IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION

Between: **(1) ROBERT TCHENGUIZ** **("Applicants")**

(2) RAWLINSON & HUNTER TRUSTEES S.A.
(in its capacity as trustee of the Tchenguiz Discretionary Trust)

and

STEPHEN AKERS **("Respondent")**

LEAVE TO APPEAL

Before: James Walker McNeill, QC, President
Nigel Peter Pleming, QC
and David Anderson, QC

Advocate for the Applicants: **Advocate Paul Richardson**
Advocate for the Respondent: **Advocate John Greenfield**

JUDGMENT OF THE COURT OF APPEAL

Introduction

1. The Applicants, Rawlinson & Hunter Trustees S.A. ("R&H"), a Swiss corporation, and Mr Robert Tchenguiz ("Mr Tchenguiz"), are respectively the Trustee and the Protector of the Tchenguiz Discretionary Trust ("TDT"), a Jersey trust over which this Court has jurisdiction under Section 4 of The Trusts (Guernsey) Law, 2008. In late 2017 R&H were replaced by Fort Trustees and Balchan Management Limited ("The New Trustees"). The Respondent ("Mr Akers") is one of the joint liquidators of certain companies incorporated in the British Virgin Islands which are connected with proceedings relating to the TDT.

2. Mr Akers and Mr Mark McDonald of Grant Thornton BVI Limited (together "the Joint Liquidators**"**), were appointed in the BVI on 18th August 2009, 16th February 2010 and 22nd February 2010.

3. These are two renewed applications for leave to appeal from judgments of Lieutenant Bailiff Talbot QC concerning committal applications, in which it was alleged by the Applicants that there had been wrongful disclosure by Mr Akers to the Serious Fraud Office of confidential information disclosed or discussed in the course of private trust proceedings. The first application (the "First Leave Application") includes an application for an extension of time and relates to a judgment of the Lieutenant Bailiff handed down on 11th March 2016 ("the March 2016 Judgment"). The second application (the "Second Leave Application") relates to a judgment of the Lieutenant Bailiff handed down on 19th July 2017 ("the July 2017 Judgment").

4. We have read, and considered, supplemental written submissions from Advocate Richardson for the Applicants dated 26th January 2018, in turn referring back to and incorporating earlier written submissions. We have also read and considered written submissions from Advocate Greenfield for the Respondent, dated 2nd February 2018, together with earlier written submissions. Both advocates addressed the court to explain, and expand, their written submissions.

The March 2016 Judgment

5. The March 2016 Judgment addressed an application by Mr Akers to strike out a committal application dated 23rd May 2014, ("the First Committal Application", or "FCA"), in which Mr Tchenguiz, supported by R&H, sought to have Mr Akers committed to prison or otherwise sanctioned for alleged breaches of an Order of the Royal Court made by the Lieutenant Bailiff, by consent, on 11th August 2010 (referred to in the various judgments as "the Protocol Order").

6. As noted by the Bailiff, when considering this application as a single judge of the Court of Appeal, the factual background of the First Committal Application was considered in some detail by the Court of Appeal in a judgment dated 24th July 2015 delivered by Bompas JA (Appeal 33/2015, *Tchenguiz v Hamedani (Akers intervening)* [2015] GLR 154) (the "July 2015 Court of Appeal Judgment"). There is no benefit to the parties, or to the public, in repeating the detailed summary there set out at paragraphs 6-41, or the history of the First Committal Application at paragraphs 42-63. In July 2015 this court set aside an order granting leave to be given for service of the First Committal Application out of the jurisdiction on a then respondent, one Mr Hamedani.

7. As also noted by the Bailiff, the principal reason given by the Court of Appeal for setting aside an order granting leave to be given for service out of the jurisdiction of the Committal Application Notice was that *"the case sought to be made against [Mr Hamedani] in the [First] Committal Application does not raise a seriously arguable case that he is guilty of contempt of court"* [paragraph 110]. As set out at paragraphs 97 to 110 of the July 2015 Court of Appeal judgment, the disclosure upon which the contention of contempt of court was based had not been made in breach of the Protocol Order.

8. On 26th August 2015, shortly after the handing down of the July 2015 Court of Appeal judgment, Mr Akers (who had intervened in those proceedings) made an application to strike out the First Committal Application. On 29th September 2015 Mr Tchenguiz responded by making an application seeking leave to amend the First Committal Application now relying on Orders dated 21st June 2010 and 28th June 2010, referred to as "the *in camera* Orders". The latest version of the amendment, at the time of the November hearing – see below – was

produced on 5th November 2015. The application for leave to amend was supported by an Affidavit sworn on 20th October 2015 of Nicole Ann Martin, personal counsel to Mr Tchenguiz, especially at paragraphs 7 – 14.

