on the civil standard of proof, I am not persuaded that an ordinary decent person would regard what was happening as objectively dishonest. It seems to me that the GFSC has approached this issue by reference to too high a standard of such a person. [Mr Moroney] was endeavouring to manage a situation not of his making for the benefit of his employer and potentially more widely than just his employer. With the benefit of hindsight, it is possible that a dim view can be taken of what he did but I consider that it is important to try to view what was happening in the light of what [Mr Moroney] had to deal with in real time. If that is the approach that the ordinary decent person would consider what was being said over those months, I am more inclined to regard that as not being dishonesty. Accordingly, although I think the absence of any express finding in the section on dealing with creditors, means it should not have been raised in para. 7225 as dishonesty, if I had to consider that issue then I would set aside that reference to dishonest but leave in place the findings of lack of integrity."

325. The Royal Court also overturned the finding at paragraph 7171 of the Decision that Mr Moroney had lied to Mr Buzaneli. The Royal Court stated (para. 665 of its judgment):

"*… it is difficult to see how misleading Mr Buzaneli, who it turns out was the principal fraudster, in order to obtain as much funding as possible to meet the responsibilities that [Mr Moroney] was found to have to perform is not accepted as being justified in the circumstances in which [Mr Moroney] found himself. I consider this finding to be harsh and unrealistic in the circumstances in which it is made. I have deliberately referred to what happened as misleading Mr Buzaneli rather than accepting that it can be characterised as lying. At para 7200 of the Decision there is acceptance by the GFSC 'that even a profitable and well-arranged business may on occasion face a temporary cash flow issue', which I consider should have informed the finding of want of integrity, although that paragraph ends with the finding by GFSC 'that there was a systemic and continuing failure to pay creditors as they fell due, in which Mr Moroney was directly implicated.' I further consider that it is important here to bear in mind that [Mr Moroney] was a manager and dealing with one of the directors, probably the main director involved with the providence entities, and that appears to have been overlooked. I am not saying that [Mr Moroney] was completely blameless but this*

finding in amongst the others should have been treated as a means of obtaining sufficient funds to keep as many creditors as possible satisfied."

326. Advocate Hill, on behalf of the GFSC, submitted that "*on a very basic level, promising creditors payments knowing there was no basis to believe they would be paid in accordance with that promise is dishonest by the standards of ordinary decent people … The SDM's finding was within the scope of reasonable decisions."* The Royal Court's decision was, he contended, wrong and irrational. "*While [Mr Moroney] may have been trying to manage a difficult situation, the problem was that, at times, he did so in a dishonest way. The standards of ordinary decent people do not generally permit people in difficult situations faced in their employment to act dishonestly. They do not permit people to lie to help their employers."* Similar points were made in relation to the specific finding about lying to Mr Buzaneli. These matters were, said Advocate Hill, relevant only to mitigation.

327. On behalf of Mr Moroney, Advocate Le Tissier pointed out that the finding of dishonesty at paragraph 7225 of the Decision was that there was no reasonable or objective basis for Mr Moroney "*to be certain*" that the statements he was making to creditors were true. He pointed out that this is different from a finding that the statements were known to be false. He criticised the SDM's approach as "*unrealistic*", "*unmoored from commercial reality*" and reflecting a "*puritanical understanding of commercial life*". He made the point that one of the purposes of the second limb of the *Ivey* test is to moderate such views. He referred us to *Wingate,* where the Court of Appeal observed: "*Obviously, neither courts nor professional tribunals must set unrealistically high standards, as was observed during argument. The duty of integrity does not require professional people to be paragons of virtue".* He invited us to conclude that the Royal Court's approach disclosed no error of law and was not perverse.

328. This Ground of Appeal challenges the Royal Court's decision to overturn the finding of dishonesty at paragraph 7225 of the Decision. Having read paragraphs 7159 to 7202 of the Decision, where the SDM narrates the primary factual position on this issue, we reject this Ground of Appeal. The GFSC's submission that "*promising creditors payments knowing there was no basis to believe they would be paid in accordance with that promise is dishonest"* does not reflect the SDM's findings. As Advocate Le Tissier pointed out, the SDM found that there was no reasonable or objective basis for Mr Moroney "*to be certain"* that statements made to creditors were true. That finding appears to have been deliberately framed to reflect the situation described in the primary factual narrative.

329. Much depends on precisely what was being said to creditors; but we do not find in the factual narrative set out in the Decision any specific example of a statement which was objectively dishonest (as opposed to reflecting a want of integrity). For example, Mr Moroney is said (at paragraph 7184 of the Decision) to have told one creditor that they would "*look to catch up with what's owed before the end of the month"* (emphasis added). That does not, on the face of it, represent a specific commitment to pay a specific amount by a specific time, without any reasonable belief that the payment would be made, such as would have justified a finding of dishonesty.

330. The Decision records Mr Moroney's position that he believed that the wider Providence Group was solvent and that, though there was a cash flow problem, the companies would come out at the other end with all liabilities met. Although the SDM finds (at paragraph 7054 of the

Decision; see also paragraph 7190) that Mr Moroney was sufficiently on notice from the lack of detailed information from Brazil for it to be unreasonable for him to rely on what he had been told about assets in Brazil, he does not find that Mr Moroney's belief was not honestly held by him. We consider that, in these circumstances, the Royal Court was entitled to conclude that the Decision did not contain the basis for the finding of dishonesty at paragraph 7225.

331. On the other hand, we consider that the Royal Court did err in relation to the statement to Mr Buzaneli. On the face of it, what is described at paragraph 7171 of the Decision is a deliberately false statement by Mr Moroney to Mr Buzaneli as to the amount of money needed to meet creditors by a certain date. That was objectively dishonest. That the false statement was made to a person who turned out to be the prime mover behind the fraudulent scheme and was made with a view to seeking to secure enough funds to continue to "manage" creditors may go to mitigation. It does not affect the dishonest character of the statement.

332. We accordingly sustain the GFSC's Ground of Appeal 2.5, but only in respect of the Royal Court's decision in respect of the finding at paragraph 7171 of the Decision.

Mr Fuller Ground 3

333. Mr Fuller takes issue with the Royal Court's treatment of two findings of want of integrity in the Decision: (i) findings in relation to an entity called Cornhill; and (ii) findings in relation to the revised Scheme Particulars. He also takes issue with certain specific findings made by the Bailiff at paragraphs 334, 337 and 367 of the Royal Court judgment.

Cornhill

334. According to the Decision, Cornhill was a Slovakian financial services business. LFS was not permitted to treat its relationship with Cornhill as an intermediary relationship and had no discretion to treat Cornhill as its customer. LMS accordingly required to ensure that appropriate CDD procedures in accordance with regulation 4 of the AML Regulations were undertaken on the individual clients of Cornhill who invested in cells in PIF. In fact, LMS erroneously treated Cornhill as an "intermediary" and not obtained CDD on the underlying individual investors as required by the law.

335. Breaches of the AML Regulations and the Rules in the Handbook relating to Cornhill were identified in July 2015 in a memorandum addressed to the Board of LMS. This was discussed by the Board in August 2015. Although the minutes recorded in terms that the "*only option"* was to request CDD on all those who had invested, the Board rejected that option and decided to take an approach which meant that they continued to treat Cornhill wrongly as an intermediary and continued to fail to obtain CDD on the individual clients.

336. Mr Fuller became aware of the issue when he saw the minutes and board pack from the August 2015 board meeting. The Board Pack for the November 2015 meeting, which Mr Fuller chaired, included a Compliance Officer's report which stated the position, and that "*underlying CDD should be obtained for all the investors …".* The Board noted the report but concluded that "*whilst Slovakia is not an Appendix C country, the due diligence standards followed by Cornhill were equivalent to the standards required by the GFSC in Guernsey".*

337. At a meeting in February 2016 which Mr Fuller chaired, he reported to the Board that followed a review of the Handbook he had "*determined"* that business could be accepted from Cornhill provided it was categorised and monitored as "high risk"; on that basis, and having "*satisfied ourselves that their procedures are FATF equivalent, we can consider Cornhill as our customer".* The Board accepted this recommendation. The SDM concluded that Mr Fuller's reading of the Handbook was "*incompetent and mistaken".*

338. Collas Crill identified the position in respect of Cornhill as "*a serious concern".* They gave unequivocal advice that Cornhill could not be treated as an intermediary, that whilst LFS continued to treat Cornhill as an intermediary it was in breach of the AML Regulations and Handbook rules, and that LDFS must reat the underlying Cornhill investors as its clients and obtain and verify CDD on them. Collas Crill recommended immediate steps to prevent further non-compliance and drew attention to the obligation to notify the GFSC of the material failure to comply with the AML Regulations and the Handbook.

339. Mr Fuller saw the Collas Crill report in March 2016. He did not take immediate steps to cause LFS to remedy the breaches, nor did he take steps to cause LFS to notify the GFSC of the breaches. Instead, he revisited his own analysis of the Handbook. He reiterated in an email the view which he had previously taken. The SDM concluded that: "*Instead of following the cogent and correct advice of Collas Crill, Mr Fuller encouraged the executive directors of LFS to continue with the inappropriate treatment of Cornhill".*

340. At a meeting in May 2016, the GFSC noted from LFS' board minutes a reference to a "*nominee investor which had been treated as an intermediary. But was not in an Appendix C country".* Mr Fuller told the GFSC that this issue had been identified during a compliance review, that the Board had debated it "*many times", "including taking legal advice"* but was "*satisfied that the matter was now resolved".* The SDM took the view that Mr Fuller's approach at that meeting was misleading and displayed a want of integrity. The reference to taking legal advice would convey the impression that the Board had followed that advice, when in fact the advice had been ignored.

341. The Royal Court concluded (at paragraph 356 of its judgment) that the SDM was entitled to make "*a finding of want of integrity in May 2016 because the First Appellant chose not to follow the correct advice that had been given by Collas Crill in respect of the Cornhill issue.* Mr Fuller takes issue with the Royal Court's conclusion. He contends that, since there is no finding that he did not honestly believe that his reading of the Handbook was correct (even though mistaken), the finding of want of integrity "*falls away".*

342. The GFSC acknowledges that the Royal Court fell into error in its description of the SDM's findings. The SDM did not find a want of integrity because Mr Fuller chose not to follow the advice given by Collas Crill. He found a want of integrity in the way that legal advice was relied on in explaining the position to the GFSC. We accept the GFSC's concession. It is apparent from paragraph 356 of the judgment that the Royal Court has misunderstood the finding which the SDM had made.

343. However, it does not follow that we can or should ourselves reverse the SDM's finding. Rather, our conclusion that the Royal Court has erred in its approach to the SDM's findings on this matter simply leaves those findings standing.

344. Although we accept that the Royal Court fell into error in the way that the Bailiff described the SDM's finding, it does not follow that the Royal Court was wrong to reject Mr Fuller's challenge. Mr Fuller's contention that because there is no finding that he did not honestly believe that his reading of the Handbook was correct (even though mistaken), the finding of want of integrity "*falls away"* is plainly misconceived. It elides honesty and integrity which, as we have already explained, are different concepts.

345. The Decision describes how Mr Fuller relied, in the context of seeking to reassure the GFSC that the matter had been resolved, on the fact that the Board had taken legal advice when, as he knew, the Board had rejected that advice and had not done those things which the lawyers had advised were necessary in order to comply with the law and the regulatory requirements. That was, on the face of it, misleading. Even if Mr Fuller honestly believed that his reading of the Handbook was correct (and the legal advice therefore wrong) a finding that referring to that advice in the meeting with the GFSC displayed a want of integrity was open to the GFSC.

346. Mr Fuller contends that the Bailiff did not apply the *Walters* ground to this issue. Standing the factual findings in the Decision on this issue, there would, in our view, have been no basis for concluding that the finding of want of integrity on this issue was unreasonable, whether on a *Wednesbury* or on a *Walters* basis.

Revised Scheme Particulars

347. At paragraph 5390 of the Decision, the SDM made the following finding about Mr Fuller:

> "*Although he was on notice that those clauses of the Revised Particulars for the PIF Scheme were misrepresentations, Mr Fuller did not take any steps to prevent those Revised Particulars being used. He therefore had a direct share in responsibility for the failure in this regard by PIMIL to comply with the high standard of integrity required of a licensee … and his own conduct demonstrated a gross lack of competence and serious lack of integrity because he stood by while investors relied on Revised Particulars he knew to be misleading."*

348. The SDM goes on to observe that Mr Fuller did not take any steps to ensure that investors were informed that they had invested on the basis of misleading Particulars or to remediate the position. He did not identify for himself the need to inform investors and did not monitor that this was being done.

349. These findings built on an earlier section of the Decision, where the SDM made findings to the following effect: that Mr Fuller was aware of the terms of successive Revised Particulars (paragraphs 5246 to 5248 of the Decision); and that Mr Fuller knew that the money which had been and was being transferred to PGL/PGFL was not being invested to finance factoring in Brazil in accordance with the Scheme Particulars (paragraph 5256 of the Decision). These

findings were supported by reference to primary findings about documents which Mr Fuller had seen.

350. The Bailiff discussed this issue at paragraphs 339 to 348 and 357 of the Royal Court judgment. He was satisfied that the GFSC was entitled to conclude that Mr Fuller was incompetent and lacking integrity in relation to these matters. Advocate Dawes seeks to contend that in reaching that conclusion the Royal Court erred in law. He does so on the basis that Mr Fuller's honesty is not in issue. He makes a number of points under reference to the underlying facts: that the Scheme Particulars had been prepared by reputable lawyers; that the company had received a clean audit; the absence of concern on the part of the Group Accountant as to the use of the funds; and the fact that other directors, who were accountants, were not raising an issue. This said to be "*consistent with Mr Fuller's state of mind being, for want of a better word, 'innocent' and, objectively not constituting a want of integrity*".

