

Renewed Appeal application pursuant to s. 21(2) of The Court of Appeal (Guernsey) Law, 1961; seeking an extension of time pursuant to r. 17(1) of The Court of Appeal (Civil Division) (Guernsey) Rules, 1964 and consideration as to whether the Appellants' require permission to appeal the interlocutory judgment and interlocutory order.

[2021]GCA50

**IN THE COURT OF APPEAL OF
GUERNSEY**

CIVIL DIVISION APPEAL No. 553

1 October 2021

Before: **Jonathan Crow, QC**
David Perry, QC
Jeremy Storey, QC

Between: **(1) Sherborne Corporate Services Limited** **Appellants**
(2) Kenilworth Consultants Inc

-and-

The Public Trustee **Respondent**

Crow JA

INTRODUCTION

1. This is the judgment of the full court on a renewed application by the Appellants pursuant to s. 21(2) of The Court of Appeal (Guernsey) Law, 1961 (“the 1961 Law”). The Appellants are seeking an extension of time pursuant to r. 17(1) of The Court of Appeal (Civil Division) (Guernsey) Rules, 1964 (“the 1964 Rules”) in which to appeal against a judgment of the Royal Court (McMahon B) given on 9 December 2020, and the subsequent Act of Court dated 22 December 2020. The Public Trustee also contends that the Appellants need permission to appeal pursuant to s. 15(e) of the 1961 Law, on the ground that the impugned decision was an interlocutory order. The Appellants dispute that they need permission to appeal.

2. These applications arise in the context of long-running proceedings, but the essential background can be stated shortly. On 29 March 2017, the Appellants were removed as trustees of five occupational pension schemes listed in Schedule 1 to the order (“the Schemes”). In their place, the Public Trustee was appointed “*immediately ... as Trustee of the Schemes*” for a period of six months. On 22 September 2017, that appointment was continued “*until further order of the Court*”.
3. Following the appointment of the Public Trustee as trustee of the Schemes, there appears to have been a considerable amount of litigation aimed at identifying and recovering property allegedly belonging to the Schemes, the full detail of which is not before this court. Merely by way of illustration, we have been shown a judgment of the then Bailiff, Sir Richard Collas, dated 13 March 2019, in proceedings brought by the Public Trustee against various Respondents, including these Appellants, claiming that certain property in Kidderminster, England, belonged to one of the Schemes.
4. On 24 June 2020, the Public Trustee issued an application (subsequently amended on 3 December 2020) which has been referred to as “the Account Application”. It sought extensive directions and relief, including an order that the Public Trustee “*as trustee of the Schemes be given all powers to carry out (to the extent necessary or desirable) the following, to the extent that he does not already have such powers: (i) the administration of the Schemes; (ii) the carrying into effect of any relief the court grants in respect of this application*” and other ancillary matters. More specifically, the Public Trustee sought an order requiring the Respondents to the Application (including these Appellants) to deliver up full and complete copies of various documents listed in the Schedule to the Application, and also to execute mandates or instructions addressed to various named Information Holding Entities requiring them to deliver up the same copy documents to the Public Trustee.
5. In response to the Account Application, the Appellants served an application dated 16 October 2020, headed “Application for judgment on alleged *ultra vires* actions by the Applicant” (*i.e.* by the Public Trustee). This application has been referred to as “the *Ultra Vires* Application”. Whilst it appeared to allege various breaches of trust and various historic *ultra vires* acts by the Public Trustee, and it also contained a certain amount of argument as to why the relief sought in the Account Application ought not to be granted on the merits, the main thrust of the *Ultra Vires* Application was that the powers conferred

on the Public Trustee by the orders made in 2017 were limited, such that the Public Trustee was acting *ultra vires* in seeking the relief set out in the Account Application.

