COLLAS CRILL

Clarification on GFSC mandate

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The Court of Appeal of Guernsey has recently provided clarification on the mandate of the island's financial regulator, the Guernsey Financial Services Commission (GFSC). The case provides practitioners, industry and of course, the GFSC with helpful guidance on a number of areas, including:

- Whether the GFSC has the power to issue time-determinate prohibition orders under the various regulatory laws;
- Whether it was reasonable and proportionate to issue a public statement and if so, what would be the appropriate content of such a public statement; and
- Whether the Senior Decision Maker (SDM) process can be considered an independent and impartial tribunal for the purposes of Article 6 of the European Convention on Human Rights (ECHR).

Background

Y was a chartered accountant who was employed by "Licensee X" who held a fiduciary license. Eventually, Y became a controller of Licensee X. Whilst employed by Licensee X, Y also operated as a sole trader providing accountancy services separately from the business of Licensee X.

However, in the course of working for Licensee X, Y also began to offer the service of incorporating companies for clients, who were not clients of Licensee X, and without ensuring that correct customer due diligence had been sourced and stored with, or outside of, Licensee X. It was alleged that this had been done using Licensee X's systems during office hours without their permission or knowledge.

Y began to think he may be in breach of the regulatory laws and in particular, the Criminal Justice (Proceeds of Crime) (Legal Professionals, Accountants and Estate Agents) (Bailiwick of Guernsey) Law, 2008. At this point, he made an initial disclosure to the GFSC's Authorisation's Unit. The GFSC then commenced a lengthy investigation into the matter which resulted in a referral to the GFSC's Enforcement Division.

Upon the matter being referred to an SDM, the process followed the various steps outlined in the GFSC's Decision-Making Process Relating to the Use of Enforcement Powers, dated October 2017. This culminated in a Final Notice being issued by the SDM against Y.

The sanctions imposed by the SDM were, *inter alia*:

1. Orders pursuant to each of the suite of Regulatory Laws prohibiting Y, for a period of four years, from (i) holding the position of director, controller, partner, manager, financial adviser, general representative or

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authorised insurance representative; and (ii) acting as Money Laundering Reporting Officer or Compliance Officer within a person licensed under any of the Regulatory Laws;

2. A discretionary financial penalty of £13,000; and

3. The issuance of a public statement.

Y then made a statutory appeal to the Royal Court disputing the findings of the SDM on a total of nine grounds of appeal.

Royal Court findings at first instance

Taking the three points of appeal listed above, the Royal Court determined the following:

Time-determinate prohibition orders

It had been assumed by the GFSC, industry and the Royal Court that the GFSC did, in fact, have the power to issue time-determinate prohibition orders. The established practice of the GFSC had always been to issue prohibition orders in line with the severity of the alleged offence.

In previous statutory appeals, the Royal Court had upheld such orders as being lawful. However, the Deputy Bailiff held that upon a correct interpretation of the various Regulatory Laws, the GFSC was not afforded that power.

Thus, in the case of Y, the time-determinate prohibition order given by the SDM was ultra vires. In coming to this decision, the Deputy Bailiff reasoned that from a literal and strict interpretation of the regulatory laws, the regulator was not provided with the ability to issue such orders.

The Deputy Bailiff also sought guidance from the practice of the FCA in the UK and the regulator in Jersey. In both of these jurisdictions, prohibition orders are given for an indefinite period with an indication of when the regulator would consider an application for reinstatement.

To the Deputy Bailiff this made sense since a finding that a person is not fit and proper (which is required in order to issue a prohibition order), necessitates a binary choice – one is either fit and proper or one is not. The expiry of time in and of itself does not cure the deficiency of being found not fit and proper. Essentially, there is no automatic rehabilitation to allow one to be back in the fit and proper camp again.

Public statements

Another weapon in the armoury of the GFSC in enforcement actions is the issuance of a public statement. Often, this is the most damaging for individuals in terms of their personal and professional reputations; especially so in a small jurisdiction such as Guernsey.

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In the case of Y, the appellant appealed whether given the findings of the SDM in his or her Final Notice, the issuance of a public statement was proportionate.

Y also appealed the content of the public statement in that it contained information which was either irrelevant or superfluous and that the length of the statement at eleven pages was gratuitous.

In terms of the former, the Deputy Bailiff held that under the circumstances, the issuance of a public statement against Y was warranted. However, in terms of the appeal as to the statement's content, the Deputy Bailiff found in favour of Y. In doing so, the judge reasoned the following:-

- Context is permitted;
- It must be a factual notice in order to protect the public as consumers and act as a deterrent to others. It should be limited to what was actually found by the SDM but importantly, it cannot be a substitute for the SDM's reasoning and cannot follow too closely that reasoning contained within the SDM's Final Notice;
- The decision to issue a public statement necessarily entails a balancing act between the need to protect the public and the reputation of the Bailiwick whilst protecting the individual's rights under Article 8 ECHR which protects one's rights to private and family life.

