

Application for Leave to Appeal to the Court of Appeal and for an Extension for Time for service of the Notice of Appeal.

**[2021]GCA029**

**IN THE COURT OF APPEAL OF GUERNSEY**

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

**4 August 2021**

**Before: James W McNeill QC, sitting as a Single Judge**

**Between:**

**(1) FORT TRUSTEES LIMITED and  
(2) BALCHAN MANAGEMENT LIMITED**

**Applicants**

**and**

**(1) ITG LIMITED and  
(2) BAYEUX LIMITED**

**Respondents**

**Advocate N J Robison for the Applicants**

**Advocate J M Wessels for the Respondents**

**McNeill JA**

1. There is before me, sitting as a Single Judge of the Court of Appeal, an application for Leave to Appeal and for an Extension of Time for service of the Notice of Appeal. The judgment appealed against is that of Her Honour Hazel Marshall, QC, Lieutenant Bailiff, in *ITG Ltd and Bayeux Ltd v Fort Trustees Ltd and Balchan Management Ltd* [2021]GRC007 (the “Judgment”).

**Background**

2. The Judgment sets out the salient information as to the background in this matter which, for over a decade, has spawned numerous litigations. In essence, the dispute, or disputes, relate to various operations of a Jersey Trust, the Tchenguiz Discretionary Trust (the “TDT”). The former co-trustees of the TDT are the present Respondents (sometimes “I&G”), corporations based in Guernsey; and the Applicants (sometimes “F&B”) are the current trustees of the TDT, acting on behalf of the beneficiaries of whom the principal beneficiary is Mr Robert Tchenguiz.

3. As the learned Lieutenant Bailiff indicated in the Judgment, the overarching issue to be determined in this litigation related to the entitlement, in principle, of a trustee or former trustee to an indemnity out of the trust assets for reasonable costs, reasonably incurred in connection with the trust. The principal litigations were now coming near to their conclusions, and the issue before the learned Lieutenant Bailiff was as to the claim of the Respondents for such indemnity out of the TDT in respect of expenditure comprising legal costs incurred in two of the sets of proceedings in which subsequent trustees of the TDT had made claims against the Respondents in excess of £561m on behalf of the TDT and in which the Respondents had been successful following lengthy procedure. I do not here present an account of the salient history of the litigations and their surrounding circumstances. This can be found in short form at paragraphs [4] to [12] of the Judgment.
4. Leave to appeal the Judgment was sought from the learned Lieutenant Bailiff and refused on 10 June 2021. That application is now renewed before me.

#### **Extension of time**

5. The decision below was handed down on 23 April 2021 and an Application for Leave to Appeal together with a draft Notice of Appeal served on 21 May 2021, within the one-month time limit provided for by Rule 3 of the Court of Appeal (Civil Division) (Guernsey) Rules 1964. In accordance with Section 15(e) of the Court of Appeal (Guernsey) Law 1961 leave was required and, as provided for in Rule 16(7) of the Rules, the application had to be made first in the Royal Court. The hearing took place on 10 June, when the application was refused.
6. In accordance with what may be a common practice, when the application for leave was made to the learned Lieutenant Bailiff a separate application was also made for extension of the one-month time limit; but, as the application was refused, there was no consideration of that, unopposed, separate application. In my judgment, in circumstances such as existed before the Royal Court, there was no need for an application for extension. This question had been raised in *Macnamara v Gauson* [2009-10 GLR 387] when an Application for Leave together with a Notice had been served within the one-month limit, but the Respondent contended that a Notice could not properly be served without leave to appeal and that the failure to seek an extension deprive the Court of jurisdiction. In finding against that argument the learned Deputy Bailiff (Collas) stated at [17]:

“In my view time is deemed to have stopped running when the application was lodged with HM Greffier and served on the defendant. .... the underlying purpose of the Rules has been achieved, namely to ensure that notice of the application is served on the defendant in a timely manner and without delay.”

7. It follows from this that, once there has been timeous service of the application for leave together with what, necessarily, is a proposed Notice, the Court has jurisdiction, without the need for further extension, to grant leave to Appeal on the basis of the Notice which has been served.
8. The application below having been refused on 10 June, the Applicants may renew the application to this Court under Rule 16(6). No separate time-limit is provided for in such circumstances and the Applicants have again sought an extension which is opposed upon the basis that, in not making the application to this Court until 13 July, there has been a significant delay which ought to be taken into account in determining whether to grant the extension. For the Applicants it has been stated that the reasons for the delay were that, since the hearing on 10 June, the Applicants have been heavily involved in other aspects of the overall proceedings, including a three-day hearing before the Judicial Committee, following which further written submissions required to be filed and, separately, that time was taken with filing and service of extensive particulars of objections to legal costs sought by the Respondents. That said, the Applicants have pointed out that such changes in wording as there are between the draft Notice below and that now before this Court are not substantive and in fact reduce the number of complaints following the hearing below.
9. In my judgment it is correct that, where an application for leave is renewed before this Court, it will, almost inevitably, be necessary for there to be an application for an extension unless, perhaps, matters have been dealt with so expeditiously that the initial application has been made within days of the judgment below and the renewed application served within days of the refusal, thus meeting the one-month time-limit. What is clear is that the initial application stops time running; and in my judgment time starts to run again upon a refusal by the lower court. Rule 16(6) provides no separate time-limit as between the refusal and the renewed application and the position is, simply, that the Rule 3 time-limit requires to be addressed at this later stage.

