Renewed application by the Appellants seeking permission to appeal a judgment of the Royal Court; on the ground that the presiding judge erred by applying the wrong test for strike out or summary judgment.

[2021]GCA048

Court of Appeal Case No. 554

IN THE COURT OF APPEAL OF GUERNSEY (Civil Division)

ON APPEAL FROM THE ROYAL COURT OF GUERNSEY (Ordinary Division)

Judgment Handed down: 11 October 2021

Before:

Jonathan Crow, QC
David Perry, QC
Jeremy Storey, QC

Between:

(1) Fort Trustees Limited
(2) Balchan Management Limited **Appellants**

and

(1) ITG Limited
(2) Bayeux Limited

Respondents

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

Storey JA

1. This is the judgment of the full court.

Introduction

2. This is a renewed application by the Appellants (**'F&B'**), two Guernsey corporations, for permission to appeal an interlocutory decision. It is made in accordance with sections 8, 15(e) and 21(2) of The Court of Appeal (Guernsey) Law, 1961 and r.16(6) of The Court of Appeal (Civil Division) (Guernsey) Rules 1964 (**'the Rules'**). The decision under challenge is a judgment of the Royal Court in Civil Matter 1462/2010 (commonly referred to as **'Guernsey 1'**) by Her Honour Hazel Marshall QC, Lieutenant Bailiff, sitting alone dated 23 April 2021 [2021] GRC 007 (**'the Judgment'**) given after a hearing in December 2020.

3. The purpose of the Judgment was to rule on an application by the Respondents (**'I&B'**) to strike out most, but not all, of F&B's pleaded objections to amounts claimed by I&B in their Proof of Debt under their indemnity for legal costs incurred in Guernsey 1 and Civil Matter 1793/2013 (commonly referred to as **'Guernsey 3'**) in connection with the Tchenguiz Discretionary Trust (**'TDT'**), a Jersey Trust, during and after their trusteeship of the TDT.

F&B have been trustees of the TDT since 5 September 2017; I&B, the former co-trustees, had been removed by the protector of the TDT, Mr Robert Tchenguiz, in July 2010, and replaced by Geneva Trust Company (**'GTC'**). Claims for breach of trust brought by GTC and then F&B against I&B in Guernsey 1 and Guernsey 3 were ultimately unsuccessful.

4. An initial application for permission to appeal (which was accompanied by a draft notice of appeal dated 21 May 2021) was dismissed in an *ex tempore* judgment of the learned Lieutenant Bailiff on 10 June 2021. A second application (which was accompanied by a draft notice of appeal dated 13 July 2021) was dismissed by McNeill JA sitting as a single judge of this court in a reserved judgment dated 4 August 2021 [2021] GCA 029. McNeill JA was very familiar with the subject matter of the relevant proceedings having delivered several judgments therein. Notwithstanding these earlier decisions, F&B are entitled to have their application determined afresh by this court. This is that determination.

5. The parties were informed that the court would deal with the renewed application of 16 August 2021 (which was accompanied by a draft notice of appeal dated 16 August 2021) 'on the papers', that is on the basis of the documents submitted to the court by F&B and I&B and without hearing oral submissions from either side. We received written submissions dated 10 September 2021 on behalf of F&B – which add little to the detailed notice of appeal – and a skeleton argument dated 17 September 2021 on behalf of I&B and responsive submissions dated 24 September 2021 on behalf of F&B. F&B's two sets of submissions largely repeat their skeleton argument of 8 June 2021 and their written submissions dated 23 July 2021 for the single judge.

Background

6. The comprehensive, systematic and entirely clear 90 page Judgment sets out the salient background ([1] – [12], [39] – [53] and [98] – [101]), the scope of I&B's indemnity claim ([13] – [15], [31] – [38] and [48] – [97]) and the nature of I&B's strike out application ([16] – [30]).

7. We gratefully adopt the brief summary contained in [3] of the judgment of McNeill JA:

> *"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* [I&B] *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* [I&B] *in excess of £561m on behalf of the TDT and in which* [I&B] *had been successful following lengthy procedure …"*

The relevant test employed by the Royal Court

8. I&B's strike out application took the form of an application for summary judgment (see [113] – [117] of the Judgment). The Lieutenant Bailiff followed the 'threshold test' before a court will order a taxation, set by the Jersey Court of Appeal in *Alhamrani v JP Morgan Trust Company (Jersey) Limited* [2007 JLR 527].

