Application for leave to appeal against an order for interim payment; and an application for leave to intervene in that appeal.

[2022]GCA091

IN THE GUERNSEY COURT OF APPEAL
Civil Appeal No. 557

11 July 2022

Before:

Jonathan Crow QC, Presiding
Jeremy Storey QC
James Wolffe QC

Between:

(1) ITG LIMITED
(2) BAYEUX LIMITED

Plaintiffs

and

(1) GLENALLA PROPERTIES LIMITED
(2) THORSON INVESTMENTS LIMITED
(3) ELIZA LIMITED
(4) OSCATELLO INVESTMENTS LIMITED
(5) GENEVA TRUST COMPANY (GTC) SA (formerly Rawlinson & Hunter Trustees SA)

Defendants

and

(1) GLENALLA PROPERTIES LIMITED
(2) THORSON INVESTMENTS LIMITED
(3) ELIZA LIMITED

Third Parties

and

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

Intervening Parties and Applicants

and

(1) MRS HELEN GREEN
(2) MR KELVIN HUDSON

Joint Receivers

and

(1) MR ROBERT TCHENGUIZ
(2) FORT TRUSTEES LIMTIED as co-trustee of the Tchenguiz Discretionary 'A' Trust
(3) BALCHAN MANAGEMENT LIMITED as co-trustee of the Tchenguiz Discretionary 'A' Trust

Advocate J Wessels for the Plaintiffs
Advocate NJ Robison for the Intervening Parties
Advocate P Richardson for the Proposed Intervening Parties

WOLFFE JA

1. This is the judgment of the Court. It concerns an application for leave to appeal against an order for interim payment; and an application for leave to intervene in that appeal.

2. These two applications arise in long-running litigation between the former and the present Trustees of the Tchenguiz Discretionary Trust ("the TDT"). The former Trustees of the TDT are ITG Limited and Bayeux Limited ("I&B"). The present Trustees of the TDT are Fort Trustees Limited and Balchan Management Limited ("F&B"). The TDT is a Jersey trust.

3. On 4 January 2022 Lieutenant Bailiff Marshall QC issued a judgment dealing with a number of matters. Among other decisions, she concluded that I&B should receive an interim payment of £5 million on account of their claim to an indemnity against the assets of the TDT. This decision is reflected in the order of the Royal Court of that date. F&B applied to the Lieutenant Bailiff for leave to appeal that part of her decision. The Lieutenant Bailiff refused that application.

4. F&B have renewed their application for leave to appeal before the Court of Appeal. This application was placed before Jonathan Crow QC who has, in terms of Article 15(2) of the Court of Appeal (Guernsey) Law 1961, referred it to the full court for determination. With the agreement of the parties, we have done so on the papers without an oral hearing.

5. F&B, as Trustees of the Tchenguiz Discretionary A Trust ("the TDAT"), and Robert Tchenguiz ("RT") have applied for leave to intervene in the appeal and have filed written submissions and a bundle of exhibits in support of their application.

6. We grant leave to appeal but on limited grounds; and we also grant the joinder application. This judgment explains our reasons.

The general background

7. By virtue of Article 26(2) of the Trusts (Jersey) Law 1984, the trustees of a Jersey trust are entitled to be indemnified from the trust assets against expenses and liabilities incurred by them. Both I&B as former Trustees of the TDT and F&B as the present Trustees of the TDT have claims for such indemnity against the assets of the TDT.

8. In *Investec v Glenalla* [2018] UKPC 7, the Judicial Committee of the Privy Council ("JCPC") upheld the conclusion of this Court that certain BVI companies were entitled to a very substantial sum by way of damages ("the BVI Companies Judgment Debt") enforceable through I&B against the assets of the TDT. The value of the TDT's assets was less than the amount of the BVI Companies Judgment Debt. The BVI Companies accordingly applied to the Royal Court ("the Priorities/Proofs Application") to marshal the claims of creditors purporting to have a right to be indemnified from the TDT's assets. By order dated 15 October 2018, the Royal Court made various orders in that application, including for the lodgement of Proofs of Debt. Among the Proofs of Debt which have been lodged pursuant to that order are: (i) a Proof of Debt of I&B; (ii) various Proofs of Debt of F&B as Trustees of the TDT; (iii) various Proofs of Debt of F&B as Trustees of the TDAT; and (iv) a Proof of Debt of RT.

9. In March 2019 the liquidators of the BVI Companies assigned the BVI Companies Judgment Debt to F&B as Trustees of the TDT. This assignment was apparently taken as part of a global settlement of claims and cross-claims amongst a number of parties, including the BVI Companies, Kaupthing Bank HF, F&B both as Trustees of the TDT and as Trustees of the TDAT and RT. A hearing was listed in the Priorities/Proofs Application in October 2019 for argument on: (i) the effect of the assignment and, in particular, whether the assignment extinguished the BVI Companies Judgment Debt ("the Assignment Issue"); (ii) resolution of any objections to the Creditors' Proofs of Debt; and (iii) the order of priority of payment of the Creditors' Proofs of Debt. Following that hearing, in a decision handed down on 9 December 2019 ([2019] GRC 064), the Lieutenant Bailiff ruled:

    (a) that the correct principle for distribution of the trust assets in satisfaction of claims made by or through successive trustees was not *pari passu* but "first in time" according to the dates of appointment of the successive trustees ("the Priorities Determination"); and

    (b) that the effect of the assignment of the BVI Companies Judgment Debt to F&B as Trustees of the TDT was to extinguish the BVI Companies Judgment Debt ("the Assignment Determination").

    The Court adjourned all remaining Creditors' Proofs of Debt for further argument at a later date.