351. Like the submission in relation to Cornhill, this submission proceeds on the fallacy that the absence of a finding of dishonesty excludes a finding of want of integrity. The SDM made findings (which are not challenged) about the state of Mr Fuller's knowledge, both of the Particulars and of the fact that funds were not being invested in accordance with the Particulars. In these circumstances, a finding of incompetence and want of integrity was open to the SDM. The points which Mr Fuller took were ones which he could no doubt have advanced (and may well have advanced) in the proceedings before the GFSC; they do not undermine, as a matter of law, the findings which are under challenge.

Paragraph 334

352. The SDM found that Mr Fuller was personally responsible for revising and updating Providence's institutional investment presentation which was in use from September 2015. The SDM further found that he had not made sufficient enquiries to satisfy himself factually before undertaking that exercise, and that as a result the presentation contained statements that were misleading or untrue. At paragraph 5305 of the Decision, the SDM made the following finding:

> "*It was reckless and showed poor judgment on the part of Mr Fuller to produce the September 2015 Presentation in this form containing information which he had not verified, and it is likely that institutional investors and others who saw it would have been misled. Through his involvement in the September 2015 Presentation and its continued use, Mr Fuller was implicated in the promotion of PIF and Providence products on the basis that all money invested in PIF flowed to the factoring companies in Brazil to finance factoring operations, which he knew had not been and was continuing not to be the case, reflecting adversely on his competence and probity."*

353. The Royal Court dealt with this shortly at paragraph 334 of its judgment. It recognised that Mr Fuller undertook this work after visiting Brazil as part of his induction as a new director. It concluded that the finding relating to his judgment, competence and probity was one which the GFSC was entitled to make.

354. Advocate Dawes challenges this conclusion on the basis that Mr Fuller was entitled to rely on material provided to him, and that there was no question that he believed anything other than that the material was accurate. He makes the point that he made detailed representations on the

issue to the SDM. We reject this challenge. The points which he makes were ones for the SDM to consider. The SDM was entitled to reach the conclusion which he did; and the Royal Court was right so to hold.

Paragraph 337

355. Mr Fuller contends that "*insufficient weight"* was attached to a letter dated 29 May 2015 sent by the Board of Providence Investment Funds PCC Ltd to the GFSC in which inter alia the fact of less than 100% deployment of funds to Brazil was disclosed. He states that he saw this letter for the first time in September 2015. It is said to be a "*key document in terms of assessing Mr Fuller's state of mind/knowledge/what was required of him, in the context of what was already known by the GFSC".* Mr Fuller alleges that the SDM "*failed to draw the correct inferences from this document";* and criticises the Royal Court for mentioning it only briefly at paragraph 337 of the judgment.

356. Like the other issues raised under this Ground, these contentions do not maintain a focus on the fact that this is an appeal on the basis of alleged errors of law on the part of the Royal Court which was itself engaged in an appellate process within the context of the statutory framework which we have outlined above. Questions of weight were matters, in the first instance, for the SDM. Whilst the Royal Court may, in the context of a Jurat unreasonableness challenge, take the view that the weight attached by the SDM to any particular consideration rendered the decision unreasonable, the Royal Court was entitled to approach this issue in the manner that it did.

Paragraph 367

357. Mr Fuller takes issue with observations which the Bailiff made at paragraph 367 of the Royal Court judgment:

> "*I am further satisfied that the First Appellant [Mr Fuller] ought to have identified a suspicion of impropriety. This does not relate to Mr Buzaneli's fraud, but rather to the First Appellant's approach to what needed to be questioned as matters deteriorated at LFS and PIMIL. He could rely on the part being played by those companies' Advocates and he could rely on the clean audit from PwC, but always subject to the concerns set out in the management letter that accompanied the audits which referred ... to 'a number of systemic failings by the Boards of PIMIL and PIF' and that 'the Entities have operated with insufficiently documented governance oversight and a lack of objectivity. There are also multiple situations of related party transactions which give rise to potential conflicts of interest and we did not see appropriate levels of documentation in respect of these situations and how they were being managed.' Bearing in mind that the First Appellant was part of the remediation plan being put in place, I consider that he should have done more about matters like this which confirmed that there was some suspicion of impropriety, but he did not do so. In these circumstances I accept that the GFSC could draw attention to the First Appellant not acting to the objective standards expected of him, even as a non-executive director."*

358. Mr Fuller criticises this passage on the basis inter alia: (i) that it bears to contain a finding by the Bailiff himself that Mr Fuller "*should have done more"*; and that the Bailiff bears to have made that finding without "*any proper evaluation or weighing of the evidence*". Whilst the

Bailiff does, at this point, bear to express his own view, he does so in the context of concluding that "*the GFSC could draw attention to the First Appellant not acting to the objective standards expected of him, even as a non-executive director"* – in other words, a conclusion that the GFSC was entitled to conclude that there was a failure by Mr Fuller to meet the standards of competence and integrity which were to be expected of him. The Bailiff briefly referenced points which Mr Fuller had made in mitigation but then quoted the management letter, the terms of which provided an intelligible foundation for the observation which then followed. There is nothing in this complaint.

Mr Fuller Ground 4

359. Mr Fuller's fourth Ground of Appeal makes two points. First, he contends that the Bailiff erred in law "*as regards the issue of collective responsibility".* Mr Fuller contends that the SDM wrongly held Mr Fuller to have "*collective responsibility/liability for regulatory breach by LFS and PIMIL"* and that the Bailiff erred in law in apparently adopting the same approach. Secondly, Mr Fuller contends that the Bailiff erred in not upholding his challenge to the SDM's alleged failure to identify an objective standard for a non-executive director. His broad point was that the SDM had failed to consider what was required of a newly appointed non-executive director and had applied a standard of perfection, as opposed to considering whether any particular judgment was one which was open to the reasonably competent non-executive director.

360. At paragraphs 4990-4992 of the Decision, the SDM made the following observations:

> "*4990. Mr Fuller asserts that 'As a matter of general Guernsey law, directors owe their duties individually not collectively', relying for that purpose on a citation take out of context from the Royal Court's decision in Carlyle. Carlyle was there considering the duties owed by a director to the relevant company. However the regulatory regime in Guernsey does impose collective responsibility on the Board of a licensee: see Rules 2.1.1, 2.1.6 and 3.1.1 of the Licensees Rules …*
> *4991. Mr Fuller goes on to submit that, 'as a matter of law, it is wrong to hold individual directors to be personally in breach of a provision of or made under the prescribed laws applying either to a firm or to a 'Board' …'. The Commission has not purported to find that Mr Fuller or other respondent directors were personally in breach of such a provision. As a director at material times, Mr Fuller was individually responsible, and as a member of the relevant boards at material times Mr Fuller shared collective responsibility for breaches of such provisions as are found in this Notice, which also sets out to analyse the extent and appropriate characterisation of such responsibility.*
> *4992. Mr Fuller also suggests that the proposition that it is wrong to hold individual directors to be personally in breach of a provision of or made under the prescribed laws applying either to a firm or to a 'Board' applies 'particularly in circumstances where the director concerned is non-executive'. That is incorrect. There is no material distinction between executive and non-executive directors in this context; in particular the duties imposed on the board of a licensee under the Licensees Rules apply to the directors collectively, whether or not they are 'executive' directors. A non-executive director will not generally fall to be regarded as part of 'senior management' on whom*

duties are separately imposed under the Licensees Rules and the Commission does have regard to a director's non-executive status …".

361. Before the Royal Court, Mr Fuller challenged this analysis. The Bailiff did not address the issue about collective responsibility explicitly in the Royal Court judgment, although he referred, at paragraphs 329 and 520, without apparent adverse comment, to passages in the Decision which state that Mr Fuller shared collective responsibility as a member of the Board of LFS for all contraventions during the period when he was as director. He discussed in some detail, at paragraphs 310 to 321 of the judgment, the point about the role of a non-executive director.

362. Mr Fuller has renewed the point about collective responsibility before us. Advocate Hill, on behalf of the GFSC contends that the principle of collective responsibility is recognised in the terms of the Licensees (Conduct of Business) Rules 2016 ("the Licensees Rules"), the Finance Sector Code of Corporate Governance and the Handbook on Countering Financial Crime and Terrorist Financing. He submits that although the regulatory regime envisages the collective responsibility of the Board, it does not follow that a director is held strictly liable for a breach by the licensee. He contends that the SDM evaluated each individual's role in the collective failure of the Board.

363. Principle 2 of the Finance Sector Code of Corporate Governance states: "*Directors should take collective responsibility for directing and supervising the affairs of the business".* Guidance published pursuant to that Principle states: "*Directors have a collective duty to be conversant with applicable legislation, regulation, policy, rules, instructions, guidance and codes of practice to an appropriate level to enable them to discharge their responsibilities".* The Licensees Rules impose a number of statutory responsibilities on the Board collectively. These include: ensuring that there are effective and appropriate policies, procedures and controls in place which provide for the Board to meet its obligations under the Protection of Investors Law and the Licensee Rules; to act and to take all reasonable steps to ensure that all employees act so as to avoid serious damage to the licensee's reputation or to its financial position; and effective responsibility for compliance with the Protection of Investors Law, the Licensees Rules and any rules or guidance made under the Protection of Investors Law.

364. In the present context, the issue in relation to each Respondent was whether he was a fit and proper person and, accordingly, whether he satisfied the minimum criteria for licensing. Accordingly, whilst it is legitimate to set the individual relevant officer's failings in the context of the collective responsibility of the Board as a whole, the focus ultimately requires to be on whether that individual fulfils the minimum criteria. That appears to be the approach which the SDM took. It is true that in the Decision the SDM noted that Mr Fuller was a director of LFS and PIMIL between 11 August 2015 and 4 August 2016, found that during this period, LFS and PIMIL were in contravention of various regulatory laws (paragraphs 5118 to 5169) and took the view that Mr Fuller "*shared responsibility"* for those contraventions (paragraph 5584.1). Indeed, in assessing the seriousness of Mr Fuller's non-fulfilment of the minimum criteria for licensing, the SDM started by observing that the contraventions by LFS and PIMIL, whilst he was a director were "*very serious"* (paragraph 5483). But, as foreshadowed at paragraphs 5151 and 5169 of the Decision, the SDM then went on to make specific findings as to the extent of Mr Fuller's responsibility for salient failures on the part of those two companies. The SDM focused (at paragraphs 5170 to 5175 of the Decision) on whether Mr Fuller himself fulfilled the minimum criteria for licensing, and whether he was a "*fit and proper person*", before going

on to examine (over a lengthy section of the Decision between paragraphs 5176 and 5477) Mr Fuller's personal role, and concluding that he failed whilst a director of LFS and PIMIL, and fails, to meet the minimum criteria for licensing and that his failure falls within the serious bracket. Further, in assessing the seriousness of Mr Fuller's non-fulfilment of the minimum criteria, the SDM addressed Mr Fuller's "*relative responsibility"* for the contraventions and non-fulfilments by LFS and PIMIL. Thus, Mr Fuller was not being held "*strictly liable"* for corporate failings but was being held to account for his own serious failings as a director.

365. On the second point, Advocate Dawes advanced the argument that:

> "*A director must not be assessed in a vacuum. There was a failure on the part of the SDM generally to consider either (a) what was required of a (newly) appointed reasonably competent NED of a regulated entity or (b) whether and in what way the acts or omissions of Mr Fuller measured against that standard let alone (c) how the reasonably competent NED of a regulated entity would, or rather, could, have responded and (d) how matters would have played out in that scenario and with what consequence (also relevant to sanction). The SDM (and the Bailiff) appear to have substituted their judgment for that of Mr Fuller as opposed to considering whether that judgment was open to the reasonably competent NED of a regulated entity."*

366. We reject this contention, which was presented in the abstract and without drawing our attention to any particular passages in the Decision (or indeed in the Royal Court judgment) which were said to be in error. The Bailiff observed (paragraph 319 of the Royal Court judgment):

> "*... I do not consider that there is any merit in the submission that these matters have been viewed in a vacuum. To the contrary, I consider that the SDM has painstakingly sought to address the various points made on behalf of [Mr Fuller] before finalising the Decision. ..."*

The Bailiff, who was steeped in the case, was entitled to take that view. An individual who accepts a position in a regulated entity must satisfy the minimum criteria for licensing. These incorporate standards which involve both the assessment of facts and the application of evaluative judgment. It would be an error to supplement the statutory criteria with a standard, not mentioned in the statute, of the "*reasonably competent NED of a regulated entity".* The question is not whether the individual in question was negligent but is whether he or she satisfies the minimum criteria for licensing (which, in these cases, resolves into a question as to whether the Respondent in question is a "*fit and proper person"*). That is a judgment for the regulator, subject to review by the Court. It is apparent from the terms of the Decision that the SDM did not assess Mr Fuller's position "*in a vacuum"* but has identified his state of knowledge, has assessed what he did and did not do, made findings under reference to the minimum criteria for licensing, and assessed the seriousness of the failings on Mr Fuller's part which he found.

THE FINDINGS THAT THE RESPONDENTS DID NOT MEET THE MINIMUM CRITERIA FOR LICENSING

367. As we have explained above, the Royal Court set aside certain of the findings which the SDM had made against each of the Respondents. It nevertheless rejected the contention, advanced on

behalf of each Respondent, that the Court should also set aside the SDM's finding that he did not meet the minimum criteria for licensing. Each of the Respondents criticises this aspect of the Court's reasoning. Each Respondent contends, first, that the Royal Court, erroneously, took the view that each and every finding against him had to be set aside if his appeal was to succeed. And, secondly, each Respondent contends that in forming its own view as to whether he satisfied the minimum criteria for licensing, the Royal Court impermissibly exceeded its role as an appellate court.

368. Mr Fuller advanced these two criticisms in his seventh and sixth Grounds of Appeal respectively. Mr Tattersall and Mr Moroney advanced them under cover of their second Ground of Appeal. Although Advocate Hill took a point about the scope of the second Ground of Appeal of these two Respondents, these issues are both put squarely in issue by Mr Fuller's sixth and seventh Grounds of Appeal, and the first, at least, is explicitly put in issue by Mr Tattersall and Mr Moroney's second Ground. We accordingly propose to deal with them as they apply to each of the Respondents.