10. It seems to me, therefore, that as with any application for extension of time, the matter is at large for the court under Rule 17. Being at large, the whole circumstances ought to be taken into account but, in essence, time having started on the handing down of the judgment below and interrupted by the application below, it is the whole period from initial application to date of the making of the renewed application which must be considered, the period of the proceedings below being excised. This exercise will vary with circumstances but, whilst an applicant is, in a sense, entitled to use the whole month before serving below, there is certainly no reason for an assumption that a further month should be available within which to make the renewal.
11. The underlying purpose of Rule 3 is an expeditious commencement of an appeal where a court of competent jurisdiction has made its finding and the fact that there has been an application to the lower court and a refusal should not deflect from that purpose. To the contrary, Rule 16(7) provides for a potentially dual application process: the renewed application is not an appeal from the refusal, it is a second opportunity to obtain leave for the proposed ground(s) of appeal, and ought to be brought expeditiously.
12. Here, there was no expedition at the hands of the Applicants. It was not until about four weeks had elapsed from the June hearing that there was an enquiry as to Court of Appeal availability and a further week elapsed from their being told that a single judge would consider the matter on the papers before the Application and Notice were served. As the Applicants have expressly stated, the Notice before this Court is substantially that which was before the Royal Court and the renewed application could have been presented almost immediately after the decision of the learned Lieutenant Bailiff.
13. I am not impressed with the suggestion that other professional commitments in the overall litigation presented a reason for delay. Not only is it well known that the parties here have very large teams of lawyers looking after their interests, but the only material consideration after the June hearing was whether or not to renew the application. Whilst there might, eventually, have been reconsideration and reformulation of arguments which had not succeeded before the learned Lieutenant Bailiff, all that required to be lodged and served was the existing Application and Notice. Having taken almost the full month to perfect the Application and Notice in May, one assumes that best efforts had been made to identify the most appropriate Grounds of Appeal.

14. When all of these matters are considered, I fail to discern a relevant and cogent reason for a delay of almost five weeks in making a renewed application. In such instances it is not sufficient merely to show that there has been no obvious prejudice to a respondent: there is an inherent prejudice to a respondent who, having succeeded below, is put to additional delay in having her or his rights resolved. Time limits are set with that purpose in mind and it is for the applicant in question to show the court both that there has been a relevant reason for the delay and that the court should exercise its jurisdiction to allow the extension. I shall return to this after considering the merits of the Application for Leave.

#### **The criteria for the grant of Leave**

15. Parties are agreed as to the proper test to be applied in an application for leave. It has been settled for some time in this jurisdiction that the general test is twofold. First, unless it appears that the appeal would have no real prospect of success, permission will be given. In other words, a fanciful prospect will not do. Second, even where there is no prospect of success, the court has a discretion to grant leave if there are relevant exceptional circumstances. For this discretion to emerge, there is an issue which should, in the public interest, be examined by the Court of Appeal. The principal examples to which reference has been made in this latter connection are questions of great public interest or questions of general policy. See *Macnamara v Gauson* at [21]-[32], *Carlyle Capital Corporation & Ors v Conway & Ors* [2011-12 GLR 562], *Chick v Guernsey Financial services Commission* [2020] GCA078. It is undesirable to attempt to refine further what may be the nature of such matters, but it is obvious that there must be something of considerable importance to outweigh the natural reluctance of the courts either to engage in hypothetical issues or to encroach unnecessarily on the court time available to litigants with live issues.

16. Leaving aside general policy, it must be highly likely that the issue will be one of identifying a principle of general application or some other point of law. A perceived general public interest in the determination of a factual dispute, such as one in which the issue is as to how an individual set of circumstances falls to be appraised by reference to an undoubted principle of law, will be unlikely to satisfy the requirement. A thorough consideration of facts is often of considerable importance in establishing or reviewing a principle; but for the public, and for

litigants to come, the certainty for acting is found in the proper formulation of the principle and its parameters.

**The proposed Grounds of Appeal: prospect of success**

17. Neither the Grounds of Appeal nor the Written Argument for the Applicants sets out with particular clarity or precision the critical propositions upon which it is argued that the ground of appeal is well founded.
18. There is a single ground of appeal, namely, that the Lieutenant Bailiff, having correctly identified the test for striking out objections, erred in failing to apply that test (Draft Notice of Appeal (the “Notice”) [6]-[9]; Written Argument (the “WA”), [23]-[25]). The nature of the error is stated to be in setting too high the bar which the Applicants had to meet in order to avoid being struck out. On certain issues this result is presented as arising by virtue of departing from the test; on others it appears more akin to argument that, on the facts, the learned Lieutenant Bailiff should have found otherwise than was done.
19. Given the very clear structure of the judgment below (the “Judgment”), one would have expected the principal thrust in the Notice and WA to be in respect of the section of the Judgment headed ‘The *Alhamrani* threshold test and its application’ [102]-[127]; but as to this there is hardly any detailed exploration.
20. There had been no dispute below as to the test to be applied for the present issues. It was that as set out in *Alhamrani v JP Morgan Trust Company (Jersey) Ltd* [2007] JLR 527. For present purposes it will be sufficient to refer to a short section of the the decision below to understand that test or ‘assessment’ process. A fuller rehearsal will be found at [102]-[121]
21. As the learned Lieutenant Bailiff stated:

25. The proceedings within which this Application is made are what is now known as an “*Alhamrani* assessment” or “*Alhamrani* taxation”. This is a convenient label for the particular *sui generis* exercise of determining a dispute between a beneficiary and a trustee or former trustee about the trustee’s claimed indemnity for his expenditure. It is a reference to the Jersey case of *Alhamrani v JP Morgan Trust Company (Jersey) Ltd* [2007] JLR 527 which concerned a dispute about the proper approach, both procedural and substantive, to resolving such a claim. It was in fact for the costs of some legal proceedings. (It is, of course, the case that this exercise is to be decided by reference to Jersey law, as the proper law of the TDT, although I cannot see that Guernsey law would be any different.)”

.....

27. It is common ground that, on an *Alhamrani* assessment, the law (and this is Jersey law, although again I do not think Guernsey law would be different) is that the burden of proving the unreasonableness of any relevant part of the trustee’s claim to indemnity

lies on the objecting party, and the benefit of any doubt is to be given to the trustee: see *Alhamrani* at [66(v)]. This arises out of the fact, which is emphasised in *Alhamrani*, that the starting point is that a trustee is entitled to a “full” indemnity for his expenses - in other words for everything which he has spent. Once such actual expenditure is proved, any challenge must therefore be shown to be on grounds which are properly effective for cutting down that *prima facie* entitlement.

