

Privacy application and an appeal against the decision of McMahon B dated 19 April 2024, not to recuse himself in relation to any further role in the existing proceedings between the parties.

[2024]GCA064

**IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY
(CIVIL DIVISION)**

**ON APPEAL FROM THE ROYAL COURT OF GUERNSEY
SITTING AS AN ORDINARY COURT**

CoA Case No: 583

20 September 2024

Before: **David Perry KC, JA**
Paul Matthews, JA
Sir Adrian Fulford, PC, JA

**IN THE MATTER OF THE TRUSTS (GUERNSEY) LAW, 2007 (AS AMENDED) AND
PURSUANT TO THE ROYAL COURT CIVIL RULES, 2007**

Between:

(1) MIREILLE RAYMOND SALEM **Plaintiffs /**
Respondents

(2) MOUSSA RAYMOND SALEM

- and -

(1) SEQUENT (C.I.) LIMITED **Defendants /**
(Formerly Rothschild Switzerland (CI) Trustees Limited) **Appellants**

(2) GUERNSEY GLOBAL TRUST LIMITED

(3) SEQUENT (GUERNSEY) LIMITED
(Formerly Rothschild Trust Guernsey Limited)

(4) SEQUENT SERVICES LIMITED
(Formerly Rothschild Trust Financial Services Limited)

JUDGMENT

MATTHEWS JA:

Introduction

1. This is the judgment of the Court, on an appeal against the decision of McMahon B dated 19 April 2024, on an application dated 10 November 2023, not to recuse himself in relation to any

further role in the existing proceedings between the parties. The underlying Cause by the respondent plaintiffs (Salem and Salem) against the appellant defendants (Sequent (C.I.) Limited and others) was issued in April 2022. It is one for breach of trust. The defendants are trustees of certain trusts, and the plaintiffs are beneficiaries of those trusts. We will refer to the parties as the defendants and plaintiffs in this judgment, albeit that they are the appellants and respondents to this appeal.

Privacy application

2. By an application dated 11 September 2024, which we heard on 16 September 2024 (the day before the main hearing), the defendants applied for orders (inter alia) that:

“The Court makes a declaration as to whether, and if so to what extent:

- a. The Appeal shall be heard in private;
- b. The Court's file in respect of the Appeal shall be sealed; and/or
- c. Any written judgment issued in respect of the Privacy Application and/or the Appeal be redacted or anonymised. “

3. In *Alpha Development Limited v Barclays Wealth Trustees (Guernsey) Limited*, Judgment 11/2015, after reviewing authorities from Guernsey, England and the Isle of Man, McMahon DB said:

“22. ... (a) There is a general presumption that all aspects of a case are to be held in public.

(b) In exceptional circumstances, that presumption can be rebutted where it can be demonstrated that justice would be frustrated otherwise.

(c) The test to apply is one of strict necessity.

(d) The burden of establishing that the test applies lies on the applicant.

(e) The Court expects the applicant to adduce clear and cogent evidence in support of such an application.

(f) If that test applies, derogating from the general presumption follows as a matter of principle. Equally, if the test does not apply, the Application must be refused. There is no question of exercising a discretion.

(g) Any limitations on the ordinary rule of open justice granted by the Court will, therefore, be the minimum required to preserve the confidentiality of the information involved so as to secure the proper administration of justice.”

4. In *Re K Trust* [2020]GCA090 the single judge of this court (McMahon B) considered that it was appropriate to grant to the trustee of the K Trust “a full privacy order in respect of the appeal” brought by a beneficiary of the trust (Beneficiary A) against the decision of the Royal Court in relation to the construction of a trust instrument. The proceedings at first instance had been heard in private, and the resulting judgment anonymised. The trustee said that, if there were no privacy order granted, any observer of the appeal proceedings, taking into account the anonymised judgment of the Royal Court, and also another trust judgment from 2014 in which

beneficiaries of the K Trust were also involved, “would be able to join the dots ... and so be able to identify the parties and other details.”

5. The trustee’s application was supported by another beneficiary (Beneficiary B), who had now attained the age of majority, and by the Advocate appointed to represent the interests of minor, unborn and unascertained beneficiaries. Beneficiary A did not oppose the making of the order, but questioned whether a privacy order could be made. However, if the trustee were to apply at the cost of the trust, then Beneficiary A would prefer that it were granted.
6. The judge held that a privacy order should be made for the appeal. In reaching this conclusion, the judge relied on (i) the fact that most administrative trust applications could properly be held in private, (ii) the likelihood of needing to refer during the hearing to family circumstances that would otherwise be private, and (iii) his opinion that publicity would be damaging to those concerned. It is to be noted that the appeal concerned the construction of the trust instrument, with reference to the personal circumstances of the beneficiaries: see the (anonymised) substantive judgment on the appeal at 2020 GLR 312.

7. McMahon B concluded:

“7. ... It would defeat the terms of the privacy order made in the Royal Court if this Court were to conclude that the appellate hearing must be conducted in public, unless there were a material change of circumstances. I am not persuaded that one beneficiary attaining the age of majority constitutes such a material change of circumstances, where the other reasons for having made a privacy order continue.”

8. It is thus clear that this Court can and should re-evaluate the case for a privacy order on any appeal. Such an order is not to be made as a matter of course merely because one was made at first instance. The circumstances in which an appeal is made are not the same as those in which the order was made in the Court below. The matters in contention may be narrower, and the need to discuss private matters less. In our judgment, the application before this court is a fresh application, and must be judged accordingly.
9. All the proceedings so far between the parties, including the earlier administrative (or “blessing”) proceedings referred to below, and the application before the Bailiff whose decision is being appealed, were held subject to certain privacy restrictions (although in the breach of trust claim these restrictions are not open-ended, but must be reviewed at a certain point). In effect the defendant trustees were seeking the continuation of those restrictions on this appeal. They said that materials from the administrative proceedings that are relied upon in the main claim include confidential information relating to Guernsey law trusts, the beneficiaries of those trusts (who include minors) and potentially sensitive commercial and financial matters. They said that the recusal application drew upon and referenced matters arising in the administrative proceedings.
10. Consequently, they said that lifting privacy restrictions in relation to this appeal *could* have an impact upon the efficacy of the privacy restrictions imposed in relation to the breach of trust claim and/or the earlier administrative proceedings described below and *could*, in turn, be to the detriment of the beneficiaries of the trusts. The plaintiffs, who are beneficiaries (but not all the beneficiaries) of the trusts, were neutral on this question.
11. We considered that the scope of this appeal was more limited than the original application before the Bailiff. And that application was in turn far narrower in scope than the breach of trust

claim. As is well known, privacy in trust cases is not for the benefit of the trustees but the beneficiaries. But the plaintiffs were neutral. Although there were other beneficiaries, they were unlikely to be identified on this appeal. The identity, situs and value of the trust assets were all irrelevant to the appeal. Accordingly, we saw no “necessity” to depart from public justice in this case, and decided to make no order at that stage.

12. However, we also made clear that that decision did not affect the efficacy of the existing Royal Court privacy order, and neither did it prevent any application during the appeal hearing for the Court to sit in camera if need be. (In fact, none was made.) In addition, this judgment was provided to the parties in draft before it was made public, so that they might consider whether any application should be made for redaction or anonymisation.