6. The matter came before the Bailiff for a hearing which started on 9 December 2020. The Sixth Respondent, Roger Mewis (“Mr Mewis”), presented the oral argument on behalf of the Appellants on that day (remotely). Also in attendance (remotely) was Mr Hawkins, Mr Mewis’s Litigation Friend. It is apparent from the transcripts that the Bailiff started the hearing by seeking and obtaining confirmation from Mr Mewis that the intended relevance of the *Ultra Vires* Application was to persuade the court that the Public Trustee was not entitled to move the Account Application because he was not authorised to do so by the terms of the orders under which he had been appointed. It was on that basis that the Bailiff dealt with the *Ultra Vires* Application, which he dismissed in an *ex tempore* judgment the same day. It is apparent from the transcript of the hearing that Mr Mewis was present (remotely) while the judgment was being given.
7. In early July 2021, the Appellants served an undated Notice of Appeal seeking to challenge the Bailiff’s ruling on the *Ultra Vires* Application. It was supported by written submissions dated 4 July 2021.
8. The Appellants’ proposed appeal was considered on the papers by a single judge of this court, Sir Wyn Williams, who gave his ruling on 14 July 2021. Like the Bailiff, Williams JA understood the *Ultra Vires* Application as an attempt by the Appellants to prevent the Public Trustee from moving the Account Application (paragraph 7). He treated the matter before him as an application for an extension of time under r. 17 (paragraph 2), rather than as an application for permission to appeal, because he did not consider that he had enough information to determine whether the Bailiff’s decision on 9 December 2020 and the subsequent Act of Court dated 22 December 2020 constituted interlocutory rulings in respect of which permission to appeal would be required under s. 15(e) of the 1961 Law (paragraph 18).
9. Williams JA dismissed the application for an extension of time principally because he did “not consider that the Appellants have provided a reasonable explanation for the delay in initiating these appeal proceedings” (paragraph 14). However, he also “considered the proposed grounds of appeal” to the extent he was able to do so in light of the documents provided by the Appellants, and reached the conclusion that the Appellants had not

satisfied him that there was any real prospect of an appeal succeeding (paragraph 15). Finally, he also observed that “*the proceedings have moved on since the Act of Court of 22 December 2020*” and that that was another “*factor which militates against the lengthy extension which is sought*” (paragraph 16).

10. Following the decision of Williams JA, the Appellants renewed their application to the full court by a document dated 16 August 2021 (“the Renewal Application”). The Appellants’ principal argument in the Renewal Application is that Williams JA “*appeared not to follow the established Gaudion test and consider the seriousness of the grounds for appeal but instead elected to concentrate on the time element*” (paragraph 2). This was a reference to the decision in Gaudion v. Weardale Limited (1997) 24 GLJ 83, which laid down a two-part test for determining an application for an extension of time under r. 17, requiring the court to consider both the question whether the appellant has a sufficiently arguable appeal and also whether as a matter of discretion an extension of time ought to be granted in light of the reasons for the delay and any prejudice suffered by the respondent.
11. The Public Trustee provided his Written Submissions in response to the Renewal Application on 3 September 2021, and the Appellants provided their written rebuttal to those Written Submissions on 17 September 2021 (“the Rebuttal”). A substantial part of the Rebuttal (in particular, paragraphs 2.20 to 2.50) comprises argument on whether the Public Trustee should, on the merits and in exercise of the court’s direction, be granted the relief sought in the Account Application. For the avoidance of doubt, that is not the issue to which the impugned judgment of 9 December 2020 was directed. There was no ruling on the merits and the Account Application is still to be determined. The Bailiff’s judgment, and the Appellants’ proposed appeal against it, are concerned with the question whether the Public Trustee was acting *ultra vires* in even asking for the relief sought in the Account Application. At paragraph 15 of his judgment the Bailiff had stated: “*the Public Trustee’s application of 24th June 2020 is capable of being entertained which is the way that I have chosen to treat the *ultra vires* application*” (our emphasis). Further, the Bailiff made it clear that any allegation of historic breach of trust or a hostile claim against the Public Trustee would have to be the subject of a procedurally correct summons by someone with the legal standing to do so (paragraphs 3 and 15 of the judgment).

THE LEGAL FRAMEWORK

Is permission to appeal required?

