Leave to appeal against the Act of Court of the Royal Court dated 8 August 2023 following a reserved judgment. The Judgment below dismissed an application for summary judgment and/or strike-out made by the Directors against the last-named Plaintiff.

**[2024]GCA027**

**IN THE COURT OF APPEAL OF GUERNSEY**

**CIVIL DIVISION**

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

**Civil No: 577**

**Before:** **Jonathan Crow CVO, KC**
**David Perry, KC**
**Sir Adrian Fulford, PC**

**Between:**

**(1) WOLFGANG JOACHIM ERICH LANDL**
**(2) ANDREA BRIGITTA SCHAERER LANDL**
**(3) KHKJ HOLDINGS LIMITED**
**(4) ALI HASAN MAHMOUD MOHAMED HUSAIN**
**(5) KULDEEP SINGH LAMBA**
**(6) GURVINDER SINGH LAMBA**
**(7) L'OEILLET LIMITED**
**(8) ANUPE DHORAJIWALA**
**(9) RUPAL TERAIYA**
**(10) RAJEN R. SHAH**
**(11) TEO STRUCTURED INVESTMENTS LIMITED**
**(12) JAMAL ALAMER**
**(13) FABRIZIO CERÈ**
**(14) MOHAMED NOORUDDIN**
**(15) EUGENIO BERENGA**
**(16) VELES MANAGEMENT CORP.**
**(17) CAREY AG (AS TRUSTEE OF THE MARRAKECH TRUST)**
**(18) VLADIMIR ISAKOV**
**(19) NAJAH HASAN ALAALI**
**(20) GIANCARLO PAROLO**
**(21) LANDSEND INVESTMENTS LIMITED**
**(22) YASSER JEIROUDI**
**(23) LUXX PCC LIMITED (IN LIQUIDATION)**

**Plaintiffs**

**-and-**

**(1) STEPHEN WILLIAM HOGG**
**(2) STEPHEN WATTS**
**(3) IAN JAMES HENDERSON**
**(4) EFG PRIVATE BANK (CHANNEL ISLANDS) LIMITED**

**Defendants**

**Advocate T.J. Bamford for the Twenty Third Plaintiff / Respondent**
**Advocate P.T.R. Ferbrache for the First to Third Defendants / Applicants**

**JUDGMENT**

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**Crow JA**

**INTRODUCTION**

1. This is the judgment of the court on an application by the First to Third Defendants ("**the Directors**") at least for leave to appeal against the Act of Court of the Royal Court (Lieutenant Bailiff Finch) dated 8 August 2023 ("**the Order below**") following a reserved judgment of the same date ("**the Judgment below**").

2. In very brief summary, the Judgment below dismissed an application for summary judgment and/or strike-out made by the Directors against the last-named Plaintiff ("**LPCC**") in relation to one particular pleaded issue. The Royal Court did not decide that the Directors' argument on that issue was necessarily wrong, but it held that the matter should be determined at trial.

3. We said in para. 1 above that this is an application "at least" for leave to appeal because there is a disagreement between the parties both as to the nature of what is before the court, and as to how the court should proceed. The Directors contend that this should be treated as a rolled-up hearing for leave and (if leave is granted) for the substantive appeal to be determined. In response, LPCC submits that the only matter before the court is an application for leave to appeal, but even that should not be determined at this stage. The reasons for this regrettable lack of consensus can only be explained by tracing the procedural history of the matter in a little more detail.

4. Before proceeding any further, it is convenient first to mention that the numbering of the Plaintiffs adopted in this judgment differs from that in the Cause. The explanation is provided in paras. 6 – 8 of the judgment of Lieutenant Bailiff Marshall KC dated 23 February 2024 ("**the Strike-out Judgment**"). There are properly twenty-three Plaintiffs, not twenty (as wrongly indicated in the Cause).

**THE PROCEEDINGS & THE JUDGMENT BELOW**

5. LPCC is a Guernsey protected cell company incorporated on 17 September 2014. The London Heritage Fund ("**the Fund**") is the only cell. It was an authorised, closed-ended investment scheme regulated by the Guernsey Financial Services Commission ("**the GFSC**"). LPCC went into voluntary, solvent liquidation on 16 June 2021, by which time about 90% of the share capital raised from investors had been lost.

6. The First to Twenty-second Plaintiffs ("**the Shareholder Plaintiffs**") were some of the shareholders in the Fund. The Directors were directors of LPCC and of the Fund.