Background

13. The background to this appeal can be shortly stated. On 7 October 2019, the defendant trustees took a decision in relation to proposed appointments to be made out of the trusts in question. They then issued proceedings seeking the Royal Court’s “blessing” of that decision under the well-known *Public Trustee v Cooper* jurisdiction. The various hearings involved in those proceedings took place before McMahon B in 2020 (in part under Coronavirus procedures), but judgment was not handed down until 12 April 2021, when the Bailiff refused to “bless” the decision.
14. In his judgment in the “blessing” proceedings, the Bailiff made a number of findings in relation to the conduct of the defendants and the administration of the trusts. In May 2021, the defendants appealed against the “blessing” judgment. For the purposes of the appeal the defendants applied for and obtained *Beddoe* relief in relation to the costs of the appeal. The appeals were due to be heard in October 2021. In August 2021 the protector of one of the trusts announced a decision to remove two of the trustees of that trust and appoint a new trustee in their place.
15. The plaintiffs invited the defendants to withdraw their appeals. When this did not happen, they sought the summary dismissal of the appeals on the basis that they had been rendered academic. Written submissions were made by the parties. This Court directed that the appeals should not proceed as listed, but that short submissions should be made as to whether the appeals should be dismissed or should be stayed pending the appointment of a new trustee. On 19 October 2021, this Court gave written reasons for that direction, as well as for its decision, after considering the parties’ submissions, to *stay* rather than dismiss the appeals.
16. The defendants now say that the Bailiff in dealing with the “blessing” application made findings on matters which are in issue in the breach of trust proceedings that have now been brought, and

“that any fair-minded and informed observer would conclude that there was a real possibility that, should the Bailiff continue to sit in the Breach of Trust Proceedings, that tribunal would be biased on the grounds of pre-determination of matters in issue by reason of the Bailiff’s express factual findings in the Administration Proceedings”.

Accordingly, they seek his recusal from these proceedings for the future.

17. It is however a curious feature of this appeal that the defendants make no attempt, either in the notices of appeal or in their written case, to set out the detailed findings of the court in the “blessing” application that they consider disqualify the Bailiff from sitting in the breach of trust

proceedings in future. Nor in fact does the judgment of the Bailiff on the recusal application set out such findings, beyond a short reference to a lack of knowledge about a part of the trusts' business interests (at [60]) and a short reference to decisions being vitiated by conflicts of interest (at [75]). (These references are set out verbatim in the extract from a skeleton argument in the recusal application reproduced in the next following paragraph.)

18. To judge from their skeleton arguments filed in the recusal application, the defendants appear to be complaining about what they call certain "Determinations" in the "blessing" judgment which were then the subject of the (currently stayed) appeal to this Court. In their second skeleton argument, of 2 April 2024, the defendants say this:

"23. The Plaintiffs offer bare denials as to the direct connections between the (appealed) Determinations and the allegations advanced in the Breach of Trust Proceedings. The Defendants have however illustrated the clear thematic continuity of the allegations advanced in relation to the [Foreign Business] and Conflict of Interest across the Blessing Judgment, the Appeals, the Draft Cause and the Final Cause. These inescapable interconnections are summarised by the following nonexhaustive examples:

‘[Foreign Business]

- (a) In the Blessing Judgment, the Bailiff stated as follows:

(i) *"Throughout these proceedings, one of the oddities has been that the Trustees do not appear to have known very much about the [Foreign Business] and, in particular, what it comprises and how much it is worth. That absence of understanding has led them to rely heavily on the analysis of FTI Consulting";* and

(ii) *"I have already commented on the impression I have formed throughout these proceedings of the absence of real oversight by the Trustees of the [Foreign Business]";*

- (b) In the Appeals, the Defendants (and [another beneficiary]) directly challenge the Bailiff's findings on the basis that he was wrong to:

(i) Criticise *"the Trustees for not knowing "very much about the [Foreign Business], and in particular, what it comprises and how much it is worth";* and

(ii) Criticise the Defendants' attempts to value the R Branch's minority interest in the [Foreign Business] and their reliance upon independent professional advice in relation to the same;

- (c) Yet, in the Cause of Action, the Plaintiffs allege that *"The Trustees... failed to have or failed to maintain an adequate understanding of what interests in the [Foreign Business] were vested in them as trustees... [and]... failed to gain or failed to maintain an adequate understanding of how the [Foreign Business] was controlled and operated and, in particular, how profits from the [Foreign Business] were made and flowed up to (or were intended to flow up to) the R Trusts".*

Conflicts of Interest

- (a) In the Blessing Judgment, the Bailiff stated as follows:

(i) *"In relation to the approach to the [Foreign Business], I do not think that the Trustees have been much assisted by the [Law Firm] Note. In particular, the relevant section of that Note does not appear to invite the Trustees to consider whether this is an area where they might need to give serious thought to the possibility that there exists a conflict that goes beyond what was capable of being managed... [I]t really does beg the question as to whether they were reaching decisions in the beneficiaries' exclusive interest or whether they might be regarded as prioritising their own interests over the beneficiaries' interests. This is also referred to as taking a decision for a collateral purpose. I am persuaded that the Trustees' decisions on the [Foreign Business] are vitiated by the conflicts of interest arising from the group of companies position as trustees also for the [other branches of the family]. There necessarily has been too much reliance on information from those sources with no effective oversight. An informed observer would regard the perception of conflict as obviously existing..."*

(b) In the Appeals, the Bailiff's finding is directly challenged by the Defendants and [another beneficiary] as follows:

(i) *"The Appellants challenge the Bailiff's criticism of the Trustees (at [75])... In analysing what the conflict was, the Bailiff is said to have been wrong "in failing to grapple with two fundamental issues:*

First, what competing duties or interests the Trustees had to those they were required to exercise as trustees of the R Trusts which might have vitiated the Decisions actually taken.

Second, why the steps taken by the Trustees to manage any potential conflict were inadequate so as to vitiate the decision. The mere presence of a conflict is not enough"; and

"... any conflict is authorised because the Trustees are trustees of a trust for all branches of the family. There is no breach of fiduciary duty "where the trustee does not place himself in a position of conflict of interest and duty, but is placed in that position by the settlor or the terms of the trust" (Lewin at [46-041]241). The Trustees have not, in being appointed as a trustee for a trust with three branches of beneficiaries whose interests may not align, 'placed themselves' in a position of conflict between their fiduciary duties as trustee of those trusts and any other duty or interest...Further and in any event, the decisions reached were eminently reasonable ones taken without reference to the [other branches of the family's] interests and so any conflict did not vitiate the Decisions. 241 Boardman v Phipps [1967] 2 A.C. 46, 146";

(c) Yet, in the Cause of Action the Plaintiffs allege that:

(ii) *"This unmanageable (or unmanaged) conflict of duties has led directly to the Trustees' inaction or inability to investigate effectively matters that had been brought to their attention by the Plaintiffs. The Trustees instead consistently preferred to rely upon self-serving and misleading information regarding the business and its profits provided*

to them by those who have been allowed to run the business since 2013, with no proper oversight from the Trustees"; and

(iii) "... the Trustees' breaches of duty... were caused or contributed to by the conflict of duties or of interest to which the Trustees were subject at all material times, given Sequent's role (and the Trustees' own role) in respect of the R Trusts and the F Trusts and the B Trusts..."

19. A table exhibited to the affidavit of Karen Farman dated 9 November 2023 sets out further examples (which are stated to be non-exhaustive). The *Cause* in the breach of trust claim then alleges that in breach of trust the defendants failed to have and maintain an adequate understanding of the trusts' foreign business interests (at [67]), and that these breaches of trust were caused or contributed to by the conflicts of interest referred to (at [70]). We have to say that this is an unsatisfactory way of proceeding. But we have done the best we can with the materials before us in the way that they are arranged.

The hearing bundle

20. We wish to make one comment about the hearing bundle. This is that it was not paginated throughout, although of course on computer media a search could be made for a particular page. The Advocates were able to refer us to tabs but not in all cases to page numbers. It would be helpful in future if Advocates were able to produce bundles paginated throughout, so that they are able to give the Court page references during the hearing.

