IN THE GUERNSEY COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE ROYAL COURT OF GUERNSEY

BEFORE

JAMES McNEILL QC, SITTING AS A SINGLE JUDGE

BETWEEN **ALAN MICHAEL CHICK**

APPLICANT

and

THE GUERNSEY FINANCIAL SERVICES COMMISSION

RESPONDENT

THE APPLICANT IN PERSON
FOR THE RESPONDENTS: ADVOCATE C EDWARDS

JUDGMENT

McNEILL JA:

1. There is before me, sitting as a single judge of the Court of Appeal, an application for leave to appeal to the Court of Appeal at the instance of Mr. Alan M. Chick (the "Applicant") in respect of proceedings raised by him against the Guernsey Financial Services Commission (the "Commission").

2. In this matter I have received from Mr. Chick his Notice of Appeal, a 17 page letter to the Registrar of the Court of Appeal (the “August 2020 letter”) setting out issues to be addressed by me together with his earlier 40 page document of 6 July expanding on his Grounds of Appeal. I have also received written submissions on behalf of the Commission and in response to that, and at my request, a further 43 page letter from

Mr. Chick. These, together with associated documents and authorities and earlier judgments in this matter, I have taken into consideration.

3. This is a renewed application for leave. By a judgment dated 12 June 2020 (the "June Judgment") the Royal Court (Collas, LB) struck out the Applicant's claim on the basis that no reasonable grounds for bringing the action were disclosed. The Applicant then applied to Lieutenant Bailiff Collas for leave to appeal the judgment on grounds set out in a Notice and Grounds of Appeal both dated 6 July 2020. In a judgment dated 3 August 2020 (the "August Judgment"), the learned Lieutenant Bailiff concluded that the criteria for granting leave had not been met. The renewed application for leave was made on 10 August 2020.

Background

4. The background to the Applicant's Cause is set out in the July Judgment, especially at paragraphs 11 and 12. It is not necessary to repeat them here. The essential background is that the Applicant was a shareholder and director of a licensed financial entity and came under investigation by the Commission in about 2015. Following upon a fairly standard process, a final decision was issued on 31 May 2018 stating that the Applicant did not satisfy the minimum standards required of those carrying out regulated activities within the Island's fiduciary sector. A financial penalty of £50,000 was imposed together with five years' prohibition from holding or carrying out the function of director, controller, partner or manager in that sector. The Applicant received notice of that decision on 31 May 2018 and was advised of his right to appeal within twenty-eight days of the decision. He did not do so but, on 4 October 2018, paid the penalty after civil proceedings had been issued to enforce payment. The present proceedings were commenced in May 2019. The present proceedings, therefore, do not constitute an appeal challenging the factual and legal findings in the process. Rather, as is set out in paragraph 85 of the Cause, the Applicant contended that his human rights as enshrined in Articles 6, 7 and 14 of the European Convention on

Human Rights (the “ECHR”) as incorporated in the Human Rights (Bailiwick of Guernsey) Law, 2000 had been breached by the failure of the Commission to address (i) issues raised by him in complaints and appeals regarding the misrepresentation of relevant evidence, (ii) requests for rectification under the Data Protection (Bailiwick of Guernsey) Law, 2001 and the Data Protection (Bailiwick of Guernsey) Law 2017, and (iii) claims that inaccurate and unsubstantiated comments had been made by the Director of Enforcement at an Industry seminar on 9 October 2018.

5. As is clear from the June Judgment, central to the Applicant's contentions that his Article 6 ECHR right to a fair trial had been breached was that the Commission through its relevant Senior Decision Maker ("SDM") acts as judge and jury in its own matters, contrary to the advice of the IMF for an independent and impartial tribunal, when the States of Guernsey could have done so as they had in establishing the Tax Tribunal under the Income Tax (Guernsey) Law. The learned Lieutenant Bailiff, therefore, took some time to consider the role of an SDM by reference to the decision in Y v The Chairman of the Guernsey Financial Services Commission and Her Majesty's Procureur (unreported judgment 47/2018) (McMahon DB). This led to the conclusion that any defect in the process which might exist at the Commission level is cured by the independent and impartial right of appeal to the Royal Court, thus satisfying the requirements of Article 6.1. See paragraph 46.