12. The Public Trustee submits that the Appellants require permission to appeal pursuant to s. 15(e) of the 1961 Law, on the basis that the decision of 9 December 2020 was an interlocutory judgment, and the Act of Court dated 22 December 2020 was an interlocutory order. We accept that submission. The meaning of “*interlocutory*” in this context was discussed in *McNamara v. Gauson* [2009-10] GLR 387, at paragraph 7, where Collas DB (as he then was) explained that the question was whether the impugned decision would finally have disposed of the matter in question, whichever way it was decided.
13. The Appellants’ Rebuttal misunderstands the issue (in paragraphs 2.1 to 2.3). The question whether the 9 December judgment was interlocutory does not turn (as the Appellants appear to believe) on whether the decision was in itself determinative of the *Ultra Vires* Application: it plainly was, because that Application was dismissed. Rather, the question is whether the decision would finally have disposed of the whole matter in question, whichever way it was decided – which it plainly did not because, having dismissed the *Ultras Vires* Application, the Bailiff rightly proceeded to case manage the Account Application.

The test for permission to appeal

14. The judgment in *McNamara v. Gauson* also deals (in paragraphs 22 – 34) with the test for granting permission to appeal. Having considered certain materials from Jersey and England, the Deputy Bailiff expressed the view that the correct test in this jurisdiction is whether the proposed appeal has a real prospect of success. If not, permission should be refused other than in exceptional circumstances where, in the public interest, the matter should be considered by this court – for example, because it raises questions of great public interest or of general policy, or because authority binding on the Court of Appeal may call for reconsideration. We propose to adopt that test in this ruling.

The time for serving a notice of appeal

15. Rule 3 of the 1964 Rules provides that: “*Every notice of appeal shall be served ... within one month from the date on which the judgment or order of the court below was pronounced.*” The relevant judgment in this case was given on 9 December 2020. The

relevant order was made on 22 December 2020. The Notice of Appeal was served in early July 2021.

The test for granting an extension of time

16. Under r. 17 of the 1964 Rules, the court has power to extend the period within which a person is required by the Rules to do any act. As noted above, the decision in *Gaudion* established a two-part test under r. 17, and that is the approach we propose to adopt. We shall accordingly deal in turn with the question of delay, and then with the apparent merits of the proposed appeal.

THE DELAY

17. In their written submissions dated 4 July, repeated in their Renewal Application, the Appellants said this:

“Our sincere apologies to the Court for the delay in seeking an appeal but this was totally unintentional. The Court may have some appreciation that Litigants in Person, as are the Applicants, do not always fully understand the court’s format and procedures. The person who speaks on behalf of the Applicants, does so simply because he is the most knowledgeable about events and structure [sic], due to his position within the pension scheme, and was only able to attend the Hearing for one day due to a medical condition. The doctor’s certificate, which was submitted to the Court recommended that he did not attend further.

As such, the Applicants were expecting to receive a Formal Final Judgment, as had been the case in a parallel hearing, indeed, five months after the hearing. Regrettably, the Applicants had not understood the significance of the Court Order, as being the Formal Final Judgment, and were waiting for any further information, which may have come to light subsequent to the original “Court Order”. This is evidenced by the exchanges of emails with HMDG.”

18. The Appellants’ first point is accordingly based on an assertion that they are litigants in person. That assertion might be open to challenge, because the Appellants are in fact corporate entities, not individuals. Nevertheless, for the purpose of this application, we will proceed on the assumed basis that they are to be treated as litigants in person.
19. In our judgment, that does not require the court to allow any wholesale dispensation from the applicable rules, nor does it entitle the Appellants to automatic indulgence where there has been any specific failure to comply with the rules. The court’s publicly accessible procedures apply to all litigants, including litigants in person, and all litigants in person

should accordingly familiarise themselves with those rules. Nevertheless, where there has been an instance of non-compliance by a litigant in person who then seeks a relaxation of any particular rule, the court will in the exercise of its discretion take fully into account the fact that anyone without a legal training may be unaware of detailed procedural requirements, and may struggle to grasp concepts which are unfamiliar to them.