The law on recusal

21. The law on recusal of a judge for bias in this jurisdiction is clear. We can refer briefly to three Guernsey decisions.
22. The first is *X Ltd v The Guernsey Financial Services Commission*, Jmt 3/2017. The respondent appointed a very senior UK lawyer (Queen's Counsel) with judicial experience to act as a senior decision maker ("SDM") in relation to allegations of breaches of regulations. After considering the materials available, the SDM issued the applicants with a notice of proposal to impose sanctions (a "Minded To" letter). This invited further evidence and representations. The applicants complained that the SDM by issuing the notice displayed apparent bias, and asked him to recuse himself. The applicants then sought judicial review of the notice and of the SDM's refusal to recuse himself.
23. The court refused leave on the papers to bring judicial review proceedings, saying that the application was premature as there had been no final decision. The applicants renewed their application at an oral hearing. Their submission was that "A fair-minded observer would consider that there is a real possibility that the SDM has pre-determined this case." They relied on the decision of the House of Lords in *Porter v Magill* [2002] 2 AC 357. The respondent contended that the SDM had merely reached a provisional view, disclosed to the applicants as required by the legislation. This required the SDM to set out the provisional findings he would make in the absence of further evidence or representations.
24. This was not a case of a judge recusing himself or herself. But it was treated as if it were such a case. Judge Russell Finch referred to a number of English authorities, and relied on two in particular. In *Lanes Group plc v Galliford Try Infrastructure Ltd* [2012] Bus LR 1184 (and not, as stated in the judgment, *Guildford Toy Infrastructure Ltd*), Jackson LJ (with whom Richards and Stanley Burton agreed) said:

“56. There is nothing objectionable in a judge setting out his or her provisional view at an early stage of the proceedings so that the parties have an opportunity to correct any errors in the judge’s thinking, or to concentrate on matters which appear to be influencing the judge. Of course, it is unacceptable if the judge reaches a final decision before he is in possession of all relevant evidence and arguments which the parties wish to put before him. There is, however, a clear distinction between (a) reaching a final decision prematurely and (b) reaching a provisional view which is disclosed for the assistance of the parties.”

25. The other English case on which Judge Finch particularly relied was *Otkritie International Management Investment Ltd v Urumov* [2014] EWCA Civ 1315 (and not, as stated in the judgment, *Otkrittie*), where Longmore LJ (with whom Laws and Moore-Bick LJJ agreed) said:

“13. ... The general rule is that [the judge] should not recuse himself unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so. Although it is obviously convenient in a case of any complexity that a single judge should deal with all relevant matters, actual bias or a real possibility of bias must conclude the matter in favour of the applicant; nevertheless there must be substantial evidence of actual or imputed bias before the general rule can be overcome. All the cases, moreover, emphasize, that the issue of recusal is extremely fact-sensitive.”

26. The judge in the *X Ltd* case said:

“On the logic of [the applicants’] submissions any Minded To letter would be subject to JR and allegations of pre-judgment and bias. It cannot have been the intention to provide for the issuing of a bland, circumspect and unspecific type of letter, which would then, should an adverse determination be finally issued, rightly be criticised for not being fair to the named parties. The procedure must be workable. It has the advantage of allowing individuals in [the applicants’] position to have the opportunity to make further representations before a final (appealable) decision comes out. [The respondent] is, in reality, being impeached for following a procedure designed to be fair to those affected by it.”

27. Unsurprisingly, the judge dismissed the application for leave to apply for judicial review.

28. The second Guernsey case is *Rogers v Moerman*, Jmt 41/2017. Following a trial before the Seneschal of Sark (who is not a lawyer) in February 2017, an eviction order was made on 3 March 2017 against a tenant at the instance of her landlord. She appealed to the Royal Court against that order. One ground of appeal was that, unknown to the appellant, in November 2017 the Seneschal had nominated the respondent landlord for election to the post of *conseiller* in a forthcoming local election. (In fact, the candidates proposed were returned unopposed, and so no election took place.)

29. It was agreed that the test for apparent bias in Guernsey was that set out in *Porter v Magill* [2002] 2 AC 357, where Lord Hope said:

“103. ... The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

30. The respondent’s counsel argued that, because all nominations for the office of *conseiller* were published, the appellant must have had constructive notice of the proposal. McMahon DB said:

“88. ... I am not persuaded that there is any foundation in Advocate Ferbrache’s submission on constructive notice. The trial was either a fair hearing or it was not. Albeit with some reluctance, I have concluded that it was not a fair hearing because the Seneschal erred in not, at the very least, raising the question with the parties as to whether he should continue to constitute the Court. As I have already said, I think this was a genuine oversight on his part. Further, given the strong words of guidance about the duties of Advocates appearing before a lay judge in Sark, both Advocates should recognise their own shortcomings in not having identified this as an issue that needed to be addressed.”

31. The Deputy Bailiff allowed the appeal for three reasons. One of these was:

“111. ... that the Seneschal should, once he decided not to recuse himself, have drawn the attention of the parties to him having proposed the Respondent for the office of *Conseiller* and then dealt with any application to recuse him or invite the parties to waive any objection that would otherwise have been available to them.”

32. Finally, in *Sherborne Corporate Services Ltd v Kenilworth Consultants Inc* 2022 GLR 97, this Court dealt with an appeal from a decision of McMahon B. The decision concerned five pension schemes governed by Guernsey law, of which the appellants were the former trustees but whom the Royal Court had removed in favour of the respondent. The respondent had sought and obtained from the Bailiff an order for the appellants to produce documents and information relating to the scheme. The appellants sought to appeal this order on no fewer than ten grounds.

33. The first ground itself raised three separate issues, of which one was apparent bias of the Bailiff. This was based on the fact that the Bailiff had presided over an earlier hearing, on a different issue, at which he had also reached a decision adverse to the appellants. Bompas JA, giving the judgment of this Court, referred once again to the test for bias laid down by Lord Hope in *Porter v Magill*, and said:

“45. ... The fair-minded and informed observer would not conclude that, simply because a judge has taken an adverse view on some previous application or applications of submissions by a litigant or has made orders adverse to the litigant, the judge is biased, or appears to be biased, against the litigant. The fair-minded and informed observer would understand that a judge is well-fitted by professional training and experience to decide each application fairly and impartially on its merits. Indeed, there is often very great advantage to parties and to the administration of justice in securing judicial continuity.

[...]

47. ... a judge would be wrong to accede too readily to a recusal invitation: the recusal should only take place if the judge is genuinely unable to give one or other party a fair hearing, or decides that a fair-minded and informed observer would conclude that there was a real possibility of an unfair hearing. The danger of acceding too readily to a recusal request is plain: there can be at the very least loss of time, effort and cost, as there would have been in the present case. There can be occasions when the delay caused by a recusal leads to a denial of justice, when a matter has become urgent. Challenges raised on the basis of apparent bias can easily become a weapon for a litigant seeking to delay proceedings. In our judgment it would not have been appropriate for the Bailiff to recuse himself from continuing to hear the Account Application by reason of what was put forward in the 7 December 2021 email.”

34. It is clear from these three authorities that the law on judicial recusal is the same, *mutatis mutandis*, as in England. For the purposes of this appeal, it is necessary to make three further citations from English cases. One is from *Sengupta v Holmes* [2002] EWCA Civ 1104. This was a case where the Preliminary Proceedings Committee of the General Medical Council had decided that a complaint against Dr Sengupta should not proceed to the Professional Conduct Committee. The complainants had successfully applied by way of judicial review to quash that decision.
35. Dr Sengupta sought permission to appeal against *that* decision. Laws LJ refused permission to appeal on the papers, saying that the judge had been right for the reasons he gave. The application for permission was renewed orally, and this time Simon Brown and Tuckey LJ gave permission to appeal. The substantive appeal was subsequently listed before Laws, Jonathan Parker and Keene LJ. Dr Sengupta submitted by counsel that Laws LJ should recuse himself, on the ground of apparent bias, having previously refused permission to appeal.
36. Laws LJ (with whom Jonathan Parker LJ agreed) discussed the characteristics of the fair-minded and informed observer. He said:

“38. [Counsel for Dr Sengupta] accepts that the bystander may be taken to possess ‘some knowledge of legal culture’. He would know of the central place accorded to oral argument in our common law adversarial system. This I think is important, because oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by a judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it. Knowledge of it should, in my judgment, be attributed to the fair-minded and informed observer; otherwise the test for apparent bias is too far distant from reality. It is a commonplace for a hearing to start with a clear expression of view by the judge or judges, which may strongly favour one side; it would not cross the mind of counsel on the other side then to suggest that the judge should recuse himself; rather, he knows where he is, and the position he has to meet. He often meets it.

