Application to allow fresh evidence to be adduced out of an application by Trustees of a separate trust and for the Proposed Intervening Parties to be joined to the appeal in respect of the costs of the appeal and the applications within and as regards ancillary matters of a possible appeal to the Judicial Committee of the Privy Council.

[2020]GCA049

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO. 538

16th September 2020

Before:

Bailiff of Guernsey, President
James McNeill QC
George Bompas QC

Between:

(1) ITG Limited and **(2) Bayeux Limited**	**Plaintiffs and Respondents**
-and-	
(1) Glenalla Properties Limited **(2) Thorson Investments Limited** **(3) Eliza Limited** **(4) Oscatello Investments Limited** **(5) Geneva Trust Company SA**	**Defendants**
-and-	
(1) Fort Trustees Limited **(2) Balchan Management Limited**	**Intervening parties and Appellants**
-and-	
(1) Helen Green **(2) Kelvin Hudson**	**Joint Receivers**
-and-	
(1) Fort Trustees Limited **(2) Balchan Management Limited** **(3) Robert Tchenguiz**	**Proposed Intervening Parties**

Advocate N J Robison for the Appellants
Advocate J M Wessels for the Respondents

Advocate P Richardson for the Proposed Intervening Parties
Mr R Hodges, as a director, for the Fifth Defendant

The President:

1. This judgment deals with issues consequential upon the judgment of this Court handed down on 21 August 2020 [2020] GCA043 (the "August Judgment"). Since then Sir Michael Birt reached the age of retirement from this Court and the issues now falling to be dealt with have been considered by the remaining two members of the Court together with Bompas JA.

2. The issues before us now arise out of applications by the Appellants ("F&B") to allow fresh evidence to be adduced, out of an application by F&B as trustees of a separate trust, the Tchenguiz Discretionary 'A' Trust (the "TDAT") and Mr Robert Tchenguiz (the "Proposed Intervening Parties") to be joined in the appeal, in respect of the costs of the appeal and the applications just mentioned, and as regards ancillary matters in respect of a possible appeal to the Judicial Committee of the Privy Council.

3. There has been a large measure of agreement among the parties, including in correspondence exchanged after the parties' Skeleton Arguments were lodged, culminating in the terms of a draft Order as agreed between the parties on all but one element, which has recently been forwarded to the court, but this short judgment sets out our decisions on the issues that have been raised.

The Fresh Evidence Applications

4. F&B, as Appellants, brought two applications for fresh evidence to be adduced, the first presented on 10 June 2020 and the second on 23 July 2020. In support of the second application, F&B filed an Affidavit referred to as "Martin 26" which contained two separate exhibits, one labelled confidential (the "Confidential Exhibit"). The second paragraph of that application sought an order that the Confidential Exhibit be sealed on the court file and that application was granted: see paragraph [43] of the August Judgment. The Respondents ("I&B") accept that an order should be made reflecting the terms of paragraph [43] of the August Judgment.

5. After some discussion on this matter between those representing F&B and those representing I&B, there is now agreement that the Confidential Exhibit to Martin 26 be sealed on the file of this court and that its contents should not be disseminated further without an order of the court, but that it may be deployed by I&B in the continuing proceedings in this matter before the Royal Court, subject to the conditions agreed between the parties. We are satisfied that this agreed order reflects what the court can properly order, especially where Martin 26 had been prepared for the Royal Court proceedings rather than solely for use before this court. Apart from making that order, both Fresh Evidence Applications are dismissed.

Costs

Parties' costs of the appeal

6. F&B have consented to an order to pay the costs of I&B of the appeal on the recoverable basis. That is accepted.

7. GTC sought an order that the Appellants pay its costs of the appeal on the recoverable basis, to which F&B have also now consented. That is also accepted, to be subject to taxation if required.

Fresh Evidence

8. In respect of the Fresh Evidence Applications, through Advocate Robison's correspondence, F&B have now consented to an order that they pay the costs of those applications on the indemnity basis, having previously only agreed to do so on the recoverable basis.