9. Both 2015 applications, to strike out and to amend, were considered by the Lieutenant Bailiff at a hearing in November 2015, leading to the March 2016 Judgment. The Lieutenant Bailiff relied, inevitably, upon the Court of Appeal's conclusion that the First Committal Application disclosed no reasonable cause of action. The Lieutenant Bailiff's conclusion on the strike out application is set out in paragraphs 17 and 18 of the March 2016 Judgment:

> *"17. Even though Mr Richardson contended otherwise on behalf of Mr Tchenguiz, it appears to me to be abundantly clear that what the Court of Appeal described in Tchenguiz v Akers and Hamedani as the Factual Ground for allowing Mr Hamedani's appeal was the central ratio decidendi of their decision and that the reasons given in paragraphs 102-110 of the judgment are equally applicable to the case in the Committal Application made by Mr Tchenguiz against Mr Akers. In particular, what was said in relation to Mr Hamedani in paragraph 108 of the judgment of the Court is, in my judgment, equally applicable to the case put against Mr Akers in the Committal Application:*
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> > "*… the Committal Application is explicitly based on breach of the Protocol Order as a central foundation. It would not be open to the Royal Court to commit [Mr Hamedani] on the Committal Application for a different contempt of court which had no reference to any breach of the Protocol Order.*"
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> *18. It follows, in my judgment, that, unless I were to allow the amendment application, the Committal Application must be struck out against Mr Akers under rule 52(2)(a) of the Royal Court Civil Rules, 2007 on the ground that it discloses no reasonable grounds for bringing the claim against Mr Akers. Although the decision of the Court of Appeal on the Factual Ground does not, of itself, bind Mr Tchenguiz on his case against Mr Akers on the Committal Application, the issue as between them is so substantially the same on the Factual Ground that it is, in my judgment, clear that, in accordance with the decision of the Court of Appeal, I should conclude that the Committal Application discloses no reasonable claim against Mr Akers and that, subject to my decision on the amendment application, the Committal Application must be struck out as against him. I have reached this conclusion without any hesitation. I regard the contrary argument as untenable. As I have said, to my mind, the reasoning of the Court of Appeal is as applicable to the case against Mr Akers as they have found on the case against Mr Hamedani. Even though the alleged contempt by each of them differs, in that Mr Akers is alleged to have committed a breach of an order, i.e. the Protocol Order, to which he was party, whilst Mr Hamedani was pursued as an alleged aider and abettor, the reasoning of the Court of Appeal on the Factual Ground has the effect, in my judgment, of determining the case against Mr Akers under the Committal Application in favour of Mr Akers."*

10. The Lieutenant Bailiff then turned to consider the cross-application for leave to amend. Earlier in his judgment, at paragraph 10, he recorded the following submission:

> *"It was accepted by Mr Greenfield on behalf of Mr Akers that Mr Tchenguiz would be entitled to start again with a fresh committal application against Mr Akers, but Mr Greenfield argued that the right and proper course was for me to strike out the Committal Application, and order Mr Tchenguiz to pay Mr Akers' costs, which he*

claimed on an indemnity basis, and that I should direct that Mr Tchenguiz only be permitted to issue any new application to commit Mr Akers to prison which he might decide to file after his costs of the Committal Application had been paid."

After consideration of the applicable legal principles, from Guernsey and English cases, considered in more detail below, the Lieutenant Bailiff decided not to allow the amendment application for the reasons set out in paragraphs 26-31 of the March 2016 Judgment.

11. Before leaving the March 2016 Judgment, in light of what has followed, it is helpful here to set out the last paragraph, paragraph 32:

> *"I shall therefore strike out the Committal Application as against Mr Akers. In doing so, I do not express any further views than the limited views I have set out above about the contents of the proposed amendments. I have decided, in order to be fair to Mr Tchenguiz, that, rather than me making any further comments on the proposed amendments at this stage, I should leave him to decide, first, whether or not to issue a new contempt application against Mr Akers, and, secondly, if he were so to decide, to have a further opportunity to 'sign off' on any new application which his Advocate might file on his behalf."*

The July 2017 judgment

12. Shortly after the March 2016 Judgment, on 29th March 2016, the Second Committal Application ("SCA") was issued – also by Mr Tchenguiz and R&H, against Mr Akers and Mr Hamedani. This application relied, as anticipated by the earlier application to amend, on the June 2010 *in camera* orders and was supported by a further Affidavit, sworn on 25th April 2016, of Nicole Ann Martin. We were informed in the course of submissions that, to all intents and purposes, the SCA was the same as the amended FCA put before the Royal Court in November 2015. Mr Hamedani was not served with the SCA and has not otherwise submitted to the jurisdiction of this Court. The present proceedings can be treated as conducted between Mr Tchenguiz and the trustees on the one hand, and Mr Akers on the other, and we do so.

