The Guernsey Court of Appeal upheld findings of lack of probity against Nicholas Walton Hofgren in relation to regulatory breaches as a director of GFG Limited, but remitted the assessment of seriousness and sanctions to the Commission due to errors in the Royal Court's approach to evaluating the gravity of the conduct and the proportionality of sanctions.

[2025]GCA093

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

19 December 2025

BEFORE:

Clare Montgomery KC, President;

Roddy Dunlop KC, JA; and

The Rt Hon Dame Julia Macur, JA

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

IN THE MATTER OF AN APPEAL PURSUANT TO
SECTION 106 (1) OF THE FINANCIAL SERVICES
BUSINESS (ENFORCEMENT POWERS) (BAILIWICK OF GUERNSEY) LAW, 2020

BETWEEN:

NICHOLAS WALTON HOFGREN

Appellant

-and-

CHAIRMAN OF THE GUERNSEY FINANCIAL SERVICES COMMISSION

Respondent

Introduction

1. This is an appeal against the judgment of HH Hazel Marshall KC, Lieutenant-Bailiff sitting in the Royal Court dated 21 November 2024 (the Judgment) which dismissed Mr Hofgren's appeal against a Final Notice (the Decision) issued by the Chairman of the Guernsey Financial Services Commission (the Commission) dated 16 November 2022.

2. Advocate Adkins appears on behalf of Mr Hofgren (the Appellant). Advocate Hill appears on behalf of the Commission (the Respondent). Both Advocates appeared on appeal in the Royal Court. Advocate Adkins also attended the Appellant at a hearing convened by the Senior Decision Maker (SDM) during the Commission's investigation into GFG Limited. Both Advocates have filed substantial written cases and responses and have spoken to them. We address only those submissions relevant to the disposal of this appeal below.

3. I gratefully adopt paragraphs [6] to [33] of the Court of Appeal's decision in *GFSC v Fuller & ors* [2025] GCA 071 (*Fuller)* which sets out the Regulatory Framework and process involved in an

investigation conducted by the Commission and provide the context in which appeals to the Royal Court made pursuant to section 106 of The Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020 ("the Enforcement Powers Law") are to be adjudicated.

4. Section 106 of the Enforcement Powers Law, so far as relevant provides:

> Appeals to Royal Court against decisions of Commission.
>
> (1) A person ("A") aggrieved by a decision of the Commission - [to impose sanction] may appeal to the Royal Court against the decision.
> (2) …
> (3) The grounds of appeal under this section are that-
> (a) The decision was ultra vires or there was 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.
> …
> (6) On an appeal under this section the Royal Court may –
>
> (a) set the decision of the Commission aside and, if the Royal Court considers it appropriate to do so, remit the matter to the Commission with such directions as the Royal Court thinks fit, or
> (b) confirm the decision, in whole or in part.
>
> …

5. The jurisdiction of the Royal Court in this appellate function is well described in *GFSC v Domaille* [2024] GCA 003, (*Domaille*) as adopted in *Fuller*. 'In summary, 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): namely, 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. "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."'

6. The appeal to this Court from the Royal Court is pursuant to section 107 of the Enforcement Powers Law and may only be brought, with leave, on a question of law.

Background

7. At all relevant times, Mr Hofgren was a director of GFG Limited (GFG), a manager for various funds operating through protected cell companies of GFG Funds PCC Limited (the Scheme) of which specified transactions were made subject of an investigation by the Commission. The Appellant was interviewed on 14 and 15 January 2021.

8. The Commission appointed Dr Kirsty Hood KC (as she then was; now Lady Hood) as the SDM in the investigation on 5 May 2022. A Final Notice supported by the SDM's 'Statement of Reasons' (Reasons) was issued on 16 November 2022.

9. The SDM concluded that the Appellant had contravened the 'Minimum Criteria for Licensing' (MCL) and concluded that the contraventions justified the following sanctions: a financial penalty of £290,000, (albeit not to be imposed because of Mr Hofgren's impecuniosity); a prohibition order for 14 years from holding the position of shareholder, controller, director, partner, manager, money laundering reporting officer and/or money laundering compliance officer pursuant to section 33 The Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020 "the Enforcement Powers Law); an order disapplying the exemption in section 3(1)(g) of The Regulation

of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2020 (the Fiduciaries Law) to preclude him from holding up to six directorships, which would not otherwise be exempt for 14 years; and the issuing of a public statement pursuant to s 38 of the Enforcement Powers Law.

10. Mr Hofgren appealed the Decision to the Royal Court pursuant to s. 106 of the Enforcement Powers Law, asserting that the decision was in error of law, unreasonable, lacked proportionality or that there was a material error of facts or as to the procedure.

11. The Royal Court handed down judgment on 21 November 2024 dismissing the appeal.

12. Mr Hofgren was granted limited permission to appeal (grounds 4, 5 and 6) by the Royal Court. Thereafter, Wolffe JA, sitting as a single judge of the Court of Appeal, granted permission to appeal Ground 1. The Appellant renews his application for permission to appeal Ground 3 to this Court.