The SDM enforcement process and Article 6

Initially, Y argued that the SDM process was not an independent and impartial tribunal as the GFSC appointed SDM is an organ thereof, not thus not fully independent.

Y therefore claimed that his Article 6 rights under the ECHR had been violated. Although Y eventually dropped this ground of appeal, the Deputy Bailiff thought it important enough to address within the Y decision. In obiter dicta, the question of whether the SDM process was actually Article 6 compliant was answered in the affirmative, with the Royal Court deciding that:-

"*there is no requirement for every body deciding such matters to be an independent and impartial tribunal provided there is a right of appeal to a court of full jurisdiction to hear the matter. If so, then not only is any breach of Article 6 purged but it prevents such a breach from occurring in the first place*".

Thus, if there were any defects at the GFSC level regarding Article 6 ECHR, these are necessarily cured by the right of statutory appeal to the Royal Court.

The findings of the Guernsey Court of Appeal

Not all issues canvassed by the Royal Court at first instance were insisted upon by the parties at the Court of Appeal. However, in relation to the question as to whether the GFSC had the power to issue time determinate prohibition orders, the Court of Appeal emphatically ruled that it does.

In reaching this conclusion, the Court of Appeal considered the actual language of the statutes in question and determined the following:-

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- In considering a power to impose a sanction, that power should admit the imposition of some lesser sanction and that in cases where there is no express provision to the contrary within the legislation granting that power, a prohibition order "need not be a blanket prohibition" and "that a statutory provision giving a power to impose a penalty or sanction will normally include as part of the power a power to do a lesser thing...". Thus, by implication, the power to do the greater implies the power to do the lesser.

- As regards the Royal Court looking to other jurisdictions for guidance on how they approach prohibition orders, the Court of Appeal held that no help can be gained by doing so since these regulators operate under different legislation and regulatory framework. Interestingly in obiter dicta, the Court of Appeal remarked that in relation to the practices of these other regulators they "*had serious misgivings about the position they have taken*". It remains to be seen whether these other regulators will review their approach to prohibition orders in light of the Court of Appeal's remarks.

- And lastly, in terms of the interpretation of the words 'prohibit' or 'prohibiting', the Court of Appeal ruled that contrary to the Deputy Bailiff's reasoning at first instance, there can be no rationale for interpreting those words to be necessarily restricted to prohibition without limitation of time. As for the Deputy Bailiff's point that a prohibition for a specified period necessarily implies that the authority considers that the affected person should have returned to a state of being fit and proper, the Court of Appeal held that the "specification of the period does not fetter the authority's hands; any further breaches will lead to further orders".

Comment

The Y decisions serve as a valuable reminder that regulators must act within their statutory powers and that the Courts are there to keep them in line should that be necessary. By appealing the decision of the SDM to the Royal Court, Y was able to secure successes on a number of grounds against the GFSC, most notably, in relation to the GFSC's practice of issuing public statements.

In deciding that the public statement in Y's case went too far, the GFSC was provided judicial guidance on the form and content of public statements going forward. This should be welcomed by the GFSC and industry alike.

The Y decision also provided clarity on whether the GFSC SDM process was Article 6 ECHR compliant. Although often complained about by those going through the enforcement process, that the relationship between the GFSC and the SDM is too close (the idiom "judge, jury and executioner springs to mind), the Court decisively affirmed its compliance by citing the individual's right to statutory appeal to the Royal Court.

This right appeal cures any defect as to procedure at the GFSC level and thus preserves the individual's right to a fair and impartial tribunal. Again, this issue was not considered by the Court of Appeal.

Finally, the Court of Appeal resolutely confirmed that contrary to the findings of the Royal Court at first instance, the GFSC did indeed have the power to issue time determinate prohibition orders.

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Such a finding will of course be welcomed by the GFSC given that their past practice has now been vindicated. It will also be welcomed by industry at large given that wrongdoers will no longer be facing indefinite prohibitions, which are arguably more draconian.

It is also certainly arguable that some power has been taken out of the GFSC's hands, whereby once the time has been spent, the individual's prohibition lapses.

By allowing the GFSC to review a prohibition after the passing of a certain amount of time, in order to determine whether an individual is then fit and proper, , this necessarily imparts power to the regulator and implies a presumption that the individual is not fit and proper. Essentially, the burden is on the individual to prove that they should no longer be prohibited.

Now with prohibition orders lapsing after a certain period, there is a necessary presumption that the individual is no longer unfit and improper once the time has been spent, with the burden on the regulator to determine whether the individual is unfit and improper to be a licensee.

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