10. F&B appealed the Priorities Determination and the Assignment Determination to this Court which upheld both decisions in a judgment dated 21 August 2020, handed down on 16 September 2020 ([2020] GCA 043). The Priorities Determination has been appealed to the JCPC. The Assignment Determination has not. Accordingly, it is not now a matter of dispute that the effect of the assignment of the BVI Companies Judgment Debt to F&B as Trustees of the TDT was to extinguish the BVI Companies Judgment Debt. The appeal to the JCPC has been argued but judgment was not yet been handed down. The question of whether the Priorities Determination was correct accordingly remains live.

11. If the JCPC refuses the appeal, and upholds the Priorities Determination, I&B will be entitled to payment of the full amount of their Proof of Debt to the extent that it is determined to be correct. F&B and those claiming through F&B will be entitled to payment only to the extent that there are funds remaining after payment in full of I&B. On the other hand, if the JCPC sustains the appeal and determines that all claims on the assets of the TDT fall to be paid *pari passu*, the claims of F&B and those claiming through F&B will fall to be brought into account, and to the extent that they are well-founded, the value of I&B's indemnity will be reduced.

12. While the appeal to this Court from the Lieutenant Bailiff's decision of 9 December 2019 was pending, on 4 February 2020, F&B as Trustees of the TDT applied to the Royal Court for permission to amend their Proof of Debt ("the TDT Application"). The amended Proof of Debt included claims by RT and F&B as Trustees of the TDAT to one third each of the BVI Companies Judgment Debt ("the RT/TDAT Claims"). The amount of each of those claims was approximately £79,551,000. These claims were advanced on the basis of an argument that, as part of the global settlement mentioned above, RT and F&B as Trustees of the TDAT gave up claims against other parties and that as a result, the benefit of the BVI Companies Judgment Debt was or was to be treated as held beneficially, on a constructive or resulting trust, for RT, F&B as Trustees of the TDT and F&B as Trustees of the TDAT in equal shares.

13. On 30 April 2020 the Lieutenant Bailiff refused the TDT Application. In her judgment, given on that date ([2020] GRC 020) she gave three reasons. First, the position being advanced by F&B in the TDT Application was inconsistent with the case which had previously been advanced by them when arguing the Assignment Issue as to the effect of the relevant

documents. Second, the Lieutenant Bailiff could discern no reasonably arguable basis for the RT/TDAT Claims. Third, she was not prepared to admit the RT/TDAT Claims to proof simply because F&B, as Trustees of the TDT, were willing accept them.

14. In relation to the third point, the Lieutenant Bailiff made the following observation (paragraph 46):

> "… in the circumstances where the TDAT and RT are really part of the same group and under similar control, a simple ''mirror'' assertion by F&B with their TDT hat on, that they accept a liability to make payments to RT and to the TDAT on behalf of the TDT, would not be enough. … unless and until a properly arguable claim is formulated on behalf of the actual recipient parties then, in my judgment, it should not be allowed into the proofs in this matter at this stage, to muddy the waters and complicate things on such an insubstantial basis. F&B can pursue their own individual claims but in my judgment it should be left to [RT] and the TDAT Trustees, if they can, to make any claim individually on their own behalf and demonstrate its legal justification".

In light of that observation, RT and F&B as Trustees of the TDAT have, in the subsequent procedure, had separate representation from F&B as Trustees of the TDT.

15. The Lieutenant Bailiff also observed (paragraph 44) that inclusion of the RT/TDAT Claims would only matter if the Priorities Determination were to be reversed. She stated (paragraph 48):

> "… until the appeal is determined there is no point dealing with disputes about claims which will only have any material effect if the appeal succeeds. Adjudicating on challenges to the claims of I&B, and possibly those of GTC, all of which take a degree of priority over those of F&B and those claiming through them as matters stand, can be usefully progressed because they will need to be determined in any event, but disputes with regard to the validity or extent of claims made by or through F&B at present have no practical consequences – at least not directly. This will need to be taken into account in future directions."

16. On 23 July 2020, RT and F&B as Trustees of the TDAT applied for permission to join the proceedings in the Royal Court in order to pursue Proofs of Debt which advanced the RT/TDAT Claims ("the Royal Court Joinder Application"). They submitted evidence ("the Royal Court Evidence") in support of that application. On 24 July 2020, F&B as Trustees of TDT applied in the Court of Appeal to be allowed to rely on the Royal Court Evidence in support of their appeal against the Lieutenant Bailiff's decision of December 2019. On 29 July 2020, RT and F&B as Trustees of TDAT applied to join that appeal ("the Court of Appeal Joinder Application").

17. The Court of Appeal declined to admit the Royal Court Evidence as fresh evidence in the appeal and refused the Court of Appeal Joinder Application. In its judgment of 21 August 2020 ([2020] GCA 043), the Court explained (paragraphs 27 and 28) that there was no question or issue for resolution in the appeal between the proposed intervening parties and the existing parties to the appeal; and that it would be premature to circumvent the correct procedure by allowing them to intervene in the appeal to advance an application for relief which was yet to be dealt with by the Royal Court. The Court also set out its reasons for rejecting the application to admit fresh evidence. It took the view (paragraphs 39-40) that F&B had had sufficient opportunity to adjust their position to rely, in the alternative, on the alleged constructive or resulting trust argument, and had chosen, for tactical reasons, not to do so at an earlier stage. The Court confirmed (paragraph 42) that its decision did not preclude RT and F&B as Trustees of the TDAT from pursuing their arguments about constructive or resulting trust before the Royal Court albeit that the Court made clear that it was not giving any encouragement as to the wisdom of doing so.