9. We agree with that outcome because the circumstances surrounding the making of the Fresh Evidence Applications do indeed fall well outside of the norm and justify an award of costs on the indemnity basis. As we indicated at paragraph [39] of the August Judgment, attempting, some six months after the presentation of the Notice of Appeal, to introduce an inconsistent case constituted manifest unreasonableness in the conduct of the proceedings, seeking to rely upon a position wholly at odds with F&B's earlier evidence. We are satisfied that I&B's costs of those Fresh Evidence Applications should be awarded against F&B on the indemnity basis.

Joinder

10. As to the costs of the Joinder Application, with that application also being formally dismissed, the Proposed Intervening Parties had initially resisted the provisional view we articulated that costs should be awarded against them on the indemnity basis. They have now agreed to pay I&B's costs of the Joinder Application jointly and severally on the indemnity basis. We are satisfied that this is the appropriate order to make. This was a blatant attempt to disrupt proceedings. The potential issues were well known in January and even clearer in April. To present such an application, with no indication other than to support views expressed by (essentially) the same party in another guise, reeks of an attempt to present some other arguments which might derail the appeal process. In the submissions made on behalf of the Proposed Intervening Parties on the question of costs, their attempt to pray in aid the COVID-19 pandemic is, in our view, specious. Well before the end of April even court proceedings were taking place via electronic platforms and instructions could readily have been provided. The award of indemnity costs against the Proposed Intervening Parties extends to include any costs incurred by I&B in dealing with those submissions.

Indemnity

11. I&B sought an order that neither of the Proposed Intervening Parties or F&B are entitled to make any claim against the TDT assets in respect of their own costs as regards the Joinder Application or the Fresh Evidence Applications. This aspect has now also been agreed. Accordingly, there will be no indemnity available out of the assets of the TDT in respect of F&B's and the Proposed Intervening Parties' costs of the Fresh Evidence Applications and the Joinder Application, with all other issues relating to the availability of indemnity and quantification being remitted for determination by the Royal Court. That approach is also accepted by us.

Permission to Appeal to the Judicial Committee of the Privy Council

12. The one issue on which agreement between the parties has not been reached is the question of whether permission to appeal is needed in respect of an appeal as of right against the dismissal of the appeal on substantive issues and the imposition of time limits.

13. By reference to the Privy Council decision in *A v R* [2018] UKPC 4 at paragraph [8], I&B submitted that if F&B intended to seek permission to appeal to the Privy Council, it was necessary for an application for permission to appeal to be made to this court. Noting that both the Court of Appeal (Guernsey) Law, 1961 and the Court of Appeal (Civil Division) (Guernsey) Rules, 1964 were silent on the time limit for seeking permission to appeal to the Privy Council, it was submitted that the timing of any application was a matter for this court to determine. Whilst F&B were entitled to sufficient time to articulate proposed grounds of appeal, there was a need for matters to move forward as expeditiously as possible.

14. That the Court of Appeal had the jurisdiction to regulate its own procedures, for example in relation to time limits, could be seen in the judgment of Beloff JA in *Re F* (Guernsey Judgment 32/2013) especially at paragraphs [44] – [45].

15. In response, F&B indicated that advice was being taken on whether or not to take an appeal to the Privy Council, but submitted that an appeal to the Privy Council lay as of right, hence the lack of provision in the 1961 Law or the 1964 Rules for any time limit for seeking permission to appeal. The only time limit was that provided by rule 11(2) of the Judicial Committee (Appellate Jurisdiction) Rules 2009, which provides that where permission to appeal is required, the relevant time limit is 56 days from the date of the order or decision of the court below or the date of refusal, if later. As was made clear by Lord Hodge in *A v R*, it was submitted, where appeals lay as of right, the Court of Appeal held only a residual power to prevent an abuse of process such as there being no genuinely disputable issue or an excessive delay which had allowed the Court of Appeal decision to have been acted upon.

16. In our judgment, if F&B are aggrieved at the dismissal of their appeal, this Court has no power to insist upon an application being made to it nor, even more so, to prescribe a time limit for the making of such an application. It is a matter for the unsuccessful Appellants to decide what steps they wish to take.

Conclusion

17. For the reasons given, we confirm that we are content to make an Order in the form provided, confined to paragraphs 1 to 8 thereof.