20. In the present case, we take the following accumulation of factors into account in rejecting the Appellants' efforts to rely simply on their status as litigants in person as a justification for extending time:

- (i) It is apparent, both from the written submissions of the Appellants and also from the transcript of the hearing on 9 December 2020 that Mr Mewis is an intelligent and articulate man.
- (ii) He was present (remotely) throughout the hearing, and as such he heard the Bailiff giving judgment that afternoon, when the Bailiff clearly stated: "*I am going to dismiss the respondents' ultra vires application dated 16th October 2020*" (paragraph 15). Mr Mewis also heard the Bailiff say: "*More particularly what that means is that the Public Trustee's application of 24th June 2020 is capable of being entertained*" (paragraph 15).
- (iii) It is apparent from the Appellants' written submissions dated 4 July that they received the Act of Court dated 22 December 2020, which clearly stated at paragraph 3 that "*The Ultra Vires Application is dismissed and the costs are reserved*".
- (iv) Rule 3 of the 1964 Rules (quoted in paragraph 15 above) is expressed in plain language, and it conveys an entirely straightforward concept which requires no legal training to understand.
- (v) In order to comply with r.3 the Appellants needed to do no more than file a straightforward Notice of Appeal with grounds (as they did without difficulty in July 2021) – the detailed written submissions in support could have followed later.

21. The second point on which the Appellants seek to rely is Mr Mewis's medical condition. He explained to the Bailiff at the close of the hearing (after judgment had been delivered) that he was suffering from spinal stenosis, that he was unable to take any more pain killers, and that he would have to cease attending the hearing and lie down. In our judgment, that is irrelevant to the issue in hand. The fact that Mr Mewis was unable, through back pain, to attend the resumed hearing on 10, 18 and 22 December 2020 (when nothing was decided substantively and the Appellants were given liberty to apply) does not provide any justification for the Appellants failing to serve a Notice of Appeal within one month after the hearing on 9 December 2020 which he did attend, and at which the Bailiff gave the judgment which the Appellants are now seeking to challenge. Further, we note that Mr Mewis was able to file, on behalf of the Appellants, an application dated 17 December 2020. Nor does Mr Mewis's medical condition provide any excuse for the delay between the Appellants' receipt of the Act of Court dated 22 December 2020 and the service of their Notice of Appeal about six months later.

22. The Appellants' third point is based on an assertion that they were expecting to receive a written judgment. We reject that as an excuse for the delay:

- (i) The Bailiff gave no indication on 9 December 2020 (or otherwise) that he would be providing any written judgment (or any further reasons) in relation to the *Ultra Vires* Application.
- (ii) The Appellants have adduced no evidence to suggest that they made any effort to contact the court (or, for that matter, the Public Trustee) after 9 December 2020 in order to ascertain whether any written judgment would be issued, and if so when.
- (iii) The Appellants' alleged expectation of receiving a written judgment is said to be supported by certain correspondence with HMDG. The only email we have been shown dates from late June 2021, and it provides no evidence that the Appellants believed, from December 2020 onwards, that they were waiting for anything further from the court in relation to the dismissal of the *Ultra Vires* Application. We note that Williams JA may have been shown further correspondence, because he said this in paragraph 13 of his ruling: "*I have read those emails [plural]. They are dated late June 2021 and*

apparently relate to a decision made by the Bailiff in May relating to the Clause 3(C)3 application [of 17 December 2020 for funding under that clause of the Trust Instrument]. In my judgment this email exchange has no bearing upon the delay in bringing this appeal.”

- (iv) As noted above, the Appellants received a copy of the Act of Court dated 22 December 2020.