13. Mr Akers, by application dated 7th November 2016, applied for the Second Committal Application to be struck out on the basis that it was an abuse of process, and also that the pleading disclosed no reasonable grounds – relying on Rule 52(2)(a) and (b) of the Royal Court Civil Rules 2007:

> "*(2) The Court may strike out a pleading if it appears to the Court –*
>
> *(a) that the pleading discloses no reasonable grounds for bringing or defending an action,*
> *(b) that the pleading is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings, …*"

14. The application was considered by the Lieutenant Bailiff during a number of oral hearings in November 2016, January 2017 and March 2017, and judgment was handed down on 19th July 2017.

15. The judgment first considers Rule 52(2)(b), abuse of the Court's process, on the logically correct basis that "only if the application to strike out on the ground of abuse of process were to fail would it be necessary for Mr Akers to rely upon his other argument for strike out under Rule 52(2)(a)" – see paragraph 10.

16. There is extensive citation in the judgment from the English case-law (going back to *Henderson v Henderson* (1843) 3 Hare 100), and from the then recent decision of this Court in *Rawlinson & Hunter Trustees S.A. v Investec Trust (Guernsey) Limited* [2016] GLR 332, confirming that the *Henderson v Henderson* principle was part of the law of Guernsey. In paragraphs 23 to 47 of his judgment the Lieutenant Bailiff considers and applies the thirteen principles set out by McNeill JA at paragraph 10 of the judgment in *Rawlinson & Hunter Trustees S.A. v Investec Trust (Guernsey) Limited*.

17. There is no complaint in this application for leave to appeal as to the correctness of the Lieutenant Bailiff's summary of the applicable abuse of process principles. In the July 2017 Judgment, there is extensive consideration of the submissions made by the parties, and the overall conclusion was that the Second Committal Application should be struck out. The reasons are helpfully summarised by the Bailiff at paragraph 16 of his 8th January 2018 decision refusing leave to appeal:

> *"After analysing the two Causes, he concluded that there existed 'a close and substantial overlapping of the matters in issue in the First Committal Application and those pleaded in the Second Committal Application' (paragraph 45) and he held that Mr Tchenguiz could, and should, have brought all his claims in the one set of proceedings (paragraph 42). He found (paragraph 51) that at the time of bringing the First Committal Application Mr Tchenguiz was represented by 'experienced Counsel, and also by in-house Counsel, and in the absence of any explanation for bringing that application based only on an alleged breach of the Protocol Order, when the terms and effect of the in camera Orders were known to him and his advisors, the Second Committal Application was, in my judgment, brought as an abuse of the process of the Court'. That is the basis on which he held that the Second Committal Application be struck out."*

18. The Lieutenant-Bailiff then turned, at paragraphs 54 to 61 of the July 2017 Judgment, to the application based on Rule 52(2)(a), that there were no reasonable grounds for the Second Committal Application. The conclusion is at paragraph 62:

> *"As mentioned already, I would have held that the case pleaded against Mr Akers in the Cause, as analysed by me in the previous paragraph of this judgment, was arguable and not bound to fail and I would have allowed it to proceed to trial. I would also have concluded that the pleaded case was not weak. In doing so, I would have found that there was a sound legal basis for the case in committal raised by the Applicants in the Cause in the judgments of the Royal Court of Jersey in Westbond International Bank Ltd v. Cantrust (C.I.) Ltd [2004] JRC 111 and In re the M and other Trusts [2012] (2) JLR 51. But, in reaching such conclusions, I would not have done more than refusing to strike out the Cause under rule 52(2)(a) since, in my judgment, to have done so would, in the circumstances of this case, have amounted to me conducting a mini-trial or beginning to do so."*

The application for leave to appeal

19. By Notice dated 16th August 2017, the Applicants applied for leave to appeal against both the March 2016 and July 2017 Judgments, on the basis of the draft Grounds set out in the Notice of Appeal.

20. The challenge to the March 2016 Judgment focussed on the refusal by the Lieutenant Bailiff to allow Mr Tchenguiz to amend the First Committal Notice and, (at paragraph 3) that "*the First Judgment must be wrong if the Second Judgment is correct*".