39. Another aspect of our legal culture is the expectations which the judges have of each other. Far from supposing that his fellow-judge would or might stand by an earlier view for no other reason than he had formed it, any judge would positively expect that his fellow would without cavil alter his view if he were objectively persuaded that it ought to be altered; and, to be blunt, would think much the worse of him if he would not. This too, it seems to me, would be known to the bystander.”

37. Keene LJ said:

“47. One important factor which exists both at a renewed application hearing and at a substantive appeal hearing is the benefit enjoyed by the court of listening to oral argument. This is a fundamental part of our system of justice and it is a process which as a matter of common experience can be markedly more effective than written argument. It will be evident from what has been said earlier in this judgment that, before hearing oral argument in this case, I had some considerable sympathy for the applicant’s arguments. The process of oral debate has persuaded me that those arguments are unsound ...

48. ... It is not easy for a professional judge to put himself or herself in the position of an ordinary litigant or member of the public who does not possess such insight into and

experience of the judicial decision-making process. Yet that is what has to be done if proper regard is to be had for the need to maintain public confidence in our procedures. However, the application before us postulates that the fair-minded and *informed* observer knows of the refusal of permission on the papers, since that is the very foundation of the allegation of bias. Such an observer must also be taken to know that such a refusal is not the end of the road, because the matter has progressed to a full appeal hearing, and it is therefore to be assumed that an observer who is indeed ‘informed’ is conscious of the sequence of procedures between the initial lodging of the written Appellant’s Notice seeking permission to appeal and the substantive appeal hearing. That degree of knowledge is sufficient for him to conclude that there is no real possibility of bias, because it is the existence and nature of those procedural stages which, to my mind, lead properly to the conclusion that the judge in question still retains an open mind at the substantive appeal hearing. An uninformed observer might think differently, but no system can guard itself against criticism by the uninformed, nor does it need to adapt itself in what would be a vain attempt to deflect such criticism.”

38. The second citation is from *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 1515, Sir Terence Etherton C (with whom Hallett and Sharp LJ agreed) commented on the role of an appellate court in relation to a decision on recusal. He said:

“41. I agree with the comments of Mummery LJ in *AWG Group Ltd* [2006] 1 WLR 1163 at [20] that, on the issue of disqualification, an appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances, and that the appellate court must itself make an assessment of all relevant circumstances and then decide whether there is a real possibility of bias.”

39. The third (and longest) citation is from *Otkritie International Management Investment Ltd v Urumov*, to which reference has already been made. This case concerned an appeal against the decision of the judge, Eder J, to recuse himself, where an application for committal for contempt was being made against the defendant, and Eder J had already delivered a long judgment dealing with some of the same issues as would arise on the contempt application.

40. Longmore LJ, having considered various authorities, said this:

“22. There is thus a consistent body of authority to the effect that bias is not to be imputed to a judge by reason of his previous rulings or decisions in the same case (in which a party has participated and been heard) unless it can be shown he is likely to reach his decision ‘by reference to extraneous matters or predilections or preferences’. There can be no suggestion that Eder J would proceed in the present case by reference to such matters.

23. The judge appears to have thought that the charges of ‘actual bias’ by Mr Urumov made all the difference because the allegations were ‘so serious’ (para 17) that he ought to recuse himself. But can the mere elevation of the allegation from imputed bias to actual bias make a critical difference? I cannot think that it does. Of course such an allegation is an extremely serious one; it should not be lightly made. But the mere fact that a litigant decides to raise the stakes in that way cannot give rise to any difference of legal principle.

24. Eder J gave 3 reasons for his decision. The first reason was that it was consistent with previous authority. I cannot agree; the above analysis shows that bias is not to be held to exist unless there is some reason to suppose that the judge would not bring an objective mind to bear on the case. If Mr Urumov wishes to rely on different arguments or different evidence from evidence previously adduced, no doubt the judge will take such arguments or evidence into account. There is no reason to suppose he will be influenced by extraneous matters or predilections or preferences. In one sense the present case is even less promising for Mr Urumov than it was for Mr Ablyazov because Mr Urumov can rely on the principle that a charge of contempt must be proved to a criminal standard. Mr Ablyazov had already been found to be in contempt to the criminal standard of proof and yet the judge was held to have rightly not recused himself from a trial where only the civil standard of proof applied.

25. Secondly Eder J applied the observation in *Locabail* that, if there is any real ground for doubt, that doubt should be resolved in favour of recusal. But he does not explain what the real ground for doubt is in this case. The judge specifically said (in para 17 and also in para 13 of the judgment giving permission to appeal) that the allegations of bias are ‘groundless’ and ‘spurious’.

26. The third reason given by the judge is that the matter could be dealt with by another judge of the Commercial Court. No doubt it could be but that cannot in itself be a good reason for recusal any more than it could be a good reason not to recuse himself (in a proper case) that another Commercial judge could not be made available.

27. The judge appears not to have been referred to the remarks of Chadwick LJ in this court in *Triodos Bank N.V. v Dobbs* [2001] EWCA Civ 468, in which Mr Dobbs invited the court to recuse itself and (more particularly) Chadwick LJ to recuse himself, as a result of his conduct in relation to a permission to appeal application in related proceedings. Chadwick LJ, giving the judgment of the court of which Neuberger LJ and I were members, said this:-

‘7. It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If the judges were to recuse themselves whenever a litigant – whether it be a represented litigant or a litigant in person – criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised – whether that criticism was justified or not. That would apply, not only to the individual judge, but to all judges in this court; if the criticism is indeed that there is no judge of this court who can give Mr Dobbs a fair hearing because he is criticising the system generally, Mr Dobbs' appeal could never be heard.

8. In the circumstances of this case, I have considered carefully whether I should recuse myself. Mr Dobbs has not advanced this morning any reason

why I should approach his appeal with a disposition to decide against him; other than that he tells me that he is criticising me in relation to past conduct. That, I am afraid, is not a good reason for me to recuse myself. I do not do so. The other members of the court, who are within the rather wider ambit of Mr Dobbs' application take the same view.'

If the judge had been referred to these remarks (reiterated by this court in Ansar v Lloyds TSB Bank Plc [2007] IRLR 211, para 17) he might very well have decided he ought not to recuse himself.

28. Another matter which concerned the judge was that a few days before he gave judgment Andrew Smith J decided to recuse himself in the complex and long-running case of *Dar Al Arkan Real Estate Development Company v Al Refai* [2014] EWHC 1055 (Comm) from hearing a committal application after he had ruled in favour of the applicant/defendant that without notice orders made against them should be discharged because the claimants had misled the court and failed to comply with undertakings given to the court in the court's orders. Once the defendants had obtained this ruling, they applied for an order that the managing director of the first claimant be committed to prison. The judge first decided that that application should be heard before any trial and then turned to an application by the claimants that he should recuse himself from hearing the contempt application. On the discharge application the judge had rejected the managing director's account of how documents came to be deleted from certain hard drives which were to be preserved and delivered to the claimant's solicitors as to which no full and honest explanation had been given. He accepted (para 36) that the views he had formed had been formed on issues (quite possibly on all the issues) likely to be crucial on the committal application and that the evidence on the committal application was likely to be essentially the same as the evidence he had heard on the discharge application. In the light of these considerations he considered the claimants were entitled to have another judge to hear the contempt application.