23. In exercising our discretion, we also take into account the following matters:

- (i) The Appellants have adduced no evidence to suggest that they made any effort to familiarise themselves with the applicable deadlines, but failed (despite such efforts, and because of their lack of legal training) either to find or to understand r. 3.
- (ii) The Appellants have adduced no evidence to suggest that they made any inquiries of the court as to the applicable deadlines for serving the Notice of Appeal.
- (iii) The delay between the judgment in December 2020 and the application for permission to appeal in July 2021 is very substantial indeed. The one-month time limit under r. 3 has been exceeded by about five months.
- (iv) Although there is no express time limit for renewing an application from the single judge to the full court under s. 21(2), it is clear that, when the full court is considering an application for an extension of time, the totality of the delay between the date of the impugned judgment and the date of the renewal application under s. 21(2) must be taken into account: *Fort Trustees Ltd v. ITG Ltd* [2021] GCA 029 (McNeill JA, 4 August 2021), at paragraph 10. Applying that approach, it is accordingly relevant to take into account the fact that there was a further delay of slightly over a month between the decision of the single judge on 14 July and the service of the Renewal Application on 16 August.

24. In their Renewal Application, the Appellants complain (in paragraphs 10 – 12) that the Public Trustee’s “*underhand and reprehensible modus operandi*” has had the effect of

depriving the Appellants of sufficient financial resources to instruct legal representation. We are not in a position to make any finding in relation to these allegations: but, even assuming that the Public Trustee's conduct has contributed to the Appellants' indigence, that would serve only to explain why they are (as we assume) litigants in person. It would not further explain or excuse the delay with which we are concerned.

25. Separately, as Williams JA noted, the proceedings have moved on since 9 December 2020. In particular, the court has proceeded to case manage the Account Application, which was what the *Ultra Vires* Application was intended to forestall. As a result, the practical utility of revisiting the correctness of the Bailiff's ruling on the *Ultra Vires* Application has effectively been eliminated.
26. Furthermore, the fact that the Public Trustee has proceeded with the Account Application since December 2020, and the court has been case managing that Application on the basis that the *Ultra Vires* Application had been definitively dismissed, means that any appeal against the Bailiff's ruling now would be prejudicial to the Public Trustee and also to the good administration of justice.
27. For all these reasons, we do not consider that the Appellants have established any good reason to extend the time within which to serve their Notice of Appeal. We will turn next to consider the merits of the proposed appeal.

THE MERITS OF THE PROPOSED APPEAL

Introduction

28. The second issue for the court to consider under the approach laid down in *Gaudion* is the apparent strength of the proposed appeal. In our judgment, this issue should be addressed in essentially the same way as an application for permission to appeal. In other words, the court should not attempt a mini-trial of the proposed appeal on the merits. Rather, the court should simply consider whether there is a real prospect of success. We shall accordingly deal simultaneously with the second limb of the test under *Gaudion* for an extension of time, and the application for permission to appeal.

29. The Notice of Appeal identifies four grounds of appeal, namely: (i) an appearance of bias on the part of the Bailiff in adopting an advocacy role at the hearing on 9 December 2020; (ii) a failure by the Bailiff to take into account relevant matters “*concerning the criteria laid down by the Law Officers of the Crown in the appointment of the Public Trustee*”; (iii) a failure by the Bailiff to take into account relevant matters concerning the appointment of the Public Trustee as specified in the 2017 Acts of Court; and (iv) errors of law in the interpretation of those orders.
30. Subsequently, the Renewal Application simplified the Appellants’ argument to “*two cited reasons for appeal*” (paragraph 58) – namely, (i) apparent bias on the part of the Bailiff during the course of the hearing on 9 December 2020, and (ii) an allegation that, on the correct interpretation of the 2017 Acts of Court, the Public Trustee was acting *ultra vires* in pursuing the relief sought in the Account Application.
31. The Rebuttal (in paragraph 1.1) further recharacterizes the Appellants’ grounds of appeal as involving nothing but “*alleged appearances of bias by the Bailiff*” – namely, the “*alleged act of advocacy*” during the hearing on 9 December 2020, and “*the case of interpretation of words by the Bailiff to mean the exact opposite of their natural meaning*”.
32. In our judgment, the Renewal Application represents the clearest distillation and classification of the Appellants’ intended argument. We will accordingly deal in turn with the allegation of bias, and with the question of interpretation.