The Decision

13. Paragraphs 1 to 13 of the Decision provides a succinct description of "key parties and relationships" and refers to the facts of the transactions referred to in [14] below. This part of the Decision is unchallenged, and it is unnecessary to repeat any detail here save to indicate that Mr Hofgren's role was identified as "one of the controllers and ultimate beneficial owners of GFG Limited since its incorporation in 2014. He was also an Executive Director from that time until October 2019. …[He]was described as Managing Director in a number of documents, …[and] now accepts that this is a fair description of the role he undertook".

14. When considering whether Mr Hofgren had failed to fulfil the requirements of MCL, the SDM expressly referred, in paragraphs [28] to [35] of the Decision, to three transactions, namely:

    (i) the DXD loan transaction;
    (ii) the Lombard 82 EMTN's investment in November 2015 and January 2016; and,
    (iii) Xenfin Cell loans and consequent conflict of interest.

15. The appeal before the Royal Court and, by virtue of Ground 1, before this Court has necessitated scrutiny of paragraph [28] of the Decision and justifies its inclusion in full:

> "Whether Mr Hofgren fails to fulfil the MCL
>
> [28] In respect of the DXD loan transaction, I note that Mr Hofgren now accepts that, on reflection, his actions fell below the standards that could be expected of him: in particular, (i) he acknowledges that he lacked experience in the world of diamond investments; (ii) he accepts that he over enthusiastically promoted the investment, but states that he was persuaded by Mr Ismail Ahmed as to his connections with the diamond industry; and (iii) he accepts that he should have asked more questions about issues around the diamond cutters and the inconsistent information that he was provided with. However, Mr Hofgren asserts that the steps that he took were made with the aim of advancing the interests of FX Cell. Having considered matters, I find that with regard to the DXD loan transaction, Mr Hofgren's actions demonstrate a lack of competence and soundness of judgement, and were lacking in probity, in several ways. The FX Cell had been set up for foreign exchange trading, however, in early 2015 Mr Hofgren had been considering involving GFG Limited in a diamond purchase. Cornhill's agreement to the use of FX Cell was secured. I find that it was at Mr Hofgren's instigation that FX Cell was used for a diamond backed loan. Mr Hofgren did not have the necessary professional skill or experience in this field. PEL appears to have been of little financial substance, and there seems nothing to link that company, nor Mr Ismail Ahmad, to diamond trading. Concerningly, this therefore seems at odds with the letter written by Mr Hofgren to the Custodian in April 2016 wherein Mr Hofgren suggested that Mr Ismail Ahmad had proven to GFG Limited that he had extensive contacts in the mining and polishing sectors, and that GFG Limited had contacted many parties in the sector who had confirmed the abilities and reliability of Mr

> Ismail Ahmad. Mr Hofgren expressly stated therein that the letter was written in his capacity as a director of GFG Limited, and I do find that the recipient could reasonably have considered it to be a letter on behalf of the GFG Limited Board. It is therefore of concern that Mr Hofgren now indicates that it was not a letter from GFG Limited, and in places represented his perspective. Furthermore, insofar as Mr Hofgren now seeks to argue that he was persuaded by Ismail Ahmad as to his connections with the diamond industry this does appear at odds with his statements at interview that he had spoken with others who had worked with Mr Ismail Ahmad, that Mr Gilligan had spoken to others who knew of Mr Ismail Ahmad in the industry, that due diligence had been completed, and that Mr Hofgren formed an impression from his own observations of Mr Ismail Ahmad. Mr Hofgren told the Scheme Board in November 2016 that the diamonds had been polished, whereas later correspondence suggests that the cutting and polishing would not be completed until the end of November or the beginning of December. There is no evidence of due diligence being carried out in respect of the second diamond polisher, and serious concerns would subsequently be raised as to its legitimacy. In November 2016, Mr Ali Ahmad provided Mr Hofgren with a letter purportedly from the second polisher confirming when work on the diamonds would be completed, but the attached manifest appeared to pre-date the polisher's involvement. On occasion, when questions were raised about details of the transaction, rather than ensure these questions were answered satisfactorily, steps were taken to progress the transaction in another way. For example, regarding the verification of the identity of the first proposed cutter and polisher of the diamonds, when Mr Le Roux raised questions and suggested that he (or another) should accompany Mr Hofgren to the premises of the polisher, Mr Hofgren quickly suggested that another agent should be used. Furthermore, when the Auditors were not comfortable as to the existence of the parcel of diamonds, the parcel was not retrieved from the second polisher, but a second parcel of diamonds was sent. Particularly serious is that when the diamonds had been sent to Dubai, Mr Hofgren followed Mr Ali Ahmad's instruction to allow a third party to remove two diamonds from the storage facility. There seems to be no documentary support for the explanation now tendered by Mr Hofgren for this conduct. Two stones were subsequently returned to the storage facility. However, Mr Hofgren had facilitated the removal, by an unverified third party of a significant portion of the collateral securing the loan from the Scheme, without the knowledge of other Directors. At a later stage, it was discovered that the stones at the storage facility included two stones which were cubic zirconia, as well one which was a laboratory-grown diamond. In the light of the evidence available, including that of Danielle Gallienne, the suggestion that these stones had been wrongly graded at the outset seems unconvincing. In any event, however it came about, the value of the security for the loan was therefore less than anticipated. When the DXD loan was in default, and options were being discussed, the information supplied by Mr Hofgren to the GFG Limited and Scheme Boards would not appear to have been accurate, e.g., as to the costs of transferring the diamonds from Dubai to the UK. Mr Hofgren also told his fellow Directors that he had to be present to access the storage vault in Dubai, which was incorrect in that he had previously permitted others to attend and remove stones. He had, however, told the manager of the storage vault that he was to be contacted were anyone other than himself to request access. On the day before the carrying out of the independent valuation, Mr Hofgren had attended at the storage vault unbeknownst to his fellow Directors. Ultimately, the DXD loan was not fully repaid. The bill of sale which had been put in place was not called upon."