29. It is thus clear that in *Dar's* case the judge felt that the informed observer could not have the necessary confidence in the proceedings when the judge had already considered the essential evidence that would be deployed on the committal application and had come to the conclusion that the witnesses giving it were lying to him. A recusal application is a very personal matter for the judge to decide and this court will seldom interfere with this delicate jurisdiction. The overall feeling I have from reading Andrew Smith J's judgment is that he himself felt uncomfortable about reconsidering essentially the same evidence on the very same issue which he would have to decide in the contempt application.

30. The present case is different for two quite separate reasons. First as trial judge Eder J has considered an enormous number of issues and sub-issues between the parties. He has not focussed solely or mainly on the very issue that the judge will have to decide on the contempt application; the canvas of his judgment is infinitely broader. The focus of the contempt application will be much narrower and it is (in theory) quite possible that that narrow focus, coupled with the higher standard of proof required for the application, could produce a different result even if the evidence is essentially the same. In any event, the evidence may not be essentially the same.

31. Secondly, it is clear that Eder J feels no personal embarrassment or discomfort in considering the contempt application. Not only has he not said anything to indicate such embarrassment or discomfort; he has positively said that the fears expressed by Mr Urumov are groundless and that he would welcome his decision (which he reached

with "extreme reluctance") being overturned. Since the reasons he gave for his decision are, in my view, defective, overturned it should be.

32. Usually this court will be astute to support judges exercising what I have called 'this delicate jurisdiction' of recusal. But it is also important that judges do not recuse themselves too readily in long and complex cases otherwise the convenience of having a single judge in charge of both the procedural and substantial parts of the case will be seriously undermined. Of course, if the judge himself feels embarrassed to continue, he should not do so; if he does not so feel, he should.

[...]

34. For these reasons I do not consider the judge was right to have recused himself, even if he was right to hold that the allegations made by Mr Urumov were allegations of actual bias. I would therefore allow this appeal."

41. So, the judge asked to recuse him- or herself should do so only where the case is properly made out. Another way of putting this point is that the rule is a rule of law, and confers no discretion on the judge. If the case crosses the line, the judge must not hear the case. If it does not do so, the judge cannot ordinarily decline to do so. Consequently, the usual grounds for attacking *the exercise of a discretion*, such as showing that the judge did not take into account all and only relevant factors, or that the decision was irrational, are beside the point. Either the judge had jurisdiction, or the judge had not. If he or she was disqualified through apparent bias then the judge had no jurisdiction. But if he or she was not so disqualified, then the judge had jurisdiction.

42. In the latter case, however, there may be circumstances involving personal embarrassment or discomfort of the judge, referred to in *Otkritie* above, paras 29-32, where the judge's decision not to sit will nevertheless be supported by the higher courts. But such cases are exceptional. In the *Dar* case, for example,

"the judge had already considered the essential evidence that would be deployed on the committal application and had come to the conclusion that the witnesses giving it were lying to him."

Of course, that is not this case. Here the Bailiff, having concluded that he otherwise was not disqualified, did not seek to avoid sitting for reasons of personal embarrassment.

43. In our judgment, that is the substantive law which we must apply.

Leave to appeal

44. But there is a threshold question. This is whether the appellant needs leave to appeal. Section 15 of the Court of Appeal (Guernsey) Law 1961 relevantly provides:

"15. [(1)] 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, ...

[...]”

45. The meaning of the term “interlocutory” for these purposes has been considered in a number of Guernsey decisions. These include *Havilland Estates Ltd v Channel Island Ceramics Ltd* (1993) 15 GLJ 78, CA, *McNamara v Gauson* 2009-10 GLR 387, *Chilcott v Dockerill*, Judgment 49/2018, CA, *ITG Ltd v Glenalla Properties Ltd* [2022] GCA 091, and *Landl v Hogg* [2024] GCA 052 (where the earlier cases are considered). The courts in this jurisdiction have adopted the test set out in the English cases of *Salaman v Warner* [1891] 1 QB 734 and *Salter Rex v Ghosh* [1971] 2 QB 597, namely, that, to determine whether an order is final or interlocutory, regard must be had to the nature of the application made in the court below. An order is not final unless it would have finally determined the proceedings whichever way the application in the court below had been decided.
46. During the hearing we asked whether the question of leave had been considered. We were told that the matter arose in correspondence between the parties’ advocates and the court, and after the hearing we were sent copies of that correspondence. The matter of leave had been referred to the Bailiff, who, in an email dated 23 May 2024, amongst other things said:

“Although it may not be directly in point, I think the *Bordeaux Vineries Ltd v States Board of Administration* (1993) 16 GLJ 85 supports the view that the recusal was not an interlocutory decision but a final decision and so no application for leave is required.”

Both firms of advocates accepted that position.

47. *Bordeaux Vineries Ltd v States Board of Administration* was a decision of this Court, on appeal from a decision of the then Bailiff not to recuse himself in proceedings brought by an aggrieved landowner in relation to the defendants’ refuse site. The plaintiff alleged that the defendants were in breach of an earlier court order, and applied for an order that they be punished for contempt. The plaintiff objected to the Bailiff (or Deputy Bailiff) hearing the application, on the basis of the connection to the States Administration. Nevertheless, the Bailiff after hearing the recusal application, declined to recuse himself.
48. The plaintiff appealed. The question of leave to appeal does not seem to have been mentioned by anyone. This court considered simply the substance of the appeal (and dismissed it). It is not clear whether the Bailiff in the present case took that to mean that everyone thought no leave was needed. We cannot know if that is so or not. But a decision where a point is assumed and not argued is not a binding authority. In *National Enterprises Ltd v Racal Communications Ltd* [1975] Ch 397, 406F, for example, Russell LJ (with whom Cairns LJ and Sir John Pennycuik expressly agreed on this point), held that where in an earlier decision a point was not in issue, and was not argued, and the court expressed no view on it, then even though the decision assumed that point it was not a binding authority upon it.
49. We prefer to approach the matter in accordance with the statutory language, as interpreted by the judicial decisions of this jurisdiction. In our judgment, an order by a judge on an application that s/he recuse him- or herself does not determine the proceedings whichever way the application is decided. Indeed, it does not decide them in *either* way that the application is decided. The proceedings are the underlying breach of trust proceedings in which the judge is asked to recuse him- or herself, and not the recusal application itself. As a result, in considering the present application, we proceed on the basis that an order of a judge declining to recuse

him- or herself is indeed an interlocutory order for the purposes of section 15(1)(e) of the 1961 Law, and leave to appeal is therefore required.

50. As to the test for giving leave to appeal, in *ITG Ltd v Glenalla Properties Ltd* [2022] GCA 091, referred to above, Wolffe JA said:

“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 ...”

51. Since the parties appeared before us, having prepared for and argued the full appeal, we will deal with this as if it were a “rolled-up” hearing, that is, the question of leave and the substantive appeal being dealt with together.

Admissibility of findings

52. There is one other general point of law which we should mention. This is the admissibility of any findings made in the “blessing” judgment in the breach of trust proceedings. The matter was discussed by the Royal Court in the decision in *Kazzaz v Standard Chartered Trust (Guernsey) Ltd* [2023] GRC 049. Marshall LB held (at [144]-[145]) that the English rule known as the rule in *Hollington v Hewthorn* [1943] KB 587 was no part of the law in Guernsey. This is not the occasion for this Court to deal with that issue. It will or may arise in the breach of trust proceedings in any event, and can be left to be dealt with then.

The grounds of appeal and the written case

53. The grounds of appeal, as set out in the notices of appeal, are:

1. The Bailiff made an error of law in applying the wrong legal test;
2. The Bailiff made an error of law and/or fact in considering that procedure mitigated apparent bias;
3. The Bailiff made an error of law in relying on the private nature of the “blessing” proceedings which are under appeal;
4. The Bailiff made an error of law in failing to give proper reasons for his decision.