369. One of the minimum criteria for licensing, in the case of a relevant officer, is that the individual is a "*fit and proper person".* In deciding whether or not an individual is a fit and proper person, and therefore satisfies that criterion, the GFSC is required to have regard to the various considerations set out in paragraph 1 of Schedule 4 of the POI Law. A judgment that a relevant officer is not a "*fit and proper person"* may be, and no doubt usually will be, founded on the totality of the individual findings in respect of that person's competence, probity (or integrity), judgment and so on.

370. That was indeed how the SDM approached matters in the present case. For example, in relation to Mr Fuller, at paragraphs 5170 to 5174 of the Decision, he identified the legal structure of the analysis which we have just outlined. After a lengthy discussion which is set out between paragraphs 5176 and 5477 of the Decision, the SDM concluded, at paragraph 5478.2, that:

> "*For the reasons set out in paragraphs 5170-5477 above, Mr Fuller is not a fit and proper person and did not and does not fulfil minimum criteria for licensing specified in the regulatory Laws and applicable to him".*

In other words, the finding that Mr Fuller was not a "*fit and proper person"* reflected an evaluative judgment based on the totality of the findings in respect of Mr Fuller's probity, competence, experience and soundness of judgment and so on. The SDM took a similar approach in relation to Mr Tattersall (see in particular paragraphs 6234-6244 and 6556.2 of the Decision). In relation to Mr Moroney the format is different, but the basic analysis the same (see in particular paragraphs 7219-7221 of the Decision).

371. In the case of each Respondent, the Royal Court set aside a number of the findings which had formed part of the basis upon which the SDM had concluded that he was not a fit and proper person. Nevertheless, the Court did not, in the case of any of the Respondents, set aside the finding that he did not fulfil the minimum criteria for licensing applicable to him. The critical paragraphs where the Court addressed that question are paragraphs 368 (Mr Fuller), 532 (Mr Tattersall) and 675 (Mr Moroney) of the Royal Court judgment.

372. Different parts of the Royal Court's judgment disclose three possible rationales for that outcome.

i. a view that if any adverse finding survived, it would follow that the minimum criteria for licensing were not satisfied;

ii. a view that the surviving findings would have entitled the GFSC to conclude that the minimum criteria for licensing were not satisfied; and

iii. a conclusion by the Court itself that, in light of the surviving findings, the minimum criteria for licensing were not satisfied.

373. The first of these potential rationales is suggested by passages which appear at the outset of the Royal Court's discussion of Mr Fuller and of Mr Tattersall. At paragraphs 293-4 of its judgment, the Court states:

> "*[Mr Fuller's] primary case is that the entirety of the Decision as it affects him should be set aside … This primary case was always going to be an ambitious task to meet … The difficulty with the Appellant's primary case is that it necessitates considering each and every finding made in the Decision in order to assess whether that finding was capable of being supported by reference to the material that was reviewed. … In any event, unless all the findings made are set aside, I will still need to consider whether any of the sanctions that were imposed is disproportionate or unreasonable."*

374. Similarly, in introducing the discussion of Mr Tattersall's case, at paragraphs 415-6 of the judgment, the Royal Court states:

> "*[Mr Tattersall's] primary case is also that the entirety of the Decision against him should be set aside … [Mr Tattersall's] primary case is, in my view … an ambitious proposition because the circumstances of the collapse of PIMIL as part of the Providence Group and of which he was a director was such that the setting aside of each and every finding made in respect of him would be required before that conclusion could be reached. In [Mr Tattersall's] case the SDM made a number of findings that he was dishonest. They are, of course, serious allegations, and Advocate Greenfield sought to explain why each could not be sustained but there are also other findings relating to [Mr Tattersall's] lack of competence, lack of integrity and poor judgment, which would also need to be overturned before the overall finding of not fulfilling those minimum criteria for licensing could be set aside. Accordingly, in the same manner as with [Mr Fuller] this has involved considering each and every finding made in the Decision in order to assess whether that finding was capable of being supported by reference to the material that had been reviewed …"*

375. Advocate Hill's submission, on behalf of the GFSC, was that these passages were simply making the logical point that the entirety of the Decision could only be set aside if every adverse finding was set aside. If that were to be the correct reading, they would be unexceptionable. The difficulty is that the last sentence of paragraph 294 of the judgment contains the statement:

"*… unless all the findings made are set aside, I will still need to consider whether any of the sanctions that were imposed is disproportionate or unreasonable".* That implies that the Royal Court took the view, at this point in the judgment, that if any single finding survived, it would follow that the Respondent in question was not a fit and proper person and did not fulfil the minimum criteria for licensing. And paragraph 416 of the Royal Court judgment likewise discloses that the Royal Court expressed the view that it was only if every adverse finding was set aside that the "*overall finding*" of not fulfilling the minimum criteria for licensing could be set aside.

376. That was an error of law. As we have explained above, the SDM determined that each of the Respondents was not a fit and proper person on the basis of an evaluation of the totality of the findings which he had made against them. Insofar as the Royal Court set aside material findings, upon which the SDM had relied in making that judgment, the conclusion was undermined. It would be incorrect to assert, as the Royal Court appears to have done in the passages to which we have referred, that if any single finding survived, it would follow that the same overall judgment that the individual in question was not a *"fit and proper person"* would fall to be made. The Court may, perhaps, have had in mind that a public statement or financial penalty under section 11C or 11D of the FSC Law may be made if an individual does not satisfy "*any of* the minimum criteria for licensing". But the relevant criterion under paragraph 1(1) of Schedule 4 to the Protection of Investors Law, and the equivalent provisions in other repealed Regulatory Laws, is simply that the individual is a "*fit and proper person".* The individual findings to which the Court addressed its attention were the basis for an assessment as to whether that criterion was fulfilled and not, individually, criteria which themselves had to be satisfied.

377. The second of the potential rationales for the Court's approach which we have identified above is suggested by the way the Court dealt with Mr Moroney's case. The Royal Court noted, at paragraph 675 of the judgment, that it had upheld findings of dishonesty, want of probity (or integrity), competence and lack of sound judgment against him. The Court went on to state:

> "*As a result I reject the submission of Advocate Le Tissier that [Mr Moroney] should have been found to be a fit and proper person because it was open to the GFSC in light of these findings to conclude that [Mr Moroney] had not met the minimum criteria for licensing".*

The last part of this sentence (following the word "*because"*) discloses that the reason for the approach the Court took in relation to Mr Moroney was its view that it was open to the GFSC in light of the findings which had survived scrutiny to conclude that Mr Moroney did not fulfil the minimum criteria for licensing. This was an error of law. Ex hypothesi, the GFSC had *not* reached such a conclusion by reference only to the findings which had survived scrutiny. The mere fact that it would have been *open* to the GFSC to have reached that conclusion does not justify the Royal Court in leaving standing the finding that Mr Moroney did not satisfy the minimum criteria for licensing when the Court had set aside material findings which had formed part of the SDM's reasoning. Since the critical reason expressed by the Court for its conclusion on this matter in relation to Mr Moroney betrays an error of law, we sustain his appeal on this point.

378. There is rather similar language in the Court's concluding summaries of its decision in relation to Mr Fuller and Mr Tattersall. At paragraph 438 of its judgment the Royal Court states:

> *"... whilst I have set aside some of the findings made against [Mr Fuller], I have concluded that there was material before the GFSC that could properly lead to the conclusion that he failed to satisfy the minimum criteria for licensing. To that extent I confirm those parts of the Decision."*

Very similar language appears in the overall summary of Mr Tattersall's case at paragraph 568 of the Royal Court judgment.

379. It would appear, though, that, in relation to these two Respondents, the Royal Court decided not to set aside the finding that he did not satisfy the minimum criteria for licensing on the basis of the Court's own view that the surviving findings justified that conclusion. At paragraph 368 of the judgment, having noted that it had set aside certain of the findings which the SDM had made against Mr Fuller, the Royal Court observed:

> "*... the majority of the findings are, in my view, capable of having been made. As a result it follows that the finding of the cumulative effect of the various findings does mean that [Mr Fuller] was properly found, whilst he was a director of LFS and PIMIL, not to meet the minimum criteria for licensing."*

380. Similarly, at paragraph 532 of the judgment, the Royal Court expressed its conclusions in relation to Mr Tattersall:

> *"By way of summary, I am satisfied that the majority of the findings made by the GFSC against [Mr Tattersall] are justified. I have set some aside, but I have not set aside all those relating to dishonesty ... which means that I have been satisfied that [Mr Tattersall's] attempt under his primary case to avoid the conclusion that he did not meet the minimum criteria for licensing fails. The cumulative effect of the findings upheld show that, whilst [Mr Tattersall] was a director of PIMIL, he did not meet the minimum criteria for licensing ..."*

381. It would appear that the Court, at these passages, considered the "*cumulative effect"* of the findings which it had upheld, and concluded for itself that this effect justified the Court in concluding that Mr Fuller and Mr Tattersall did not fulfil the minimum criteria for licensing. That is particularly clear in the final sentence of the passage we have quoted from paragraph 532 of the judgment. Having regard to the surviving findings in each case, this might be thought to be an unsurprising conclusion. In the case of Mr Tattersall those findings included findings of dishonesty. In the case of Mr Fuller, they included multiple findings of want of integrity. There would be a basis upon which the Royal Court could have concluded that the GFSC was bound to make a finding that neither of them was a fit and proper person (and therefore did not satisfy the minimum criteria for licensing). But the Court did not, on the face of it, address that question.

382. Advocate Dawes, for Mr Fuller, and Advocate Greenfield, for Mr Tattersall, criticised the approach which the Royal Court took. It was, so they contended, "*an illegitimate exercise of autonomous decision-making"*, to use the language of the Court in *Domaille*, which was incompatible with the analysis *in Domaille* of the Royal Court's appellate role (see, in particular, paragraphs 82 and 94 of *Domaille*). The assessment of whether the findings which had survived scrutiny on appeal justified the conclusion, in the case of either of these Respondents, that he was not a fit and proper person, and therefore did not meet the minimum criteria for licensing, was one for the GFSC and not for the Royal Court. On this analysis, having decided to set aside certain of the findings on which the GFSC had relied, the Royal Court should have remitted the matter to the GFSC for reconsideration.

383. As a general proposition, this submission is sound. If the Court sets aside material findings upon which the GFSC has relied when determining that an individual is not a fit and proper person (and therefore does not satisfy the minimum criteria for licensing), the Court should remit the question of whether the individual is or is not a fit and proper person to the GFSC for reconsideration in light of the findings which have survived appellate scrutiny. The qualification that the findings are "material" is an important one. Section 11H(5) of the FSC Law provides:

> *"On an appeal under this section the Court may –*
>
> *(a) set the decision of the Commission aside and, if the Court considers it appropriate to do so, remit the matter to the Commission with such directions as the Court thinks fit, or*
>
> *(b) confirm the decision, in whole or in part."*

If the Royal Court is satisfied that the setting aside of particular individual findings would have made no difference to the conclusion that the individual was not a fit and proper person, it would be entitled to set aside those findings, but nevertheless to confirm the decision as regards the minimum criteria for licensing. Standing the primary fact-finding and evaluative role of the GFSC within the overall system of regulation, we consider that the Royal Court could only take such an approach if it were to be satisfied that it would be plainly wrong for the GFSC not to conclude, on the basis of the surviving findings, that the individual was not a fit and proper person – in other words, that a remit would serve no practical purpose.

384. In the present case, the Royal Court did not address this question. We accordingly allow the appeals of Mr Fuller and Mr Tattersall on this ground.

385. Although we have sustained the GFSC's Grounds of Appeal 1, 2.2, 2.3 and 2.4, not all of the SDM's findings against Mr Tattersall, Mr Dewsnip and Mr Moroney have survived the process of appeal to the Royal Court and this Court. In the case of each of these men, the Royal Court will require to consider whether or not it should remit to the GFSC for reconsideration the question of whether, on the findings which have survived the Court's scrutiny, the Respondent is not a fit and proper person or whether, applying the guidance we have set out above, the Royal Court can safely conclude that such a remit would serve no practical purpose.

386. In the case of Mr Fuller, two matters have not survived the process of appeal, thus far. We have sustained Mr Fuller's appeal on the basis that the Royal Court judgment was, in one respect,

inadequately reasoned. That specific matter will require to be reconsidered by the Royal Court. The SDM's findings of want of integrity in respect of Mr Fuller's representations have been set aside for the reasons we have explained. However, the SDM stated that these findings were merely "*confirmatory"* of a decision which he would have made in any event at least in respect of the imposition of a prohibition order. The Royal Court will require to consider in the case of Mr Fuller whether or not a remit to the GFSC for reconsideration of the question of whether Mr Fuller is not a fit and proper person is required.

SANCTIONS

387. The Royal Court addressed separately the appeal by each Respondent against the sanctions which had been imposed on him. In summary, the Court drew the following conclusions.

(a) In relation to Mr Fuller, the Court concluded (paragraph 394) that the discretionary financial penalty of £125,000 which the SDM had imposed was disproportionate and unreasonable. Whilst the Court accepted that the threshold for the imposition of a prohibition order had been met, it concluded that a ten-year prohibition order was disproportionate and unreasonable (paragraphs 406 and 407). The same conclusion applied to the length of the disapplication of the exemption in section 3(1)(g) of the Fiduciaries Law (paragraph 409). The public statement would require revisal once a fresh decision had been taken by the GFSC (paragraph 410). The Court accordingly set aside the GFSC's decision in respect of sanctions (paragraph 410). It decided to remit the matter to the GFSC for reconsideration (paragraph 411) without giving directions (paragraph 412).