16. There is no ground of appeal directly touching upon the Lombard investment, but which is summarised here as part of the context of the whole. In paragraphs [29] and [30] the SDM found that Mr Hofgren's actions lacked soundness of judgement in being influenced by Cornhill, a Marketing Co-ordinator of the FX Cell and the promoter of Lombard. Conflicts of interest were "inherent in the transactions." The transactions included a number of loans made to ventures controlled by Mr MacInnes, the CEO and ultimate beneficial owner of Xenfin Capital, which gave

rise to conflicts of interest. The SDM found that Mr Hofgren's actions demonstrated "a lack of competence and soundness of judgement, in a number of ways".

17. In paragraph [31], the focus of a renewed application for permission to appeal (Ground 3), the SDM also found Mr Hofgren to be in conflict of interest concerning dealings between Vordere and Property Cell and Xenfin. Mr Hofgren took the lead in negotiations which envisaged Vordere buying properties and Property Cell and Xenfin gaining Vordere shares in return. He "failed to manage the conflict of interests presented by his roles in GFG Limited and Vordere". Advice regarding the conflicts of interest was eventually sought which indicated "that at the very least he [Mr Hofgren] should recuse himself from the Vordere proposal decision". He had, nevertheless, continued to be present in subsequent Scheme Board meetings and played an active role in promoting the transaction. The Vordere shares were suspended shortly thereafter; "… even were it not deliberately brought about by Mr Hofgren, the end-result is that the Scheme, and investors in the Scheme, were left with potentially illiquid assets, whilst the properties came into the ownership of Vordere. Mr Hofgren was a Director of Vordere, and one of the ultimate beneficial owners of GFG Limited, which was to receive a transaction fee (in Vordere shares) in addition to the other fees payable by Vordere to GFG Limited in terms of the June 2017 agreement. Mr Ali Ahmad and his brother are also understood to have benefitted from the Vordere / Dolphin transaction, because they provided consultancy services to Vordere. The contrast between the failures with regard to putting in place adequate registered security relating to other Scheme investments (already discussed above), and the much more careful manner in which security was apparently handled with respect to the investments in Dolphin property suggests a failure to carry on business with prudence and integrity. In all the circumstances, I find that Mr Hofgren failed to prioritise the interests of investors over his own interests. I find that this demonstrates a lack of probity, soundness of judgement and competence."

18. In paragraphs [33] – [34] the SDM made findings regarding the reliability of Mr Hofgren's evidence. In summary, she found that he had provided "misleading" evidence to the Commission, "when being asked regarding the conflict of interest presented by his Vordere role, [he] gave the impression to the Commission that when Vordere was being considered, he did not participate. In all of the circumstances, I find that this was misleading. … Accordingly, I find that Mr Hofgren has engaged in business practices appearing to be deceitful or otherwise improper, or which otherwise reflect discredit on his method of conducting business or his suitability to carry on business under the POI Law, 2020." Further, he made an inaccurate statement regarding the connection between Dan Healy and Vordere, "since Mr Healy was to be paid an introducer / brokers fee as part of the Vordere / Dolphin transaction". The Appellant "*confirmed that Mr Healy was not employed or connected to Dolphin or GFGL in any way*". However, e-mails to and from Mr Healy used a dolphinig.co.uk email address, and Mr Hofgren's Outlook contacts states that Mr Healy was Head of UK Distribution at Dolphin International Group….There were also links with GFG Limited, in that for a period Mr Hofgren was a Director of Heartwell Holdings Limited (which was owned by Mr Healy), and GFG Limited had entered into an agreement with Dynamic Marketing Consultancy JLT (a further company owned by Mr Healy)….It would therefore appear that Mr Hofgren misled his fellow Directors. Conflicts of interest could not therefore be assessed. In April 2020, Mr Healy became a Director of Vordere."

19. In paragraph [35], the SDM found that Mr Hofgren, during interview had "created the impression that he had gained little reward from his role at GFG Limited. … In fact, whilst Mr Hofgren may not have taken regular Director's fees, it would seem that 50% of net income was paid over to Rivage, a company beneficially owned by Mr Hofgren. From the incorporation of GFG Limited until the end of April Mr Hofgren received £1,909,061. …I find that Mr Hofgren created a misleading impression as to the extent to which he personally benefitted from GFG Limited. This reflects poorly on his probity."