28. This is, therefore, a key difference from a party and party costs taxation. In the latter, the claiming party must positively make out his claim to have his expenditure reimbursed. In an *Alhamrani* assessment the starting point is that once the trustee demonstrates expenditure which *prima facie* qualifies for being made in connection with the trust, it is for the objecting party to prove that such expenditure does not qualify or should be disallowed. The starting points are different.

22. The Notice commences by addressing matters by reference to specific words used in the Judgment. It starts by noting one part of one sentence of the Judgment at [123] as suggesting the adoption of an erroneous approach (Notice [8.1]); but does not go on to identify, for example, the critical importance of this clause within the context of the whole of the Judgment’s decision on this point at [122]-[127]. It then suggests that ‘A notable feature of the [Judgment] is multiplicity of expression as regards the threshold(s) apparently in play…… [which] may reflect a degree of uncertainty/confusion on the part of the Lieutenant Bailiff in dealing with the Application’ (Notice [9]) But the Applicants do not proceed to explain, through any analysis whatsoever, why even this rather unspecific conclusion follows from the whole passage.
23. Taking each of these in turn, the words criticised in [123] are “[*My approach*] does not amount to applying an initial hurdle of “real concern” that the costs were too high, although I do accept that the effect, in the end, may look somewhat similar.” In the Notice, the concluding clause is underlined as one of a number of examples showing that an erroneous approach of setting the bar higher than the test would allow had indeed been taken by the learned Lieutenant Bailiff. However, as the Applicants take no issue with any of the remainder of the six paragraphs which are devoted to discussion on application of the threshold test, the implied assertion that the allegedly objectionable sub-clause demonstrates that the correct test was not applied must be addressed through a careful consideration of the whole of the passage in order to identify whether, properly construed in that context, there is weight in the assertion.
24. Adopting that method, it is clear that the assertion is without foundation. The whole passage reads:

122. Therefore, when considering whether any particular objection made by the paying party (F&B) passes the threshold test, the question becomes, in my judgment: does

the objection which has been raised suggest that there is a real (rather than fanciful) prospect of F&B's establishing that the costs in question were, *without the benefit of any doubt* incurred unreasonably by the trustee? Put another way: is the objection raised by F&B obviously bad, or does it really require further investigation, having regard to the fact that F&B will ultimately have to establish beyond doubt that the costs incurred were unreasonably incurred or unreasonable in amount? As a matter of practical effect, F&B do have to show only that it is "arguable" that their asserted objection can be made out (as I accepted in my judgment of 30th April 2020), but that arguability has to be evaluated in the context that the objection will ultimately have to be proved, in effect, beyond reasonable doubt.

123. This is not, I emphasise, mistakenly to apply the "high hurdle" to the threshold test itself; it is to apply the ordinary threshold test to the actual parameters for the "cause of action" which F&B would be required to establish at a trial. It does not amount to applying an initial hurdle of "real concern" that the costs were too high, although I do accept that the effect, in the end may look somewhat similar. It respects and applies the test laid down by the Jersey Court of Appeal, but recognises how that test must practically and realistically apply to the case which would have to be proved, in all the circumstances.

124. Of course, whilst the threshold test does not itself require matters raising "deep concern" that the costs in question are unreasonable to be shown, that point is not irrelevant. If and insofar as any matter does, or could, raise such deep concerns that "something has gone wrong", that will be very material in deciding whether the arguability of achieving the ultimately required high standard of proof of unreasonableness has been made out.

125. I should also record the following further points. Advocate Robison submitted that it was not necessary for F&B to prove that the challenged expenditure was incurred in breach of trust. He relied on the fact that in *Alhamrani* the court dealt only with objections as to reasonableness, whilst referring to breaches of trust as a different hypothetical case which would properly be referred, by the Greffier, to the Royal Court (see above). The proposition may be correct, but I do not find it of much help. First, it seems to me that for an incumbent trustee to incur unreasonable costs on trust administration matters (such as appearing neutrally in proceedings) must, logically, itself be a breach of trust, in any event. Second, insofar as the indemnity relates to expenditure incurred after the trustee left office, there is no concept of breach of trust to apply. The problematic case is where a trustee, whilst in office, expends money on legal advice or representation with regard to its own position. Where that expenditure relates to a matter which is subsequently litigated, then the outcome of the litigation may well affect the position, just as it retrospectively affects the position as regards expenditure spent by a former trustee on defending himself, once he proves successful. As I have said previously, the question what is reasonable expenditure for which the trustee is entitled to claim reimbursement where there has been no legal determination to decide the matter one way or the other in principle will be very highly fact sensitive, and the concept of breach of trust is not particularly helpful. In all cases, the test of eligibility for indemnity is that of reasonable expenditure, reasonably incurred, on qualifying matters. Whether or not ineligible expenditure can also be classified as having been made in breach of trust adds nothing.

126. Advocate Wessels' point in this context was, rather, that, if read properly, *Alhamrani* shows (at [60]) that to qualify as sufficiently cogent, an objection has to be capable of being "*the subject of proceedings*", such that vague allegations of "inadequate particularisation" of costs incurred would not surmount the hurdle of disclosing an arguable objection. Advocate Robison's riposte to that point is that the particularisation is inadequate because I&B has not chosen, nor been compelled, to provide further detail, beyond the narratives behind the bills and the information which I have referred to above, which would enable the objection to be properly evaluated and formulated as "the subject of proceedings". This dispute, he urges, is properly

considered in conjunction with all the facts. I do not need to make any ruling on this point, because it is dealt with later, at the level of the objections themselves.