6. Going on to consider the Article 6 issues, the learned Lieutenant Bailiff concluded that the procedures were not criminal or quasi-criminal in nature, and, in consequence, the criminal limb of Article 6 was not engaged. See paragraph 54.

7. In turning to look at the civil limb of Article 6, the learned Lieutenant Bailiff observed that, in his view, there was 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. See paragraph 56. However, when looking

at the civil limb, it was necessary to review the whole process available to the litigant; and that would include the right of appeal to the Royal Court. See paragraph 57. Accordingly, were any inadequacies to be found, they would be addressed within that appeal process.

8. Following on from his determination that the proceedings were neither criminal nor quasi-criminal in character, the complaint of breach of Article 7 rights fell away. See paragraph 58.

9. Finally, having failed to identify interference with Convention rights, no Article 14 discrimination issue arose. See paragraph 59. It is pertinent to add that the Lieutenant Bailiff had heard the application for strike out as Bailiff but, due to the disruption caused by the Covid-19 pandemic, had been denied the opportunity to attend to the judgment during the period of time set aside for it. The judgment was therefore handed down in his capacity as a Lieutenant Bailiff. See paragraph 62.

The August Leave Judgment

10. Eight substantive Grounds of Appeal were presented to the Lieutenant Bailiff and these remain the grounds before me. Set out in full by the Lieutenant Bailiff in paragraph 4 of the August judgment, they can be categorised as follows.

11. Ground 1 would seek to argue that the June Judgment was invalid due to the judge who had heard the application (Collas B) having retired as Bailiff even although immediately thereafter having been appointed as Lieutenant Bailiff. Lieutenant Bailiff Collas could not now deliver a judgment acting judicially in a different judicial capacity.

12. Grounds 2, 3, 4 and 6 raise different issues but each based upon the same premise, namely, that the SDM who had imposed sanctions on the Applicant had been invalidly appointed because the appointment was in contravention of Section 19(5) of the

Financial Services Commission (Bailiwick of Guernsey) Law (as amended) (the "FSC Law"). Among other matters, the decisions of the SDM were *ultra vires* and should be set aside.

13. Ground 5 is not expressed in particularly clear terms but, as understood by the learned Lieutenant Bailiff, raised two issues. The first is that the proceedings should be properly characterised as criminal or quasi-criminal. The second is that if the SDM was not sufficiently impartial or followed incorrect procedures, the overall procedure would not have been compliant with the European Convention on Human Rights.

14. Ground 7 would call into question the June Judgment upon the basis that the Royal Court incorrectly failed to look at additional evidence which the Applicant had sought to adduce.

15. Ground 8 is that the June Judgment was in error in not allowing the Cause to proceed to a full hearing of the Royal Court with Jurats.

16. The learned Lieutenant Bailiff refused leave in respect of each Ground.

17. As regards Ground 1, he had been appointed as a Lieutenant Bailiff immediately upon demitting office as Bailiff so there was no break in continuity and the change in status did not prevent him from handing down the June Judgment.

18. As regards Grounds 2, 3, 4 and 6, the learned Lieutenant Bailiff pointed out that the Applicant had understood that the decision by the SDM in his case had been made in exercise of powers which could not be delegated because of the provisions of Section 19(5) of the Financial Services Law. The learned Lieutenant Bailiff pointed out, however, that the appointment of the SDM was within the powers of delegation and

that the sanctions imposed on him by the SDM did not involve the exercise of any powers excluded by Section 19(5).

19. In respect of Ground 5, he had considered the issue in the June Judgment by applying the test in Engel and Others v The Netherlands ECHR 8 June 1976 and the Applicant had not suggested that a different test should have been applied. Parallels with disciplinary proceedings in other professions had no relevance. Separately, had there been any deficiencies, that would have been addressed by exercise of the right of appeal.

20. As to Ground 7, the June Judgment had been based on the material facts as pleaded, as was the correct approach to a strike out application.

21. As to Ground 8, he had not allowed the claim to proceed to a hearing before Jurats because the application to have the claim struck out was well founded.