18. The parties were at odds as to how the Royal Court Joinder Application should be dealt with. The applicants (ie RT and F&B as Trustees of TDAT) took the view that the Application should be adjourned *sine die*, on the basis essentially that the issue which they proposed to advance would be academic unless the JCPC overturned the Priorities Determination. I&B's position was that the application should be listed and determined without further delay. On 15 September 2020, I&B applied for an order that the Royal Court Joinder Application be listed for a hearing. On 17 September 2020, the applicants' lawyers wrote to the Greffe withdrawing the Royal Court Joinder Application and agreeing to pay costs on an indemnity basis. The letter stated that the applicants intended to support an appeal to the JCPC against the Court of Appeal's decision to dismiss the Court of Appeal Joinder Application.

19. In the event, that decision was not included in the appeal which F&B as Trustees of the TDT took to the JCPC. The skeleton argument filed in support of the application for permission to appeal to the JCPC contained an assertion that the RT/TDAT Claims were still to be resolved. This prompted I&B's lawyers to write in January 2021 alleging that RT and F&B as Trustees of the TDAT had "acted tactically by keeping a future claim up their sleeve while giving the impression that any such claim was being withdrawn". They stated that in the absence of an irrevocable undertaking not to raise these arguments in the future, I&B would apply to the Royal Court to seek a final resolution of the issue. The lawyers for F&B and RT declined to provide the proposed acknowledgment and maintained their position that the determination of the RT/TDAT Claims should be adjourned until after the determination of the appeal to the JCPC.

The immediate background

20. Meantime, the Royal Court continued the process of identifying the costs and charges to which I&B were entitled as a creditor (and, on the basis of the legal position determined by the Lieutenant Bailiff and this Court, the priority creditor), of the assets of the TDT. A hearing was listed for November 2021 to determine whether certain objections by F&B to I&B's claims should be struck out or should proceed to a substantive hearing. I&B applied for an interim payment of £12.755 m (subsequently reduced to £6.558m) to be made to them on account of their claim against the assets of the TDT, pending determination of the Creditors' Proofs of Debt; and that application fell to be addressed at the November 2021 hearing.

21. In their skeleton argument, I&B argued inter alia that, for the purposes of determining their application for an interim payment, the Court should have no regard to the RT/TDAT Claims. F&B opposed the application for an interim payment and argued that it would be appropriate to await the outcome of the appeal to the JCPC before making any orders for payment. In opposing the application, F&B argued inter alia: (i) that the proposed interim payment would be inconsistent with the Lieutenant Bailiff's previous recognition of the significance of the JCPC appeal; (ii) that it would involve disregarding the RT/TDAT Claims in circumstances where those Claims were not before the Court; and (iii) that it was highly unlikely that any overpayment would subsequently be recoverable from I&B, who had no assets and existed solely for the purposes of the Proofs/Priorities Application.

22. In paragraph 300 of her judgment of 4 January 2022, the Lieutenant Bailiff explains what happened during the hearing, on 18 November 2021, in the following terms:

> "I stated in the course of the hearing, that it seemed to me to be wrong that [RT] and F&B (with their TDAT trustee hat on) could simply block I&B's claim to an interim payment on the basis of a ''worst case'' minimum to which they really must be entitled even on a *pari passu* basis by asserting claims which I had already said appeared to be completely unarguable, without any attempt to show that their claims did, in fact, have some substance or merit. I had declined to direct them to do so in April 2020 because

at that time I&B's claim was insufficiently defined so as to provide any basis for an interim payment, but matters had now changed, and the assertion of the existence of the RT/TDAT claims without any attempt to justify them *was* having a practical impact. Even with the decision of the [JCPC] expected imminently … I did not think it right to allow this situation to continue. I therefore ordered F&B – who were parties to the hearing before me, even if they might choose to instruct other Advocates in relation to advancing the RT/TDAT claims together with [RT] – themselves, and to convey the same to [RT], that if they were indeed minded to pursue these claims at all, they must, within 7 days (of 18 November 2021 when I made that order) file such claim, together with a sufficient explanation of how the claim was composed, plainly with a view to my assessing whether it disclosed any reasonable claim or cause of action. As I stated above the issue had ceased to be a totally academic one, with the potential availability of a worthwhile interim payment to I&B having become appropriate."

23. On 25 November 2021, RT and F&B as Trustees of TDAT applied to the Royal Court: (i) to be joined as parties; and (ii) to be allowed to rely on their Proofs of Debt. They invited the Court to adjourn the application until after the conclusion of the JCPC appeal. The supporting affidavit recited the procedural history but did not explain the basis or composition of RT/TDAT Claims. On 9 December 2021, the advocate for I&B objected that this was in blatant defiance of the Lieutenant Bailiff's order and that she should accordingly disregard and disallow the RT/TDAT Claims as being unarguable.

24. On 16 December 2021, the advocate for RT and F&B, as Trustees of the TDAT, submitted a skeleton argument which, according to the Lieutenant Bailiff (paragraph 303), reiterated their grounds for seeking an adjournment "but also, highly belatedly … set out a basis for their argument that these claims had sufficient potential validity that they could not simply be dismissed as unarguable". Although none of the parties have shown us the skeleton argument, it would appear from the Lieutenant Bailiff's judgment that it relied not only on the constructive or resulting trust argument which had been advanced in 2020 but also on a new argument, relying on principles of unjust enrichment (paragraphs 313-315). By letter dated 17 December 2021, the advocate for I&B noted the skeleton argument and requested the Lieutenant Bailiff to determine the application for an interim payment without regard to the RT/TDAT Claims or to list a hearing for determination of the point as soon as possible.

25. The Lieutenant Bailiff did not list a hearing for determination of the point and proceeded, on 4 January 2022, to issue her judgment. It does not appear that she formally dealt with the joinder application made by RT and F&B as Trustees of the TDAT.