20. Consequently, and for reasons she went on to enumerate in paragraph [36], the SDM concluded that "the reputation of the Bailiwick as a finance centre was put at significant risk by Mr Hofgren's actions in the DXD loan transaction. There is an inherent risk of money laundering and terrorist

financing in dealings with diamonds: despite this, Mr Hofgren instigated the Scheme's involvement in such a transaction, when there was not the necessary professional skill or experience in GFG Limited. … The lack of the professional skill or experience in GFG Limited necessary to carry out a transaction which involved inherent risk of money laundering and terrorist financing, increased the risk that that might occur. Separately, the collapse of Dolphin and the effect on investors has attracted media attention: accordingly, the Bailiwick's reputation as an international finance centre was also put at significant risk by the impact on Property Cell and Xenfin Cell of the collapse of Dolphin …I also find that Mr Hofgren did not demonstrate adequate knowledge and understanding of his legal and professional obligations. He often did not share information in advance with other Board members in order to allow their consideration of the matter; rather decisions were often taken by himself, and simply presented to the other Directors as a *fait accompli* for their ratification." She proceeded to give several examples, including identifying Mr Hofgren's inappropriate involvement of Mr Ali Ahmed (see [15] above) in several matters and to whom he is described as "extremely subservient." This reflected "poorly on Mr Hofgren's probity, and soundness of judgement."

The appeal to the Royal Court

21. The judgment of the Royal Court is reported at 2024 GRC 079.

22. The appeal before the Royal Court was advanced on two broad grounds; one asserted unreasonable conclusion and errors in the findings made in the Decision, the other a consequent lack of proportionality in the sanctions imposed.

23. As to the first, the Lieutenant-Bailiff observed in [108] of her judgment: "the challenges made in the Grounds of Appeal do not touch on many of the findings made in the Decision. They appear to be focused on those which go, or arguably go, to the probity or integrity of Mr Hofgren's conduct…".

24. The several specific challenges made in this regard were identified and comprehensively addressed in paragraphs [109] to [346] of the Judgment and will be referred to as necessary in the judgment below. However, the Lieutenant Bailiff's "preliminary observations" on "clarity" and "approach to probity" provide the context of her approach to these points on appeal and are helpfully contained within paragraphs [88] to [100] of the Judgment.

25. In paragraph [90], finding some merit in the Appellant's arguments that the "Decision proceeds in a style which often suggests accusation or conclusion by insinuation rather than by clear finding" and that some of the SDM's findings were couched in vocabulary which is "regrettably vague and coy, and has the flavour of euphemism", the Lieutenant Bailiff determined the question to be whether the findings and meanings were sufficient "to enable the subject to understand the faults, deficiencies and contraventions which have led to the ultimate decision to sanction him, and to enable any Court charged with reviewing such decision on appeal to assess whether such reasons, and therefore sanctions, are justified." However, "The Appellant is not entitled to be obstinately or pedantically obtuse in his reading of the Decision"; see paragraph [91].

26. In paragraph [92], the SDM's style was determined to be "very much to make a high level finding of her conclusion, coupled with a list of the matters which, by implication, she regards as justifying this, leaving the logical link to inference rather than expression. Sometimes she provides the examples before her conclusion, and sometimes after, and she may also lump conclusions together." It was not necessary that the SDM should identify these failings separately, "because the "*decision*" which is being appealed against is the overall "*decision*" to impose a sanction on Mr Hofgren, and that decision is made on the basis of the global assessment of a subject's conduct, measured against the MCL generally in the light of the failings/misconduct found and described. Any misconduct or failures relied on may consist of a set of separate incidents, either exhaustively, or given as examples, or relied on collectively"; see paragraph [93].

27. In paragraph [96] the Lieutenant Bailiff accepted that a finding of 'want of probity' did require "some actual finding of knowledge or belief of the subject (belief being simply a deduction or a

consciously affirmed piece of knowledge) upon which judgment of the probity of particular actions taken, in that context, can be made. Sometimes, a specific investigation and conclusion as to knowledge may be necessary, because the relevant conduct itself is ambiguous as to such knowledge or belief. However, if the action in question discloses in itself an irrefutable state of knowledge, that finding does not need to be stated expressly."

28. Overarching the SDM's findings in relation to specific transactions, the Royal Court noted in paragraph [98] of the Judgment that the SDM's decision disclosed two underlying themes. First, that Mr Hofgren's "general pattern of conduct in running GFG as if he were entitled to do so alone, without advance notice to or discussion with his fellow directors, and that there was really no need for this, except where it was needed as a formal matter, for the observance of required company law procedures; second (Para. 38) was that of his running GFG with constant and apparently deferential regard to the wishes and opinions of Mr Ali Ahmad. …if they are justifiable, they provide context. The reasonableness of the SDM's specific findings, including those she chooses to designate as want of probity, are properly viewed in the context of such underlying themes if proven."

29. Second, that the SDM's reasons were "punctuated with findings that Mr Hofgren's statements, submissions and responses at various times appear to exhibit inconsistencies and inaccuracies. Whether this amounts to a failure to fulfil any of the MCL of course depends on context … inaccuracies in the context of more formal business situations - running a business or dealing with the Commission - could well be; it would raise questions at least as to the subject's proper regard for care." The Lieutenant Bailiff accepted the Commission's argument that, although fact dependant, "frequent instances of such inaccuracies in a serious business context, might well be fairly judged to tip the matter over into lack of probity, for example, for displaying an underlying cavalier disregard for the importance of truth and accuracy in business dealings which amounted to a transgression of proper standards of professional ethics."