22. The learned Lieutenant Bailiff also considered whether there were exceptional circumstances that involved an issue of public interest. He concluded that, by reason of the case law concerning the statutory right of appeal, no exceptional circumstances arose.

The renewed Leave application

23. As I understood the Applicant's presentation of papers to me, he continued to rely upon his arguments as set out in the 40 page Grounds of Appeal, to the end that I might reach a different view or different views to those expressed by the learned Lieutenant Bailiff. In addition, however, the August 2020 letter places great stress on the judgment of the European Court of Human Rights in McGonnell v The United Kingdom (ECHR, 8 February 2000, App no. 28488/95) and uses it in a number of different ways either to support the Applicant's own arguments or to seek to refute the

views of the learned Lieutenant Bailiff. However, the core point which the Applicant seeks to draw from McGonnell is that the European Court of Human Rights concluded that it had not been necessary for Mr. McGonnell to have lodged an appeal to the Guernsey courts before seeking redress under Article 6 of the Convention. This, in the Applicant's submission, would indicate that the fact that he had not submitted an appeal to the Royal Court within the twenty-eight day time frame did not prevent him from seeking redress under Guernsey's Human Rights Law 2000 at a later date. (Paragraphs 46 and 47 of the August 2020 letter). Recasting this as a proposition in law, the argument for the Applicant is that, in order to show a violation of the Article 6 right to a fair trial, it was necessary only to consider the process which had taken place and not to take into account the existence of a right of appeal to a judicial body.

24. Separately, the August 2020 letter expanded on the arguments as to the invalidity of the June Judgment and questioned upon what precedent reliance was being placed to permit the judgment to be handed down after the Bailiff had taken up a separate, and junior, role within the Guernsey judiciary.

Discussion

The test for leave

25. The test has been most recently considered by the plenary Court of Appeal in Tchenguiz and Others v Akers (Judgment 16/2018). At paragraphs 26 to 31 of the judgment of the court, it was confirmed that the test in this jurisdiction is that leave to appeal will be given unless there is no reasonable prospect of success, a fanciful prospect being insufficient. There may, however, be exceptional circumstances which, in the public interest should be examined on appeal or where authority binding on the appeal court might call for reconsideration. Having regard to each of the grounds of appeal and to the overarching argument, I too refuse leave to appeal for the following reasons.

26. As to Ground 1, the circumstances here are probably unique. There have been numerous instances of judges dying in office and that circumstance giving rise to either the need for a re-hearing if sitting as a single judge or a re-hearing of an appeal if the appellate court has not reached a stage of agreeing the determination. Quite separately, there have been instances of judicial failing, where a judge's failure to issue judgment, or to do so within a reasonable time, have led to the case being transferred to another judge and, on occasion, to the first judge retiring early. None of these circumstances apply here. The issue is as to whether the power in the new office includes the power to hand down judgments. Sir Richard Collas was appointed as a Lieutenant Bailiff on 11 May 2020 and, by virtue of Section 6(2)(a) of the Royal Court of Guernsey (Miscellaneous Reform Provisions) Law, 1950 and Part I of the Schedule to The Interpretation and Standard Provisions (Bailiwick of Guernsey) Law, 2016, a Lieutenant Bailiff is empowered to preside over the Royal Court and to discharge the judicial function of the office of Bailiff. There is, therefore, no distinction between the two roles as regards the judicial function empowered. This is not a case of a retiral which was followed by the holding of a quite different judicial office where the new office did not encompass the functions of the earlier office. The Schedule to the 2016 Interpretation Law specifically defines "Bailiff" to include the Deputy Bailiff, a Lieutenant Bailiff, the Juge-Délégué and a judge of the Royal Court. Nothing could be clearer in identifying that the judicial functions were the same for each of those judicial offices.

27. The only question then remaining would be whether, having removed from one office, the translation prevented the continuation of the work done in the earlier office. Consideration of that question would lead to the examination of the doctrine of *functus officio* which, in the broadest terms, identifies that nothing can be done validly after the mandate has expired. Here, the judicial mandate was replaced by an identical judicial mandate and, therefore, the doctrine of having performed the office and no longer having a mandate to do so does not apply. Most often the plea of *functus officio* will be made in respect of an arbitrator whose work in respect of an arbitration has come to

an end and to whom no further applications may be made. Nothing could be more different to the circumstances applying to Sir Richard.