54. In their notices of appeal and in their written case, the defendants in fact split the first ground into two, as matters a and b in the list below. In their written case the second ground appears as matter d. The third ground appears as matter c, and the fourth as matter e.

55. In summary, the defendants say that the Bailiff made errors of law in his analysis of the relevant principles governing recusal applications, and also reached the erroneous decision that procedural mechanisms other than recusal could cure any apparent bias. The alleged errors of law are:

- a. The Bailiff applied the wrong legal test;
- b. The Bailiff relied on an irrelevant procedural distinction between the two proceedings;
- c. The Bailiff relied on irrelevant features of the “blessing” proceedings;
- d. The Bailiff relied on matters of procedure to manage or mitigate the risk of apparent bias.
- e. The Bailiff failed to give adequate reasons for his decision.

We deal with them in turn.

a. The Bailiff applied the wrong legal test

56. The defendants say that the Bailiff asked himself whether he had “prejudged any issue that will arise in the action”, when he should have asked himself, based on the statement of Lord Hope in *Porter v Magill* and adopted in this Court in *Sherborne Corporate Services*, “whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that [he] was biased.”

57. There is a question as to whether this is in fact a different test in substance from that set out in *Porter v Magill*. In *Otkritie*, Longmore LJ began his judgment by setting out the concept of bias, quoting verbatim the test in *Porter v Magill*. However, it is notable that, having done so, he then went on to say:

“1. ... The concept of bias ... extends further to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have ‘pre-judged’ the case.”

58. And, in *Zuma’s Choice Pet Products Ltd v Azumi Ltd* [2017] EWCA Civ 2133, Floyd LJ said:

“29. The mere fact that a judge has decided applications or issues in the past adversely to a litigant is not generally a reason for that judge to recuse himself at further hearings: if that were not the case, the same judge could not make two successive interim decisions in a case without risking accusations of bias. It would make it impossible for there to be a designated judge assigned to the hearing of complex cases with multiple interim applications. The fair-minded and informed observer does not assume that because a judge has taken an adverse view of a previous application or applications, that he or she will have pre-judged, or will not deal fairly with, all future applications by the same litigant.”

59. This latter quotation was later cited with approval by the Privy Council in *Stubbs v R* [2019] AC 868, [23]. So, it is clear from these authorities that the principle of bias can be expressed in the language of pre-judgment, exactly as the Bailiff said. However, for reasons that will appear, it is not necessary for us to express a concluded view on whether they are the same test or different. This is because of the contents of other parts of the Bailiff’s judgment.

60. A second point is whether it matters that the Bailiff stated the test as whether “the evidence satisfies *me* that I have not pre-judged anything ... ” (emphasis supplied). In other words, the complaint is that he was not looking at the perception of the fair-minded and informed observer, but instead at his own. In context, we do not think there is anything in this. The judge is either

satisfied that the fair-minded and informed observer would not think he had pre-judged anything, or he is not. It is quite clear from the context that the Bailiff was thinking of the objective observer's perception rather than his own.

61. The Bailiff discussed the relevant law of recusal shortly. He began by saying this:

“7. There is Court of Appeal authority adopting in this jurisdiction the test for apparent bias found in the speech of Lord Hope of Craighead in *Porter v Magill* [2002] 2 AC 357. This is found in *Sherborne Corporate Services Limited v The Public Trustee* [2022] GCA 024. I am, therefore, obliged to follow that test.”

62. So, there is a clear statement, at the outset of the discussion on the law, of the legal test by which the Bailiff considered himself to be bound, and which he would follow. That is exactly the test for which the defendants contended before the Bailiff, and for which they now contend before this Court. The Bailiff then referred to further English authority which had been cited to him by the defendants, and which expanded on that test: *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 1515, [35]. It is not necessary to set that out.

63. The Bailiff then went on to say to summarise the defendants' arguments in this way:

“10. ... The basis for there being such a real possibility [of bias] is said to be that, having formed critical views of the conduct of the Defendants in their capacities as trustees of various trusts, and having made judicial determinations on issues that will be of central importance to the outcome of the action, where those determinations are under appeal, albeit the appeal is stayed, it all results in me ‘*being inherently, and unavoidably, burdened by [my] prior assessments of the Defendants' conduct and, in essence, being bound by the Determinations in any role [I] play in the Action*’. As such, it is submitted that it appears to be impossible for me to approach the allegations advanced in the action without the presence of bias. Because it is said that I will be placed in a position of difficulty, it follows that any fair-minded observer must conclude that there is an apparent bias.”

64. Further, in the last sentence of paragraph 13 of his judgment, the Bailiff said:

“It is suggested in particular [by the defendants] that I have already pre-judged some of the issues that will need to be determined in the breach of trust action”.

Then, at the beginning of the very next paragraph, the Bailiff made the statement now complained of:

“14. I have reached the conclusion that the Application to recuse me is without merit and so has to be dismissed. Before reaching that conclusion, I have considered whether it can properly be said that I have already pre-judged any issue that will arise in the action. I fear that this is based on a misunderstanding of what was involved in deciding the *Public Trustee v Cooper* application.”

65. In context, it will be seen that, in using the words now complained of in paragraph 14, the Bailiff was merely responding to a specific point made by the defendants in argument, and

referred to by him at the end of the previous paragraph of his judgment. He then went on in, the same paragraph, to say that he was satisfied that he had “not pre-judged anything in any event”.

66. The Bailiff then went on to deal with a further argument of the defendants, that there were other judges available in Guernsey to deal with the case. In this connection he referred to passages in the English decision in *Otkritie*, which in fact we have already cited above. He then said this:

“21. It seems to me that the principles from the cases to which I have referred demonstrate that judges should, unless satisfied that their participation would not result in a fair hearing, principally as a result of being satisfied that the *Porter v Magill* test applies, resist the temptation to recuse themselves ... ”

67. Finally, the Bailiff said this:

“22. I further take the view that I should not recuse myself from any further involvement in this action because the test adopted in Guernsey from *Porter v Magill* (*supra*) is not satisfied. I do not consider that the fair-minded and informed observer, recognising that this is a person who is not unduly sensitive or suspicious, but equally not complacent, having considered all the facts of my past involvement with the previous set of proceedings, would conclude that there is a real possibility that I am biased against the Defendants.”

68. So, although the Bailiff at an early point in the discussion section of his judgment uses the words complained of, they were uttered in reference to a specific argument made by the defendants. And, both in the law section and at the end of the discussion he expressly refers to the *Porter v Magill* test, which the defendants say is the correct one (a fact acknowledged by the defendants in their notice of appeal at [4.1], and in their case at [44]). His closing words make clear that in his view he has applied *that* test, rather than some other, and found that recusal is not justified.

69. Once one reads the judgment carefully, the argument that the Bailiff applied the wrong test (if it was the wrong test) is simply unarguable. The Bailiff clearly applied the right test. But it is important to notice this. Even if he had *not* applied the correct test, that would not by itself have meant that the appeal would have to be allowed in any event. As we have already said, this is not an attack on the exercise of judicial discretion, where an application of the wrong test is usually fatal. This is a matter of law. The important question therefore is whether, applying the correct test, the Bailiff reached the right answer.