9. The Lieutenant Bailiff was careful to note at [103] and [106] of the Judgment the different factual scenario pertaining in *Alhamrani* where the trustee seeking reimbursement had participated in legal proceedings on a neutral basis. At [111] and [119] of the Judgment the Lieutenant Bailiff expressed the view that the status of I&B since 2010 (defending themselves against claims made on behalf of the TDT) did not require any different 'threshold test' (*"not*

obviously bad and requires investigation") but that, in its application, the different circumstances from *Alhamrani* would have to be taken into account.

10. In *Alhamrani* Vos JA rejected as too high a burden of demonstrating either *"real grounds for concern about the propriety of fees and expenses sought to be charged"* or *"a real cause of concern that something had gone wrong"*. Instead, Vos JA (with whom Birt DB and Beloff JA agreed) set this *"high hurdle"* for the objector to meet:

    > *"[60] ... the Royal Court should be prepared to entertain any allegation that could properly be the subject of proceedings. If, for example, the allegation made can be seen without investigation to be without foundation, and would therefore in any other proceedings be struck out as disclosing no reasonable cause of action, the court will not allow the beneficiaries' complaints to be progressed. But if the allegation is not obviously bad, and requires investigation, I do not believe that the court can or should erect an artificial threshold for the beneficiary to overcome before his allegations will be determined by the court ...*
    >
    > *[62] ... the "high hurdle" is applicable to the resolution of the issue itself by taxation or otherwise, not to the threshold. The only threshold is the one equivalent to a striking out. But once a challenge is made, costs and expenses will only be disallowed if these are shown clearly to have been unreasonably incurred – that is the high hurdle – and the trustee will have the benefit of any doubt on that issue"* (and see also [66(iv) and (v)]).

    The Lieutenant Bailiff repeated this at [102], [105] – [107], [119] and [121] of the Judgment.

11. Further, at [118], the Lieutenant Bailiff thought it legitimate *"to look at the ultimate position which ... F&B ... would have to prove in order to succeed ... it is for F&B to prove that* [I&B's] *actual costs incurred were either unreasonably incurred (on the particular matter) or unreasonable in amount (for the particular matter)".*

12. I&B's claim to indemnity is subject to Article 26(2) of the Trusts (Jersey) Law 1984 (**'JTL'**):

    > *"A trustee may reimburse himself or herself out of the trust for or pay out of the trust all expenses and liabilities reasonably incurred in connection with the trust"* (see [31] – [38] of the Judgment).

13. It is essential, in order to put F&B's grounds of appeal into their proper context, to read in full [122] – [127] of the Judgment, yet this section receives little attention in the draft notice of appeal:

    > *"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."*

The Criteria for the Grant of Leave

14. The parties are agreed as to the proper test that we need to apply. It was set out by McNeill JA at [15] and [16] of his judgment:

> *"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 …"*

15. F&B rely upon the second limb of the test in the event we conclude that there are no real prospects of success.

Notice of Appeal

16. The draft notice of appeal dated 16 August 2021 contains a single ground of appeal in section 2 (error in applying wrong test for strike out or summary judgment) with five examples in section 3, because the Lieutenant Bailiff allegedly set the bar too high in four respects:

    (1) not applying *Alhamrani* correctly;
    (2) applying a test of 'likelihood' and/or the test for final resolution of the dispute;
    (3) conducting a mini-trial; and
    (4) erroneously interpreting *"in connection with"* in Article 26(2) JTL.

Discussion: Prospects of Success

17. We take each of the four sub-grounds in turn. We agree with McNeill JA who observed at [17] that neither the grounds of appeal nor F&B's written submissions sets out with particular clarity or precision the critical propositions upon which it is argued that the ground of appeal is well-founded. F&B did not heed this criticism in the third iteration of the draft notice of appeal, post-dating the judgment of McNeill JA.

- *(1) not applying Alhamrani correctly*

18. F&B claim that the Lieutenant Bailiff, in her application of the *Alhamrani* test, failed to appreciate that F&B are not objecting beneficiaries but incumbent trustees objecting to the activities of a largely non-neutral former trustee.

19. There can be no doubt, in our judgment, that this highly experienced Lieutenant Bailiff who had listened to eight days of legal submissions and reserved her decision for four months was only too aware of the status of the parties and the circumstances surrounding F&B's objections.