The Royal Court's decision

26. On 4 January 2022, the Lieutenant Bailiff awarded I&B an interim payment of £5 million to be paid out of the Preserved Sum. Her reasoning may be summarised as follows:

    (i) She could order an interim payment in respect of a sum which it appears sufficiently certain that "the claiming party is sufficiently certainly going to recover… so as to not to keep the party unreasonably out of his/her entitlement for any longer than necessary" (paragraph 305).

    (ii) Leaving aside the RT/TDAT Claims, she should proceed on the basis of the "very worst case" scenario advanced by I&B as indicating the order of a payment which I&B would undoubtedly recover even on a *pari passu* principle of distribution. Absent consideration of the RT/TDAT Claims, this approach would justify an interim award of £5 million (paragraph 306).

(iii) She should factor in the assumption that the JCPC appeal would succeed, and that the correct distribution regime would, contrary to the determination of this Court, be *pari passu* rather than first in time (paragraph 307).

(iv) The "main factor for consideration" was whether the Lieutenant Bailiff should treat the RT/TDAT Claims as "having sufficient possible merit that they could turn out to be valid and sustainable, so that is the case of a *pari passu* distribution, they would adversely affect the amount which I&B could claim to recover". I&B's advocate advised the Court that if the RT/TDAT Claims were factored into the "very worst case" scenario, that would reduce the potential recovery for I&B from £6.5 million to £833,739.07 – an amount not worth pursuing according to I&B's advocate (paragraph 308).

(v) The Lieutenant Bailiff concluded: "that I can and should disregard these claims on the grounds that they do not disclose the availability of any sufficiently reasonable claim or cause of action to justify according them any weight whatsoever at this stage" (paragraph 309).

(vi) In her judgment, the Lieutenant Bailiff explains that conclusion in some detail. She sets out the views which she had expressed in her judgment of 30 April 2020 (paragraph 310) and goes on to explain why, in her view, the explanation contained in the skeleton argument did not improve the position. At paragraphs 311 and 312 she gives further reasons for rejecting the "constructive or resulting trust" argument which she had rejected in April 2020. At paragraphs 313 to 315 she sets out, in some detail, the reasons why she rejected the argument based on principles of unjust enrichment.

(vii) For these reasons, she decided to award an interim payment of £5 million to I&B as "an appropriate figure to exercise due caution with regard to the payment, as against [I&B's advocate's] calculation of £6.5Mn odd, given the potential for adjustments that may still be required" (paragraph 316). She makes two further points, in the following terms:

> "317. . … First I have not gone so far as actually to strike out the claims intimated by [RT] and the trustees of the TDAT, because I do not need to do so; I have simply decided that in all the circumstances of the case, I consider it is sufficiently safe, as to doing justice rather than causing any real risk of injustice, to allow an interim payment of the amount I have stated, notwithstanding the present intimation of those alleged claims.
>
> 318. Second, I have also borne in mind the fact that in what I regard as the highly unlikely event that this interim payment did turn out to have been excessive, there are likely to be other points in the distribution of assets, or giving effect to costs orders, where this can be adjusted, and it is also the case that I could, if necessary, order any excess from an interim payment to be repaid. I do recognise that the facts of the matter suggest that I&B themselves are not likely to be of sufficiently sound finances to be able to make payments personally, but this litigation is clearly being supported by insurers, and any interim payment will therefore be being received by them in the full knowledge that it is, merely, interim and there is the outside possibility that something might have to be repaid."

The grounds of appeal

27. The grounds of appeal are expressed compendiously in the Notice of Appeal to the effect that the decision was "unjust for breach of natural justice principle and/or was irrational or unreasonable in a *Wednesbury* sense". The draft Grounds of Appeal indicate that the principal contentions which F&B propose to advance are as follows:

    (i) The Lieutenant Bailiff did not hear the claimants in the RT/TDAT Claims, nor give them any opportunity to be heard. The Court made a decision which would prejudice the effectiveness of the RT/TDAT Claims (by reducing the assets necessary to cover those Claims if successful) without giving the persons directly affected a fair opportunity to state their case and to know and answer the other side's case.

    (ii) It was internally inconsistent: (a) to proceed on the basis that F&B would succeed in the JCPC appeal without treating the RT/TDAT Claims as also likely to succeed; and (b) to proceed on the basis of an assumption that all other Proofs of Debt would require to be met in full whilst not applying the same approach to the RT/TDAT Claims.

    (iii) The Lieutenant Bailiff concluded that I&B's insurance cover would respond if a repayment was required without considering any evidence or argument as to whether this would in fact be the case.

28. F&B's written submissions filed in support of their application for leave articulates the essential arguments as being that the decision "was (i) *irrational* in so far as it was inconsistent with other findings within the Judgment and was inconsistent with other, earlier findings in the same Civil Action by the same Court, and (ii) was *contrary to established principles of natural justice* (and a breach of Article 6 of the Convention) in so far as the Decision was made in the absence of the persons who were/are primarily affected by the Decision and therefore without the Royal Court hearing full argument from all necessary and proper parties, which itself impacted on the rights and interests of the parties to the litigation".

The Royal Court's decision on leave

29. The Lieutenant Bailiff refused leave to appeal. It suffices to note that the principal ground upon which we propose to grant leave (namely, that it is open to argument that she did not give F&B and RT a fair opportunity to address the substance of the RT/TDAT Claims) appears, from the reasons which she gave, to have been advanced before her by reference to Article 6 of the European Convention on Human Rights. Before us, the point was advanced principally under reference to common law principles.