70. As to that, the defendants rely on five points. First, in the “blessing” proceedings the Bailiff had made findings critical of the conduct of the defendants in relation to, *inter alia*, their knowledge of the business affairs of various companies owned ultimately by the trusts, and conflicts of interest. Second, the appeals from the “blessing” decision having been stayed, it is said that the findings as to the defendants’ conduct “have been neither upheld nor overturned and cannot be relied upon” by the parties to those proceedings in the underlying cause. Third, the plaintiffs challenge the conduct of the defendants in that cause, echoing the comments made by the Bailiff in the “blessing” proceedings. Fourth, it follows that the plaintiffs would be inviting the Bailiff to agree with his earlier decisions in the “blessing” proceedings. And, fifth, “the Bailiff would be inevitably and unavoidably burdened by his prior assessment of the identical issues of fact about which he made findings” in the “blessing” decision. If he agreed with them, he would reinforce the impression of bias. If he disagreed, he would undermine his earlier decision.

71. We accept the first and third points. We disagree with the rest. On the second point, the question *whether* the findings in the “blessing” decision can be relied on in the underlying Cause is unaffected by the stay on the appeal. Unless and until the stay is removed, and this Court takes a different view from the Bailiff on appeal, his decision stands. (In the “blessing” appeal, this Court said that until the stayed appeal was decided it “would be difficult” to rely on the Bailiff’s “blessing” judgment, but the point remains.) The question of admissibility itself (as to which, as we have already said, we express no view) is a matter which will be determined in the cause, as will the weight (if any) which might be given to such findings. The fourth point adds nothing to the other points made. Either the Royal Court would be entitled to rely on the earlier findings or it would not. It does not matter which judge made them.
72. As to the fifth point, judges inevitably operate in the light of decisions which they and other judges have already made in the same litigation. Doing so in the present case does not automatically mean that the *Porter v Magill* test is satisfied. As Longmore LJ said in *Otkritie*, at [24], a case where earlier findings had been made by the judge which would or might be relevant in the contempt application yet to be heard, bias is not to be held to exist unless there is some reason to suppose that the judge would not bring an objective mind to bear on the case.
73. So, it all depends on the circumstances. Given that the other grounds relied on by the defendants rely on the circumstances, it is desirable to postpone final consideration of this question until those grounds have been addressed.

b. The Bailiff relied on an irrelevant procedural distinction between the two proceedings

74. The defendants complain that the Bailiff relied (at [14] of the judgment) on a purported “real difference between considering untested affidavit evidence and reaching conclusions based on the submissions of the parties on the issues that fall to be considered before any decision can be ‘blessed’ and presiding at a civil trial”. They say that that is irrelevant to the question whether there is apparent bias. The finding of facts is the finding of facts, however done.

75. The defendants then say in their case:

“32. ... Where a judge has reached a final decision on written evidence, there is obviously a real possibility that, should that judge subsequently be called on to determine the same factual issue albeit on different evidence, he will recollect his previous determination and be unavoidably influenced by it, thus giving rise to the appearance of bias. This was the very concern alluded to in *Stubbs v Queen*”.

76. *Stubbs v R* [2019] AC 868 (to which we have already briefly referred) was a decision of the Privy Council on appeal from The Bahamas, where the question was:

“1. ... whether a judge who has presided at an aborted trial by jury ought to have recused himself from sitting on an appeal against conviction by the defendants following their conviction on the same charges at a further trial by jury in which he played no part.”

77. The general rule as to apparent bias was stated by Lord Lloyd-Jones in these terms:

“16. A judicial ruling necessarily involves preferring the submissions of one party over another. However, it is obviously not the case that any prior involvement by a judge in the course of litigation will require him to recuse himself from a further judicial role in respect of the same dispute. In the great majority of such cases there will simply be no

basis on which it could be suggested that the judge should recuse himself, notwithstanding earlier rulings in favour of one party or another, and there will often be great advantages to the parties and to the administration of justice in securing judicial continuity. The issue will only arise at all in circumstances where prior involvement is such as might suggest to a fair-minded and informed observer that the judge's mind is closed in some respect relevant to the decision which must now be made. It is not possible to provide a comprehensive list of factors which may be relevant to this issue which will necessarily depend on the particular circumstances of each case ... However, relevant factors are likely to include the nature of the previous and current issues, their proximity to each other and the terms in which the previous determinations were pronounced.”

78. On the facts of this case, the Privy Council held that the judge should have recused himself. But it is clear from the advice of the Board that this was because of the fact that the present proceedings were an appeal. As Lord Lloyd-Jones said:

“31. In the course of his submissions Mr Knox placed great emphasis on the fact that if a retrial had taken place following the discharge of the jury in the second trial, there could have been no objection to Isaacs J sitting as the trial judge at that re-trial. This is correct. Indeed, it is often the case that, following an aborted trial, a retrial takes place before the same judge and a different jury. However, this does not assist the respondent. While this process may involve the same judge revisiting the rulings he made at the first trial, this is essentially a repetition of one stage of the judicial process in circumstances where the earlier rulings were rendered of no effect by the aborted trial. There is no prejudice to a defendant in these circumstances. If a previous ruling against the defendant is repeated at the re-trial the defendant is in no worse a position and, if there are good grounds, he will be able to appeal the ruling to an independent and impartial appellate tribunal. On the other hand, where, as here, one is concerned with an appeal, very different considerations apply. An appellant is entitled to be heard by an independent and impartial appeal tribunal without any appearance of bias by way of pre-determination or pre-judgment. For the same reason, the common case of a judge who has to make successive rulings in the same proceedings (see para 16 above) is not analogous to the present case. In the former the high desirability of judicial continuity is an important factor, whereas in the present case this consideration is entirely absent.”

79. Accordingly, *Stubbs* does not support the proposition contended for by the defendants. That said, we agree that how the evidence is received by the court for the purpose of making the findings in the earlier decision is not relevant to the question whether there is apparent bias if and when those findings are admitted for the purposes of the second decision. If the Bailiff had supposed that it mattered *how* the evidence was received, then we would have agreed that he fell into error. But, on reviewing the context in which he made the statement in paragraph 14 of his judgment complained of, we find that that is not the case.

80. In paragraph 11 of his judgment, the Bailiff set out an extract from the decision of the English Court of Appeal in *Cotton v Brudenell-Bruce* [2014] EWCA Civ 1312, discussing the nature of the function of the court in dealing with a “blessing” application. Vos LJ (with whom Moore-Bick and Black LJ agreed) said:

“78. ... the trustees are not asking the court to find facts. They are asking the court to decide whether they have presented sufficient evidence to satisfy it that the trustees have fulfilled their duties to their beneficiaries in deciding upon the transaction in

question, and have formed a view which, in all the circumstances, reasonable trustees could properly have formed. This is a very different exercise from the situation, after the event, where a beneficiary is seeking to prove that the trustees have failed in their duties by selling, for example, at an undervalue.”

81. In paragraph 14 the Bailiff referred back to that passage and *then* pointed out the difference between the issues before the court on a “blessing” application, and those in a breach of trust claim (as Vos LJ said). The “fact” found in the “blessing” application in this case was that the trustees had *not*

“presented sufficient evidence to satisfy it that the trustees [had] fulfilled their duties to their beneficiaries in deciding upon the transaction in question, and [had] formed a view which, in all the circumstances, reasonable trustees could properly have formed”

82. Here the Bailiff was making the point that the fair-minded and informed observer would appreciate that the two cases, and the matters in issue in them, were different, and would take that into account in concluding whether or not there was a real possibility of bias. Even if we were wrong about that, we cannot see that that matters overall, because, as we have said, the question we have to answer is not whether the Bailiff, in declining to recuse himself, took into account an irrelevant consideration, but whether he reached the wrong answer.

c. The Bailiff relied on irrelevant features of the “blessing” proceedings

83. Here the complaint is similar to the previous one. It is that the Bailiff relied on the private nature of the “blessing” proceedings, compared with the breach of trust claim, and that the decision was under appeal. What the Bailiff said was:

“21. ... In this instance, it is also important to bear in mind that the decision that has been appealed was taken in proceedings that were held in private and that the comments made by the Court of Appeal when staying the proceedings will, I suspect, be advanced once again. Whilst I have considered the possibility carefully, I do not consider that the Defendants, or any of them, would not get a fair hearing were I to sit on any aspect of the action.”