127. Finally, and importantly, I remind myself that it is with regard to matters going to “reasonable costs, reasonably incurred” (i.e. broadly Questions (5) and (6) above) that the trustee gets the benefit of the doubt, and hence the application of the “high hurdle” which has the practical effect on the threshold test which I have been discussing. These were the matters which were being focused on in *Alhamrani*. Where the issue goes to a factor affecting the availability of the right to indemnity *at all*, that issue would be decided on balance of probability, and the threshold test for strike out/summary judgment will therefore apply in the ordinary way. This is because the special *Alhamrani* threshold test under discussion is a specific application of the more general threshold test, applied to particular issues where the claimant is (unusually) deemed to have the benefit of the doubt. (emphasis in original)

25. On a matter such as this, the sub-clause highlighted in [123] must be read in the immediate context of the whole of [122] and [123], to the remainder of which no objection is taken. The critical point identified by the Lieutenant Bailiff is that where, in any detailed investigation, a contention will succeed only where it is established beyond doubt, it follows that the ordinary threshold test of “standing no real prospect of success” ineluctably means “standing no real prospect of success of showing, beyond reasonable doubt, that ....”. In such circumstances, whilst it was open to the learned Lieutenant Bailiff to note that the end result “may look somewhat similar to [applying an initial hurdle of “real concern”]”, such an observation does not indicate that the principal analysis is flawed. There may be many occasions when the same result might be achieved by two different methods, one valid and one invalid. An example is the that the same result in a mathematical exercise might be achieved by the application of a relevant mathematical formula as well as by the application of an inapposite mathematical formula. But, there, the fact that an erroneous approach might give the same result does not affect the validity of the result achieved by the proper application. The position is the same here: the words objected to do not colour or debase the effect of the words to which no objection is taken. It therefore follows that the words objected to in [123] do not provide an example of departing from the identified test and setting the bar too high.
26. Turning to the second point, that of multiplicity of expression at [122]-[124], again there is no foundation for this unparticularised suggestion. In many carefully reasoned judgments, the court will find itself exploring the issues before it and discussing its reasoning in differing ways in order to explain to the various anticipated audiences – and therefore sometimes in differing

language and register – how the decision in question has a feeling of robustness. That may be the case here.

27. As far as [122] is concerned, the three sentences set out the test from three different standpoints. The first expresses the test in the classical way sc. ‘Is there a real (rather than fanciful) prospect of.....?’ Given the decision reached it emphasises that there must be no doubt. The second sentence expresses that situation from the standpoint of the investigation in hand: ‘Is the objection obviously bad or does it require further investigation?’ This emphasises that, to be worthy of further investigation, there must be a prospect of proving the validity of the objection beyond reasonable doubt. In the third sentence the learned Lieutenant Bailiff expresses matters more simply and by reference to the practical effect of her decision: yes, the threshold test is that it can be shown to be arguable that the asserted objection can be made out ‘but that arguability has to be evaluated in the context that the objection will ultimately have to be proved, in effect, beyond reasonable doubt.’ Thus, any multiplicity of expression derives from the nature of the standpoint being addressed and there is neither tension as between any of them, nor do they found any suggestion that the learned Lieutenant Bailiff was either confused or uncertain as to the robustness of her decision.
28. In [123] the learned Lieutenant Bailiff merely moves on to express the decision in more simple terms, perhaps for the lay reader. The first sentence explains that, in present circumstances, the ‘ordinary threshold test’ has to be applied to the parameters which would be required at trial. The second emphasises that the approach has used a route different from that of seeking to apply the ‘real concern’ hurdle at this stage. The third goes on to make the point that the application of *Alhamrani* to present circumstances must take into account the case which would have to be proved in this instance. [123], therefore, does not innovate or detract from [122].
29. As to [124], it is impossible to see how the sense of expression here could suggest confusion or doubt. In the first place it recognises a point which is in favour of the Applicants: the threshold test does not require the objector to show a matter raising deep concern, but if there is a matter which suggests the possibility that something has gone wrong, that would be material in deciding arguability. In the second, the recognition that a depth of concern may support arguability at the level of beyond reasonable doubt is entirely in line with the principal view that,

to be worthy of further investigation, there must be a prospect of proving the validity of the objection beyond reasonable doubt.

30. I turn now to the other passages to which the Notice refers as indications that the wrong test had been applied: that is, a test of likelihood of success as opposed to absence of a real prospect of success. At the outset it must be said that, given the care, detail and clarity with which the learned Lieutenant Bailiff has engaged with setting out the application of *Alhamrani* in the present circumstances, it might be thought unlikely that there would be an error in application. I shall deal with each in turn. The Notice is somewhat telegraphic in its line of argument regarding each of these distinct passages; but, as I have said, the common theme of the Notice here is that the passages to which reference is made suggest that the learned Lieutenant Bailiff applied a test of likelihood of success as opposed to that of real prospect of success.
31. The Applicants referred to [268] where it had been stated ‘...I cannot see any situation in which such an objection might be likely to be sustainable on a more focussed basis.’ The Notice underlined the word ‘likely’ as an indication that the test of likelihood of success had been applied. This rather scant attack does not survive a modest analysis of the context. In [267] and the earlier part of [268] the learned Lieutenant Bailiff had struck out objections relating to the costs of legal research as misconceived and without real prospect of success. It was in refusing to give liberty to apply that the learned judge indicated that, having considered the background and reviewed the evidence, she could not see any situation in which such an objection might be sustainable. This is not an instance of applying the wrong test to the material before the court.
32. Issue was then taken with [319] and the statement ‘The question is, do Advocate Robison’s arguments satisfy me that he is sufficiently likely to be able to show, beyond the benefit of any doubt, that no reasonable litigant would have done so in some particular respect?’ Again, the word ‘likely’ was underlined. With this example should be taken the ensuing one as it ([322]) is of a similar nature and comes within the same section of reasoning regarding the objection in respect of the use of English Lawyers. In [322] the court said among other matters: ‘I consider that if the extensive task of examining closely all the costs which may be identified under this head were undertaken, the overwhelming likelihood is that I&B would be able to demonstrate

that all the costs incurred on English Lawyers were reasonable costs...’, the word ‘likelihood’ being underlined.