20. It was never argued below that a test less stringent than *Alhamrani* should be adopted and, notwithstanding the terms of paragraphs 8 and 9 of the current notice of appeal, F&B have clarified (at paragraph 13 of their submissions of 24 September 2021) that no such contention is advanced. Instead, F&B submit that in applying the *Alhamrani* test of 'not obviously bad on its face' the Lieutenant Bailiff was required to take into account as a matter of fact that the objections are raised by an incumbent trustee, but did not do so, thereby creating an *"error of law as well as fact which should be corrected"*. However, the Lieutenant Bailiff recognised that her application of the *Alhamrani* test here was to a different factual scenario to that in *Alhamrani* (see paragraph 9 above). In our judgment there is no real prospect of success in F&B's contention that the Lieutenant Bailiff, when examining the period after I&B had left office, failed to take proper account of the objecting party being a new trustee rather than a beneficiary. *Alhamrani* made no distinction between costs incurred in the administration of the trust and costs incurred in defending successfully a breach of trust claim. It is common ground that trustees are entitled to an indemnity in such circumstances (see paragraph 15 of F&B's submissions of 24 September 2021).

- *(2) applying a test of 'likelihood' and/or the test for final resolution of the dispute*

21. It is said that the Lieutenant Bailiff, while expressly accepting the principles set out by Vos JA in *Alhamrani* (see paragraph 10 above), was *"in effect "erecting an artificial threshold" for F&B to surmount by … elevating the proposition, stated in Alhamrani, that the claiming trustee (here former trustees) should have the benefit of the doubt … to a requirement that the questioning trustee should be able to show, even at a preliminary, permission stage and before all evidence has been adduced, that the charge was unreasonable "beyond reasonable doubt"".* *Alhamrani* makes clear that the burden of proving unreasonableness of any relevant part of a trustee's claim to indemnity lies on the objecting party and the benefit of any doubt is to be given to the trustee (Judgment at [27]).

22. We have considered carefully [122] – [127] of the Judgment. The words in [123] criticised at paragraph 12.1 of the notice of appeal must be read in their full context. We agree with McNeill JA that *"the words objected to do not colour or debase the effect of the words to which no objection is taken".* We are confident the Lieutenant Bailiff did not set her summary judgment test too high, and was entitled in different contexts to describe the test in varying terms, for example 'Is there a real prospect of F&B's establishing that the costs in question were, without the benefit of any doubt, incurred unreasonably by the trustee?', 'Is the objection obviously bad or does it require further investigation?' or 'Is it arguable that F&B's asserted objections can be made out at a final hearing (but that arguability has to be

evaluated in the context that the objection will ultimately have to be proved, in effect, beyond reasonable doubt)?'. We are quite satisfied that the Lieutenant Bailiff applied the principle that to be worthy of further investigation there must be a prospect of proving the validity of the objection beyond reasonable doubt.

23. F&B submit that the Lieutenant Bailiff was wrong, on a summary judgment application, to apply the hurdle for final resolution of a dispute which she did in utilising a test of 'likelihood'. It is clear to us that F&B's legal advisors have searched the Judgment for all references to 'likely' or 'likelihood' (for example [268], [319], [322], [330] and [354]) with a view to persuading this court that the Lieutenant Bailiff set the bar too high.

24. We do not accept that there is any real prospect of F&B establishing that the Lieutenant Bailiff applied a test of 'likelihood of success' as opposed to 'real prospect of success' or paid lip service to the latter.

25. As to [268], this must be read alongside [267]. The Lieutenant Bailiff had struck out objections relating to the costs of legal research as lacking a real prospect of success. She then added that she was refusing liberty to apply because no more focused objection was likely to be sustainable. The correct test was clearly applied.

26. As to [319] and [322], these must also be read in their proper context. The Lieutenant Bailiff was clearly applying the test 'Are the objections not obviously bad?', having regard to the circumstances and the entitlement of I&B to the benefit of the doubt. 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.

27. As to [330], again it is absolutely clear that the test being applied is 'Is there a real (as opposed to fanciful) prospect of showing a charge to have been unreasonable?'. Again, the paragraph must be read in the light of the precision and clarity at [110] – [127].

28. As to [354], this must be read in its immediate and surrounding context of [324] – [382]. At [331] a 'sufficient doubt' test was noted. At [362] and [372] – [373] the Lieutenant Bailiff referred to any real prospect of F&B ultimately satisfying the court that the costs were unreasonable, applying the proper test in *Alhamrani*, objectively and beyond the benefit of doubt. At [363] the Lieutenant Bailiff referred to the 'not obviously bad' test.

29. Where the Lieutenant Bailiff acknowledged (for example at [106], [123] and [380]) she was setting the bar high, she was merely reflecting that the *Alhamrani* bar is indeed a high one and higher than F&B had been arguing for and higher than on an *inter partes* taxation of costs.