84. This statement is not entirely clear. But it seems likely that the Bailiff was merely noting these matters in passing, rather than seeking to rely on them as demonstrating there was no appearance of bias. If so, then there was no error. If, however, the Bailiff in saying this *was* intending to rely on the private nature of the “blessing” proceedings or the fact that the first decision was under appeal as a reason for thinking that there was no apparent bias, then we would not agree. But, for the reasons given before, we cannot see that taking into account an irrelevant consideration automatically vitiates his decision on recusal. The question is whether he reached the wrong answer.

d. The Bailiff relied on matters of procedure to manage or mitigate the risk of apparent bias.

85. The defendants’ complaint is that the Bailiff “appears to have considered that the possibility that the trial of the Breach of Trust Proceedings *might* be conducted by a judge and Jurats would be an answer to any objection of apparent bias”. In his judgment the Bailiff considered the possibility that the trial might be conducted with a judge and Jurats, and that the latter (usually an uneven number) would find the facts. It would only be in circumstances where a jurat could not continue and the jurats were evenly divided that the judge would have a casting vote on the facts.

86. What the Bailiff then said was:

“However, the manner in which whoever is presiding would vote in those circumstances would inevitably depend on how the evidence had come across at the trial. Unlike in the *Public Trustee v Cooper* matter, there would most likely be cross-examination so that even if the reference by Advocate Cole to the determinations made in those proceedings were related to any of the matters, I disagree that it would mean that, if I were presiding, I would be bound to vote on any point just to ensure that it would be consistent with such a determination. In any event, that would be contrary to my oath of office. Further, in reaching a different conclusion, if that is what it would be, would be justified because of the different manner in which the evidence had been adduced at trial.”

87. In relation to the Bailiff’s oath of office, it is to be noted that this includes specific reference to the Bailiff’s duty to correct his or her own mistakes once they become known. In part the oath reads (in French):

“ ... que, si par erreur ou autrement vous faisiez aucun défaut ou trepas a l'encontre, vous vous redresserez incontinent selon l'avis et bonne opinion des dites Jurés ... ”

which Advocate Lyne for the plaintiffs translated as

“ ... that, if mistakenly or otherwise you yourself should be faced with any shortcoming or downfall, you will redress yourself unreservedly in a manner conforming with the advice and respectable opinion of the said Jurats ... ”

88. We agree with the defendants that the mere fact that the facts were found by Jurats rather than the judge would not be an answer to a refusal to recuse himself if the apparent bias test were otherwise satisfied. The judge would still have to direct the Jurats on matters of law (including on some aspects of the evidence) and would in the circumstances described have a casting vote on the facts. On the other hand, if (as seems likely) all the Bailiff meant was that the fact that the jurats would determine the facts was relevant to the question whether to the fair-minded and informed observer there was a real risk of the appearance of bias, then we do not think that he fell into error.

89. The real point, once again, is whether, if the judge found all the facts at the trial, the apparent bias test would be satisfied. In this connection, it is to be noted that the Bailiff in the extract just quoted from his judgment referred to two points of general application. These were (i) his oath of office and (ii) he could reach a different conclusion at trial because the evidence would or might be different, and received differently. These points apply just as much to the case where the judge found all the facts at the trial as they do to the case where the Jurats were involved. Once more, the question is whether he reached the wrong answer on the apparent bias test.

e. The Bailiff failed to give adequate reasons for his decision.

90. Here the complaint is set out in the defendants’ case as follows:

“44. While the Bailiff *did* identify the correct legal test for apparent bias at [22] of the Recusal Judgment (referring to the decision in *Porter v Magill* and stating what the test for apparent bias was), the Bailiff *did not*, either in that paragraph or elsewhere in the

Recusal Judgment, address *why* and *how* he considered that that test was not in his view satisfied.”

91. What the Bailiff said was:

“22. I further take the view that I should not recuse myself from any further involvement in this action because the test adopted in Guernsey from *Porter v Magill* (*supra*) is not satisfied. I do not consider that the fair-minded and informed observer, recognising that this is a person who is not unduly sensitive or suspicious, but equally not complacent, having considered all the facts of my past involvement with the previous set of proceedings, would conclude that there is a real possibility that I am biased against the Defendants ... ”

92. In addition, at [15] of his judgment, the Bailiff referred to the likelihood of extensive evidence and cross-examination at trial, and said that (if involved in fact-finding) he would not be bound to find in order to be consistent with the decision in the “blessing” application. And, in [19] of his judgment, the Bailiff explained why he had “not simply acceded to the [recusal] Application as the easiest option, irrespective of the applicable test”.

93. The defendants do not cite any authorities in support of the proposition that there is a duty to give reasons. But there is no doubt that such a duty exists in Guernsey law: see *Bohan v Bithell* 2014 GLR 347, [15]-[16], where the earlier authorities are collected, and reference is made to English caselaw, and also *Landl v Hogg* [2024] GCA 027, [64].

94. However, the degree of reasoning that needs to be given varies with the subject-matter. In the English decision of *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, CA, Henry LJ, giving the judgment of the court, said (at 381B):

“That today’s professional judge owes a general duty to give reasons is clear ... although there are some exceptions. It does not always or even usually apply in the magistrates court, nor in some areas where the court’s decision is more often than not a summary exercise of discretion - in particular orders for costs.”

On the same page, and over onto the next, he went on:

“We make the following general comments on the duty to give reasons:

...

(3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject-matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other ... ”

95. Here the subject-matter is recusal for apparent bias. The test is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility

that the tribunal was biased. This is not capable of scientific proof. No testing is done, for example, by asking third parties what they think. Instead, the judge assesses the position, and simply says that in his or her opinion a fair-minded and informed observer would, or would not, so conclude. It is a summary determination of the question by the judge.

96. Of course, if the judge in coming to this conclusion expresses reasons or matters on which reliance is placed which are bad reasons or irrelevant matters, the appeal court can interfere. However, it is unlikely to do so if the appeal court's own assessment is that, although the judge expressed bad reasons or took into account irrelevant matters, the conclusion itself was the correct one in the circumstances. It is after all a matter of law, and the basis on which the appeal is allowed is normally that the decision was wrong. The appeal court will regret the need to have had to deal with the matter, but there is no sense in remitting the matter to the judge to decide again.

Conclusion

97. The role of the appellate court, as discussed in the *Resolution Chemicals* case, cited above, is to decide whether the test for apparent bias is met or not. In the present case, leaving any irrelevant matters out of account, our view is that the judge's view of the matter was right: the fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that the tribunal was biased. In particular, the judge correctly reminded himself of his judicial oath, and referred to the fact that the issues in the "blessing" and the breach of trust proceedings were different, and to the fact that the evidence may be different (as well as subjected to cross-examination) when the matter comes before the court in the latter.
98. As to the judicial oath, the fair-minded observer is informed by appreciations of the qualities of a judge and the characteristics of the judicial function: see *Stubbs v R* [2018] AC 1646, [22]. The Bailiff might also have referred to his professional training, and his lack of interest in the outcome. He could have referred to the importance of oral argument and the expectation by his fellow judges that he would change his mind if so persuaded, as set out in the extracts from *Sengupta v Holmes* [2002] EWCA Civ 1104, [38], [39]. But the matters he did refer to underline the open-mindedness which is the hallmark of the unbiased judge. Any error in referring to irrelevant matters would not diminish that. We have no doubt that the Bailiff did not have a closed mind.
99. In our view, given that this is a rolled-up hearing, where the defendants need to obtain leave to appeal before embarking on the substantive appeal, we think we should refuse leave altogether, on the basis that there is no real prospect of success, and no other good reason for this court hearing the full appeal. However, if we were wrong about this, and if it were a substantive appeal, then we would dismiss the appeal.