Written submissions

30. We have considered the written submissions filed on behalf of F&B in support of the application for leave to appeal, written submissions on behalf of I&B inviting us to refuse leave to appeal, and a further written response on behalf of F&B. We have also taken into account the submissions filed on behalf of F&B, as Trustees of the TDAT, and RT, in support of their application to intervene in the appeal. The submissions in respect of leave to appeal join issue on: (i) the test for leave; (ii) whether the appeal has real prospects of success; and (iii) whether a question of public importance arises. The submissions also join issue on the application to intervene in the appeal.

The test for leave to appeal

31. Article 15(1)(e) of the Court of Appeal (Guernsey) Law 1961 provides:

    "An appeal shall not lie to the Court of Appeal under this Part of this Law –

…
(e) without the leave of the presiding judge of the court whose decision is sought to be appealed from or of the Court of Appeal from any interlocutory order or interlocutory judgment, except in the following cases …" (none of which is relevant to the present application).

It is not a matter of dispute that the order for an interim payment is an interlocutory order or interlocutory judgment for the purposes of this provision.

32. The parties agree that the decision of Collas DB in *McNamara v. Gauson* 2009-10 GLR 387 sets out the test which this Court should apply when considering whether or not to grant leave. However, their written submissions disclose that they, in fact, disagree as to what the test entails. F&B contend that "if the prospects are more than merely fanciful, leave must be allowed". I&B, by contrast, argue, under reference to an observation of Sumption JA in *Ogier v. Grand Havre Holdings Ltd,* Court of Appeal, September 25th 2007, unreported (noted at 2007-08 GLR *N* [15]), that in order to justify granting leave "there must be substantial grounds for challenging the decision of the Lieutenant Bailiff". It is accordingly necessary for us to consider those two cases and to address the approach which we should take in deciding whether or not to grant leave.

33. In *Ogier v. Grand Havre Holdings Ltd,* Royal Court, 30th May 2006, unreported, Hancox LB ordered that the action be struck out for want of prosecution. In a subsequent judgment (27th April 2007, unreported) he held that his decision to strike out the action was interlocutory in nature and refused leave to appeal. He observed that the "principles which govern applications for leave to appeal in the United Kingdom … have been followed in Guernsey". He cited certain decisions of the Court of Appeal of England & Wales and a Practice Direction [1999] 1 WLR 1027 issued by the Master of the Rolls in that jurisdiction. When the application for leave was renewed before the Court of Appeal, Sumption JA, giving the judgment of the Court, did not explicitly address the approach which fell to be taken. He concluded that "there are no substantial grounds for challenging the Lieutenant Bailiff's conclusions in this case" and therefore refused leave.

34. In *McNamara,* the Deputy Bailiff (as he then was), Richard Collas, dismissed the plaintiff's application to restore his action which had become *périmée*. In his judgment, the Deputy Bailiff held that this decision was interlocutory in nature, such that an appeal required leave, and, having considered the approach which fell to be taken to the question, refused leave to appeal. He noted that the Practice Direction to which Hancox LB had referred in *Ogier* set out (in paragraph 2.8) a "general test for permission to appeal" in the following terms:

> "The general rule applied by the Court of Appeal, and thus the relevant basis for first instance courts deciding whether to grant permission, is that permission will be given unless an appeal would have no real prospect of success. A fanciful prospect is insufficient. Permission may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal. Examples are where a case raises questions of great public interest or questions of general policy, or where authority binding on the Court of Appeal may call for reconsideration."

35. The Deputy Bailiff took the view that, since the Court of Appeal in *Ogier* had not criticised the approach taken by Hancox LB, it had, by implication, agreed that the Practice Direction of 1999 was to be followed in Guernsey. He noted the different approach taken, at that time, by the Courts of Jersey, when considering leave under Article 13 of the Court of Appeal (Jersey) Law 1961 – to the effect that one of the following requirements should be met before leave would be granted: (i) there is a clear case of something having gone wrong; (ii) a question of general principle is decided for the first time; or (iii) there is an important question of law upon which

further argument and a decision of the Court of Appeal would be to the public advantage: *Glazebrook v. Housing Committee* [2002] JCA 217, [2000] JLR *N* [43]. However, for the reasons which he gave, the Deputy Bailiff preferred the decision of Hancox LB in *Ogier* and adopted the test which had been set out in the Practice Direction of 1999. He concluded that in the case before him no point of general principle arose and that the appeal had no real prospect of success, and accordingly refused leave.

36. Against that background, we now address the competing submissions about the approach which we should take when deciding whether or not to grant leave to appeal. The starting point is the statutory provision under which leave falls to be considered, namely Article 15(1)(e) of the 1961 Law. We note the following features of that provision. First, it is concerned with appeals against interlocutory decisions. These are various in nature, and include essentially procedural decisions as well as decisions, like those in *Ogier* and *McNamara*, which effectively bring the proceedings to an end. The approach to leave must be capable of responding appropriately to the full range of interlocutory decisions. Second, except in relation to the listed categories of case, an appeal does not lie to this Court in respect of an interlocutory decision unless leave is granted. The starting point is, accordingly, a prohibition against appeals against interlocutory decisions unless there is a positive reason to allow an appeal. Third, the statute itself does not confine or limit the considerations which may be relevant to the grant of leave. It is open to the Court to articulate the principles upon which applications for leave should be addressed, provided that it respects those features of the statutory provision. Indeed, it is appropriate that we should articulate those principles, with a view to promoting a consistent approach.