(b) In relation to Mr Tattersall, the Court concluded that, whilst a discretionary financial penalty was justified, £175,000 was disproportionate and unreasonable (paragraph 567). It allowed the appeal against the amount of the penalty and the duration of the prohibition order and disapplication of the exemption in section 3(1)(g). It followed that the Court also allowed the appeal in respect of the public statement (paragraph 568). The Court accordingly set aside the GFSC's decisions in relation to sanctions (paragraph 568) and remitted the matter to the GFSC for reconsideration without giving directions (paragraphs 569 and 570).

(c) In relation to Mr Dewsnip, the Court allowed the appeal in relation to the public statement but otherwise dismissed the appeal (paragraph 615).

(d) In relation to Mr Moroney, the Court concluded that the discretionary financial penalty of £45,000 was not reasonable and proportionate (paragraph 685), although it was satisfied that a financial penalty could be justified (paragraph 686). The Court also allowed the appeal against the duration of the prohibition order and the disapplication of the exemption in section 3(1)(g) (paragraphs 697 and 698). It followed that the appeal against the public statement was also allowed (paragraph 699).

388. Mr Tattersall and Mr Moroney, in their respective Grounds of Appeal 2, identify a number of alleged errors in the Royal Court's reasoning. They contend, putting it broadly, that the Royal Court did not identify a proper basis upon which it could make findings about the sanctions

against them. The GFSC, for its part, in GFSC Grounds of Appeal 3, 4, 5 and 6 challenges certain specific aspects of the Royal Court judgment in respect of sanctions.

389. It will be convenient to set out again the relevant provisions of sections 11C and 11D of the FSC Law.

> "*11C. (1) Where the Commission is satisfied that a licensee, former licensee or relevant officer –*
>
> *...*
> *(b) does not fulfil any of the minimum criteria for licensing specified in the regulatory Laws and applicable to him,*
>
> *it may, subject to the provisions of section 11E, publish a statement to that effect.*
> *...*
> *(2) In deciding whether or not to publish a statement under this section and, if so, the terms thereof, the Commission must take into consideration the following factors –*
> *(a) whether the contravention or non-fulfilment was brought to the attention of the Commission by the person concerned;*
> *(b)the seriousness of the contravention or non-fulfilment;*
> *(c) whether the contravention or non-fulfilment was inadvertent;*
> *(d) what efforts, if any, have been made to rectify the contravention or non-fulfilment and to prevent a recurrence;*
> *(e) the potential financial consequences to the person concerned, and to third parties, including customers and creditors of that person, of publishing a statement;*
> *(f) the action taken by the Commission under this section in other cases."*
>
> *11D. (1) Where the Commission is satisfied that a licensee, former licensee or relevant officer –*
>
> *...*
> *(b) does not fulfil any of the minimum criteria for licensing specified in the regulatory Laws and applicable to him,*
>
> *it may, subject to the provisions of section 11E, impose on him a penalty in respect of the contravention or non-fulfilment of such amount not exceeding the relevant sum calculated in accordance with subsections (1A) and (1B) as it considers appropriate.*
>
> *(2) In deciding whether or not to impose a penalty under this section and, if so, the amount thereof, the Commission must take into consideration the following factors –*
> *(a) whether the contravention or non-fulfilment was brought to the attention of the Commission by the person concerned;*
> *(b)the seriousness of the contravention or non-fulfilment,*
> *(c) whether the contravention or non-fulfilment was inadvertent;*
> *(d) what efforts, if any, have been made to rectify the contravention or non-fulfilment and to prevent a recurrence;*
> *(e) the potential financial consequences to the person concerned, and to third parties, including customers and creditors of that person, of imposing a penalty;*
> *(f) the penalties imposed by the Commission in other cases ..."*

390. We make the following observations, by way of introduction to our analysis of the Grounds of Appeal to which we have referred.

391. First, the relevant precondition to the imposition of a discretionary financial penalty or a prohibition order is a finding that the relevant officer does not fulfil any of the minimum criteria for licensing.

392. Second, sections 11C and 11D of the FSC Law require the GFSC, when deciding whether or not to make a public statement (and if so the terms thereof) or to impose a discretionary financial penalty (and if so the amount thereof), to take into consideration, among other factors: (i) "*the seriousness"* of the non-fulfilment of the minimum criteria for licensing; and (ii) the action taken (or penalties imposed) by the Commission in other cases.

393. It follows that, when considering these two penalties in respect of any person, the GFSC requires to make an assessment of "*the seriousness"* of that person's non-fulfilment of the minimum criteria for licensing. It is the seriousness of the non-fulfilment of the minimum criteria for licensing which the GFSC is required to take into consideration.

394. In the present context, the basis of the non-fulfilment was a finding, in the case of each Respondent, that he was not a fit and proper person. That finding was, in turn, based on specific findings, which included findings, depending on the particular Respondent, of dishonesty, want of integrity, lack of competence and poor judgment. There is no requirement to characterise individual findings as "serious" or "very serious", although it is open to the GFSC to do this if it finds this helpful. The conduct which requires to be characterised for the purpose of the statutory requirement to take into consideration the *"seriousness"* of the non-fulfilment is the entirety of the conduct which is reflected in the judgment that the individual in question is not a fit and proper person (and therefore does not fulfil the minimum criteria for licensing).

395. Thirdly, an assessment of "*seriousness"* in relation to a breach of some rule or standard may be undertaken by reference to the quality of the conduct which breaches that rule or standard. Thus, dishonesty may be regarded as a more serious breach of professional standards than incompetence. But an assessment of "*seriousness"* may also take into account the consequences of the conduct in question. To take an example from another context, the crime of causing death by careless driving is much more serious than the crime of careless driving. Thus, in the present context, incompetence which has resulted in significant losses to investors may, on that account, justifiably be regarded as more "*serious"* than equivalent incompetence which has been discovered (and therefore brought to an end) before it has had any adverse consequences. Further, an assessment of "*seriousness"* may also take into account the context of the conduct in question. In the present context, incompetence which has, albeit unwittingly, enabled a serious fraudulent scheme to be perpetrated may, on that account, be regarded as more serious than incompetence which did not have that consequence.

396. Fourthly, the assessment of the seriousness of the conduct in question is an evaluative judgment which falls to be made in the first instance by the GFSC. The Royal Court's role, in the context of a statutory appeal against the GFSC's decision, is to apply the statutory grounds of appeal. These include, of course, Jurat unreasonableness. It follows that the Court is not excluded from concluding that the weight which has been attached by the GFSC to relevant considerations renders the decision unreasonable, provided that the Court keeps in mind that it is exercising an appellate review of the reasonableness of GFSC's assessment and not a primary decision-making function.

397. Fifthly, if the Court finds that the GFSC's assessment of seriousness was flawed, then that assessment falls to be set aside. In that event, since seriousness is a factor which the GFSC must take into consideration when assessing a public statement or a discretionary financial penalty, the sanctions will also fall to be set aside. If the proceedings are to continue, the case will require to be remitted to the GFSC, with or without directions from the Court, for reconsideration of the sanctions imposed, in light of the Court's decision.

398. Sixthly, if the Royal Court has set aside primary findings about an individual's conduct, upon which the finding of fitness and fulfilment of the minimum criteria for licensing is based, that will generally – as we have explained above – require a remit to the GFSC for reconsideration. Equally, insofar as the assessment of seriousness was based on the same findings, the question of seriousness would also fall to be set aside and remitted to the GFSC for reconsideration, unless the Royal Court were to conclude that, notwithstanding that certain findings have been set aside, the GFSC could not reasonably change its view of the seriousness of the non-fulfilment of the minimum criteria for licensing, looking to the findings which have survived appellate scrutiny.

Mr Tattersall and Mr Moroney: Ground of Appeal 2

399. Mr Tattersall and Mr Moroney advance a number of criticisms of the way that the Royal Court dealt with their respective appeals against sanctions.

Criticism 1

400. These Respondents criticise the Royal Court for the way that it characterised, at paragraph 1 of its judgment, their primary case. The Royal Court stated: "*Each of the Appellants' primary cases is that the Respondent GFSC should not have found him not to meet the minimum criteria for licensing, with the consequence that his appeal should be allowed."* These Respondents state that this summary was inaccurate. Their primary cases were that the GFSC was wrong to impose sanctions, on the basis that the relevant legal tests were not met on the facts. The relevant test in relation to the imposition of a prohibition order was not whether they met the minimum criteria for licensing, but whether they were fit and proper persons to perform the relevant functions.

401. The Respondents are correct that the precondition to the imposition of a prohibition order under section 34E of the Protection of Investors Law and other repealed Regulatory Laws is a finding that the individual is not a "*fit and proper person".* By contrast, the precondition to the publication of a statement or the imposition of a financial penalty under section 11C or section 11D is a finding that the individual does not fulfil any of the "*minimum criteria for licensing"* specified in the repealed Regulatory Laws. But of course, in the case of relevant officer, a finding that he is not a fit and proper person carries with it the inevitable consequence that he also does not fulfil the minimum criteria for licensing applicable to him. It is evident that the Royal Court, throughout its judgment, has referred to the minimum criteria for licensing, rather than to the fit and proper person test, but it is equally evident that the Court has done so on the footing that, in the context of these appeals, the two may be treated as interchangeable. The Respondents did not identify any point in the judgment at which this could be said to disclose an error of substance.

Criticism 2

402. Mr Tattersall also contends that the Royal Court failed to identify a legal basis upon which the prohibition order could be upheld. At paragraph 532, the Court's judgment states that it is satisfied that the cumulative effect of the findings which had survived scrutiny showed that Mr Tattersall did not meet the minimum criteria for licensing. The paragraph refers to 6556 of the Decision. Mr Tattersall contends that this paragraphs relates only to the publication of a statement and the imposition of a financial penalty, and that the Royal Court did not refer to the conclusions in the Decision which relate to the imposition of a prohibition order, or indeed address the question of whether he was a fit and proper person (as opposed to fulfilling the minimum criteria for licensing).

403. We reject this contention. At paragraph 6556.2 of the Decision, to which the Royal Court judgment refers, the SDM concludes that, for the reasons set out in the previous paragraphs:

> "*Mr Tattersall is not a fit and proper person and did not and does not fulfil minimum criteria for licensing specified in the regulatory Laws and applicable to him."*

The SDM goes on to find that the threshold is therefore satisfied for the GFSC to be able to exercise its powers to impose a discretionary financial penalty and to publish a statement. It is self-evident that the finding also satisfied the threshold for the imposition of a prohibition order. Indeed, at paragraph 6619, the SDM states that "*As the Commission has found that Mr Tattersall is not a fit and proper person to be a manager (or director, controller or partner) of a licensee"* it is appropriate to consider a prohibition order.

404. There is no suggestion that any of the other minimum criteria for licensing were of any relevance to Mr Tattersall. Indeed, at paragraphs 6238 to 6240 of the Decision, the SDM stated:

> "*6238. In considering whether or not to impose a financial penalty … and/or publish a statement … the Commission has to consider the question of whether Mr Tattersall fulfilled and fulfils any of the minimum criteria for licensing specified in the regulatory Laws and applicable to him.*
> *6239. The relevant one of those criteria is whether Mr Tattersall is a fit and proper person to be a director, controller, partner or manager of a licensee. The question of whether Mr Tattersall is a fit and proper person is also relevant to the question of whether the Commission has power to make a prohibition order …*
> *6240. For the reasons set out above and summarised below, the Commission finds that Mr Tattersall is not a fit and proper person and does not fulfil the minimum criteria for licensing …"*

405. It is evident that the Royal Court, throughout, has referred to fulfilment of the minimum criteria for licensing, and treated that as interchangeable with the fit and proper person test. In the context of these cases, where the findings that the Respondents failed to fulfil the minimum criteria for licensing applicable to them were predicated on findings that they were not fit and proper persons to undertake the relevant functions, that equiparation has no practical consequence. It does not give rise to any implication that the Court did not apply its mind to

the correct test. The Court's decision, in effect that the challenge to paragraph 6556.2 of the Decision failed, carried (subject to the point which we have accepted above as to whether the Court should have drawn its own conclusion on this point) the necessary implication that the test for all available sanctions had been satisfied.

Criticism 3

406. Mr Moroney contends that the Royal Court failed to identify the conclusions of the SDM which it had upheld. He contends that it is not possible to identify whether the Royal Court upheld the conclusions both on the publication of a statement and on the prohibition order. That is said to result in the decision being inadequately reasoned. We reject that contention. The Royal Court set out in some detail its analysis in relation to the prohibition order and allowed Mr Moroney's appeal against its duration. As the Royal Court stated, it followed from its decision in relation to the other sanctions that the appeal against the public statement required to be allowed (paragraph 699 of the Royal Court judgment).

Criticism 4

407. Mr Tattersall and Mr Moroney contend that the Royal Court failed to reach a conclusion as to whether the findings against each of them were serious or very serious. This is said to vitiate its conclusions as regards the proportionality of sanctions, on the basis that a necessary foundation for a conclusion as to what was properly open to the SDM to hold on proportionality is to determine whether his findings on the level of seriousness were rational. They say that the Bailiff's analysis of seriousness in relation to Mr Tattersall is "*hesitant and fundamentally unclear".* As regards Mr Moroney, the Bailiff observed (at paragraph 681 of the Royal Court judgment) that he could not "*see anything on the face of the Decision that fixes the level of seriousness".*

408. In relation to Mr Tattersall, the Bailiff made comments about the level of seriousness at various points in his judgment. As we have observed above, the GFSC is obliged to take into consideration the "*seriousness"* of the non-fulfilment; and that falls to be assessed by reference to the conduct as a whole. The critical point in the judgment where the Bailiff addressed the issue is at paragraph 559 of the judgment, where he said this:

> "*Just because a relevant officer is found to be dishonest does not mean that it places that person into the very serious category. The actual findings must be looked at individually and collectively. As I have commented the finding in para. 6430 is serious, but I am not persuaded that the cumulative effect of all the findings necessarily justifies that conclusion that [Mr Tattersall's] conduct was very serious, however much deference I should give to the GFSC."*

At a later point in the Royal Court judgment (paragraph 566) he stated: "*... the setting aside of some of the findings of dishonesty (and some other findings) brings into question whether this is a very serious case or more appropriately to be regarded as serious and, if it is properly the latter, then the bracket into which this conduct falls inevitably shifts."*

409. The contention is that, since the Bailiff did not himself fix the level of seriousness, he could not rationally go on to address the duration of the financial penalty or the prohibition order. That contention misunderstands the nature of the appellate review required of the Royal Court. It is inconsistent with the contention advanced against the Royal Court's findings in relation to the fulfilment of the minimum criteria for licensing. Once the Royal Court had set aside certain of the underlying findings against a Respondent, that also undermined the SDM's conclusions as to: (i) whether the Respondent was a fit and proper person and therefore did not satisfy the minimum criteria for licensing; (ii) the evaluation of the seriousness of the non-fulfilment; and (iii) the sanctions imposed – unless the Royal Court can conclude that the GFSC would be bound to reach the same conclusions on the basis only of those findings which have survived. All of these matters required to be remitted to the GFSC.