7. The substantive claim sought damages against the Defendants (i) on behalf of the Shareholder Plaintiffs for "*breach of statutory duty*", namely s. 34 of the Protection of Investors (Bailiwick of Guernsey) Law, 1987 ("**the PoI Law**") and (ii) on behalf of LPCC, for breach of duty under the general law applicable to directors to exercise reasonable diligence, skill and care, and (possibly) also for breach of statutory duty under s. 34.

8. By their Counterclaim, the Directors sought a declaration that LPCC was liable to indemnify them in respect of any and all claims made against them by the Shareholder Plaintiffs, including the costs of dealing with such claims.

9. The claimed entitlement to an indemnity was based partly on the contractual terms pursuant to which the Directors were appointed as non-executive directors of LPCC and of the Fund ("**the Services Contracts**") and partly on LPCC's Articles of Association. So far as relevant, the Directors' Services Contracts provided as follows:

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"*9.1 The Company and/or the Fund agrees to indemnify you and keep you indemnified subject to Clauses 9. 2 and 9. 4 from and against all claims or liabilities arising out of or in connection with your negligence, default or any breach by you or your fiduciary duties or the terms of this appointment (other than in the case of liabilities arising from any fraud or wilful default on your part) ...*

*9.2 This indemnity will not include any liability that you may incur:-*

*9. 2.1 to the Company or to the Fund or to an associated company ...*

*9. 2. 4 in defending civil proceedings brought by the Company or the Fund ... in which judgment is given against you.*"

10. Article 123 of LPCC's original Articles of Association (now Article 126) provides as follows:

> "*The Professional Directors, secretary, other officers or employees and affiliates of the Company may be indemnified out of the assets of the company to the fullest extent permitted by the Companies Law from and against all actions, costs, charges, losses, damages and expenses which they or any of them may incur or sustain by reason of any contract entered into or any act done, concurred in or omitted, in or about the execution of their duty or supposed duty or in relation to it.*"

11. For present purposes, it is unnecessary to decide whether Article 123 is merely permissive, or whether it has the effect of conferring an indemnity. At the very least, it permits LPCC to provide the Directors with the indemnities conferred under their Services Contracts ("**the Indemnities**").

12. By para. 7(a) of their Réplique (which was repeated in para. 37 of their Defence to Counterclaim), the Plaintiffs denied that the Directors are entitled to be indemnified by LPCC with respect to the claims of the Shareholder Plaintiffs. They relied in this regard on s. 10 of the PoI Law, which provides as follows:

> "*Any provision of an authorised or registered collective investment scheme which would have the effect of exempting any person carrying on a restricted activity in relation to the scheme from liability for failure to exercise due care and diligence in discharge of his functions in respect of the scheme is void to that extent.*"

13. On 7 November 2022, the Directors issued an application seeking (i) summary judgment on their Counterclaim, and/or (ii) an order striking out the Defence to the Counterclaim to the extent that it denies that the Directors are entitled to be indemnified by LPCC in respect of the Shareholder Plaintiffs' claims. No basis for striking out any part of the Defence to the Counterclaim has been advanced other than by reference to the argument that the Directors are entitled to summary judgment. Accordingly, the strike-out application was in our judgment superfluous, and the substance of the matter turns on whether the Directors are entitled to summary judgment. Accordingly, the question whether the test for strike-out is different from the test for summary judgment, and if so what impact that might have, does not need to be considered.

14. The Royal Court dismissed the Directors' application. Its reasons are set out principally in paras. 11 and 12 of the Judgment below, which only make sense in light of para. 10:

> "*10. There was reference to public policy in the course of the hearing. Can the Directors of Authorised Collective Investments Schemes (ACIS's), in effect, avoid personal liability arising under the POI legislation? Advocate Bamford submitted that if the Directors are entitled to be indemnified, that would be met out of funds originally contributed by investors to the ACIS. As paragraph 23 of the Plaintiffs' skeleton concluded "in effect paying the investors back*

*with their own money, or the money of other investors." Advocate Jones submitted that it was both appropriate and permissible for Directors to be indemnified by a company against third party claims. PCC indemnities here do not extend to any liability of a Director to PCC. Advocate Bamford suggested that the interpretation urged by Advocate Jones would produce absurd results. But Advocate Jones in reply submitted that the question was not a novel or different point and neither the POI Law nor the Companies Law vitiate these indemnities. Section 10 of the POI Law is not relevant to Directors enforcing contractual rights against the company.*