30. Regarding the appeal against sanctions, the Royal Court in paragraphs [478] and [479], [481] [484] of the Judgment accepted that the sanctions imposed were "on any basis, severe. The question is whether they were nonetheless reasonable and proportionate to the level of his deficient conduct and failures to fulfil the MCL." The Appellant had been found to be a "central protagonist" in a financial business scheme which used the Bailiwick's jurisdiction to set up an investment enterprise which he had "run" for a period of about five years, "without due regard for, and observance of, the standards of proper competence, conscientious diligence, scrupulous probity and meticulous observance of the requirements of the Commission … and with the more particular consequences of losses to investors, risks of financial crime and possible risk to the reputation of the Bailiwick, as the Commission found on its investigation…. Even without any finding of actual dishonesty, the totality of shortcomings in Mr Hofgren's conduct is notably far-reaching." "The Appellant's conduct did justify the "very serious" label which it has been given "in places." The reason for the SDM's imposition of severe sanctions on the Appellant was "that he was conducting regulated finance business, whilst being far from scrupulous to ensure that his personal interests were subordinated to the interests of his dependent investors – and this was aggravated by the losses which the consequent situation in fact caused to them."

31. However, the Lieutenant Bailiff did think it might "be an exaggeration to describe any risk to the reputation of the Bailiwick as "significant" (Band 3 or 4) as opposed to being merely a possibility, which would put it into Band 2. That, however, is a matter of judgment. I cannot displace it unless I take the view that it is outside the margin of appreciation for a reasonable decision-maker on the point, and I do not think I can. It is, in any event, a relatively small point in the overall picture." (See [487]).

32. Of the sanctions imposed, the Lieutenant Bailiff was satisfied that the fine was proportionate, but she had "far more misgivings about the length of the Prohibition Order. The only qualifying condition for imposing one is the Commission's forming its opinion that the person is not a "fit and proper person" to hold a relevant role in finance sector business (s 33 (1) of the EP Law) …There

are no particular factors mandated in the EP Law to be taken into account when fixing the duration of a Prohibition Order, which, expressly, may be indefinite: see s 33(6) of the EP Law.

The appropriate length is therefore entirely within the discretion of the Commission but, the reasonable objectives of any such Order would naturally have to be taken into account. These would seem to be matters such as protection of the public, punishment, deterrence, marking disapproval of particular conduct, and possibly time for rehabilitation. The reasonable length of any Prohibition Order would have to be assessed with such matters, and their objectives, in mind as well as the seriousness of the contravening conduct. I also note that it is always possible, at least in theory, for a person subject to a Prohibition Order to apply to have it lifted: see s 33 (5) of the EP Law" (See [493]).

33. It is clear that the Royal Court would have been minded to reduce the length of the Prohibition Order, however, whilst the length of the Prohibition Order was "somewhat longer than my intuitive expectations I certainly cannot say that it strikes me as so "extreme" that I begin to think it might be properly set aside for unreasonableness or disproportionality."

The appeal before the Court of Appeal

34. Ground 1, by leave of the Single Judge, challenges the Royal Court's judgment that the SDM was not required in paragraph [28] of the Decision to identify and give reasons for the findings she made regarding Mr Hofgren's state of knowledge in respect of those behaviours which, in her opinion, amounted to a lack of probity as contrary to the test as set out in *Ivey v Genting Casinos UK Ltd (Trading as Crockfords Club)* [2017] UKSC 67 (*Ivey)* as applied in *Williams v General Dental Council* [2023] EWCA Civ 481 (*Williams*); *Stuart Harris Associates v Goburdhun [2023] EAT 145, (Stuart Harris); Maxfield Martin v Solicitors Regulation Authority* [2022] EWHC 307 (*Maxfield*). Consequently, the Decision lacked clarity; see *Domaille* at [182] and [183]. Further, the Royal Court had wrongly "recharacterised" paragraph 28 of the Decision by reasons "amounting to two overall findings neither of which were articulated by the SDM" and thereby misconstrued the Decision.

35. In similar vein, the Appellant renews his application, from the refusal of the Single Judge, for permission to appeal draft Ground 3, regarding the Xenfin Cell loans and consequent conflict of interest in terms that the Royal Court erred in law, more particularly, in failing to acknowledge or sufficiently weigh the evidence relating to Mr Hofgren's taking of legal advice and, as submitted, reasonable interpretation of that legal advice regarding apparent conflict of interests, and therefore in assessing whether he did lack probity.

36. Grounds 4, 5 and 6, by leave of the Royal Court, are concerned with the Lieutenant Bailiff's approach to her review of the SDM's assessment of the seriousness of Mr Hofgren's breach of MCL and the consequent level of sanctions imposed other than on a Wednesbury unreasonableness basis. Specifically, Ground 4 challenges the Lieutenant-Bailiff's deference to the SDM and Commission's opinion that the Appellant's behaviour posed a risk of reputation to the Bailiwick regardless of her own stated views as to error/proportionality. Grounds 5 and 6 challenge the Lieutenant-Bailiff's identification of the findings she set aside as 'de minimis' or inconsequential and would therefore have played no part in the SDM's Decision on sanction.

Discussion
Grounds 1 and 3

37. There is no issue about the principles of law at play and under examination in this ground of appeal.

38. A judgment or regulatory decision, such as the Statement of Reasons, must be sufficiently clear to be understood by the parties and wider public for the reasons explained in *Fuller* at paragraphs [223] and [224]. When scrutinising a judgment for inadequacy of reasons, the appellate court should review the judgment, in the context of the material evidence and submissions at the trial and the knowledge and understanding of those who were present at the trial; see *Fuller* at paragraphs [225]

and [226] which adopts and endorses the judgment in *English v Emery Reimbold & Strier Ltd* [2002] 1 WLR 2409 and *Harris v CDMR Purfleet Ltd* [2009] EWCA 1645.