- *(3) conducting a mini-trial*

30. F&B submit that, by reference to nine paragraphs of the Judgment, the Lieutenant Bailiff conducted a 'mini-trial', ignoring the possibility of further evidence. In our judgment there is no merit to this allegation. The Lieutenant Bailiff, at [122], expressly had in mind the possibility of further evidence and the test used is proof of this: 'Is there a real … prospect of F&B's establishing that the costs in question were … incurred unreasonably?' (our emphasis). The matter is put beyond doubt at [398]:

> *"I emphasise, though, that I am not making a decision, or even giving any "indication" … 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."*

31. In any event, it is difficult to envisage fresh evidence becoming available to F&B between now and the final hearing when their objections are based inevitably on the materials effectively available to I&B at the time when they made the payments, now disclosed to F&B pursuant to the Lieutenant Bailiff's unappealed order of April 2020: [371].

- *(4) erroneously interpreting "in connection with" in Article 26(2) JTL*

32. F&B submit that the Lieutenant Bailiff interpreted the words *"in connection with the trust"* in Article 26(2) JTL so broadly as to permit *"unfettered"* expenditure by the former trustees and to create *"a virtually insuperable hurdle"*. The Lieutenant Bailiff had indeed held at [35] that the relevant words *"are of potentially very wide application, and presumably intentionally so".* So far as we are aware, the legal ambit of Article 26(2) does not appear to have been the subject of legal argument below – none is identified in the notice of appeal.

33. The Lieutenant Bailiff's approach can be seen from [63] where she required the connection to be more than *"slight or ephemeral"*, amounting to a *"real and of recognisable substance"*, a matter of fact and degree.

34. We are of the view that F&B's criticism is, in reality, not an error of statutory interpretation but of factual findings made by the Lieutenant Bailiff (for example at [320], [330], [368], [370] and [402]), against which there is no real prospect of any successful appeal.

35. Finally, F&B submit that the Lieutenant Bailiff wrongly excluded certain of F&B's arguments at [150], [169], [181] and [204], because they are collateral attacks on the decisions in Guernsey 1 or Guernsey 3 by this court and the Judicial Committee of the Privy Council (**'the Privy Council'**). [169] is a decision (albeit in the alternative) in F&B's favour so we do not follow the criticism now made. Section 3.6 of the draft notice of appeal before McNeill JA (*"Not a collateral attack"*) has been removed from the latest draft notice of appeal, no doubt because McNeill JA (in our view correctly) held at [44] that this ground *"would make a nonsense of judicial proceedings"*.

Illustrative examples relied upon by F&B in Section 3 of the notice of appeal

36. As we have found no merit in F&B's sole ground of appeal, it is unnecessary to deal with the factual conclusions now said to be wrong. They were addressed by McNeill JA at [45] – [57] of his judgment and we gratefully adopt his views.

Discussion: Public Interest

37. At paragraph 1(b) of their application for permission to appeal dated 16 August 2021 F&B state, as an alternative ground, that the issue of 'breadth of a trustee's right to indemnity' should be examined in the public interest. In paragraphs 15 – 17 of their written submissions of 10 September 2021 F&B assert that the primary issues that warrant consideration by the Court of Appeal, regardless of the merits of the proposed appeal, are the extent to which, and via which methodology, former trustees may indemnify themselves from the assets of the trust of which they were once trustees – but this must be read in the light of paragraph 13 of F&B's responsive submissions of 24 September 2021 (see paragraph 20 above). It is therefore common ground that the *Alhamrani* test governs I&B's claims for the periods during and after their trusteeship. It is also common ground that a trustee is *prima facie* entitled to an indemnity for defending itself successfully against breach of trust allegations. It is therefore not helpful for F&B to characterise the Lieutenant Bailiff's Judgment as a licence for a former trustee to incur costs *"with impunity"* in an attempt to cloak the relevant issues with an aura of general public interest:

"… Guernsey and Jersey must be able to offer certainty to … settlors; the certainty of knowing what the money in a trust is to be used for and whether, because of the Decision, trustees are (on F&B's case) apparently now being given a 'blank cheque' and the freedom to defray costs from assets in their trusteeship, no matter how obliquely related the costs are to that trusteeship and even where the incidence of such costs is not only for the (sole) benefit of the trustee but is also to the detriment of the trust and its beneficiaries … So much so that it may be detrimental to the financial stability and viability of the Bailiwicks as a whole …"

Like McNeill JA we regard these submissions as self-serving and surprising.