21. In relation to the appeal against the July 2017 Judgment, the complaint was summarised in paragraph 7 of the draft Grounds of Appeal (developed further in paragraphs 8-11):

> *"In striking out the Second Committal Application as an abuse of process on Henderson v Henderson grounds, the Lieutenant Bailiff failed (or failed sufficiently) to take into account the fact that Mr Tchenguiz had (by his application to amend) raised the case based on the in camera Orders in the First Committal Application; and that the sole reason why an allegation of breach of the in camera Orders had not been made in the First Committal Application was that the Lieutenant Bailiff himself had refused permission to amend the First Committal Notice. The Lieutenant Bailiff's conclusion that, in these circumstances and applying a broad merits-based approach, Robert Tchenguiz and Rawlinson & Hunter Trustees SA were misusing or abusing the process of the court, was wrong in law".*

22. The Application for Leave to Appeal was reissued in October 2017 when new trustees replaced R&H. On 3rd October 2017 the Lieutenant Bailiff dismissed the application for leave to appeal. As noted above, the Application was renewed before the Bailiff, sitting as a Single Judge of this Court, and on 8th January 2018, leave to appeal against both Judgments was refused. In relation to the March 2016 Judgment, the Bailiff also refused an extension of time. The key, concluding, paragraphs in the Bailiff's judgment are (at paragraphs 36 and 43):

> *"For the reasons I have given, I am not persuaded that the proposed appeal against the First Committal Judgment would have reasonable prospects of success. Therefore, having regard to the length of the delay in bringing the application, the prejudice to Mr Akers in having the threat of imprisonment hanging over him and the lack of any reasonable prospect of success leads me to refuse leave to proceed out of time and even if the application were not out of time, I would have refused leave to appeal on the merits."*
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> *"[The Lieutenant Bailiff's] careful application of those principles in the Second Committal Judgment is not wrong in law and the manner in which he has exercised discretion in doing so is not such as to invite reasonable prospect of being overturned on appeal."*

The application before the Full Court

23. In his *Submissions on Renewed Application for Leave to Appeal: Full Court*, Advocate Richardson relies on the earlier written submissions lodged before the Lieutenant Bailiff and the Bailiff in support of the application for leave to appeal, placing emphasis on two particular points:

    a. *"The well-established low threshold for granting leave to appeal in Guernsey"; and*

    b. *"The finding by LB Talbot that the case against Mr Akers, on the evidence before him, was arguable and not weak".*

24. But the application for leave is not confined to these two points. Reliance is also placed on the draft Grounds of Appeal, and on various earlier Skeleton Arguments seeking leave to appeal – dated 16th August 2017, 12th September 2017, and 21st September 2017. From those documents we extract the following additional, summarised, submissions:

    a. In relation to the March 2016 Judgment, the Lieutenant Bailiff should have allowed the amendment because "*the draft amended committal application relied on substantially the same factual allegations, but founded the alleged contempt on a*

breach not of the Protocol Order but of two orders [later reduced to one, the in camera Order of 28 June 2010] made at the outset of the Guernsey 2 Proceedings which had ordered that those proceedings should be held in camera".

b. The Second Committal Application was *"in materially identical terms to the proposed amended committal application, on 26 March 2016*".

c. The result of (a) and (b) is that either the March 2016 Judgment proceeded on an incorrect premise (that there was no need to allow the proposed amendment because a second application could be made, or the July 2016 Judgment was correct but the March 2017 Judgment was incorrect as it proceeded on an incorrect premise (as set out in paragraphs 7 to 9 of the Notice of Appeal).

d. The reason the March 2016 decision was not challenged on appeal, in time, was that the Applicants reasonably believed that the correct, judicially encouraged and approved course, was to bring the Second Committal Application (based on the *in camera* Order).

e. The First Committal Application should not have been struck out because it could "*be put into better order through amendment of the pleading*" (*Guernsey ICC Limited v Moore Stephens* – March 2014), and any prejudice could be remedied in costs (*Jefcoate and Jefcoate v Spread Trustee Company Limited* November 2013, and *Ogier v Grand Havre Holdings Limited* [2000] 29 GLJ 80).

f. In summary, for the various reasons set out above and expanded and supplemented in paragraphs 31 to 48 of the 16th August 2017 Skeleton Argument, "*there was no valid reason for refusing permission to Mr Tchenguiz to amend the First Committal Notice in terms of the Draft Amended Committal Notice*".