33. These statements must be viewed in their immediate context. Most importantly, that includes the opening of [322] where the learned Lieutenant Bailiff concludes that Advocate Robison had failed to make out objections which were not obviously bad having regard to circumstances and the entitlement of I&B to the benefit of the doubt. In other words, the correct test had been applied. In stating the view that there was an overwhelming likelihood that I&B would succeed is simply another way of stating that the prospect of the objection succeeding was merely fanciful.
34. The challenge to the passage next referred to ([330]) is more difficult to discern and, in context, appears to be based simply upon the use of the word ‘likely’ notwithstanding the remainder of the sentence in question. The sentence reads: ‘... unless F&B can show ... that there is a real (as opposed to fanciful) prospect of showing that an invoice ... is a charge which is incorrectly allocated, or is likely undoubtedly to have been unreasonable ..., then their objection fails to pass the relevant threshold, ...’ Given the terms in which this sentence is couched, it is not possible to lay emphasis on the word ‘likely’ without also giving credit for the use of the term ‘real (as opposed to fanciful) prospect’. In searching for a proper construction there appear to be only two possible analyses. One is that the use of ‘likely’ casts sufficient doubt on the use of the earlier phrase that the only proper construction is that the use of the earlier phrase does not reflect the mind of the writer at this stage of the judgment and that the sentence should be read as if the words ‘that there is a real (as opposed to fanciful) prospect of showing’ had had not been written. The other is that use of the word ‘likely’ makes no sense in the context of the stated aim of testing by reference to real (as opposed to fanciful) prospect and can be excised without doing disservice to the structure, grammar and syntax of the sentence.
35. Considering the first analysis, it seems clear that, given the whole structure of the Judgment and its systematic approach, the use of the word ‘likely’ in its immediate context would have to be of sufficient weight to cast doubt not only upon the use of the earlier phrase but also upon the whole of the *Alhamrani* discussion and decision at [110]-[127]. Put bluntly, its use here would have to be so unambiguous that it showed that the critical analysis at [110]-[127] had been forgotten and the mind of the court set on a different course: that of requiring likelihood of

success to be demonstrated. The second analysis, excision of 'likely', brings with it the recognition that, in a judgment in so many respects so careful and detailed, there can be an error in expression.

36. In my judgment the second analysis is to be preferred. Given the precision and clarity of [110]-[127] it is impossible to avoid the weight to be given to that section of the judgment. I would add that, without the clearest basis – which I do not discern – I would not have entertained any suggestion that the learned Lieutenant Bailiff's words at [122]-[127] were mere lip service to the proper test. In such circumstances it would be idle to speculate as to why the word 'likely' came to be used at this juncture; but I would note that, had the learned Lieutenant Bailiff's mind been fixed on the test of likelihood of success, the words 'likely undoubtedly to have been' would also have appeared before the preceding category (invoices incorrectly allocated). I therefore consider the proper construction to be that which excises the word 'likely'. So construed, the passage does not suggest a failure to apply the test.

37. The Notice next refers to [354] and the following words of the court: '... the evidence does not suggest that, in all the circumstances, there was any lack of appropriate oversight of the costs of the litigation such as would suggest a likelihood that the costs paid will have been unreasonable costs ...' The word 'likelihood' has been underlined. As with almost all of the points with which I have had to deal above, it would have been helpful both to the Applicants and to the court for the formulation of the Notice to have taken a little time to analyse and discuss the immediate and surrounding context of the allegedly infringing word rather than simply making a bald assertion and then noting every time the words 'likely' and 'likelihood' were used in an arguably colourable position. Here, that far from difficult task shows that there is no foundation in the assertion as regards this phrase.

38. This short clip comes as part of a lengthy consideration of numerous issues relating to Residual General Objections based on Insufficiency of Information, here as regards Scale, Supervision and Oversight of I&B's Claimed Costs. At this point in the section, which runs from [324] to [382], the learned Lieutenant Bailiff was rejecting a general approach by Advocate Robison which proceeded on several overarching points ([331]) which were said to 'cast sufficient doubt on whether these Invoices could be found to have been properly paid, as a general proposition.' Thus the 'sufficient doubt' test was noted. When moving to objections at the level of particular

charges at [355]-[362], it is clear that he learned Lieutenant Bailiff has in mind the *Alhamrani* test. At [362]: 'My view, at this high general level, would be that if I ask myself the question whether, as a matter of impression, I thought that F&B ultimately stood any real prospect of satisfying the court that these Invoices comprised or contained unreasonable costs, on the proper test (objective and beyond the benefit of doubt) my immediate impressionistic answer would be "no".' In then moving to consider particular examples, the words of the learned Lieutenant Bailiff make it clear as to which test is being used. At [363]: '...F&B have given particular examples of fee charges which they object are so lacking in particularity that they found a "not obviously bad" objection ...'. At [372]: '... these examples do not always amount to an objection which I think would pass the *Alhamrani* threshold test.'. At [373]: 'That is a very clear example of egregious unreasonableness which ..... passes the appropriate application of the *Alhamrani* test.'

39. A proper consideration of context thus shows that the wording in [354] does not indicate that the wrong test was being applied.
40. The final example is from [380]: 'I also probably need hardly add that I am aware that this sets the bar high.' The last five words are underlined in the Notice. Yet again, it is context which provides the matrix within which the question as to whether an erroneous approach has been taken is to be addressed. At this point in the Residual General Objections section, the learned Lieutenant Bailiff is explaining her final decisions and, among other matters, has decided to give F&B a restricted liberty to apply. For reasons which are probably plain further on (at [382]), it is being made clear to F&B that, in formulating objections in respect of individual charges, they must bear in mind that the principles which have been set out by the Court depart significantly from those which had been assumed by F&B to apply when formulating their original objections. The words to which attention has been drawn do not carry any suggestion that the learned Lieutenant Bailiff has taken it upon herself to adopt a particular test; rather they reflect the reality that the proper test sets the bar at a level higher than F&B had assumed and, as the Judgment proceeds to make quite clear, the liberty to apply is to proceed by reference to this test and is not simply to allow the re-advancement of those already ruled out.
41. In addition to these examples put forward as showing phraseology indicating the application of the wrong test, the Notice then goes on to suggest that the Lieutenant Bailiff incorrectly applied