37. We agree with the Deputy Bailiff in *McNamara* that paragraph 2.8 of the Practice Direction of 1999 (which we have quoted above) identifies considerations which are relevant to the question of whether or not leave should be granted. But it would be wrong in principle to treat the terms of that paragraph as if it was a statutory provision, or to read the paragraph in isolation from its context. There are two features of the context which seem to us to be of some significance. First, the "general test for permission" articulated in paragraph 2.8 of the Practice Direction of 1999 was formulated for a judicial system in which (by contrast with the position in Guernsey) leave was required for almost all appeals, whether against interlocutory or final orders (see paragraph 2.1.2 of the Practice Direction). Second, the Practice Direction recognised that additional considerations arise in the case of appeals against interlocutory orders (defined for the purposes of the Practice Direction as orders which do not entirely determine the proceedings). Paragraph 2.12 of the Practice Direction is in the following terms:

> "2.12. Appeals from interlocutory orders
> 2.12.1. An interlocutory order is an order which does not entirely determine the proceedings. Where the application is for permission to appeal from an interlocutory order, additional considerations arise: (a) the point may not be of sufficient significance to justify the costs of an appeal; (b) the procedural consequences of an appeal (e.g. loss of the trial date) may outweigh the significance of the interlocutory issue; (c) it may be more convenient to determine the point at or after the trial.
> 2.12.2. In all cases under (a) permission to appeal should be refused. In the case of (b) and (c) it will be necessary to consider whether to refuse permission or adjourn the application until after trial so as to preserve the appellant's right to appeal."

38. The considerations referred to in paragraph 2.12 of the Practice Direction of 1999 were not, of course, relevant in *Ogier* or in *McNamara*, each of which concerned a decision which, though "interlocutory" in the sense discussed in those cases, had the practical effect of determining the proceedings. It is therefore not surprising that paragraph 2.12 was not mentioned in the judgments in either case. Nevertheless, it seems to us that paragraph 2.12 sets out factors which, in appropriate circumstances, may be equally relevant to the question of leave to appeal interlocutory orders in this jurisdiction. We note, for example, that in *Barter v. Jackson* [2020] GRC 036, Sir Richard Collas LB refused leave to appeal a decision dismissing certain

exceptions de fond, even though a point of law of public importance arose, on the basis that the true facts of the case should be determined before the case was considered on appeal.

39. Against that background, we reject the contention, advanced on behalf of F&B, that "if the prospects are more than merely fanciful, leave must be allowed". It is true that paragraph 2.8 of the Practice Direction of 1999 states that: "permission will be given unless an appeal would have no real prospect of success. A fanciful prospect is insufficient." But, as we have explained, this paragraph should not be treated as if it were an exhaustive statement of the test in a statutory provision. To approach leave in the manner proposed by F&B would be to impose a fetter on the exercise of the statutory power under which leave falls to be granted which has no warrant in the terms of Article 15(1)(e). Further, to approach the question of leave in the manner proposed by F&B could result, in the case of certain types of interlocutory decisions, in leave being granted inappropriately.

40. The correct approach, in our view, is that this Court should not grant leave unless it is at least satisfied either: (i) that the appeal has a real prospect of success; or (ii) that, even though the case has no real prospect of success, there is an issue which, in the public interest, should be examined by the Court of Appeal. Cases in the second category – which will be exceptional - may arise, in particular, where a question of general principle falls to be decided for the first time, or where there is an important question of law upon which further argument and a decision of the Court of Appeal would be to the public advantage. The language which we have used allows for the possibility that a case might conceivably, on other grounds, raise "questions of great public interest" (to use the broad language of the Practice Direction of 1999), and would, it seems to us, be consistent with the absence of any express statutory constraint or limit on the power to grant leave. Further, for the reasons we have explained above, even if one of the two conditions which we have identified is met, other factors may, depending on the circumstances of the particular case, justify refusing leave.

41. This approach respects the features of Article 15(1)(e) to which we have referred. Reflecting the structure of that Article, it places the onus of persuasion on the applicant to satisfy the Court as a minimum either that the proposed appeal has a real prospect of success or that there is, nevertheless, an issue which in the public interest should be examined by the Court of Appeal. These requirements recognise that an appeal would not be consistent with the proper use of judicial time unless, at least, one of these conditions is met. At the same time, the formulation leaves open the possibility – consistent with the absence of any express statutory limitation on the considerations which may be taken into account when deciding whether or not to grant leave - that, even if one or other of these conditions is satisfied, there may be other relevant factors (such as those referred to in paragraph 2.12 of the Practice Direction of 1999) which, in particular circumstances, may justify refusing leave.

42. We do not consider that there is anything in Sumption JA's judgment in *Ogier* which is inconsistent with the approach which we have outlined. That judgment does not discuss the principles upon which applications for leave should be granted. All that can be taken from the decision in *Ogier* is that the Court concluded that there were no substantial grounds for challenging the Lieutenant Bailiff's substantive decision in that case. In those circumstances, the appeal clearly had no real prospects of success, there was no other basis for granting permission to appeal and leave fell to be refused.

43. We note that the approach which is now taken by the Jersey Courts to Article 13(1)(e) of the Court of Appeal (Jersey) Law 1961 (a provision which is in identical terms to Article 15(1)(e) of the Court of Appeal (Guernsey) Law 1961) has evolved since the decision of the Deputy Bailiff in *McNamara*. In *Crociani v. Crociani* [2014] (1) JLR 426, Beloff JA, giving the judgment of the Court of Appeal of Jersey, identified the discrepancy between the test which that Court had set out in *Glazebrook v Housing Committee* and the judgment of the Deputy Bailiff in *McNamara.* He stated (paragraph 51):

> "… the time has come to align the tests in each Bailiwick, there being no cultural or other reasons to distinguish them, and I propose … that henceforth the Royal Court and the Court of Appeal in this jurisdiction [ie Jersey] should apply the criterion, in lieu of (i)(a) [ie that there is a clear case of something having gone wrong] that the appeal "has a real prospect of success" when considering whether or not to grant permission under the Court of Appeal (Jersey) Law 1961 Article 13(1)(e)."