g. In relation to the July 2017 Judgment, there was no basis for a *Henderson v Henderson* strike out because Mr Tchenguiz *had* raised breach of the *in camera* Order, if only by the application to amend – relying on *Johnson v Gore Wood & Co* [2002] 2 AC 1, at 59C-D, and *Brisbane City Council v AG for Queensland* [1979] AC 411, at 425.

h. Nor was there any basis for an abuse of process strike out where, as in this case, "*the first failed on technical or procedural grounds*", relying *on Spencer Bower and Handley, Res Judicata* (4th Edition) at [26.16], *Barakot Ltd v Epiette Ltd* [1998] 1 BCLC 283, and *Jelson (Estates) Ltd v Harvey* [1983] 1 WLR 1401.

i. There was no basis for a finding that there had been "*unjust harassment*" – if that was the correct approach then the allegations of breach of the *in camera* Order could never have been brought.

j. The Lieutenant Bailiff had erred, in his approach to the *Henderson v Henderson* strike out, by confusing the need for a broad merits-based approach with a narrow consideration of whether or not there had been sufficient (or any) explanation for the *in camera* Orders not being relied on from the outset of the First Committal Application. Even if there was no such explanation (which is disputed) that did not form a proper basis for a conclusion that, therefore, the Second Committal Application was an abuse of the processes of the Court.

Discussion

25. We turn first to consider the two points set out in paragraph 23 above. Before doing so, however, we express our agreement with the learned Bailiff and with the Lieutenant Bailiff – and it was not argued to the contrary – that leave to appeal is required in an application of this nature. Committal proceedings involve the important potential for interference with or deprivation of liberty and, where an application has been refused, it should not be able to be reargued on appeal merely on the whim of the applicant and with the consequences for the alleged contemnor of further periods of time when there is uncertainty as to his status.

26. It is submitted by the Applicants that there is a "*well-established low threshold for granting leave to appeal*" in Guernsey. Support for that submission is said to be found in *McNamara v Gauson* [2009-2010 GLR 387] at paragraph 21. The Lieutenant Bailiff, when giving judgment on 3rd October 2017 dismissing the application for leave to appeal correctly summarised the test to be applied:

> *"The established Guernsey law relating to an application for leave to appeal is that leave will be given unless there is no reasonable prospect of success, a fanciful prospect being insufficient – Cotterill v. Ozanne (2010), Judgment 33/2010, per Judge of Appeal the Hon. Michael Beloff QC, sitting as a single judge of the Court of Appeal, applying at [11] the test applied in Ogier v. Grand Havre Holdings Limited (2007) unreported, by Lieutenant Bailiff Hancox, and in McNamara v. Gauson (supra), per Deputy Bailiff Collas at [21] to [32]."*

The "*no reasonable prospects of success*" test was applied by the Lieutenant Bailiff (at paragraph 49 of his judgment) and the exercise of his discretion was not criticised by the Bailiff (at paragraph 43, set out above) when refusing leave to appeal.

27. Is the test "low" in Guernsey? A comparison with the position in England is perhaps sufficient to address, and answer, this submission. CPR 52.6(1) provides that "*permission to appeal may be given only where – (a) the court considers that the appeal would have a real prospect of success*". These words have been considered in England and Wales case-law, including *Swain v Hilman* [2001] 1 ALL ER 91, and *Tanfern Ltd v Cameron-Macdonald (Practice Not)* [2000] 1 WLR 1311, Brooke LJ at paragraph 21:

> *"Permission to appeal will only be given where the court considers that an appeal would have a real prospect of success or that there is some other compelling reason why the appeal should be heard: C.P.R., r. 52.3(6) . Lord Woolf M.R. has explained that the use of the word "real" means that the prospect of success must be realistic rather than fanciful: Swain v. Hillman, The Times, 4 November 1999; Court of Appeal (Civil Division) Transcript No. 1732 of 1999."*

28. The editors of the England and Wales *Supreme Court Practice*, 2017 Ed., have correctly summarised the position in 52.6.2, noting the similarity with the rules relating to summary judgment:

> *"The first ground ("real prospect of success") presents no conceptual problems. It is precisely the same test as that which the courts apply when considering summary judgment: see r.24.2. The rationale is the same. If a claim or defence has no real prospect of success, the court will prevent the litigant from pursuing it. Likewise if an appeal has no real prospect of success, the court will prevent the litigant from pursuing it. The main practical difference is that (for obvious reasons) more appeals are weeded out by this process, than first instance claims or defences."*

29. We do not consider there is a material difference between the Guernsey positive test "*leave will be given <u>unless</u> there is no reasonable prospect of success, a fanciful prospect being*

insufficient", and the England and Wales more negative articulation of the test "*permission to appeal may be given only where … the court considers that the appeal would have a real prospect of success*". We do not accept that there is a *low* threshold for leave to appeal in Guernsey.