410. The somewhat tentative way in which the Bailiff expressed himself in the passages we have quoted is consistent with this analysis. As he observed, the setting aside of some of the findings of dishonesty against Mr Tattersall:

> *"... brings into question whether this is a very serious case or more appropriately to be regarded as serious and, if it is properly the latter, then the bracket into which this conduct falls inevitably shifts."*

The GFSC will require to reconsider the question of seriousness in light of the findings which have survived appellate review.

411. Mr Moroney takes three points. He points out that the Bailiff acknowledged (at paragraph 656 of the Royal Court judgment) that there was no analysis of the number of occasions on which he had authorised the transfer of funds after May 2015, or the value of those transactions. He also observes that the Bailiff stated (at paragraph 681 of the Royal Court judgment) that he could not "*see anything on the face of the Decision that fixes the seriousness as it affects [Mr Moroney] at any particular level".* He notes that the Bailiff nevertheless observed that "*the discretionary financial penalty could still be a five figure amount" (*paragraph 686 of the judgment). Mr Moroney contends that there was a "*logical impossibility"* in fixing a level of seriousness without making findings about the number and value of the relevant transfers of funds. There was, as the Bailiff acknowledged, no specific finding in the Decision fixing the level of seriousness in any particular bracket. The Bailiff did not himself fix a level of seriousness. In these circumstances, it was irrational for the Bailiff to express any view as to the appropriate level of penalty.

412. As we have already noted above, the SDM made findings to the effect that Mr Moroney did nothing to ensure or check that the transactions in question were being recorded, and it accordingly lies ill in his mouth to complain about the absence of findings about the number and value of the transactions. The absence of such findings does not create any "*logical impossibility"* in assessing the seriousness of his conduct. The SDM took into account the seriousness of his acts and omissions explicitly at paragraphs 7236 to 7243 of the Decision. He concluded that Mr Moroney's conduct represented "*a relatively serious failure by him to meet the Minimum Criteria for Licensing"* (paragraph 7243 of the Decision). This passage arguably does not explicitly place the conduct in a particular bracket (though it would be a reasonable reading, it seems to us, that he regarded the conduct as falling within the *"serious"* bracket);

but the statutory requirement is to take into consideration "*the seriousness"* of the non-fulfilment. There is no statutory requirement to adopt any particular set of brackets or categories of seriousness. In any event, since a finding against Mr Moroney has been set aside on appeal, the question of seriousness prima facie requires to be remitted to the GFSC, and it will be open to the GFSC to reconsider into which bracket of seriousness the findings against him (as modified on appeal) should be placed as part of the exercise of reconsidering the sanctions to be imposed on him.

413. For all these reasons, we dismiss Tattersall Ground of Appeal 2 and Moroney Ground of Appeal 2.

GFSC Ground of Appeal 3: comparison with persons not the subject of enforcement action

414. Mr Fuller submitted to the SDM that his actions had to be considered by reference to the position of two other directors who were not respondents in the GFSC's decision-making process. These were Mr Betley, who had resigned as a director of LFS on 9 October 2014 and as a director of PIMIL on 1 May 2015, and Mr Purvis, who resigned as a director of LFS on 7 March 2016. The SDM rejected Mr Fuller's submission. He did not accept (para. 5019 of the Decision):

> *"that questions of Mr Fuller's responsibility and conduct … and its conclusions as to the extent and nature of his personal failure during the time he was a director of LFS and PIMIL to meet the minimum criteria for licensing and the appropriate response, are influenced by the fact that it [GFSC] has not (or has not to date) pursued enforcement action against another individual who was a director of one or more of the same companies."*

415. Mr Fuller renewed the point before the Royal Court. The Royal Court was not persuaded (para. 273 of the judgment) that an "*argument about the unreasonableness of the choice made by the GFSC not to pursue regulatory action against other persons"* was a "*valid ground of appeal*". He put it this way: "*It was a matter of choice for [the GFSC] as to who to include in the investigation. If the GFSC chose not to pursue a particular person, it does not even have to explain its reasons for that decision."*

416. Nevertheless, the Royal Court concluded (para. 274 of the judgment) that the point "*does become an issue when considering the sanctions that fell to be imposed".* The Court took the view (para. 275 of the judgment) that the GFSC's decision not to pursue someone else who might also have been found not to be a fit and proper person (and who therefore remained free to undertake roles in the regulatory environment) "*becomes relevant to the consideration of just how serious this conduct has been".* The Bailiff referred to *Sahin and Sahin v. Turkey,* Application No. 13279/05, 20 October 2011, and to *Beian v. Romania,* Application No. 30658/05, 6 December 2007. He concluded (para. 275 of the judgment) that, in relation to sanction, it was open to each of the Appellants before him to "*draw attention to the position of others who have not faced any sanction to highlight how the conduct of that Appellant ought to be viewed. This is in my view no different from drawing attention to the sanctions imposed on any individual who has chosen not to appeal to this Court. It is a question about consistency of approach".*

417. Against that background, among other reasons for concluding that the discretionary financial penalty imposed on Mr Fuller was too high, the Bailiff observed (para. 395 of the Royal Court judgment):

> *"... it is also of relevance to remember that there were other directors and individuals who have not faced investigation and sanction by the GFSC. It would be inappropriate to refer to them in detail, but some directors were also taken in by Mr Buzaneli whilst they served in that capacity, yet they have not been sanctioned at all. As I set out earlier in this judgment, I take the view that comparison can properly be made to those who have escaped any further action in order to assess the level of seriousness of what has been found against [Mr Fuller] ... the proportionality of those sanctions also needs to be viewed in light of the decision not to pursue others."*

418. Similarly, in relation to Mr Tattersall, the Bailiff considered (para. 560 of the Royal Court judgment) that "*in terms of assessing the seriousness of [Mr Tattersall's] role, the GFSC should also have regard to the decision not to pursue some others who might also have been said to have played a part in the eventual collapse of the Providence entities".*

419. Advocate Hill, on behalf of the GFSC, contended that the Royal Court's approach to this issue was wrong in law. There were no findings in relation to other directors who had not been the subject of enforcement action. It was wrong in law to compare persons who had not been subject to enforcement action to other persons who had been subject to sanctions. There was nothing in the legislation which justified this approach. The two Strasbourg cases to which the Bailiff referred were, so the submission went, concerned with differential treatment by the courts. They did not support any broader principle.

420. Advocate Dawes, on behalf of Mr Fuller, contended that the decision not to investigate or pursue other individuals who had had prominent roles in the Providence Group was of obvious relevance to the statutory criterion of seriousness, indeed to fulfilment of the minimum criteria for licensing, and therefore to the issue of sanctions. The decision by the Enforcement Division not to pursue certain individuals was "*a form of finding"* which established a *"benchmark"* as to what conduct corresponded with the minimum criteria for licensing. It was, he said, *"the closest thing to an objective standard".*

421. Advocates Greenfield and Bamford, on behalf of Mr Tattersall, contended that the Article 6 jurisprudence to which the Bailiff referred applied to the GFSC's regulatory process. The GFSC, which had decided not to pursue certain individuals, could make a comparison between the position of those individuals, and the individuals against whom enforcement action had been taken. It was self-evident that if the acts of two directors were the same, the lack of enforcement action against one of them was a factor pointing to the conduct of the other being less serious. There might be case-specific reasons why the former was not pursued, but all that was required was a reasoned analysis of the position.

422. We agree with the GFSC. In deciding whether or not to publish a statement or to impose a discretionary financial penalty, the GFSC is required to take into account inter alia "*the seriousness of the contravention or non-fulfilment"* (ie non-fulfilment of "*any of the minimum criteria for licensing specified in the regulatory Laws and applicable to him"*). That is not, on

the face of it, a comparative exercise; but simply an assessment of the seriousness of the breach or non-fulfilment established against the individual in question.

423. The GFSC is obliged also to take into account "*the penalties imposed by the Commission in other cases".* That is an injunction to take into account other previous cases where penalties have been imposed or the penalties which are being imposed on other persons in the same proceedings. The statutory provision does not require the GFSC to take into account the position of individuals against whom no proceedings have been taken and no penalties accordingly ever imposed.

424. There may be many reasons why a regulator chooses not to take enforcement proceedings against particular individuals; that is a decision for the regulator. Even if the GFSC has available to it evidence about individuals against whom it decides not to proceed, it will have made no formal findings against them and no sanctions will have been imposed. It is not, in these circumstances, possible for the GFSC meaningfully to compare the position of the Respondents with the positions of those individuals. The Court, on appeal, has no insight into these matters and is in no position to make any such comparison on an informed basis.

425. We do not consider that the two Strasbourg cases to which the Bailiff referred compel any different conclusion. These are concerned with the extent of, and limits on, the responsibility of Contracting States to organise their legal systems to avoid the adoption of discordant judgments within the court system. They are founded on the principle of legal certainty. They do not have any bearing on the issue before us, which does not engage the principle of legal certainty. To the extent that the two cases might be said to be based on a very broad underlying principle that like cases should be treated alike, there is no relevant point of comparison between a person against whom no proceedings have been taken, and no findings made, and a person against whom, by contrast, findings have been made, including a finding of non-compliance with the minimum criteria for licensing.

426. We accordingly sustain GFSC Ground of Appeal 3

GFSC Ground of Appeal 4: reliance on context and consequences

427. This Ground of Appeal is to the effect that the Royal Court made an error of law in its treatment of the concept of "seriousness". The Ground challenges two specific aspects of the Royal Court's treatment of the concept of seriousness: firstly, a criticism which the Royal Court expressed of the SDM's reliance on the broader context in which the conduct of the Respondents occurred; and, secondly, the Royal Court's view that seriousness, in respect of a relevant officer, could be determined only by reference to findings of conduct and activities in the particular capacity or position in question. In his written submission, Advocate Hill, on behalf of the GFSC, stated that he did not insist on the second point, and we can therefore confine ourselves to the first one.

428. The Ground of Appeal focuses on two passages in the Royal Court's judgment. The first, in the context of the Court's discussion of Mr Fuller's sanctions appeal, was the following observation at paragraph 394 of the judgment:

"*I take the view that the GFSC has focused more than it should have done on the consequences of Guernsey having been chosen by Messrs Buzaneli and Ordoñez, 'the admitted architects and proponents of the criminal enterprise (para. 5569.2), in which to locate the Providence entities. Whilst this has damaged the reputation of Guernsey as a financial centre, this is not something for which [Mr Fuller] was responsible."*

The second is paragraph 559 of the judgment (in the discussion of Mr Tattersall's sanctions appeal), to which the Ground of Appeal refers generally in support of the proposition that, "*At times the Royal Court considered seriousness in a silo, focusing largely on the individual conduct and without sufficient or any regard to the proper context in which that conduct was carried out".* We propose to address, first, the specific passage at paragraph 394 of the judgment, which is concerned with Mr Fuller's appeal against the sanctions imposed on him.

429. The SDM characterised Mr Fuller's failure to meet the minimum criteria as "*serious*" (paragraph 5477 of the Decision) and elaborated on his reasons for that characterisation at paragraphs 5483 to 5491 of the Decision. Those reasons included the following, among others:

"5484. Although Mr Fuller had no actual knowledge of the fraud being perpetrated by Mr Buzaneli and Mr Ordoñez, his failures to make the inquiries he should have made, failures otherwise to act on information known to him, incompetence and lack of diligence, as adumbrated and discussed in detail in this Notice, facilitated the continued perpetration of that fraud.

5485. Mr Fuller shared in responsibility for failures to curb Mr Buzaneli's control over finances and to exercise appropriate oversight over, and prevent the misuse of, money from investors.

5486. The Commission regards it as particularly serious that PIF continued to be promoted while Mr Fuller was a director of PIMIL on the footing that PIMIL was monitoring that there were sufficient assets im the Factoring Companies, and investors continued to subscribe on that basis, while Mr Fuller knew that PIMIL was not monitoring such assets and was not in a position to do so, but Mr Fuller took no steps to stop this happening.

5487. Moreover, apart from his significant failures of competence and integrity, the Commission has found that Mr Fuller was implicated in dishonest conduct (although not himself personally or deliberately dishonest) in permitting and failing to prevent the continued promotion of PIF and use of the January 2016 Revised Particulars and the May 2016 Revised Particulars which provided that 'The Investment Manager monitors that there are sufficient assets in the Factoring Companies to repay the loans from the Fund' when he knew that not to be the case …

5488. The contraventions and non-fulfilments on the part of LFS and PIMIL, for which Mr Fuller shared in responsibility resulted in significant losses to investors in PIF, the Cayman Fund and PIP after the date of Mr Fuller's appointment. It is unlikely that anything Mr Fuller could have done would have prevented or mitigated losses of investments made prior to that date.

5489. However, if Mr Fuller had pursued with more diligence the enquiries he ought to have made to inform himself sufficiently regarding the affairs of PIF, it is likely that he would have identified the lack of proper contractual documentation and security arrangements … Similarly, if he had pursued with greater diligence the proposal for an

Investment Committee. In the absence of the up-to-date data which was required for PIMIL to perform its designated role as Investment Manager of PIF and the Cayman Fund, further subscriptions into PIF and the Cayman Fund ought not to have been accepted until the position was remedied (and the Commission ought to have been informed).