39. Paragraph [42] of *Seiler v FCA [2023] UKUT 00133 (TCC) (Seiler)* usefully summarises the concept of integrity in the financial services thus:

> "(1) There is no strict definition of what constitutes acting with integrity. It is a fact specific exercise.
> (2) Even though a person might not have been dishonest, if they either lack an ethical compass, or their ethical compass to a material extent points them in the wrong direction, that person will lack integrity.
> (3) Acting recklessly is another example of a lack of integrity not involving dishonesty. A person acts recklessly with respect to a result if he is aware of a risk that it will occur and it is unreasonable to take that risk having regard to the circumstances as he knows or believes them to be.
> (4) To turn a blind eye to the obvious and to fail to follow up obviously suspicious signs is a lack of integrity.
> (5) There are both subjective and objective elements to the test of what constitutes a lack of integrity. The test is essentially objective but nevertheless involves having regard to the state of mind of the actor as well as the facts which the person concerned knew.".

40. The judgment in *Domaille confirms*:

(i) There is a clear distinction between dishonesty and integrity: "honesty has at its heart a basic moral quality; integrity generally connotes adherence to the ethical standards of a profession". See *Wingate v. Solicitors Regulation Authority* [2018] EWCA Civ 336, (*Wingate)* (at paragraph 97):

> "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 own professional standards."

(ii) "It is possible for a person to lack integrity without being dishonest."

(iii) The correct legal approach in determining whether in any given case there has been dishonesty, or a want of integrity is essentially the same.

> "The standard by which the law determines … [dishonesty] is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards." *Barlow Clowes International Ltd v. Eurotrust International Ltd* [2005] UKPC 37; [2006] 1 WLR 1476 at 1479 – 1480):

(iv) The conventional exercise of deciding whether certain conduct is dishonest is by reference to the nature of the conduct and what the individual knew or believed the circumstances to be as a matter of fact. Once established, the question can then be answered as to whether their conduct (or inaction) involved dishonesty, judged objectively.

(v) A person may act without integrity or probity (the two being synonymous in this context) where objectively viewed their conduct, on the facts as they were known to them, demonstrates a willingness to run a risk that they would be acting contrary to the standards of the profession in question. This is all the more so in the financial services industry where there is a significant danger of dealing in tainted funds and facilitating criminal enterprises. The failure to hold a suspicion may, in appropriate circumstances, amount to a want of probity.

(vi) It is unnecessary to make any finding as to whether the Individuals realised that their conduct involved a want of probity. Whether they knew or believed they were acting ethically or otherwise was irrelevant."

41. The *Ivey* test does not require a decision maker to accept an individual's evidence regarding his/her state of knowledge unless it is unchallenged. In most situations, a judge or adjudicator will determine their state of knowledge or awareness of the relevant circumstances by appraisal of the objective facts as found.

42. With these principles in mind, I turn to consider the criticisms made in Grounds 1 and 3 of the Decision and the failure of the Lieutenant Bailiff in the Judgment to overturn it.

Ground 1

43. Realistically, the Appellant does not aver that the SDM made findings of fact that were not open to her on the evidence, or that she could not reasonably have concluded that certain of those behaviours did evidence lack of probity having regard to the *Ivey* test. The Appellant's criticism is as to 'process'. That is, he essentially avers that the SDM failed to distinguish between 16 identifiable findings made within paragraph 28, said to "demonstrate a lack of competence and soundness of judgment, and [which] were lacking in probity" and consequently, did not articulate and thereby failed to demonstrate that she had applied the *Ivey* test as relevant. Consequently, the judgment lacked clarity and must be remitted to the Commission for rehearing.

44. Surprisingly, Advocate Adkins was unable, when invited by the Court, to state what the Appellant's positive case on subjective knowledge or state of awareness had been before the SDM. However, from the documents filed and the (transcribed) oral submissions considered by the SDM, it appears to me that it amounted to an attempt to qualify or mitigate the Appellant's unconventional activity, when viewed against the appropriate professional standards in view of the Appellant's stated objective to advance FX Cell's position. That is, I find that it is accurately depicted in the first sentence of paragraph [28] of the Decision (see paragraph [15] above).

45. I reject the Appellant's submission that his 'retrospective' appreciation of significant default is insufficient to base his contemporaneous knowledge or awareness. The Appellant did not suddenly become aware that he had no experience in the diamond trade, or that he should not mislead his Board of Directors as to his inexperience and dealings with Mr Ahmed when promoting the DXD transaction.

46. In these circumstances, there was no need for the SDM to specifically refer to *Ivey* in her decision. The Appellant's attempt to rely upon the decisions in *Williams*, *Stuart Harris* or *Maxfield*, each of them fact specific, are misguided.