Apparent bias – alleged advocacy by the Bailiff

33. The Appellants’ argument based on apparent bias proceeds in the following steps:
- (i) The Appellants submit (in paragraph 16 of the Renewal Application, and also in paragraph 7.14 of the Rebuttal) that *R v. Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, is authority for the proposition that “*the mere appearance of “bias” is sufficient to overturn a judicial decision*”.
 - (ii) They emphasise (in paragraph 20 of the Renewal Application, and also in paragraphs 5.4 & 7.14 of the Rebuttal) that the rule is very strictly applied, even if there is no actual bias.

- (iii) They also quote (in paragraph 17 of the Renewal Application, and in paragraph 5.7 of the Rebuttal) a judgment of Lord Parker CJ in *R v. Hamilton* [1969] Crim LR 486, which says that “*the judge must not descend into the arena and give the impression of acting as an advocate*”.
- (iv) Finally, the Appellants contend (in paragraph 18 of the Renewal Application) that “*An “impression” is a subjective opinion and the subjective opinion of the Appellants was that the Ordinary Court acted in a manner which portrayed an advocacy role.*”

34. For the purpose of this application, we accept each of the propositions in (i) to (iii) above, and we also accept (for the sake of argument) that the Appellants genuinely formed a subjective belief that the Bailiff “*acted in a manner which portrayed an advocacy role*” in the course of the hearing on 9 December 2020. Nevertheless, the Appellants’ allegation of apparent bias is based on a fundamental misunderstanding of the law. They appear to believe that a judgment can be overturned on the basis of apparent bias if an appellant forms the impression that the judge appeared to be biased. That is not the law. A judgment can only be overturned on the basis of apparent bias if the appellate court, personifying a reasonable and fair-minded person with knowledge of the relevant circumstances, forms the view that there was real danger that the judge was biased. The court will form its view on that issue in the knowledge that the judge will have taken a judicial oath, and that judges are fully entitled (indeed, they are bound) to test the arguments being presented to them by positing the counter-arguments. As such, a successful allegation of apparent bias based on judicial conduct during a hearing would be a real rarity. It might possibly arise, for example, “*if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind*”: see *Locabail (UK) Ltd v. Bayfield Properties Ltd* [2000] QB 451, CA, at paragraph 27 (p. 480F).

35. Adopting that approach, it is for this court to consider the transcript of the hearing on 9 December 2020 in order to form our own assessment of whether there is a real danger that the Bailiff was biased. Having reviewed the transcript carefully, in particular those sections identified in Part 9 of the Rebuttal, we reject without hesitation the Appellants’ argument in this regard. The Bailiff’s conduct throughout the hearing was as measured

and courteous as one would expect, and there is not the slightest hint that he expressed himself in extreme or unbalanced terms. As such, there is no ground for a finding of apparent bias. On analysis, the Appellants' argument in this regard (particularly in paragraphs 33 & 51 of the Renewal Application) appears to be founded on the basis that they are so convinced of the correctness of their own argument that any indication from the Bailiff that he did not accept that argument is, in their eyes, evidence of apparent bias on his part. That position only has to be stated for its fallacy to be evident.

36. For these reasons, although (as stated above) we have dealt with the application on the assumed basis that the Appellants honestly believe that the Bailiff "*acted in a manner which portrayed an advocacy role*" during the hearing on 9 December 2020, in our judgment there is no rational basis for that belief. More importantly, the question whether the Appellants held that belief is legally irrelevant to the question whether there was any appearance of bias. That is a matter for this court, and in our judgment there was none.

Ultra vires – the Account Application

37. The second point in the proposed appeal concerns the correct interpretation of the orders made in 2017 first appointing, and then extending the appointment, of the Public Trustee. This is the kernel of the Appellants' *ultra vires* argument.

38. The relevant wording in the Act of Court dated 29 March 2017 is that the Public Trustee's appointment as Trustee of the Schemes was "*limited to the making of a full investigation into the Schemes and the taking of all such steps as she considers necessary*". (For some reason, the word "*deems*" replaced the word "*considers*" in the Act of Court dated 22 September 2017, but it makes no difference to the outcome of the present application.) It was on the basis of this wording, in particular the words "*limited to*", that the Appellants sought to persuade the Bailiff on 9 December 2020 that the Public Trustee was acting *ultra vires* in seeking the relief set out in the Account Application.