***Observations***

*11. The valuable and detailed guidance cited from the Guernsey cases is followed here. The observations of the then Deputy Bailiff in the SPL case at first glance seem, with respect, on point. On what has so far been put forward, it is not very easy to distinguish from the present case. The "public policy" argument is also relevant. If the Professional Directors' view of the indemnities and their effectiveness is right, then it is feasible that a result which may not have been intended and not within the spirit of the legislation could ensue. For the avoidance of doubt, and keeping within the scope of the present proceedings, it is not suggested that the SPL case is indistinguishable from what is before the Court, but that there is a clearly respectable argument to suggest that it could be. Nor is it considered that the public policy submission is made-out [sic], but it appears to be a "realistic" point, not "merely arguable". Both these aspects of the case are of importance in this area of financial practice and are pre-eminently worthy of full argument at trial, not summary disposal now.*

*12. Put very simply (and accept [sic] the risk of some over- simplification) the cases on summary judgment in Guernsey and England use the wording: does the Plaintiff have a "realistic" prospect of success; is it more than merely "arguable"? In connection with striking-out is the claim "unwinnable" or "bound to fail"? It is considered that neither of the Professional Directors' applications falls within this wording. Putting it again rather simply, on what has been put forward the arguments raised against the Professional Directors' submissions are neither weak, nor fanciful, nor bound to fail. A mini-trial is not desirable in the present circumstances, and a "fuller investigation" is called for*."

15. In summary, the Judgment below accordingly proceeded on the basis that: (i) the present case may not be distinguishable from the decision in *SPL Guernsey ICC Ltd v. Addison* (unreported, 12 April 2018) judgment 19/2018 ("***SPL***"); (ii) LPCC's arguments were "*neither weak, nor fanciful, nor bound to fail*"; and (iii) the issues raised on the Counterclaim merited a "*fuller investigation*", including in relation to the "*public policy submission*" on behalf of LPCC.

16. The Directors made an application to the Royal Court for leave to appeal. That was refused by Finch LB in a judgment dated 16 October 2023. The application was then renewed in this court pursuant to s. 15(2) of The Court of Appeal (Guernsey) Law, 1961 ("**the 1961 Law**"). The Bailiff (sitting as a single judge of this court) heard oral argument on 30 November 2023. He gave a detailed *ex tempore* judgment in which he expressed the view that certain of the proposed grounds of appeal would not succeed or did not need to be pursued, but nevertheless he remitted the whole application to the full court. It is in these circumstances that the matter comes before us in this sitting.

17. In the meantime, however, there was another significant development in the proceedings. Also in October 2023, there was a four-day hearing before Marshall LB of a separate application by the Defendants for summary judgment and/or to strike out the entirety of the claims against them, together with a cross-application by the Plaintiffs to make certain amendments. The argument proceeded on the assumed basis that the proposed amendments were allowed. In a detailed judgment dated 23 February 2024 (*i.e.* the Strike-out Judgment mentioned above), the Lieutenant Bailiff acceded to the strike-out application, but she did not dismiss the action entirely, instead allowing the Plaintiffs an opportunity to salvage some parts of the claim by re-pleading them. We understand that an application has been made for leave to appeal against parts of the Strike-out Judgment, which will be heard orally by Marshall LB on a date to be fixed.

**THE HEARING IN THIS COURT**

18. Towards the end of the oral argument before the single judge on 30 November 2023, the Bailiff said this, addressing Advocate Jones for the Directors:

> "*you can go to the Court of Appeal to resume your leave application. But if I were giving you any directions, I would want you to come ready to argue the full appeal at the same time. I would not do it in two stages because it will be pointless*" (emphasis added).

19. An Act of Court was then drawn up to reflect the Bailiff's ruling. It defined "*the Application*" as the Directors' application dated 18 October 2023 for leave to appeal the Judgment below. The operative part of the order provided that "*The Application*" as so defined "*is remitted to the full Court of Appeal pursuant to Rule 15(2)(b) [sic] of the Court of Appeal (Guernsey) Law 1961*". It is clear on the face of the order that, notwithstanding the Bailiff's (contingent) remarks at the close of oral argument about the possibility of giving directions for a rolled-up hearing, no such directions were formally given and the only matter that was remitted to the full court was the application for leave.

20. Nevertheless, the Directors prepared an appeal bundle which is clearly headed "*Bundle for rolled-up hearing on 17 April 2024*". The bundle was lodged with the court and provided to Advocate Bamford for LPCC on 22 March, more than 3 weeks ago. No one on behalf of LPCC took issue with the description of the hearing listed for 17 April.

21. That is the context in which there is a disagreement as to the nature of the hearing in this court: the Directors contend that this is, or should be treated as, a rolled-up hearing, and LPCC contends that it is not, and should not be so treated. But the disagreement does not end there.