5490. Mr Fuller therefore shares in responsibility for the losses incurred as a result of investments after the time of his appointment. The Commission cannot quantify the extent of such losses with precision, but if the figures reports to the November 2015 Board meeting were accurate, there had been net investments in PIF up to 30 September 2015 of (in round terms) £28.7 million … which had risen to some £37.2 million by the time of the collapse in August 2016, indicating an increase in investments in PIF after 30 September 2015 of the order of £8.5 million for the loss of which Mr Fuller shared responsibility.

5491. In considering the seriousness of Mr Fuller's contraventions and non-fulfilments and his relative responsibility for the contraventions and non-fulfilments by LFS and PIMIL during the Relevant Period applicable to him, the Commission has taken into account … [there are then set out six mitigatory circumstances]"

430. This formed part of a larger section of the Decision which addressed the various factors referred to in sections 11C(2) and 11D(2) of the FSC Law, as a precursor to considering the appropriate penalties. In that larger section, the SDM assessed the position of Mr Fuller relative to the position of directors upon whom sanctions had been imposed in other cases. The SDM took the view that it was not possible to identify precise parallels from previous decisions of the GFSC. He said this:

"*5557. First, and for reasons set out in detail elsewhere in this Notice, the Commission regards this case as the most serious to have been dealt with by a Senior Decision Maker. The Licensee Respondents were the vehicles and agents for the deliberate and fraudulent criminal enterprise initiated by Mr Buzaneli and Mr Ordoñez. Under those circumstances, having had regard to the penalties imposed in previous cases and all the other factors the Commission must take into account, and having regard to the need to calibrate sanctions appropriately within the statutory maximum of £200,000, the conduct identified by the Commission in this case falls squarely within the band of activity acknowledged by the Royal Court in Merrien as falling at the upper end of the spectrum of seriousness in which every case warrants consideration of the maximum penalty. …*

5558. The perpetration and perpetuation of that fraudulent enterprise did not require participation in the conspiracy or direct knowledge of the fraud. It was enabled and factilitated by the other Respondents in the various different ways for which responsibility (both for failures and non-fulfilments on the part of LFS or PIMIL while they were director of those companies, and for personal acts and omissions) is attributed to them in the courts of this Notice. This is a significant component of the question of seriousness which is one of the factors the Commission is required to take into account …"

431. The SDM went on to contrast Mr Fuller's position with Mr Buzaneli and Mr Ordoñez (paragraph 5569 of the Decision), among others. This is the paragraph from which the description of those Respondents as "*the admitted architects and proponents of the criminal enterprise which was perpetrated in Guernsey"* comes. At paragraph 5571 of the Decision, the SDM set out a number of features of Mr Fuller's position. These included the following:

> "*5571.11. Similarly, while Mr Fuller shares some responsibility for the damage which has been done to the reputation of the Bailiwick as a financial centre by the failure of PIF, the collapse of the Providence companies and the revelation of the fraud, the responsibility arising from his period of his directorships is pro rata less than that of those who were directors and in positions of senior executive management throughout."*

432. In expressing his conclusions as to penalty, the SDM stated inter alia:

> "*5584.1. While Mr Fuller was a director of LFS and PIMIL, both companies contravened in material particulars provisions of, or made under, one of the prescribed laws and Mr Fuller shared responsibility for and was in the respects identified above directly and personally responsible for such contraventions."*

433. The Royal Court concluded, at paragraph 389 of the judgment: "*... the overall categorisation of [Mr Fuller's] non-fulfilments as serious appears unduly harsh".* The discussion leading to that conclusion started at paragraph 373. The specific passage at paragraph 394 of the Royal Court judgment to which exception is taken in the Ground of Appeal appears as part of the Court's explanation for its overall conclusion that the discretionary financial penalty imposed was disproportionate and unreasonable, but nothing, in our view turns on that.

434. The Royal Court's assessment (at paragraph 389 of the judgment) that "*the overall categorisation of [Mr Fuller's] non-fulfilments as serious appears unduly harsh"* comes at the end of a passage which starts with the observation (at paragraph 378) that "*[i]n order to determine the seriousness of that non-fulfilment by [Mr Fuller], I take the view that the starting point will be the findings that have been upheld as against [Mr Fuller]".* Inasmuch as we have already sustained the GFSC's Grounds of Appeal 1 and 2.1, the basis upon which the Royal Court decided to "*downgrade"* the assessment of the seriousness of Mr Fuller's misconduct has been undermined. The seriousness of Mr Fuller's non-fulfilment of the minimum criteria for licensing will require to be revisited. However, the overall consequence of the Royal Court's decision as reviewed by us on appeal is that certain of the SDM's findings have been set aside. Unless the Royal Court can conclude that this would not materially have changed the GFSC's assessment of seriousness, it will require to remit the assessment of seriousness to the GFSC.

435. Advocate Hill's primary argument in respect of this Ground of Appeal was that the passage in paragraph 394 of the Royal Court judgment which he criticised disclosed an error of law. The SDM was, he contended, entitled to have regard to the context and consequences of Mr Fuller's actions. We do not read the passage from paragraph 394 of the judgment which is criticised as foreclosing the GFSC from taking those matters into account. It is followed in the Royal Court's judgment by this further comment:

> "*Even if he [Mr Fuller] had taken the steps that the GFSC has found he should have done, it would only have served to bring matters to a conclusion earlier than it did. The timescales following the publication of the SEC motion were, it seems to me, fairly compressed in any event, so it is the period beforehand when steps might have been taken, including by [Mr Fuller] to stop further investments taking place but there must be some recognition that the earliest time would have been later in 2015 at the very earliest once [Mr Fuller] had adequately familiarised himself with the companies."*

Taken as a whole, this passage, accordingly, seeks to emphasise that it is the consequences for which Mr Fuller himself could be said to bear some responsibility upon which attention should be focused when determining the appropriate level of penalty. However, in emphasising this, the Royal Court does not state, or suggest, that no regard may be had to the wider context; rather the Court expresses the view is that the SDM "*has focused more than it should have done"* on the wider context – in other words, the issue is one of weight rather than relevance. In the context of considering an appeal on grounds of Jurat reasonableness, the Royal Court is not excluded from considering the weight which the GFSC has attached to relevant circumstances; indeed, a finding of Jurat unreasonableness may arise because a decision-maker has placed such weight on one factor, by comparison with others, that the overall conclusion is unreasonable. On the face of the judgment, there is accordingly no error of law.

436. Advocate Hill put before us an alternative argument to the effect that the Royal Court had mischaracterised the SDM's reasoning. There was no basis, he said, for concluding that the SDM had focused more than he should have done on the consequences of Guernsey having been chosen by Messrs Buzaneli and Ordoñez. We reject that argument. We remind ourselves that we are dealing with an error of law appeal. We could uphold the contention only if there was no basis in the SDM's reasoning for the comment by the Royal Court which Advocate Hill criticises. We cannot so conclude. It is true that the SDM, at paragraphs 5488 to 5490, 5571.11 and 5584.1 of the Decision, which we have quoted above, focused squarely on the extent to which Mr Fuller could himself be said to bear responsibility for the failings of the companies and the losses to investors during his period of involvement with the Providence Group. But those observations appear in the context of the comments at paragraphs 5557 and 5558 of the Decision, which we have also quoted.

437. Although paragraphs 5557 and 5558 of the Decision were part of the reasoning for distinguishing decisions of the Commission in other cases, they disclose that the SDM was approaching sanctions in this case on the basis: (i) that use of regulated entities in Guernsey to perpetrate the Buzaneli/Ordoñez fraudulent scheme made this the most serious case which had been considered by a SDM; (ii) that the overall scheme was, indeed, at a level of seriousness, "*in which every case warrants consideration of the maximum penalty"*; (iii) that each of the individual Respondents had enabled and facilitated the scheme in one way or another; and (iv) that this was, in the SDM's view, a "*significant component"* of the question of seriousness. Accordingly, although the SDM rightly focused his mind on the role of Mr Fuller himself in enabling and facilitating the scheme, his starting point was that, by reason of the use which had been made by Messrs Buzaneli and Ordoñez of the Bailiwick's regulated sector to perpetrate a fraudulent scheme and, therefore, the overall seriousness of the case as a whole, the starting point was that every individual whose actions had enabled that scheme merited consideration of the maximum penalty.

438. The passage at paragraph 394 of the Royal Court judgment which Advocate Hill criticises is part of the Court's reasoning for concluding that the financial penalty imposed on Mr Fuller was disproportionate and unreasonable. We read the Court to be saying that, in the case of Mr Fuller at least, the approach indicated in paragraphs 5777 and 5778 of the Decision was too mechanical; and that, without ignoring the context, the sanctions imposed were disproportionate and unreasonable having regard to the limited period during which Mr Fuller was involved, and the limited scope for his actions, even if he had satisfied the minimum criteria for licensing, to alter the course of events. In the context of an assessment of proportionality and (Jurat) unreasonableness, that was a view which the Royal Court was entitled to take.

439. Although the Ground of Appeal also bears to refer to the Royal Court's treatment of Mr Tattersall's sanctions appeal, it does so in very general terms. The point apparently being made is that: "*At times the Royal Court considered seriousness in a silo, focusing largely on the individual conduct and without sufficient or any regard to the proper context in which that conduct was carried out."* We do not consider this point to be well-founded. When discussing Mr Tattersall's sanctions appeal, the Bailiff expressly stated that he accepted the SDM's comments that there had been significant losses to investors and significant damage to the reputation of the Bailiwick (paragraph 557 of the Royal Court judgment).

440. We accordingly dismiss the GFSC's Ground of Appeal 4.

GFSC Ground of Appeal 5: proportionality of sanctions

441. This Ground of Appeal challenges paragraphs 396 to 397 of the Royal Court judgment. These paragraphs are part of the Royal Court's discussion in support of its conclusion (expressed at paragraph 394):

> "*... that the discretionary financial penalty imposed by the GFSC on [Mr Fuller} was disproportionate and so unreasonable in the circumstances in which [Mr Fuller] found himself having taken office as a director of LFS and PIMIL in August 2015."*

442. The passage which is specifically criticised in this Ground of Appeal is in the following terms:

> *"... when considering the level of discretionary financial penalty imposed on [Mr Fuller], as well as having regard to the penalties imposed in previous cases, some consideration necessarily has to be had to the penalties imposed on others being investigated. The GFSC has quite properly chosen to apply the earlier maximum penalty available for an individual but has still stated that the penalty that would have been applied to Mr Buzaneli (and also Mr Ordoñez) had either been in a position to pay, would have been £195,000. Given that Mr Buzaneli was involved from the outset and appears to have operated in such a way that other directors, performing executive roles, were taken in, scaling down the level of involvement of [Mr Fuller] so that his discretionary financial penalty was just £70,000 below that which would have been imposed on Mr Buzaneli strikes me as being a disproportionate penalty ... the size of the differential for [Mr Fuller] strikes me as being too small ... it strikes me that a discretionary financial penalty of some tens of thousands of pounds would have been more appropriate."*

443. Advocate Hill criticised this passage on the following grounds.

(a) The Royal Court did not engage with the SDM's analysis. The SDM had explicitly had regard to the comparative position of each Respondent. He discussed this in some detail at paragraphs 5567 to 5577 of the Decision. For the detailed reasons which he set out, he had recognised (paragraph 5575) that there were factors which militated "*in favour of the penalty imposed on Mr Fuller falling into a lower band than those imposed on his fellow directors".* However, he took the view that the findings in respect of Mr Fuller were "*individually and collectively serious and require a penalty sufficiently high proportionately to reflect that seriousness (while taking into account all the factors the Commission is required to take into account) …".* The Royal Court had, so Advocate Hill contended, failed to fulfil its role on appellate review.

(b) Rather than approaching the review of the appropriate sanction by reference to all of the factors in section 11H(2), as the SDM had done, the Royal Court elevated the exercise of comparing sanctions in the same case to the single factor determinative of proportionality. This approach oversimplified the question, and undermined the statutory scheme.

(c) The implication of the observation that the sanction on Mr Fuller should have been "*some tens of thousands of pounds"* implied that the Court was proceeding on the basis that the correct legal approach was to adopt a notional range between £0 and £200,000 upon which each Respondent in the case had to be placed relative to their conduct. This approach has the result, in a case where there is serious misconduct of varying degrees, that persons who have committed serious misconduct are likely to receive a sanction which does not reflect the seriousness of their conduct. There was no legal or logical reason why the SDM could not conclude that each Respondent's conduct (apart from Mr Moroney) was such as to fall within a range towards the higher end of the GFSC's powers.

444. Advocate Dawes contended that the Bailiff's approach was correct, particularly where he had set aside key findings and downgraded the seriousness of those that remained to something less than serious. The Bailiff had permissibly disagreed with the SDM's conclusion on sanctions. He was permitted to consider and compare sanctions between individuals in the same case when considering proportionality. It was appropriate to approach the matter, within a single case, on the basis of a scale or range. It was not, he said, open to the SDM to hold that all parties (apart from Mr Moroney) were at the higher end of the fining powers.

445. Before addressing this Ground of Appeal, we observe that our decision sustaining the GFSC's Grounds of Appeal 1 and 2.1 undermines the basis upon which the Royal Court's decided to "*downgrade"* the seriousness of Mr Fuller's conduct. In particular, the Bailiff's observations that a discretionary financial penalty of "some tens of thousands of pounds" and that a "*six figure amount falls outside the range*" open to the GFSC fall to be re-assessed in light of the outcome of the appeal to this Court.

446. On the specific point which has been taken in this Ground of Appeal, it is not correct to state that the Royal Court has taken into account a "*single factor"*. On the face of it paragraphs 394

to 397 of the judgment refer to a number of considerations: (i) the requirement to refer to previous cases involving non-executive directors; (ii) the findings which have been upheld; (iii) the relative focus on the overall fraudulent scheme as opposed to the relatively short period during which Mr Fuller had been involved; (iv) the failure by the GFSC to pursue other individuals; (v) the findings of the Baxter Review; and (vi) the penalties imposed on others in this case.