It is accordingly now well-settled that in order to obtain permission to appeal to the Court of Appeal of Jersey under Article 13(1)(e) of the Court of Appeal (Jersey) Law 1961 the appellant must show: (i) that the appeal has a real prospect of success; (ii) that a question of general principle falls to be decided for the first time; or (iii) that there is an important question of law upon which further argument and a decision of the Court of Appeal would be to the public advantage. It will be for the Court of Appeal of Jersey to consider whether it agrees with the caveat which we have expressed as to whether heads (ii) and (iii) of this test are necessarily exhaustive of circumstances in which the public interest might justify leave being granted.

Real prospects of success

44. The parties appear to be in agreement that the Lieutenant Bailiff's decision to order an interim payment was a discretionary decision made under Article 69 of the Trusts (Guernsey) Law. Neither has suggested that Rule of Court 62A of the Royal Court Civil Rules 2007, which makes express provision for interim payments, would apply to the present circumstances. Ordinarily, an appeal against a discretionary decision must show: (i) that the Royal Court has misdirected itself as to the appropriate principles; (ii) that the Royal Court has taken into account irrelevant matters or failed to take into account relevant matters; or (iii) that the decision was plainly wrong. However, as a matter of principle, it seems to us that a challenge may also relevantly be advanced to any decision, whether discretionary or not, on the basis of procedural unfairness (although, as we explain below, it may be a matter for argument whether success on such a ground necessarily results in the decision being set aside).

45. As we have explained above, the Lieutenant Bailiff identified as the "main factor for consideration" whether, in all the circumstances, she should treat the intimated RT/TDAT claims as having sufficient possible merit that they could turn out to be valid and sustainable, so that in the case of a *pari passu* distribution, they would adversely affect the amount which I&B could claim to recover" (paragraph 308). In deciding, for the purposes of considering the interim payment application, to discount the RT/TDAT Claims, the Lieutenant Bailiff did not rely on the procedural history in relation to those claims, which we have outlined above. Rather, she addressed squarely the substance of the arguments which had been advanced in the skeleton argument filed on behalf of RT and F&B, as Trustees of the TDAT, and reached "the conclusion that I can and should disregard these claims on the grounds that they do not disclose the availability of any sufficiently reasonable claim or cause of action to justify according them any weight whatsoever at this stage" (paragraph 309 of her judgment).

46. We do not consider that there is any merit in the arguments that there were internal or intrinsic inconsistencies in the Lieutenant Bailiff's approach. The question before her was whether or not she should order an interim payment and, if so, in what amount. She was entitled to proceed on the cautious assumption, for that purpose, that F&B would succeed in the JCPC appeal. There is nothing intrinsically inconsistent in, nevertheless, deciding to address the substantive merits of particular claims. She was also, in our view, entitled to proceed on the cautious assumption that all other claims would require to be met in full, but nevertheless, in light both of what she already knew of the RT/TDAT Claims and of their significance in the context of the decision which was before her, to decide that she should address whether or not those claims had sufficient merit to justify her taking them into account (and, if so, how) when fixing the amount of the proposed interim payment.

47. The essential issue which is raised by the Grounds of Appeal, in our view, is whether, having decided that she should address the merits of the RT/TDAT Claims, she dealt fairly with those claims. In that regard, it is, in our view, factually incorrect to assert that the Lieutenant Bailiff did not "hear" RT and F&B, as Trustees of the TDAT. She specifically gave them an opportunity to satisfy her as to the merits of the RT/TDAT Claims. She allowed them to file a skeleton argument (albeit belatedly and following an apparent failure to comply with her order of 18 November 2021) and she considered the terms of that skeleton argument. On one view, in receiving and considering the skeleton argument, she granted them exceptional indulgence. However, she then reached conclusions (and gave effect to those conclusions by disregarding the RT/TDAT Claims when assessing the quantum of the proposed interim payment) about the merits of the arguments advanced in support of the RT/TDAT Claims on the basis of objections which she had herself identified and without hearing any further submissions and, in particular, without inviting any comment or submission from F&B (whether as Trustees of the TDT or as Trustees of the TDAT) or from RT on those objections.

48. It suffices for present purposes that we consider it to be open to argument that before reaching the conclusions which she did as to the merits of the RT/TDAT Claims, the Lieutenant Bailiff should have given F&B and RT an opportunity to address the objections which she had identified to the grounds articulated in the skeleton argument. Whilst it may be said that F&B and RT already had the benefit of her preliminary views on the resulting and constructive trust arguments, expressed in her judgment of 30 April 2020, the skeleton argument appears to have included a new argument, founding on principles of unjust enrichment, which had not previously been canvassed before her and which she dealt with without giving the parties an opportunity to address the objections which she had identified.

49. We further consider it to be open to argument that the Lieutenant Bailiff erred in proceeding - as she appears to have done at paragraph 318 of her judgment - on the basis that I&B's insurers would respond should the interim payment prove to be an overpayment. If the criticisms of her views on that issue were to be well-founded it would follow that the decision, though an interim decision, could have the effect – if the JCPC reverses the Priorities Determination, and the RT/TDAT Claims turn out to have substantive merit – of irreversibly prejudicing those claims.

50. As a matter of impression, it seems to us that, at least if taken together, these two arguments have real prospects of success. On the face of it, they have sufficient substance to justify allowing them to be ventilated on appeal. It is not appropriate for us to seek to reach a more concluded view, and whether the arguments are correct or not, of course, remains to be seen. For these reasons, it seems to us that we should grant leave to appeal with a view to allowing argument: (i) that the Lieutenant Bailiff did not have a proper basis for taking the view that I&B's insurers would respond in the event that the interim payment was an overpayment; and (ii) that in reaching the decision, she did not give F&B and RT a fair opportunity to address the substantive merits of their claims and the objections raised by the court in opposition to them.