39. In our judgment, that argument was rightly dismissed by the Bailiff and any proposed appeal would be bound to fail, essentially for two key reasons (each of which is independent of the other):

- (i) Under the terms of the 2017 Acts of Court, the Public Trustee has been appointed "*as Trustee of the Schemes and takes control of any entities owned by the Schemes...for the avoidance of doubt...[with] power to vary the powers*

and provisions of any of the Trusts if she considers it to be in the interests of the beneficiaries...[with] liberty to apply to the Court for such further Order under s. 3(3) of the Public Trustee Law [2002] as she considers necessary... ”. As such, the Public Trustee has the power, under s. 69 of The Trusts (Guernsey) Law 2007, to apply to the court for the relief sought in the Account Application. He also has all of the ancillary powers under s. 5 of The Public Trustee (Bailiwick of Guernsey) Law 2002, including the right to sue, which are similarly wide enough to enable him to seek the same relief.

(ii) Under the terms of the 2017 Acts of Court, the Public Trustee was expressly given power for the “*taking of all such steps as she considers necessary*”. Even if those words are interpreted (as the Appellants would wish) as being limited to the taking of steps considered necessary to fulfil an investigation of the Schemes, nevertheless the relief sought in the Account Application is unarguably within the scope of that power.

40. Accordingly, the Public Trustee was not acting *ultra vires* in seeking that relief. He derived the necessary powers both from the legislation and also, independently, from the court orders under which he was appointed.

41. The Appellants have sought to bolster their argument by relying on the well-known principle of interpretation outlined by Lord Hoffmann in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, HL, at 912 that words should be given their natural and ordinary meanings. In our judgment, that argument simply misses the point. The natural and ordinary meaning of the words used in the 2017 Acts of Court amply cover the relief sought by the Public Trustee in the Account Application.

42. The Appellants have also sought to rely on a letter written by the Law Officers of the Crown, representing the Public Trustee, dated 22 March 2017 (*i.e.* shortly before the appointment). (This argument accounts for the second ground of appeal in the Appellants’ Notice of Appeal, mentioned in paragraph 29(ii) above, but it is in reality simply one aspect of the argument on the correct interpretation of the 2017 Acts of Court.) In our judgment, the Law Officers’ letter helps to explain why the words of limitation were included in the 2017 Acts of Court, but they do not alter the meaning of those words, nor

do they alter the conclusion expressed above that the Public Trustee was not even arguably acting *ultra vires* when seeking the relief set out in the Account Application.

43. Finally under this heading, in so far as the Appellants also seek to contend that, by rejecting their interpretation of the 2017 Acts of Court, the Bailiff was displaying apparent bias, we dismiss that argument. We have considered carefully the transcript as a whole, and in particular the passages identified in Part 10 of the Rebuttal. In our judgment, no reasonable person could possibly come to the conclusion that there was any danger of the Bailiff having been biased in this regard.

Ultra vires – past conduct

44. Separately, the Appellants also sought to argue before the Bailiff (and have pursued the argument in this court) that the Public Trustee has in the past acted *ultra vires*, for example by administering the Schemes, bringing legal proceedings to recover property allegedly belonging to the Schemes, and seeking to have assets belonging to the Schemes transferred into his name. The Appellants’ argument is that such conduct is clearly outside the terms of the 2017 Acts of Court, because it is not “*limited to the making of a full investigation into the Schemes*”.

45. In this context, the Appellants also contend that one of the heads of relief sought by the Public Trustee in the Account Application represents an acknowledgment that past conduct (*e.g.* the administration of the Schemes to date) was *ultra vires*. The Appellants rely in this regard on paragraph 4 of the Public Trustee’s application that “*as trustee of the Schemes [he] be given all powers to carry out (to the extent necessary or desirable) the following, to the extent that he does not already have such powers: (i) the administration of the Schemes*”. In our judgment, the Appellants’ argument in this regard is a *non sequitur*. The fact that the Public Trustee seeks a direction from the court conferring powers on him “*to the extent that he does not already have such powers*” is not an admission that he does not already have such powers. Rather, it is an entirely sensible, precautionary measure, designed to eliminate any element of doubt and to forestall any unnecessary argument.