47. I agree with the Lieutenant Bailiff that: "The Appellant is not entitled to be obstinately or pedantically obtuse" when reading the judgment. I regard the submission that the Appellant finds it impossible to discern in what way his behaviours could be found to have amounted to a lack of probity as opposed to lack of competence or sound judgment with incredulity. The details of the findings are not undermined by the SDM's turn of phrase, and nor her evaluation of lack of probity for want of listing and assigning behaviours as indicating either lack of competence, lack of sound judgment or lack of probity. In this case there is a clear overlap in the categorisation. It is the Appellant's lack of competence and lack of sound judgment, quite apart from his disingenuousness, when judged against the relevant professional standards, which define his lack of probity. As the Appellant was obliged to concede before this Court, his behaviours are to be judged against a higher and professional standard, see *Wingate* above.

48. Further, I reject the Appellant's attempt to isolate paragraph [28] from what the Lieutenant Bailiff described as the "overarching findings" made in paragraphs [37] and [38] of the Decision. The

Appellant is simply wrong to describe this as the Lieutenant Bailiff's recharacterisation of paragraph [28].

49. There is no merit in Ground 1.

Ground 3

50. This ground of appeal is unarguable.

51. There is and was no dispute that the Appellant was in conflict of interest *vis a vis* his position on the "Vordere" board when the question of transfer of securities from Property Cell and Xenfin Cell arose. Nevertheless, as the SDM found "he took the lead in negotiations", and although he recused himself from voting at the relevant meetings, otherwise continued to promote the transaction, in which he stood to benefit financially. The Senior Decision Maker was entitled to conclude that: "[i]n all the circumstances … Mr Hofgren failed to prioritise the interests of investors over his own interests … this demonstrates a lack of probity, soundness of judgement and competence".

52. Ground 3 relies upon many of the submissions already addressed above in respect of Ground 1, but would also be advanced on two additional or alternative bases, namely: (i) the Lieutenant Bailiff understood the reasoning in paragraph 31 of the Decision to flow from breach of a strict liability rule that a director should not benefit collaterally from a transaction, irrespective of his belief in the benefits of the transaction, and that since the rule is a strict one, its breach cannot other than demonstrate a want of integrity; (ii) the SDM Decision and thereafter the Lieutenant Bailiff's judgment wrongly failed to recognise, in the objective assessment of Mr Hofgren's state of knowledge, that he had sought and followed competent legal advice.

53. I reject these further arguments in short order.

54. Paragraph [31] of the Decision contains a detailed exposition of the relevant chronology relating to the Vordere, Property Cell and Xefin transaction. It clearly, for the reasons given above in relation to DXD, exposes and entitled the SDM to find the Appellant lacked probity.

55. The Lieutenant Bailiff expressly, and correctly in my view, rejected the Respondent's submissions that 'strict liability' was determinative of the question. It does not arise on appeal.

56. The fact and substance of the legal advice sought by the Appellant do not assist him. I reject the Appellant's submission that the act of seeking legal advice, regardless of the stage at which it is taken, and the interpretation made of it without further question, determines issues of probity. The SDM, as confirmed by the Lieutenant Bailiff, was justified in finding that the evidence showed that the advice was sought late and that the Appellant chose to interpret it narrowly.

57. Ground 3 is unarguable. I would refuse permission to appeal.

Grounds 4, 5 and 6

58. Grounds 4, 5 and 6 are concerned with the assessment of seriousness and consequent impact upon sanctions. The Judgment was handed down, Grounds of Appeal were drafted, and permission sought prior to the hand down of the judgment in *Fuller*. The Appellant's arguments in respect of these grounds benefit by reference to *Fuller*. I unhesitatingly reject the Respondent's submission that we should distinguish *Fuller* as a decision made on its facts.

59. The thrust of the Appellant's arguments on Ground 4 is that the Lieutenant Bailiff unduly fettered her appellate jurisdiction of review of the SDM's conclusions regarding the risk of damage to the financial reputation of the Bailiwick of Guernsey, by restricting herself to principles of '*Wednesbury'* unreasonableness.

60. The thrust of the Appellant's submissions on Grounds 5 and 6 is that the Lieutenant Bailiff wrongly assumed the role of primary decision maker by adjudicating that the findings of fact she had

excluded, or otherwise recharacterized in terms of seriousness, did not displace the overall finding of seriousness which informed the decision as to sanctions.

61. Paragraphs 67 and 68 in *Domaille* emphasises the role of the Royal Court on appeal from a decision made by the Commission:

> "67. The four features of this regime that deserve particular emphasis are that: (i) the GFSC is a specialist body composed of suitably qualified individuals; (ii) it is performing a regulatory function which is of the highest public importance; (iii) in performing that function, it is required to form evaluative judgments in relation to matters (such as 'fit and proper') to which there are seldom any objectively right or wrong answers, and (iv) it is the GFSC, not any other person, which is the designated decision-maker under the legislation in respect of the power to make Prohibition Orders under s. 33 and to impose financial penalties under s. 39.
>
> 68. Under s. 106(1), a person aggrieved by a decision of the GFSC to make a Prohibition Order and/or to impose a financial penalty (among other things) "may appeal to the Royal Court against the decision."

62. Subsequently, in paragraphs 77 to 80, the Court of Appeal stated:

> "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 decision-makers 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. ….
>
> 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."(Emphasis added)

63. Accepting that one reading of the emphasised text may appear to restrict the Royal Court to a '*Wednesbury'* review in all matters, any ambiguity on the issue of the Royal Court's role on appeal is laid to rest in *Fuller*:

> 87."Like the statutory provision at issue in *Walters,* [(1997) 24 GLJ 76.] 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". … 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."