447. It is true that at paragraph 396 of the Royal Court judgment, the Bailiff expresses the view that, having regard to their respective levels of culpability, a differential of "*just £70,000"* between the penalty which would have been imposed on Mr Buzaneli and that imposed on Mr Fuller was disproportionate. It cannot be said that such a comparison is illegitimate. The GFSC is required to take into consideration the penalties imposed in other cases, and on other Respondents in the same case. It seems to us that all that the Bailiff is saying is that, having regard to all the other considerations to which he has already referred (which includes the surviving findings against Mr Fuller and, at least implicitly, his conclusion in relation to the seriousness of those findings), a differential of "*just £70,000"* was disproportionate. We accordingly dismiss GFSC Ground of Appeal 5.

448. Nevertheless, the general point being made by Advocate Hill is a sound one. The legislation requires various factors to be taken into consideration when determining the level of financial penalty. These include the seriousness of the non-fulfilment and relevant comparators in previous cases, as well as in the instant case. It would be wrong to proceed on the view that in an individual case, the Respondents require to be distributed across the whole range of financial penalty available. The penalty imposed on each Respondent should fairly reflect the seriousness of the conduct in question.

GFSC Ground of Appeal 6: directions to the GFSC

449. Ground 6 contains a further challenge to the Bailiff's comments about the permissible level of financial penalty which could legitimately be imposed on Mr. Fuller, to which Ground 5 was addressed. It also challenges certain observations at paragraph 412 of the Royal Court judgment about the imposition of a prohibition order on Mr Fuller, and a number of matters which the Royal Court stated should be taken into account by the GFSC in assessing the duration of a prohibition order. These were: (i) the role that Mr Fuller was intended to play as part of the remediation process (paragraph 406 of the Royal Court judgment); (ii) the findings of the Baxter Review (paragraph 405 of the Royal Court judgment); and (iii) the view that "*the experience of his involvement with LFS and PIMIL and the whole of the Providence situation will have served as a very salutary lesson for [Mr Fuller]* (paragraph 405 of the Royal Court judgment).

450. At paragraph 412 of the Royal Court judgment, having concluded that the question of penalty would require to be remitted to the GFSC, the Bailiff stated:

> "*I do not consider that it would be appropriate to give directions to the GFSC having decided to remit the matter. The GFSC will inevitably need to bear in mind those findings made by the SDM which I have said should not have been made. The level of seriousness of [Mr Fuller's] failings to meet the minimum criteria for licensing will need to be re-assessed. The initial focus should be on those aspects where there are*

findings of want of integrity, but to those can be added the findings upheld about incompetence and diligence, although it would be rare to impose prohibition orders if they were the only findings left. All of these matters then need to be put into the context of [Mr Fuller] being a relevant officer for just under one year. At the end of the process, the GFSC should reach a conclusion about what level of discretionary financial penalty would be proportionate and reasonable. I take the view that it cannot be greater than a five figure amount, but I am declining to make any direction setting such a cap. Whilst the damage to the reputation of the Bailiwick as a financial centre is relevant to a person's fitness and propriety to hold any particular position, and so to the length of a prohibition order, there is no direct read across to the amount of the discretionary financial penalty. There should, of course, be some correlation to the acknowledged amount of emoluments received for being a relevant officer. Similarly the GFSC will bear in mind whether there is any need at this time to impose prohibition orders and, if so, how to factor in that they might be regarded as having effectively run from an earlier time. Whilst I appreciate that the prohibition orders have been suspended pending determination of this appeal, it is important for the GFSC to have regard to the realities of what has happened in the intervening years. I do not consider that it would be helpful to impose prohibition orders (and the same applies to the disapplication of the exemption in section 3(1)(g) of the Fiduciaries Law) that are shorter but effectively expire at around the same time as the original 10-year orders would have."

We have underlined the passage which is challenged in this Ground of Appeal.

451. The GFSC's Notice of Appeal contended that the Royal Court erred in stating it was not giving directions, when it evidently was. In his written submission, Advocate Hill made clear that the GFSC was not insisting in this point. Rather, he accepted that the Royal Court had, in effect, given directions to the GFSC as to certain matters which it should take into account and in respect of the level of penalty. The GFSC contended that these were unlawful. Advocate Dawes, for his part, accepted that the Royal Court gave what amounted, in substance, to directions, but contended that these were appropriate and correct in the context of the extent to which the Bailiff had allowed Mr Fuller's appeal and his re-evaluation of seriousness.

452. At the outset, we observe that, since we have sustained the GFSC's Grounds of Appeal 1 and 2.1, the Royal Court's assessment of seriousness in Mr Fuller's case has been undermined. The question of seriousness will require to be addressed anew by reference to the findings which remain standing following the conclusion of the appellate process (including the reconsideration by the Royal Court of paragraph 332 of the judgment).

453. We address the specific points raised by the GFSC as follows:

(a) We agree with the GFSC that the Royal Court erred in law at paragraph 406 of the judgment, where the Court said that the reputational damage to the Bailiwick had to be balanced by "*the role that [Mr Fuller] was intended to play as part of the remediation process".* It is a matter of fact that Mr Fuller was appointed as a director as part of a remediation plan. It is also the position that, in that position, he demonstrated a want of integrity and incompetence. On the assumption that

those findings justify the conclusion that he was not a fit and proper person (and therefore did not satisfy the minimum criteria for licensing) it would be irrational to treat the reason why he was appointed as mitigating the position.

(b) We also agree that the findings of the Baxter Review are irrelevant to the question of sanction. It seems to us to be important to be clear that the direct and primary responsibility for the management of regulated entities rests with the relevant officers of those entities. If a relevant officer is found not to be a fit and proper person (and therefore not to fulfil the minimum criteria for licensing) – a matter which of course falls to be assessed in the context of the actual circumstances which pertained at the relevant time - it is not generally an excuse for the relevant officer's failings that there were also failings on the part of the regulator. Further, if the circumstances otherwise justify a prohibition order of a particular duration for the protection of the public and for the purposes of deterrence, the existence of regulatory failings on the part of the GFSC does not mitigate penalty. Regulatory proceedings against regulated entities and relevant officers should not become distracted by attempts to blame the regulator for the failings of those who are charged with responsibility for the management of regulated entities.

(c) We also agree that the Bailiff's comments to the effect that the experience is likely to have been a "*salutary lesson"* for Mr Fuller do not appear to have been based on any evidence and indeed are generally contrary to findings made by the SDM about the way in which Mr Fuller has approached these proceedings. In determining whether a prohibition order is justified (and, if so, its duration) in the interests of public protection and deterrence, the GFSC may (subject to appellate review by the Court) take into account evidence of genuine reflection and acknowledgement of failings on the part of a Respondent, not least because this may bear on the likelihood that lessons have indeed been learned. But there requires to be a proper evidential basis for such a finding.

454. We accordingly sustain GFSC Ground of Appeal 6.

COSTS

The GFSC's costs appeal (GFSC Ground of Appeal 7)

455. The outcome of the appeal to the Royal Court involved mixed success. In his costs judgment, the Bailiff rejected a submission advanced on behalf of the GFSC that the starting point should be that no order for costs should be made against the GFSC. That submission was advanced under reference to *Competition and Markets Authority v. Flynn Pharma* [2022] 1 WLR 2972, *Imperium Trustees (Jersey) Ltd v. Jersey Competent Authority* [2024] JCA 014 and certain English cases referred to in those two authorities. The Bailiff concluded that he should apply the usual principle that costs ordinarily follow success. On that basis he ordered the GFSC to pay 50% of the costs of Mr Fuller and Mr Tattersall and two thirds of Mr Moroney's costs.

456. The GFSC contends that the Bailiff erred in rejecting its submission that no order as to costs was the correct starting point and in adopting the principle that costs follow the event. It relies on the principle, derived ultimately from *Bradford Metropolitan District Council v. Booth*

[2000] 164 JP 485, that where a public body, acting in accordance with a public duty, is unsuccessful in proceedings, the court should consider the risk that there will be a chilling effect on the conduct of that public body by the imposition of costs. The GFSC contends that the Bailiff erred in concluding that the *Booth* principle did not apply; and, in any event, in concluding that no chilling effect existed in relation to the GFSC. Mr Tattersall and Mr Moroney accept that the law, as articulated in *Flynn Pharma* and *Imperium* is applicable in Guernsey. They contend that the Royal Court was right to find that there was no chilling effect. Mr Fuller likewise accepts that the analysis in *Flynn Pharma* is applicable and contends simply that the costs order was appropriate in the circumstances.

457. Section 1(1) of the Royal Court (Costs and Fees) (Guernsey) Law 1969 provides:

> *"The costs of and incidental to all proceedings in the Royal Court shall be in the discretion of the Royal Court and the Royal Court shall have power to determine by whom and to what extent the costs are to be paid."*

Rule 82(1) of the Royal Court Civil Rules 2007 provides:

> "*The Court may, in any action –*
>
> *(a) make such order as to the costs of the proceedings, or of any stage or application in the proceedings, and*
>
> *(b) order any party to give security for costs in such amount, on such terms and in such manner as the Court thinks just."*

458. The Court accordingly has a very wide discretion as regards costs. That discretion nevertheless requires to be exercised judicially and in accordance with the relevant principles. As Lady Rose observed in *Flynn Pharma* at paragraph 94:

> "*even where a statutory power conferred on a court or tribunal to award costs appears to be unfettered, it is appropriate for an appellate court to lay down guidance or even rules which should apply in the absence of special circumstances."*

459. We require to address, apparently for the first time in Guernsey, whether particular considerations apply when the Court is exercising its discretion as to the award of costs in a case involving a public or regulatory authority such as the GFSC. We have been shown no Guernsey authorities on the point other than the Bailiff's decision which is before us on appeal. The issue has, though, been the subject of analysis in decisions from England & Wales and from Jersey. The position has been reviewed recently by the UK Supreme Court in *Flynn Pharma, supra,* and by the Court of Appeal of Jersey in *Imperium Trustees, supra.*

460. The proposition which these cases support is that in certain types of case it is a relevant and material consideration that one of the parties is a public authority, which is exercising public functions. That proposition is supported by a line of authority from England & Wales, notably *Booth, supra, Baxendale-Walker v. Law Society* [2007] EWCA Civ 233 and *R (Perinpanathan) v. City of Westminster Magistrates Court* [2010] EWCA Civ 40. In the last of these cases, Stanley Burnton LJ summarised the position in the following terms:

"I derive the following propositions from the authorities to which I have referred.

(1)As a result of the decision of the Court of Appeal [in Baxendale-Walker] the principle in [Booth] is binding on this Court. Quite apart from authority, however, for the reasons given by Lord Bingham CJ I would respectfully endorse its application in licensing proceedings in the magistrates court.

(2) For the same reasons, the principle is applicable to disciplinary proceedings before tribunals at first instance brought by public authorities acting in the public interest …

(3) Whether the principle should apply in other contexts will depend on the substantive legislative framework and the applicable procedural provisions.

(4) The principle does not apply in proceedings to which the CPR apply.

(5) Where the principle applies and the party opposing the order sought by the public authority has been successful in relation to costs the starting point and default position is that no order should be made.

(6) A successful private party to proceedings to which the principle applies may none the less be awarded all or part of his costs if the conduct of the public authority in question justifies it.

(7) Other facts relevant to the exercise of the discretion conferred by the applicable procedural rules may also justify an order as to costs. It would not be sensible to try exhaustively to define such matters, and I do not propose to do so."

The Royal Court of Jersey has taken a similar approach in the cases referred to at paragraphs 17 to 19 of *Imperium Trustees, supra.*

461. In *Flynn Pharma,* the UK Supreme Court rejected the proposition that the approach outlined by Stanley Burnton LJ is generally applicable to all public authorities. We take the following propositions from Lady Rose's judgment (the judgment of the Court).

(a) "*… there is no generally applicable principle that all public bodies should enjoy a protected status as parties to litigation where they lose a case which they have brought or defended in the exercise of their public functions in the public interest."* (paragraph 97)

(b) "*The principle supported by the Booth line of cases is, rather, that where a public body is unsuccessful in proceedings, an important factor that a court or tribunal exercising an apparently unfettered discretion should take into account is the risk that there will be a chilling effect on the conduct of the public body, if costs orders are routinely made against it in those kinds of proceedings, even where the body has acted reasonably in bringing or defending the application."* (paragraph 97)

(c) *"This does not mean that a court has to consider the point afresh each time it exercises its discretion … The assessment that, in the kinds of proceedings dealt with in Booth, Baxendale-Walker and Perinpanathan, there is a general risk of a chilling effect clearly applies to the kinds of proceedings in which those cases were decided and to analogous proceedings."* (paragraph 97)

(d) "*Whether there is a real risk of a chilling effect depends on the facts and circumstances of the public body in question and the nature of the decision which it is defending – it cannot be assumed to exist."* (paragraph 98)

(e) "*... the assessment as to whether a chilling effect is sufficiently plausible to justify a starting point of no order as to costs in a particular jurisdiction is an assessment best made by the court or tribunal in question, subject to the supervisory jurisdiction of the appellate courts."* (paragraph 98)

462. The UK Supreme Court rejected the contention that, in proceedings before the UK Competition Appeal Tribunal, there should be a starting point of "no order as to costs" against the Competition and Markets Authority. It concluded that the Tribunal had been entitled to adopt a starting point that costs follow the event. Lady Rose justified that conclusion by considering the applicable procedural provisions and the substantive legislative framework within which the Tribunal operates. However, in doing so, she did not confine herself to the formal features of the law. For example:

(a) At paragraph 121 of the Supreme Court judgment she noted that "*the level of decision-making activity of local authorities, the police and the professional disciplinary bodies concerned in the Booth line of cases is of an entirely different order from that of the CMA. The CMA takes a limited number of decisions each year under the Competition Act. ..."* She noted that, by contrast, the Solicitors Regulation Authority undertook about 120-130 prosecutions a year (paragraph 122) and made clear that the approach taken in *Baxendale-Walker* to those cases was not affected by her decision.