46. That does not, however, dispose of the Appellants’ main point. Their main point is that the Public Trustee’s past conduct in administering the Schemes and pursuing asset-recovery litigation does not fall within the terms of the orders under which he was

appointed. If that had been the relevant issue in respect of which the Appellants were seeking permission to appeal, we might have accepted that there was a sufficiently arguable case that such past conduct fell outside the terms of the 2017 Acts of Court such as to satisfy the (relatively low) threshold test for granting permission to appeal. In saying this, we should make clear that we are not suggesting that any such argument would be likely to succeed. In particular, we recognise that, under s. 23 of the Trusts (Guernsey) Law 2007, a trustee is under a duty (a) to ensure that trust property is held by or vested in him, or is otherwise under his control, and (b) to preserve and enhance, so far as is reasonable, the value of the trust property. Under s. 30, a trustee also has all the powers of a beneficial owner. Under s. 31 a trustee can sue. We also recognise that, although the Public Trustee's appointment under the 2017 Acts of Court was "*limited to the making of a full investigation into the Schemes*" it also included the function of "*the taking of all such steps as she considers necessary*". We also note that on 26 May 2017 and 13 December 2018 the Royal Court authorised the Public Trustee to participate in litigation against, *inter alia*, the Appellants (Civil Action 2049 and the Kidderminster application respectively – see paragraph 3 above). For these reasons, there would be powerful grounds for rejecting the Appellants' argument that any of the Public Trustee's past conduct was *ultra vires*.

47. Nevertheless, we could not say at this stage that there would be no reasonable prospect of that argument succeeding. However, that is not what this application is about. As noted above, the issue which the Bailiff addressed at the hearing on 9 December 2020, and in his judgment that day, was whether the Appellants' arguments in the *Ultra Vires* Application led to the conclusion that the Public Trustee was not even entitled to move the Account Application. In other words, the issue was entirely forward looking, in that it concerned actions which the Public Trustee proposed to take. For the reasons given above, we are satisfied that the Bailiff's ruling on that point was unarguably correct. By contrast, to the extent that the Appellants sought (and still seek) to advance an argument that past conduct by the Public Trustee has been *ultra vires*, there was no relevant relief being sought from the Bailiff in the *Ultra Vires* Application. As a result, the Bailiff made clear that he did "*not need for the purposes of resolving this ultra vires application to comment on the other litigation that has been aired by the [Appellants]*" (paragraph 12 of the judgment). Since he was not being asked to grant any relief in respect of alleged historic *ultra vires* conduct by the Public Trustee, and also since he did not rule on that

question, we do not consider that there is any relevant issue in that regard in respect of which this court can now logically grant permission to appeal.

48. Furthermore, if permission to appeal were to be granted for the purpose of deciding in the abstract whether the Public Trustee's past conduct had been *ultra vires*, that would involve a very real risk of permitting the Appellants to launch collateral attacks on judgments (for example, in relation to the Kidderminster property mentioned in paragraph 3 above) in respect of which the time for appeal has long since expired. In our judgment, it would be an abuse of the court's process for the Appellants to run an appeal for the purpose of advancing an argument that could and should have been advanced in earlier proceedings which have now been concluded.

CONCLUSION

49. For the reasons given above, our judgment is that: (i) the Appellants have offered no adequate excuse for the delay such as to justify an extension of the time stipulated in r. 3 for serving a Notice of Appeal; and (ii) there is no real prospect of the proposed appeal succeeding. As such, neither limb of the *Gaudion* test for extending time is satisfied, and furthermore the principal criterion for granting permission to appeal is not satisfied either. Moreover, this is not one of those exceptional cases raising a question of great public interest or of general policy, nor is there any authority binding on this court which calls for reconsideration. In the circumstances, the application for permission to appeal is refused.