30. Reliance is then placed on the finding by the Lieutenant Bailiff that the *in camera* Order based case against Mr Akers in the SCA, on the evidence before him, was arguable and not weak. Advocate Greenfield invited us, as he invited the Lieutenant Bailiff, to conclude that there were no grounds upon which it could be concluded that there was an arguable case – see paragraphs 58 and 61 of the July 2017 Judgment.

31. The approach of the Lieutenant Bailiff to this ground was set out in paragraph 55 of his judgment, followed by the application of that approach in paragraph 56:

> *"55. In paragraph 8 of his judgment in* ***Rawlinson & Hunter Trustees S.A. v Investec****, Judge of Appeal McNeill QC confirmed that a pleading will only be struck out under rule 52(2)(a) if, on the pleaded case, the claim is unarguable or bound to fail. The question, which must be considered on the pleading alone, - but which may also, if appropriate, include an analysis of any documents there referred to - is whether a cause of action exists which has some chance of success or whether it is plain and obvious that the pleading should be struck out, using the express words of the sub-rule, as one in respect of which there are no reasonable grounds for bringing it. Furthermore, the Guernsey cases establish that a claim which is unarguable or bound to fail is a claim which is more deficient than simply a weak claim, and is one which cannot be put in better order by an amendment. The court has to be satisfied, without conducting a mini-trial, that it is perfectly clear that the claim cannot succeed, which is a high threshold. It is also important to stress that, although there might sometimes be some overlap between argument on a strike out application under rule 52(2)(a) and argument on a defendant's summary judgment application under rule 19(2)(a) of the Rules, whilst evidence is admissible, and, under rule 21, necessary on such a summary judgment application, the opposite applies on an application to strike out under rule 52(2)(a). Accordingly, on this aspect of Mr Akers' application, I have not taken into account the affidavit evidence of Ms Martin sworn in support of the Second Committal Application with the exception of the documents exhibited to those affidavits which have formed part of the Applicants' pleaded case.*
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> *56. In my judgment, with the exception of the paragraphs, and parts of paragraphs to which I refer in the next paragraph of this judgment, and also materially in paragraph 59 of this judgment, the Cause in the Second Committal Application would not have been liable to be struck out as against Mr Akers under rule 52(2)(a). I would have held that, subject to those exceptions, the Second Committal Application as pleaded in the Cause was arguable and would not have been bound to fail. I would, therefore, not have struck it out if I had not already done so under rule 52(2)(b), subject to the Applicants having filed an amended Cause limiting the basis of their case and reflecting those exceptions. Nor would I have considered the claim for the committal of Mr Akers there pleaded to have been a weak claim."*

32. Advocate Greenfield, however, in his oral submissions for Mr Akers, attacked the Lieutenant Bailiff's conclusion that the SCA was arguable, and neither weak nor bound to fail. Relying on his skeleton argument of 14th November 2017, he submitted, among other matters, that the *in camera* order(s) do not apply to the information said to have been relayed in breach.

33. In the event that leave to appeal is granted, it will be open to Mr Akers to advance such submissions on the merits of the committal application, properly supported by a Respondent's

Notice under Rule 5 of the Court of Appeal (Civil) Rules 1964. We observed the substance of those submissions but our task is to decide whether leave to appeal should be granted and, if there are arguable errors of law in the determinations, the arguability of the committal applications must be a matter for the court entertaining the appeal.

34. We accordingly turn, without comment on the merits of the underlying claim, to the strength of the Applicants' grounds for challenging each of the two judgments under appeal.

Appeal against the March 2016 judgment

35. We consider that the Lieutenant Bailiff was correct in his conclusion, for the reasons he gave at paragraph 18 of the March 2016 Judgment, that the unamended First Committal Application disclosed no reasonable grounds for the claim against Mr Akers. That conclusion followed ineluctably from the reasoning of this Court in the July 2015 Court of Appeal judgment.