64. As the Court made plain in paragraphs [396] to [398] of *Fuller:*

> "…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."

65. I do note that paragraph [454] of the Lieutenant Bailiff's Judgment does indicate her understanding that *Domaille* decided that the test of unreasonableness is not confined to Wednesbury principles.

However, I accept the Appellant's submission that this acknowledgment is not reflected in the Judgment at [339] in which the Lieutenant Bailiff said that:

> "In my judgment, this point hardly admits of any argument, because the question whether any particular conduct put the reputation of the Bailiwick as a finance centre at risk, under either of the expressions used in the Laws, is laid down as a matter to be determined by the opinion of the Commission, and the Commission's opinion is a matter of fact, albeit within the bounds of a reasonably objectively justified opinion at the extremities."

The opinion could only be challenged if "invalid in purely legal terms, ie error of law"; see paragraph [341].

66. Further, in paragraph [345] of the Judgment she said: "I do not think that I can go so far as to say that the SDM's finding is illogical, irrational or perverse, even though I may think it insubstantial. This is because, as I have said, the actual validity of the finding in this regard rests on the opinion of the Commission, with which I can only interfere if satisfied that it is outside the bounds of reasonableness. I cannot go that far."

67. These paragraphs of the Judgment demonstrate to me that the Lieutenant Bailiff proceeded under an error of law. She failed to distinguish between findings of fact and the evaluation of those findings. That the Lieutenant Bailiff regarded the SDM's opinion on the risk of damage to the Bailiwick as a financial centre as "insubstantial" indicates that she found it to be unreasonable or disproportionate per se.

68. Grounds 5 and 6 relate to the Lieutenant Bailiff's decision to set aside the SDM's finding of fact that Mr Hofgren had attempted to mislead the Commission in his answers during interview about the financial benefit he obtained from GFG as "unfair and unjustified". Further, she held the SDM was wrong to attribute Mr Hofgren's misstatement to his Board regarding the costs of transporting the DXD diamonds back to the UK "with more significance than mere insignificant casualness".

69. I accept the Appellant's submissions that the Lieutenant Bailiff's subsequent adjudication in paragraph [350] that these points were "so minor that they could only be regarded as *de minimis* in the context of the whole of the SDM's findings contained in the Decision which do still stand" does not sit easily with her previous acknowledgment that "misleading the Commission is, not surprisingly, regarded as a particularly grave failing by a regulated individual, in particular because of the duty to be open and co-operative with the Commission without which the Commission would plainly be severely handicapped in performing its regulatory role. The Commission is zealous to uphold such duty''.

70. However, I do not consider that the legal definition of '*de minimis*' resolves the question raised as a consequence of Grounds 4, 5 and 6. That is, what is in issue is whether the Lieutenant Bailiff could reasonably come to the conclusion that absent these findings, and the Lieutenant Bailiff's downgrading of the SDM's opinion of the damage to the reputation of the Bailiwick as a financial centre, that the Commission "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."

71. In paragraph [355] of the Judgment the Lieutenant Bailiff did say that "In those circumstances, I do not consider that my actual findings above undermine the overall picture, or seriousness, of Mr Hofgren's conduct on which the SDM **may** have proceeded." (emphasis provided). The use of the word "may" inevitably admits the possibility that the SDM was not **bound** to have done so; see paragraph [409] in *Fuller*. Furthermore, and significantly in my view, the Lieutenant Bailiff had hitherto proceeded on the mistaken belief that she was unable to scrutinise and set aside the SDM's evaluation of 'seriousness' other than on Wednesbury reasonableness grounds.

72. I do not accept the Respondent's submissions that we should read the Lieutenant Bailiff's "discursive" judgment as so "nearly" or "closely" in accordance with *Fuller* on this point that we may safely assume that she did conclude that the SDM would be bound to come to the same conclusion. It is patently wrong to weave a path through the Judgment cherry picking phrases and ignoring the Lieutenant Bailiff's expressed misgivings in order to dismiss the appeal. It is not for this Court, to re-cast the Lieutenant Bailiff's judgment to render a *Fuller* compliant decision or otherwise to substitute any view as to the level of sanctions to be imposed upon the basis of the Lieutenant Bailiff's findings regarding the misleading of the Commission in one respect and the risk of prejudice to the Bailiwick on the other.

73. I would uphold Grounds 4, 5 and 6.

Montgomery President:

74. I agree.

Dunlop JA:

75. I also agree.

Conclusions

76. The appeal is allowed in part.

(i) The findings of lack of probity are confirmed.
(ii) The assessment of seriousness and the consequent imposition of sanctions is remitted to the Commission with a direction that in making an assessment of seriousness it should proceed on the basis that the SDM's findings that; (i) the Appellant's behaviour caused damage to the reputation of the Bailiwick was unreasonable, in accordance with paragraphs [344] and [345] of the decision of the Royal Court; and (ii) the Appellant attempted to mislead the Commission in interview in relation to the financial benefits he received was unreasonable, in accordance with paragraphs [301] –[314], and as recorded in paragraph [351] of decision of the Royal Court
(iii) Any ancillary orders will be determined, if possible, on the papers.