the test in that she conducted a mini trial, whereas she should have borne in mind that further evidence was possible. Reference was made to selected passages from [283, [285], [296], [322], [330], [368], [371], [384] and [398]. None of these discrete passages assist the Applicants in this regard. As is clear from [122], the learned Lieutenant Bailiff was perfectly well aware that, in respect of an objection not obviously bad, the opportunity for further investigation existed. However, at the strike-out stage some appraisal of evidence and grounds of objection had to be carried out in order to identify whether there was a real prospect of establishing unreasonableness. Such an approach is different from carrying out a mini trial and making a final determination. Indeed, in one of the passages referred to in the Notice, [398], the learned Lieutenant Bailiff made this very point: ‘... I emphasise, though, that I am not making a decision, or even giving any “indication” on that point as I have not heard argument. I am merely indicating and illustrating that the normal rules of evidence, applicable to all the particular circumstances, will fall to be applied when considering I&B’s claim to remuneration.’

42. The Notice also contains argument on other matters; the inference being that they fall within the ambit of the single ground of appeal. The first is that the learned Lieutenant Bailiff fell into error in construing the phrase ‘in connection with’ as it appears in Article 26 (2) of the Trusts (Jersey) Law 1984; and it will be recollected that the TDT is a Jersey trust. In holding that the words ‘are of potentially very wide application, and presumably intentionally so’ (at [35]) it was said that the Court had failed to recognise that such words constitute a protean phrase which must take its construction from the context in which it is used.
43. I cannot discern any argument on his point before the learned Lieutenant Bailiff, nor does the Notice draw my attention to it. At [61]-[64] the learned Lieutenant Bailiff sets out an analysis of the concept of the phrase ‘in connection with’ in present contexts and no issue is taken with this analysis. In any event, the point is almost glaringly obvious, and one would expect it to be dealt with at the stage of factual analysis, sc. ‘was there a true connection or not?’ The Notice gives only one example to support the allegation of improper construction with the effect that the former trustee is left effectively unfettered in relation to expenditure reasonably incurred. At [26] it is contended that the construction has been made so wide that I&B have been permitted indemnification for attending at hearings in which it was not even a party. However, no focussed argument was made to the learned Lieutenant Bailiff that the example in question failed to meet

the necessary level or type of connection; it was merely one of a number of apparently uncharacterised objections. It follows that there is no analysis to be appraised, so it cannot be used as an example showing that Article 26 (2) had been wrongly applied.

44. The Notice then proceeds to argue that, at [150], [169] and [181], the learned Lieutenant Bailiff fell into error in mistakenly considering that, as the Respondents' claim to remuneration proceeds, certain earlier proceedings would limit the arguments available to the Applicants. Whilst I note points of this nature in [150] and [181], [169] appears to deal with a different issue. Even so, as regards the other two the Notice gives no hint as to a line of argument or propositions supporting the assertion that the learned Lieutenant Bailiff was mistaken on her approach. Absent compelling authority to the contrary, it seems to me that the learned Lieutenant Bailiff was quite correct. To raise an objection within the indemnity costs process when it is based upon a line of argument which has been the subject of judicial decision-making as between the same parties would make a nonsense of judicial proceedings.
45. Within the ensuing section of the Notice, there are set out examples said to show how the application of the wrong test led to unreasonable amounts of solicitors' charges being allowed to proceed. Again, somewhat bald assertions are made often without underlying argument or an indication as to what might have been reasonable. This comment certainly applies to the first matter referred to: solicitors reading media updates or alerts regarding high profile matters of concern to the TDT: [282]. The learned Lieutenant Bailiff deals with these issues at [277]-[285] in a perfectly sound, methodical and intelligible way. This is not an example showing that the wrong test had been applied.
46. The second point arises from [320] and indicates little more than that the Applicants disagree with the assessment of the learned Lieutenant Bailiff as to the reasonableness of the number of fee-earners deployed within firms. Again, the reasoning of the learned Lieutenant Bailiff (at [308]-[323]) is detailed and impeccable and has not been challenged in any meaningful way.
47. The third point, [374]-[375], relates to a single item where the lead solicitor in England had charged for a significant time of reading in prior to the hearing before the Judicial Committee of the Privy Council. This is an example of the level of care and conscientiousness of the learned Lieutenant Bailiff as she opens by indicating that what is about to be recorded is a matter which 'almost reaches the necessary threshold'. Again, her discussion is thorough and clear and the

Applicants neither engage wholly with it nor suggest what would have been a reasonable amount.

48. The Notice then turns to bring attention to instances of absence of evidence and insufficient particularity. The first was the evidential issue raised by Advocate Robison in respect that, as the learned Lieutenant Bailiff accepted, there was no evidence of any steps having been taken by the Respondents to keep the lawyers' costs under control, such as by scrutinising invoices and considering whether numbers, status or seniority of staff were appropriate: see [335]. Notwithstanding such an evidential lack, the learned Lieutenant Bailiff had found, at [361]:

"I observe that, in my judgment, he is also entitled, in inviting me to examine the quality of the objections, to rely on the fact that I&B (and their insurers, and advisers who were monitoring the fee position as mentioned above), had contemporaneous familiarity with, and knowledge and understanding of, the actual current situation with regard to the litigation, such that a detailed description of work done by a relevant fee-earner would in all probability have been unnecessary to enable I&B and those others to be satisfied, quite properly, that the work being done was what was currently reasonably required or appropriate."