36. The remaining question is whether the Lieutenant Bailiff was correct to refuse the application for permission to amend.
37. In defining his approach to that application, the Lieutenant Bailiff applied a number of legal principles which he distilled from recent English cases and described as persuasive. The first two such principles were stated, at paragraph 24, in the following terms:

> *"(a) In certain limited circumstances, and only with the court's permission, there is power to grant leave to amend an original commitment application – Inplayer Limited v Thorogood [2014] EWCA Civ 1511, per Lord Justice Jackson at paragraphs 25, 28 and 39.*
>
> *(b) Cases where the power has been exercised appear to be few, and appear to show that the power might be primarily exercisable where the original application set out the case in sufficient particularity in the first place – Mr Justice Newey in Zimareva-Locke v Cetin (2012)."*

38. The Lieutenant Bailiff applied those principles in paragraph 26 of the March 2016 judgment, where he held:

> *"As analysed by me above, in real terms Mr Tchenguiz has failed on the Committal Application. It should, in my judgment, only be in exceptional circumstances that the Royal Court should allow him a second chance within that very application by amending it to plead a new and different case, a fortiori a different allegation of contempt of court. I do not regard the circumstances in which the amendment application is made to be exceptional."*

39. Advocate Richardson submitted that the Lieutenant Bailiff erred in his formulation of the applicable legal principles, and that he was accordingly wrong to hold that an amendment such as that which was sought in this case should be allowed only "*in exceptional circumstances*". He criticised, in particular, the suggestion that leave to amend a committal application should be granted only "*in limited circumstances*", perhaps primarily when the original application lacked sufficient particularity, and the conclusion that amendment to plead "*a new and different case"* should be allowed only in exceptional circumstances.

40. In para 24(a), the Lieutenant Bailiff relied on the judgment of Jackson LJ in *Inplayer* (a committal case), at paragraphs 25, 28 and 39. The first two paragraph are introductory. The principle is set out in paragraph 39 (with emphasis added):

> *"A judge hearing a committal application should confine himself or herself to the contempts which are alleged in the application notice. If the judge considers that other alleged contempts require consideration, the correct course is to invite amendment of the application notice and then provide any necessary adjournment so that the respondent can prepare to deal with those new matters."*

41. In paragraph 24(b), the Lieutenant Bailiff relies on the judgment of Newey J in *Zimareva-Locke v Cetin* (also a committal case). The relevant paragraphs are 12, 14 and 18:

> *"12. Mr Cole says that the evidence in support of the application does not resolve all the difficulties. It appears to me that, to a great extent if not entirely, it is possible to see from the affidavit of the claimants what the detailed complaints are. On the other hand, what Nicholls LJ [in Harmsworth v Harmsworth [1987] 1 WLR 1676] thought was required, and seems to me still to be required, is that the relevant information is "available to the respondent to the application from within the four corners of the notice itself." As I view the application notice, there is insufficient particularity in the four corners of this notice.*
>
> *14. Given the early stage of these proceedings, I can see no good reason for denying permission to amend here. That is especially so since Woolf LJ's judgment in the Harmsworth case suggests that, were I to strike out or dismiss these proceedings on the basis that the application notice was defective, it would be open to the claimants to issue a fresh application in proper form. Against that background, as Mr Cole essentially recognised, it can make no sense to deny the claimants an opportunity to amend.*
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> *18. I have not been persuaded that a want of particularity in an application notice should necessarily result in the application being struck out. For present purposes, it is enough to say that such a want of particularity can, in an appropriate case, be cured by amendment."*

42. It is at least arguable, from these extracts, that the approach set out in paragraphs 24 and 26 of the Lieutenant Bailiff's March 2016 Judgment was too restrictive and, as such, an error or law leading to the decision not to allow the amendment.

43. There is also England and Wales case law suggesting that where there are irregularities in committal applications, a further application can be made founded on the same contempt – see, for example, *Harmsworth v Harmsworth* [1987] 1 WLR 1676, Nicholls LJ at 1687, and *El Capistrano SA v ATO Marketing Ltd* [1989] 1 WLR 471, Kerr LJ at 477D-E, and 480D-481B. In *El Capistrano*, Balcombe LJ, at 485H-486F, considers the limits of the analogy between civil and criminal contempt.

44. Advocate Richardson submitted that the Lieutenant Bailiff applied too stringent a test when considering the application to amend, contending that in Guernsey there was little or no difference between the approach to amendment to civil pleadings generally and committal applications in particular – relying on *Jefcoate v Spread Trustee Company Limited* (2013) judgment of the Bailiff at paragraphs 27 to 52. From those paragraphs we need here only set out two sub-paragraphs of paragraph 52:

> *"(e) In general, amendments should be allowed so that the real dispute between the parties can be adjudicated provided that any injustice to the other party can be compensated for in costs.*

(l) An amendment will not be allowed if the case introduced by it has no realistic prospect of success."