38. We have considered carefully whether the Guernsey Court of Appeal ought to specifically consider the ambit of Article 26(2) JTL. Any assessment would have to be on an academic and theoretical basis. This is because there is inevitably no material in this interlocutory Judgment which would allow the Court of Appeal to interpret the words of the legislation against any fixed set of facts. As McNeill JA observed, that is the preserve of academia and not the judiciary.

39. This is essentially a dispute of fact, albeit with very significant sums of money and extensive documentation involved. There are no issues of principle or points of law of general application and there would be little or no guidance to subsequent litigants from any judgment of this court. In short, there are no questions of great public interest or of general policy which should be examined by the Court of Appeal. We echo the words of McNeill JA at [16] of his judgment:

"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."

40. We find no relevant exceptional circumstances here which would require us to grant permission to appeal in the absence of any real prospects of success.

Extension of Time

41. F&B's application to the Lieutenant Bailiff for permission to appeal, dated 21 May 2021, was made within the one month period prescribed by r.3 of the Rules. However, F&B acknowledge that they now require an extension of time under r.17(1) of the Rules to serve their notice of appeal outside such one month period. Such application is opposed. It is of course unnecessary to deal with F&B's application in view of our refusal of permission but, having had full argument on the issue, we can state that we would have been minded to refuse the extension of time had we been willing to grant permission to appeal.

42. Following the refusal of permission to appeal by the Lieutenant Bailiff on 10 June 2021, F&B delayed 33 days until 13 July 2021 before applying to the Court of Appeal for permission. About four weeks after the Lieutenant Bailiff's refusal of permission, F&B's advisors first made contact with the Court of Appeal administration to enquire as to judge availability, to be informed that a single judge could consider the matter on the papers. A further week elapsed before the application of 13 July 2021 was filed. The only reason for F&B's delay was that their lawyers were at that time involved in other aspects of Guernsey 1 in the Royal Court and before the Privy Council where there was a hearing between 15 and 17 June 2021. According to F&B's lawyer, David Doutney, the application of 13 July 2021 was made *"as soon as possible".*

43. Following the refusal of permission to appeal by the single judge on 4 August 2021, F&B applied to the full court for permission only on 16 August 2021.

44. The entire period from 23 April to 16 August 2021 falls to be considered under r.17 of the Rules (ignoring 21 May to 10 June and 13 July to 4 August), there being no separate time limit between the lower court's refusal and the renewed application to the Court of Appeal. There is no further month within which to renew the application. Where an applicant uses all but two days of the one month period before issuing his application for permission, this is relevant. The initial application stopped time running on 21 May but it recommenced on 10 June, so expired on about 12 June 2021. The application of 13 July was therefore one month out of time.

45. In paragraph 24 of their written submissions of 10 September 2021 F&B rely upon their *"limited resources"*, although this must be read in the light of paragraph 11 of their responsive submissions of 24 September 2021 that F&B *"have a moderately sized legal team but it is not so large that F&B can afford <u>not</u> to prioritise those matters that are most pressing"*. We note that in the court below I&B were represented by Advocates Manchak and Wessels and F&B by Advocate Robison.

46. The three versions of the draft notice of appeal dated 21 May, 13 July and 16 August 2021 are similar. There are minor differences, primarily some subsidiary reasons being abandoned and new ones advanced, but nothing substantive. The various amendments did not justify F&B's delays. In our judgment the renewed applications could and should have been filed almost immediately after 10 June and 4 August 2021 respectively, the only material consideration being whether or not to pursue the attempt to appeal. We assume that the first draft notice of appeal of 21 May 2021 contained the most appropriate grounds of appeal. The written submissions in support of the renewed applications could have followed the filings but I&B and the court would have been on notice of F&B's intentions. There is prejudice to any potential respondent in delay to his or her rights being resolved – in this case I&B's claims may have to be stayed in the meantime (see paragraph 4 of Mr Doutney's affidavit of 5 August 2021).

47. We endorse the following comments of McNeill JA at [11] of his judgment:

> *"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."*

48. We do not accept that appropriate members of F&B's teams of Guernsey and English lawyers could not have devoted the minimum resources necessary to draft the applications of 13 July and 16 August 2021 – which mirrored substantially the application of 21 May 2021

49. For those reasons we think it likely we would have refused the extension of time sought, unless we had thought that the prospects of a successful appeal were good.

Conclusion

50. We refuse permission to appeal for the reasons given above as there is no real prospect of the proposed appeal succeeding. The case involves no question of great public interest or of general policy.