28. Separately, and unnecessarily in light of the views which I have just given, the Covid-19 pandemic has given rise to a need to respond in different ways in order to support the interests of justice. A recent example is found in Municipio de Mariana v BHP Group plc [2020] EWHC 928 (TCC) where, at paragraph 20.1 Judge Eyre QC said:

> "The principles governing late amendments to pleadings in normal circumstances are of little assistance in determining the approach to be taken to an application for the extension of time for the filing of evidence where it is said that the circumstances of a worldwide pandemic and of national lockdowns have caused delay in the gathering of evidence."

29. This emphasises the move away from rigid application of rules in such uncertain times. However, for the reasons which I have set out, it is unnecessary to go to these lengths on this matter. The local statutes show that the Lieutenant Bailiff may discharge the same judicial functions as the bailiff and, accordingly, Sir Richard had a mandate to issue the June judgment.

30. As to Grounds 2, 3, 4 and 6, it is not clear to me from the August 2020 letter whether the Applicant has understood the import of the rationale set out by the learned Lieutenant Bailiff in the August Judgment. As is clear from Ground 2, the Applicant contends that the appointment of the SDM was invalid because it was in contravention of Section 19(5) of the FSC Law. I repeat here, in a slightly different formulation from that of the learned Lieutenant Bailiff, the reason why the Applicant misunderstands the position. Section 19(5) is irrelevant to the present circumstances: it does not preclude delegation to an SDM but permits delegation to a committee. It is Section 19(1) which is relevant. Under that subsection the Commission may delegate any of its functions, but subject to specified exceptions. Subsection (1)(a) is the power of delegation: the

delegate may not sub-delegate. There is no question of sub-delegation here. Subsection (1)(b) is the duty to make the annual report, and that is not in issue here. Subsection (1)(c) relates to specific statutory functions, howsoever framed, in respect of (i) considering representations concerning a relevant decision which it proposes to take, (ii) empowering the Commission to make a decision relating to cancellation revocation suspension or withdrawal of a licence or (iii) empowering the Commission to petition for the winding up of a body corporate. None of those powers was delegated here nor sought to be used by the SDM. There was no determination in relation to the licensed entity. The sanctions imposed were prohibition of an individual from holding or carrying out the function of director, controller, partner or manager. It therefore follows that there is no prospect of success for the Applicant in respect of these grounds.

31. As to Ground 5, the learned Lieutenant Bailiff applied the three criteria in Engel and Others v The Netherlands and I do not understand the applicant to suggest that any other test applies. The analysis by the learned Lieutenant Bailiff carefully applied that test and reflected the case law to which he referred.

32. The applicant makes reference to Bordeaux Services (Guernsey) Limited et al v The Guernsey Financial Services Commission (Guernsey Judgment 18/2016) where Bailiff Collas said this at paragraph 28:

> "It should also not be forgotten that the financial services sector is a significant employer and so decisions taken by the GFSC have potential to impact on large numbers of people. The availability of discretionary financial penalties as one of the sanctions that can be imposed raises such cases to a level where the process is quasi-criminal. The GFSC's choice of delegating its functions to officers who are learned Counsel in another jurisdiction is also, in my view, something that means the GFSC's decision can be expected to bear the hallmarks of fairly closely reasoned decisions at, or approaching, the style of decision that would be expected

from a judicial tribunal. These are all factors leading me to conclude that the Decision can properly be subjected to a level of review that would not otherwise be appropriate for an obviously "lay" administrative decision affecting another sector of activity" (McMahon, D B).

33. A proper reading of this section of that judgment, however, indicates that it was not addressing the question of whether a process was indeed criminal or quasi-criminal or otherwise but, rather, whether a determination was purely legal and falling within the province of the presiding judge alone or an approach to reasonableness which takes the appellate process beyond the traditional judicial review and thereby engaged in the Jurats. See paragraph 25. The view that the process might be viewed as quasi-criminal, therefore, was not one which engaged with the Engel criteria.