(b) At paragraphs 123ff of the Supreme Court judgment, she considered in some detail the funding arrangements of the CMA and the way in which (through the level of penalty which could be imposed) the CMA is incentivised to investigate and sanction infringements by substantial undertakings even though those may be more likely to appeal.

(c) At paragraphs 130 of the Supreme Court judgment, she noted that: "*the right of appeal is 'an essential part of the system by which competition authorities, in return for receiving extensive enforcement powers, are held to account by the courts".* In the following paragraphs, she elaborated on that proposition. She noted (at paragraph 133) that, in judicial review proceedings, "*[t]he High Court has regarded the prospect of an adverse costs order as beneficial on the basis that it will encourage better decision-making within Government, a more realistic appraisal by the respondent Department of the merits of defending any particular application and the efficient and proportionate conduct of proceedings. It is also considered just that a person wronged by the actions of a public authority should be reimbursed his or her costs."*

(d) She also observed (paragraphs 136ff of the Supreme Court judgment), under reference to costs rulings by the CAT, that "*[t]he factors considered in Booth may legitimately be accommodated by the outcome of a costs award even if costs follow*

the event is taken as the starting point". She noted, for example, that the CAT often makes issues-based cost awards and often makes substantial reductions in the costs which the CMA or other regulators are ordered to pay. She concluded (paragraph 153) that the CAT had "*developed a sophisticated approach to costs awards"* which reflected "*the need to strike a balance between maintaining flexibility whilst providing predictability and between ensuring that costs awards do not undermine the effectiveness of the competition or regulatory regime whilst ensuring a just result for both parties".*

463. In *Imperium Trustees, supra,* the Court of Appeal of Jersey endorsed (albeit obiter) the following propositions as applicable to the law of Jersey.

(a) In certain cases, it may be appropriate to adopt a starting point that the Court will make no order for costs against a public authority. The rationale for this is the desirability that public authorities should make and stand by honest, reasonable and apparently sound administrative decisions in the public interest and should not be deterred from that course by the risk of litigation or the potential to face awards of costs. [paragraphs 34, 35]

(b) Nevertheless, there is no presumption in favour of such a starting point. Indeed, the proper starting point is a "*working assumption and expectation"* that public authorities will exercise their functions properly and without fear or favour and will take robust decisions when deciding how to respond to challenges to the lawfulness of their actions. [paragraph 36]

(c) Further, public law litigation is an important mechanism of accountability, and the general rule that costs follow success has a "*salutary effect in encouraging good practice in the conduct of litigation".* [paragraph 37]

(d) Against that background, there must be some basis, beyond the fact that the case concerns a public authority, for concluding that there is in relation to any particular case or type of case a real risk of a chilling effect on the proper exercise of public functions before that consideration should be given weight. [paragraphs 36, 37]

(e) Where the Court does conclude that the risk of a chilling effect falls to be given weight, it must also take full account of the other considerations relevant to the exercise of the costs jurisdiction, including the financial prejudice to the successful claimant in the particular circumstances, if a costs order is not made in its favour. [paragraph 38]

The decision of the Court of Appeal was successfully appealed to the Judicial Committee of the Privy Council, but on other grounds which do not affect this part of the judgment.

464. We agree with the UK Supreme Court and the Court of Appeal of Jersey that the mere fact that proceedings concern a public authority does not justify taking as a starting point that the Court will make no order for costs against the public authority. In our view this follows from first principles. The usual principle, which takes as a starting point that costs follow the event, is

justified by considerations both of fairness and by the salutary effect which the usual rule as to costs has on the conduct of litigation.

465. In public law litigation there is an additional consideration which supports the application of the usual approach to costs. At the core of the constitutional principle of the rule of law is the proposition that the powers which public authorities exercise derive from the law and are subject to the limits which the law sets to them. It is a corollary of that principle that public authorities may be held accountable in the courts by those affected by their decisions for the lawfulness of those decisions. The adoption of a starting point that no order as to costs will be made against a public authority even in the event of a successful challenge to its actions may discourage well-founded challenges from being brought forward. That consideration may be of particular relevance in a case such as this one, where the opportunity to seek a review of the GFSC's decision-making on appeal to the Royal Court is necessary if the system is to operate compatibly with Article 6. It follows that the adoption of such a starting point in any particular class of case would require specific justification.

466. The rationale for the *Booth* line of authority is the apprehended risk that, at least in some contexts, a public authority may be diverted from the proper exercise of its functions by the possibility of litigation and the risk of adverse costs awards. This would not serve the public interest. Further, in the conduct of litigation, public authorities are in some respects in a different position from a private litigant. For example, a public authority may sometimes be justified in deciding that it would serve the public interest to have a judicial ruling on the matter in issue, rather than conceding it, even if the public authority anticipates that the Court will rule against it, because of the wider systemic benefits (in terms of legal certainty) which a judicial ruling will bring.

467. As the UK Supreme Court observed in *Flynn Pharma,* considerations such as these are capable of being accommodated within the Court's very wide discretion as to costs even though the starting point is for costs to follow the event. To justify adopting a starting point of no award of costs against the public authority, there must be a proper basis in the material before the Court for concluding that, unless that approach is taken across the board, there is a real risk of a "chilling effect" on the proper exercise of that public authority's functions. When the Court of Appeal of Jersey in *Imperium Trustees* referred to the need for "*some special factor beyond the fact that the case concerns a public authority*" it was referring, as we read it, to the need for a basis for concluding that there is, in the particular type of case, a "*real risk of a chilling effect*" before that consideration should be given weight. In other words, the onus is on the public authority to justify such an approach. We do not understand the UK Supreme Court in *Flynn Pharma* to be saying anything different.

468. In the present case, the Royal Court rejected the GFSC's contention that the starting point should be no award of costs against it. In renewing the submission before us and contending that the Royal Court erred in "holding that the *Booth* principle did not apply", Advocate Hill made three points. First, he contended that the wide discretion of the Royal Court as to costs is such that "the *Booth* principle" is engaged. Secondly, he pointed out that the GFSC is a regulator acting in a public capacity and in accordance with its statutory functions. Its position is, he suggested, analogous to that of a professional regulator, such as the SRA in England & Wales. The GFSC has to act in accordance with its public duty in deciding whether to challenge an

appeal. Thirdly, he contended that the Commission had not acted unreasonably in responding to the appeal.

469. We accept that, at the level of principle, it would be open to the Court, if the circumstances justified it, to adopt a starting point of no award of costs against the GFSC. The real question is whether such an approach would be justified in cases involving the GFSC. The three considerations upon which Advocate Hill relied are necessary conditions, but not sufficient, for the adoption of such an approach.

470. The fact that the Royal Court's discretion as to costs is a wide one is neutral as to whether it would be appropriate to adopt the approach for which the GFSC contends. It does not exclude such an approach if it is otherwise justified, but the point goes no further than that. Further, the issue only arises for consideration because the GFSC is a regulator which acts in the public interest and there is no reason to believe that the GFSC has acted inappropriately in defending this appeal. Following *Flynn Pharma,* the mere fact that the GFSC is a public authority, which has acted reasonably, does not justify the approach to costs for which it contends. The same could have been said of the Competition and Markets Authority to which the decision in *Flynn Pharma* was directed.

471. Advocate Hill contended that the position of the GFSC is analogous to "*other professional regulators (i.e. the SRA)".* We do not accept the analogy. The mere fact that the circumstances of a particular public authority or regulator in England & Wales have been found to justify the application of the *Booth* principle does not mean that the circumstances of the analogous body in Guernsey are on all fours. In the case of any public body in Guernsey which seeks the benefit of a special approach to costs, it is for that public body to justify it by reference to considerations such as those to which Lady Rose referred in *Flynn Pharma.*

472. Advocate Hill further contended that the Royal Court erred in law in rejecting the GFSC's contention that there would be a chilling effect if the Court did not adopt a starting point of making no award of costs against it. We do not accept that contention. The Bailiff noted that the GFSC frequently resists appeals and is not always successful in doing so. He also noted that the GFSC has resources. He referred to the GFSC's 2023 financial statements and its ability to raise further resources through adjusting its fee income. Advocate Hill sought to persuade us that these considerations justified the conclusion that there would be a chilling effect. In particular, he contended that the potential for the cost of appeals to result in increases in licence fees (which would be borne by the financial services sector in Guernsey) was a strong argument in favour of the existence of a chilling effect.

473. We reject those contentions. The Bailiff was entitled to refer to the two factors we have mentioned when deciding to reject the contention that the imposition of costs liabilities on GFSC even in cases which it lost would have a chilling effect on the exercise by it of its public functions. Having himself determined a number of appeals from decisions of the GFSC, and being aware of others, he was well-placed to form a view as to whether the GFSC acts in a risk averse manner because of a fear of litigation and/or costs. He was entitled to conclude that there was nothing in the funding position of the GFSC which justified that conclusion. Advocate Hill has not shown us the 2023 accounts which were before the Bailiff, and so we are in no position to assess the position for ourselves, but the mere fact that the licence fee might have to be

increased if the GFSC is unsuccessful in resisting appeals does not justify the conclusion that the GFSC will not robustly and properly fulfil its public functions whether in its primary decision-making or in its response to appeals. It is, as the statutory provisions recognise, in the interests of the Guernsey financial services industry to have an effective regulatory regime, and we have no basis for concluding that the regulator would be deterred from responding effectively and appropriately simply because this could result in an increase in the licence fee.

474. We dismiss GFSC's Ground of Appeal 7.

Mr Tattersall's and Mr Moroney's costs appeal

475. Mr Tattersall and Mr Moroney also appeal against the Royal Court's costs decision (Tattersall Ground 4; Moroney Ground 4). They contend that since, as they contend before us, their appeals should have been allowed in full, they should also have been awarded 100% of their costs. Since we have rejected that contention, this Ground falls away. They also contend that the GFSC should pay their costs on an indemnity basis. We have been provided with no specification of the grounds for that contention. We accordingly dismiss Grounds of Appeal 4 for Mr Tattersall and Mr Moroney.

CONCLUSIONS

476. For the detailed reasons set out above, we have reached the following conclusions.

i. We reject the Respondents' structural challenge to the compatibility with Article 6 of the legislative scheme, and to the analysis set out in *Domaille.*

ii. We sustain Mr Fuller's contention that the Royal Court erred in failing to hold that there had been a material error of procedure specifically in respect of the SDM's findings against Mr Fuller based on the content and manner of his representations. We otherwise dismiss the Respondents' contentions that the Royal Court erred in failing to hold that the procedure followed in this case was incompatible with Article 6 and/or was procedurally unfair by reference to customary law principles.

iii. We sustain the Respondents' contentions that the duration of the proceedings was incompatible with Article 6 of the European Convention on Human Rights, specifically under reference to the duration of the proceedings in the Royal Court. The Royal Court will require to consider whether just satisfaction can be adequately achieved by a declaration to that effect. Otherwise, the case should be remitted to the GFSC with a direction that it should make an adjustment to the sanctions imposed by way of just satisfaction.

iv. We reject the Respondents' contention that the duration of the proceedings would, at customary law, justify setting aside the Royal Court decision.

v. We sustain Mr Fuller's contention that paragraph 332 of the Royal Court's judgment is inadequately reasoned. We otherwise reject the Respondents' contentions to the effect that the judgment is inadequately reasoned. The Royal

Court will require to reconsider the issue addressed in paragraph 332 and provide a reasoned decision.

vi. We reject the Respondents' contentions that the Royal Court did not apply the concept of Jurat unreasonableness.

vii. In respect of specific findings challenged by the GFSC, we sustain GFSC Grounds of Appeal 1, 2.1, 2.3 and 2.4. We dismiss GFSC Ground of Appeal 2.2 on the ground that it is superseded; and Ground of Appeal 2.5 on its merits. We dismiss Mr Fuller's Grounds of Appeal 3 and 4.

viii. We sustain the Respondents' contention that the Royal Court erred in itself holding that they did not satisfy the minimum criteria for licensing rather than remitting that question to the GFSC. The Royal Court will require to consider in respect of each Respondent and in light of our analysis of the law, whether the findings which have survived appellate scrutiny are such that the GFSC would be bound to hold that the Respondent did not satisfy the minimum criteria for licensing. Otherwise, that question will require to be remitted to the GFSC for reconsideration in light of the outcome of the appellate process.

ix. We sustain the GFSC's Ground of Appeal 3. The Royal Court will require to consider in respect of each Respondent and in light of our analysis of the law, whether the findings which have survived appellate scrutiny are such that the GFSC would be bound to adhere to its assessment of seriousness. Otherwise, the question of seriousness will require to be remitted to the GFSC for reconsideration in light of the outcome of the appellate process.

x. We dismiss the GFSC's costs appeal; and the costs appeals advanced by the Respondents.

477. The case will require to return to the Royal Court, for further consideration before a remit to the GFSC. The matters which will require consideration by the Royal Court, as we perceive them, are as follows.

(a) The Royal Court will require to reconsider the issue addressed in paragraph 332 of its judgment and give a reasoned decision.

(b) The Royal Court will require to consider in the case of each Respondent, in light of the outcome of the appellate process, and our analysis of the law, whether the GFSC would have been bound to hold that he did not satisfy the minimum criteria for licensing and to adhere to its findings as regards the seriousness of the non-fulfilment. Otherwise those questions will fall to be remitted to the GFSC for reconsideration in light of the outcome of the appellate process.

(c) The Royal Court will require to consider whether a declaration that there has been a breach of the Article 6 requirement that civil rights and obligations be determined

within a reasonable time is sufficient just satisfaction in respect of that breach. If not, the Court will require to direct the GFSC to make an adjustment to the sanctions imposed by way of just satisfaction in respect of that breach.