49. Having referred to this passage the Notice states, baldly, that it was not open to the learned Lieutenant Bailiff properly to reach such a conclusion on the evidence before her. Again, there is no attempt whatsoever to engage with the thoroughly detailed reasoning of the learned Lieutenant Bailiff at [331]-[376].
50. In the first place, the learned Lieutenant Bailiff responded directly, at [244]-[345] to the accepted submission at [335]. The Judgment reads:

344. I of course accept Advocate Robison's point that there is no evidence from any representative of I&B regarding their oversight of the costs that were being incurred, which might therefore have been some indirect evidence supporting that they were reasonable. However, such evidence is not necessary. This is not a negligence case. The ultimate question is the objective one of whether the costs being claimed by I&B are (sufficiently arguably at this juncture) outside the range of costs which a reasonable litigant in their position could have incurred on the proceedings in question in the circumstances at the time. Evidence of actual, and apparently reasonable, oversight and control systems may tend to suggest that they will have been, but absence of any such evidence only leaves the question at large.

345. In any event, Advocate Wessels correctly pointed out that there is evidence going to the degree of oversight and control of I&B's costs, as litigation costs. This is to be found in the Seventh Affidavit (31st January 2020) of Louise Hargreaves of Mourant (in particular paras. 22 - 28) and the First Affidavit (31st January 2020) of Simon Day of Macfarlanes, (in particular paras. 22 - 26). I will not set out the detail, but each gives evidence of the discounts and freezes on charging rates of personnel employed on the litigation which were negotiated and applied by the firms over the years, and reviewed from time to time. Ms Hargreaves testifies that, in the case of Mourant, on occasions bills rendered were queried and adjustments made.

51. After further consideration of competing arguments on this point, the learned Lieutenant Bailiff stated at [354]:

I accept Advocate Wessels' arguments that the evidence does not suggest that, in all the circumstances, there was any lack of appropriate oversight of the costs of the litigation such as would suggest a likelihood that the costs paid will have been unreasonable costs for work done in and about the two actions. Any such assertion will therefore have to be made good on the basis of other matters. The obvious other matters are inferences or doubts arising from the actual contents of the Invoices themselves, reviewed against the known background of the litigation.

52. The learned Lieutenant Bailiff then proceeded to consider competing argument as to the level of particular charges and, in the paragraph immediately preceding the challenged [361] noted:

360. Advocate Wessels further submits that, when one looks at the challenges which are articulated in this context, they are all challenges which one might well uphold and investigate on a taxation of costs, where one is looking to find the "right" figure for an opposing litigant to have to pay, but they are misconceived in the present context of the applicable principles for a trustee or former trustee's indemnity claim.

53. Accordingly, contrary to the bald assertion that it was not open to the learned Lieutenant Bailiff properly to reach such a conclusion on the evidence before her, a proper consideration of the whole passage reveals that upon the entirety of the evidence, lack of evidence, and appropriate inference upon which the finding was based, the conclusion was indeed open to the Court.

54. The other point under this head related to [368] and an issue as to whether a client was acting other than reasonably in paying the fees claimed by the lawyer notwithstanding what was said to be a startling lack of information on the invoices. In the view of the learned Lieutenant Bailiff, the litigant will usually trust her or his professional advisers in the absence of anything raising suspicions. In the Notice it was suggested that this approach abrogated the Respondents from any responsibility to consider and challenge fees. But this is not an appropriate characterisation the approach of the learned Lieutenant Bailiff at [368]:

I have concluded that it was not obviously outside the range of reactions of a reasonable litigant, in the situation of I&B, to pay the Invoices notwithstanding the lack of detail as regards the minutiae of work being done, which is what has been lighted on. It would have been perfectly clear to a litigant in I&B's position, knowing, or having informed itself, about the work required to make a good job of conducting heavy litigation, that Advocate Wessels, for example, (he being the main target of this criticism) was likely to be spending, quite reasonably, a very great amount of time on the case on which he was the lead Guernsey Advocate and which he was preparing to argue. I simply do not see that the only reasonable course for the litigant client would have been to demand further detailed information about exactly how he had spent his time and what he had been doing. I accept the argument that it is not unreasonable for a litigant to trust its own professional advisers to be charging correctly and reasonably in the circumstances, in accordance with fee agreements previously made, in the absence of anything which ought to have raised suspicions that

this was not the case. I should make it clear that this is not to condone the pretty flimsy early time recording style of Advocate Wessels, which I would not regard as adequate, even allowing for the fact that standards will, I think, have changed in the last 14 years (and I have acknowledged that Advocate Wessels' style became gradually more informative from 2011 onwards), but this exercise is not that of scrutinising Advocate Wessels' conduct, but scrutinising whether a reasonable litigant with full knowledge of the situation could, in all the circumstances, reasonably have paid his claimed fees, as I&B did. I do not find it generally arguable that they could not reasonably have done so, nor did I see any particular example which was so egregious as to make an exception (subject to one point mentioned later).

55. Consideration of this full reasoning shows that, given the particular circumstances to which reference is made, and applying the reasonable action test, the learned Lieutenant Bailiff was entitled to conclude that it could not be said that the only reasonable course for a litigant client would have been to demand further information, exception being granted regarding the emergence of suspicions.
56. In a separate sub-section of the Notice, issue is taken with the manner in which the learned Lieutenant Bailiff dealt with the matter of costs of lawyers who were dealing with the Respondents' insurers in respect of the claims made against them as the then trustees. It is contended that the learned Lieutenant Bailiff fell into error in dismissing the objections without having sight of the relevant policies. The Notice relays scant information as to the ground for so contending; save to state that it is axiomatic that key to assessing the objections are the policies themselves. This assertion yet again fails to engage with the detailed reasoning of the learned Lieutenant Bailiff, the nub of which (at [274]-[275]) is that the Respondents would have had to involve their insurers regarding the claims against them, which arose solely because of their function as a trustee.
57. The Notice also contains another separate sub-section dealing with an issue which it is difficult to characterise as coming under the broad aegis of the sole ground of appeal. This seeks to bring under review the grant to the Applicants of liberty to apply and asserts that the grants were flawed. Insofar as I understand the contentions, they appear to suggest that, in granting liberty, the learned Lieutenant Bailiff was recognising that it was not appropriate summarily to dismiss the relevant objections. The result, so it was said, should have been to recognise that the relevant objections had survived the strike-out stage and should proceed further rather than be brought back to a second round of summary judgment analysis. Such a characterisation cannot survive scrutiny of the Judgment which makes it clear that all objections are to be struck

out [377] with, separately, limited liberty to apply [379]. There is a material distinction between an analysis which determines that a strike out is appropriate but allows restricted liberty to apply and one which allows the objection to proceed: it is that there are exceptional circumstances at work which permit, as the Applicants have identified, a possible second round of summary judgment analysis. There is no logical basis in the suggestion that an allowance of a further application to summary judgment analysis brings with it an alternative of being considered to have survived that stage.