34. Without argument that the learned Lieutenant Bailiff applied the wrong test or inappropriately applied the Engel test, this ground of appeal has no prospect of success.

35. Ground 7 maintains that the learned Lieutenant Bailiff incorrectly failed to look at additional evidence. However the learned Lieutenant Bailiff addressed this issue in the June Judgment at paragraph 15 where he recorded that he had indicated at the outset that there was no necessity in an application of this nature to review evidence at the strike-out stage. He proceeded, in the Applicant's favour, upon the basis that the material facts were indeed capable of being proved. Working upon the basis that the material facts pleaded by the Applicant were capable of being proved, there was no need to consider additional evidence. This ground of appeal, therefore, has no prospect of success.

36. As regards Ground 8 and the contention that it was improper not to refer the application to a full hearing of the Royal Court sitting with Jurats, this contention

misunderstands the part which the Respondent's application for strike-out played in the overall process. It is open to a Respondent to maintain that there is no sense in allowing a Cause to go further because, even if all of the salient matters of fact are proven, the plaintiff or applicant will not be entitled to a remedy. In other words, as a matter of law, even if all the underlying facts are proven, there is no entitlement to a remedy. In accordance with Section 6(2)(a) of the Royal Court of Guernsey (Miscellaneous Reform Provisions) Law, 1950, it is the Bailiff who is to be the sole judge of law and procedure and it follows that there was no question of remitting the whole matter to the Royal Court with Jurats. It follows that this ground of appeal, too, cannot succeed.

37. I turn now to what I have referred to as the overarching argument by reference to McGonnell v The United Kingdom. This matter can be dealt with succinctly.

38. The European Court of Human Rights, in numerous decisions, has identified a settled principle as regards the importance of a right of appeal to a judicial body. The latest example will be found in Ramos Nunes de Carvalho e Sa v Portugal (ECHR, 6 November 2018, App no. 5539/13); where, at [132], the court said:

> "… The court reiterates its settled case law according to which, even where an administrative body determining 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" … that is, if any structural or procedural shortcomings identified in the proceedings before an administrative authority are remedied in the course of the subsequent control by a judicial body that has full jurisdiction …"

39. This being the consistent position of the European Court of Human Rights, any different position appearing from another decision by that court must be considered carefully.

40. On this matter, the issue before the European Court of Human Rights in McGonnell related to the contention by the government that the complaint concerning the alleged lack of independence and impartiality of the Royal Court in the applicant's case should be declared inadmissible by reason of failure to exhaust domestic remedies pursuant to Article 35 of the Convention. See paragraph 38.

41. However the applicant contended, and the court agreed, that the government's submissions were not raised before the Commission where, among other matters, they had conceded that it was not reasonably practicable for the applicant to have addressed any of his complaints to another authority. See paragraphs 39 and 40. It follows, therefore, that the decision in McGonnell is not contrary to the line of authority up to Ramos Nunes, and the learned Lieutenant Bailiff was correct to identify that it was the whole process to which Article 6.1 applied and that the availability of an independent judicial assessment such as an appeal to the Royal Court provided a process within which to consider any structural or procedural shortcomings.

42. It follows that the decision in McGonnell does not disturb the reasoning that the availability of the statutory appeal to the Royal Court was a relevant consideration.

43. Turning, lastly, to public interest, there are, in my judgment, no considerations which call for the granting of leave. The position of Sir Richard's translation from Bailiff to Lieutenant Bailiff and his being prevented from applying sufficient time to the present matter due to the Covid-19 pandemic are so singular as not to require the attention of the Court of Appeal. The Applicant's contentions in respect of contravention of Section 19(5) are not well founded. As regards Ground 5 there is no suggestion that it was

wrong to apply the test in Engel. Grounds 7 and 8 misunderstand the nature of the strike-out process. Finally, as McGonnell does not contradict any of the other authorities regarding the availability of a judicial appeal, there is no significant issue to be taken further. The application does not raise an issue where the law requires clarifying.

Conclusion

44. The application for leave to appeal is refused. Costs will be awarded on the recoverable basis.