51. The argument as to fairness is advanced both at common law and by reference to Article 6 of the European Convention on Human Rights. Whilst we are inclined to doubt whether the reference to Article 6 will add anything to the common law, we grant leave for the argument to be advanced on either or both bases. In doing so, we do not prejudge one way or the other any argument which may be advanced that it is not open to F&B, as Trustees of the TDT, to rely on Article 6 on the basis that they are not, in that capacity, victims of any breach of their Convention rights.

52. The Grounds of Appeal do not challenge the Lieutenant Bailiff's assessment of the merits of the RT/TDAT Claims; although the written submissions engage, at least to some extent, with the merits of those claims. We should not be taken to prejudge any argument which may be advanced to the effect that any procedural unfairness has had no substantive effect, or that we

should (in the absence of a Ground of Appeal criticising the Lieutenant Bailiff's assessment of the merits) proceed on that basis.

Issue which, in the public interest, should be examined by the Court of Appeal

53. F&B contend that the draft Grounds of Appeal raise a question of public importance – namely, the breadth of Article 6 of the European Convention of Human Rights and the question of who has standing to advance an appeal based on Article 6. We have granted leave, and indeed the joinder application, in terms which will allow arguments to be advanced by reference to Article 6, but without prejudging any question of standing or competency which may arise. Had we not considered the arguments which we have mentioned above to have real prospects of success, we would not have considered that any issue arises which, in the public interest, should nevertheless be examined by this Court.

The joinder application

54. As this Court recognised in paragraph 12 of its judgment in *Investec Trust (Guernsey) Limited v. Glenalla Properties Limited* (Judgment 39/2014, 11 September 2014), section 14 of the Court of Appeal (Guernsey) Law 1961 confers on this Court all the powers of the Royal Court, including the power contained in rule 37(1)(b) of the Royal Court Civil Rules 2007 on joinder of parties. Rule 37(1)(b) empowers the Court to order inter alia that any person "between whom and any party to the proceedings there exists a question or issue arising out of or relating to or connected with any relief or remedy claimed in the proceedings which, in the opinion of the Court, it would be just and convenient to determine as between him and that party as well as between the parties to the proceedings, shall be added as a party".

55. This Court has, accordingly, identified three matters which require to be established if a person is to be added as a party under this head: there must be a question or issue between that person and a party to the action; the question or issue must arise out of or relate to or be connected with any relief or remedy claimed in the proceedings; and it must be just and convenient to determine the issue as between that person and the party as well as between the parties to the proceedings. Even if these requirements are satisfied, the Court retains an over-riding discretion whether or not to order that the person be added as a party to the appeal.

56. Having granted leave to appeal, we are satisfied that we should grant the joinder application. Ordinarily, no doubt, it would be for the trustee through whom a claim on the trust fund is being advanced to articulate the claim. However, in this case, the Lieutenant Bailiff has previously (in her judgment of 30 April 2020) expressed the view that if the RT/TDAT Claims are to be pursued, they should be articulated by RT and F&B as Trustees of the TDAT. That was the context for her decision on 18 November 2021 to order them to set out the basis for their claims if they wished to pursue them. The principal issue in the appeal will be whether she should have given them an opportunity to address the objections which she had identified to the arguments upon which they founded before making her decision to award an interim payment of £5 million. Insofar as that argument is articulated at common law, it is, on the face of it, those parties who have an arguable claim to have been treated unfairly to their prejudice. Insofar as the argument is framed by reference to Article 6, it is those parties who, on the face of it, have an arguable claim to be victims of a breach of their rights. It seems to us that, in the particular circumstances of this case, the Proposed Intervening Parties are, accordingly, proper parties to be advancing those arguments.

57. Looking to the statutory test:

    (i) The essential complaint of the Proposed Intervening Parties is that the Lieutenant Bailiff has made an order in favour of I&B which has (they say) unfairly prejudiced their claims. It accordingly seems to us that, as a matter of substance, a question or

issue arises between the Proposed Intervening Parties and I&B. Although in another context, the competition between those claiming against trust assets through successive trustees would properly and sufficiently be articulated by the trustees themselves (although RT may have issues of his own), in the particular context of this case - and the way that the Lieutenant Bailiff has approached the RT/TDAT Claims - it is appropriate to allow the Proposed Intervening Parties to intervene in this appeal.

(ii) The question or issue relates to a relief or remedy claimed in the proceedings. I&B claimed an interim payment. The question or issue which the Proposed Intervening Parties wish to raise is whether the Lieutenant Bailiff has, in making her decision on that claim, treated them unfairly to their prejudice.

(iii) Although F&B, as Trustees of the TDT, have articulated that alleged unfairness as a Ground of Appeal, it is in this case the Proposed Intervening Parties who, on the face of it, have the primary interest to advance those arguments. It is accordingly just and convenient to determine the issue as between the Proposed Intervening Parties and the parties to the appeal. For the same reason, we consider that it would be appropriate, in the exercise of our discretion, to allow the Proposed Intervening Parties to be joined as parties to the appeal.

58. We recognise that F&B, as Trustees of the TDT, are already party to these proceedings. We do not prejudge one way or the other any argument which may be advanced in the appeal under reference to the fact that F&B were at all times party to the proceedings before the Lieutenant Bailiff. Nor, in granting permission to appeal under reference to Article 6 of the European Convention on Human Rights, and in granting the application for joinder, do we prejudge one way or the other any argument which may be advanced, by reference to Article 9(1) of the Human Rights (Bailiwick of Guernsey Law) 2000, to the effect that it is not open to the Proposed Intervening Parties to rely on Article 6 in these proceedings.