58. The final sub-section of the Notice seeks to maintain that the learned Lieutenant Bailiff was wrong (at [181]) to characterise certain specific arguments for the Applicants as a re-run of the earlier Guernsey litigations. In the Notice it is maintained that the learned Lieutenant Bailiff's approach to a particular objection, at [179], failed to have proper regard to salient surrounding circumstances in Guernsey 1: namely, the compromise by the present Respondents of certain injunctive relief, taken together with certain subsequent actings of the Respondents which, it is said, undermined the case of the Applicants' predecessors at Guernsey 1.

59. This argument has no clear connection with the Ground of Appeal that the bar had been set too high in applying the *Alhamrani* test. It is merely a disagreement with the learned Deputy Bailiff as to the consideration of part of one of the issues before the Court. The challenge, as set out by the learned Lieutenant Bailiff, in terms not objected to by the Applicants, was that this challenge, relating to costs incurred in pursuing 'Declarations Applications' in Guernsey 1, was a 'misconduct' challenge the viability of which depended on separating out disputes within Guernsey 1: see [174] and [175]. The nub of the Applicants' argument relating to failure to have regard to the compromise issue, set out above, is that their argument is not a 'misconduct within Guernsey 1' but an argument relating to a matter not dealt with in Guernsey 1 because of the compromise. Whichever characterisation would be preferred on a necessary analysis, the proposed challenge by the Applicants has nothing to do with the appropriate setting of the bar having regard to the *Alhamrani* test. The arguments for the Applicants therefore do nothing to suggest that this matter, taken on its own or with the other issues with which I have dealt, would in some show that there was a real prospect of success for the Ground of Appeal.

60. For all of these reasons, therefore, in my judgment the proposed Ground of Appeal has no real prospect of success.

### **The proposed Grounds of Appeal: public interest**

61. As set out above, there is a discretion to grant leave, even where there is no prospect of success, if there are salient exceptional circumstances. Here, the Applicants pray this power in aid and ask the Court to exercise its discretion to permit the appeal to proceed.
62. The over-arching consideration put forward is that cases which involve novel aspects of Guernsey or Jersey trust law are likely to be of great importance to the trust industries of both Islands and, by extension to settlors and potential settlors and to the Bailiwicks themselves. It appears that two matters are thought to be likely to give rise to novel aspects of trust law. Neither, however, relate to the establishment or reformulation of principles of law. There is no suggestion, for example, that it would be appropriate for the Court of Appeal to consider whether the *Alhamrani* test ought to be followed in Guernsey: indeed, the formulation of the test and its appropriateness for this litigation are matters of agreement as between the parties.
63. The first is said to be that this is the first occasion in which the *Alhamrani* test has been considered in the context of objections to a former trustee's claims for indemnity and that the case raises questions as to what are the relevant considerations in a claim for full indemnity for costs in such circumstances, not just as regards those incurred after trusteeship had ceased but especially where those costs are being incurred in successfully defending a claim of breach of trust.
64. In my judgment, whilst there may be singular circumstances here regarding both the level of the amounts claimed and the amount of documentation available to vouch the amounts, neither of these go to matters of principle. Nor, in my judgment does the fact that the present issues relate to a former trusteeship. The principles in *Alhamrani* are agreed to be applicable here and it will be up to subsequent litigants in either Island to reach their own view as to their application to their own facts.
65. As to the proper approach to costs incurred after trusteeship, it seems likely that the working out of *Alhamrani* principles in subsequent disputes relating to costs will be just as fact specific as the present. I am not persuaded that anything which could be said here would create such a generally applicable set of reasoning, taking matters further than *Alhamrani*, as would assist those in differing circumstances in their approach to their affairs. In truth, the argument for the Applicants in this matter is rather self-serving. They consider, somewhat pejoratively, that the

Judgment below allows former trustees in the situation of the Respondents to incur costs with impunity and that the continued validity of the Judgment will be viewed adversely. In brief, I consider this submission surprising. At the times that these costs were being incurred, the trustees were either trustees in office or, after office, persons who were seeking to defend their position and without certainty that the courts would ultimately be vindicating their stance. That cannot properly be characterised as incurring costs with impunity. In any event, for the reasons which I have already given, I, for my part, do not consider their arguments to have real prospect of success. As there is no suggestion that the Court should identify a principle of general application or some other point of law there is, in my judgment, no issue which should, in the public interest, be examined by the Court of Appeal in respect of this matter.

66. The second is said to be that there has been no previous judicial consideration in Jersey, Guernsey or elsewhere of the words “in connection with the trust” as they appear in the Jersey Trusts Law. However, for the reasons set out above, there is no material in the Judgment which would provide even the most elementary appraisal of the proper interpretation of the words against a factual backdrop. Any assessment would have to be on an academic and theoretical basis; and that is the preserve of the academic community and not the work of the courts. This consideration does not assist the Applicant. In any event, compellingly cogent reasons would have to exist before this Court would treat, as benefitting from its consideration, a matter of the proper interpretation of a Jersey statute.

67. There is, therefore, no proper basis upon which the court could exercise its discretion to grant leave notwithstanding the lack of real prospect of success.

### **Conclusion**

68. The application for leave is therefore refused and there is no need for me to express any further view as to the application for extension of time.