45. Here, we know from the July 2017 judgment that the Lieutenant Bailiff did not consider that the amendment (in essence, the SCA) had no realistic prospect of success, and, in the March 2016 judgment, he did not express any views about the prospects of success, leaving it to the Applicants to decide whether or not to make a new contempt application.

46. For these reasons we consider it at least arguable that the Lieutenant Bailiff erred in law at paragraphs 24 and 26 of the March 2016 Judgment, and that this error was a material factor in his decision to refuse the application to amend the FCA.

47. If there was such an error of law, it also seems to us that Mr Tchenguiz can reasonably argue that he was led into believing that the correct course was to issue the SCA rather than seek to appeal the March 2016 Judgment and, therefore, there are grounds (with more than fanciful prospects of success) for extending time.

48. In summary, therefore, we hold that the submissions set out in paragraph 24(a) to (f) above are arguable and have some prospects of success. We accordingly grant permission to appeal.

Appeal against the July 2017 judgment

49. If the amendment to the FCA, proposed in 2015, had been accepted by the Lieutenant Bailiff, the FCA would not have been struck out under Rule 52(2)(a), and it was expressly held (at paragraph 28 of the March 2016 Judgment) that the Lieutenant Bailiff was "*not persuaded that the amendment application can be categorised as an abuse of process*".

50. It follows that most of the grounds of complaint relating to the July 2017 Judgment (summarised in paragraph 24(f) to (j) above) derive from the March 2016 Judgment, such that we should also grant permission to appeal. The exception is paragraph 24(k):

> *"There was no basis for a finding that there had been "unjust harassment" – if that was the correct approach then the allegations of breach of the in camera Order could never have been brought."*

51. The finding of unjust harassment is set out in paragraph 47 of the 2017 Judgment:

> *"It is clear from the twelfth principle [taken from **Rawlinson & Hunter Trustees v Investec**] that bringing a second set of proceedings against the same defendant will rarely be found to be an abuse of the process of the court unless it involves unjust harassment or oppression. Whilst I find that there is no evidence of a personal vendetta being brought against Mr Akers by Mr Tchenguiz, I nevertheless consider, and hold, that the bringing of the Second Committal Application against Mr Akers did involve unjust harassment of him by the Applicants, especially by Mr Tchenguiz. For, in my judgment, Mr Akers was entitled to know, especially in these proceedings where relief was being sought committing him to prison for alleged breaches of orders of this Court, precisely how the case was put against him from the beginning, and, in particular, that Mr Tchenguiz's case against him was to commit him was not only for an alleged breach of the Protocol Order but also for alleged breaches of different Orders of this Court i.e. for alleged breaches of the in camera Orders*."

52. The unjust harassment conclusion is firmly grounded on the fact Mr Akers was entitled to know "*from the beginning*" that the committal case included alleged breaches of the *in camera* orders. Mr Greenfield submitted that the difference between paragraph 28 of the

March 2016 Judgment (where the amended FCA was not an abuse) and paragraph 47 of the July 2017 Judgment was the failure by Mr Tchenguiz to give any explanation for the non-inclusion of any reference to, or reliance on, the *in camera* orders on the FCA – in 2014. The evidence was mentioned by the Lieutenant Bailiff in the July 2017 Judgment, particularly at paragraphs 19-22 and 30- 36, but we do not find the reasoning in paragraph 47 (or in the earlier paragraphs) persuasive, or at least not persuasive enough to refuse to grant permission to appeal. These paragraphs, particularly paragraphs 39 to 44, in our judgment tend to support the argument that this is a case where allowing an amendment to the FCA (in 2016) was the right course, rather than striking out the SCA as an abuse of process in 2017.

53. As noted at paragraph 33 above, we have not addressed the argument advanced by Advocate Greenfield for Mr Akers that the SCA disclosed no reasonable ground for a committal, principally on the basis that the information said to have been disclosed by Mr Akers did not involve any breach of the *in camera* orders. We do not consider it to be appropriate, on this application for permission to appeal, to embark on a detailed examination of the merits of the SCA, or any form of mini trial. The Lieutenant Bailiff heard several days of submissions, including detailed argument (both written and oral) on this point, and concluded that the SCA was arguable and not a weak claim. We agree with the analysis of the applicable legal principles in paragraphs 54-55 of the July 2017 Judgment.

Conclusion/Disposal

54. For these reasons, we grant permission to appeal the 11th March 2016 and 19th July 2017 orders of Lieutenant Bailiff Talbot QC.