22. As a result of the Strike-out Judgment, the existing Cause has been struck out, but the proceedings have not been dismissed, nor has the Counterclaim. As such, there is in principle an extant claim against the Defendants, but it is not currently supported by any pleading; and there is an extant Counterclaim by the Directors, although it is responsive to an unpleaded claim. In these circumstances, LPCC submitted (in a letter sent the day before the hearing before this court) that we should not even decide the application for leave to appeal at this stage. It is submitted that the context of the claim and any relevant factual matrix will remain uncertain until the appeal against the Strike-out Judgment has been determined and/or the claim has been re-pleaded.

23. This is a thoroughly unsatisfactory state of affairs, and in fairness neither side is entirely blameless. If the Directors were seeking a rolled-up hearing, it would have been preferable if they had taken steps to ensure that the Bailiff gave the directions he mentioned as a possibility, and that the Act of Court made express provision in that regard; and if LPCC were to contend that nothing should be decided by this court at this stage, it would have been preferable if they had taken steps to notify the Directors and the court at an earlier stage.

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24. Nevertheless, this court must decide how best to proceed in the overall interests of the litigants and the best use of court resources.

25. On balance, we consider that it would be wrong to decide nothing. The proceedings are still in existence. Furthermore, the issue with which we are concerned arises under the Counterclaim, which has not been struck out. Moreover, it would seem almost inevitable that the Plaintiffs' claim will continue, at least in some shape or form, either because the Strike-out Judgment is overturned on appeal, or because the claim is re-pleaded in accordance with the rulings in that judgment. Either way, it seems inevitable that the question whether the Indemnities are voided by s. 10 of the PoI Law will need to be answered at some stage. For these reasons, we consider that it is appropriate at least to decide the application for leave to appeal.

26. The next question is whether we should treat this as a rolled-up hearing. So far as that is concerned, there are two substantive elements to the appeal. First, there is the question whether the Royal Court ought to have decided the question of construction summarily. If so, the second question is whether this court should decide the issue of construction for itself, or deal with it in some other way, either by deferring it to a further hearing of this court, or remitting it for decision at first instance.

27. The decision on what to do is finely balanced but, having invited submissions from the parties' Advocates at the beginning of the hearing and having considered the matter carefully, we indicated that we would hear argument and rule on leave to appeal and on the substantive question whether the Royal Court should have decided the question of construction summarily; but, if we reached the conclusion that the Royal Court should have done so, we would not decide for ourselves the question of construction on this occasion, without prejudging when and how that issue should ultimately be determined.

28. The reason for deciding the application for leave is that that matter is plainly and properly before the court, having been remitted to us by the Bailiff; the proceedings are still on foot; the issue arises on the Counterclaim, which has not been struck out; and the parties' representatives are before the court and fully prepared to argue the point.

29. The reason for deciding the substantive question whether the Royal Court should have determined the question of construction summarily is that there is clearly a public interest in resolving as much as possible as soon as possible; the Bailiff said what he said at the hearing on 30 November 2023; the appeal bundle indicated what the Directors expected the hearing to comprise; and there appears to be nothing more that could possibly be said on that question at the hearing of a substantive appeal that would not in any event be said on this application for leave.

30. The reason for refraining from deciding the question of construction now is that it is possible that efficient case-management might militate in favour of running the appeal on that point together with any appeal against the Strike-out Judgment; it is possible that the issue will fall away if the claim by the Shareholder Plaintiffs is discontinued in light of the Strike-out Judgment and/or any appeal against that judgment; it is possible that the scope of the issue and/or the relevant context will be affected by any repleaded claim against the Directors; and it is possible that further material, such as the terms of the GFSC's authorisation, might affect the outcome. Although we do not consider any of those individual possibilities to be likely, the uncertainty created by their cumulative effect, taken together with the fact that an application for leave is the only thing that is formally before the court, is sufficient to persuade us not to determine finally the question of construction at this stage.

**THE GROUNDS OF APPEAL**

31. The Directors seek leave to appeal on six main grounds, some of which have more than one element. In brief summary, the Directors submit that:

(i) the Royal Court was wrong to apply a burden of proof to the issue of construction; instead, it should have treated the issue as a matter of law and determined it in the Directors' favour;

(ii) the Royal Court was wrong not to distinguish the decision in *SPL*;

(iii) alternatively, the decision in *SPL* should be disapproved;

(iv) the Royal Court wrongly left out of account the Directors' arguments as to the difference between an indemnity and an exemption; had it taken those arguments into account, it would have accepted the Directors' submission that the Indemnities in this case are not voided by s. 10 of the PoI Law;

(v) the Royal Court was wrong to conclude that considerations of public policy were relevant and required full argument at trial; instead, it should have held that such considerations do not affect the conclusion on the issue of construction;

(vi) the Royal Court failed to give adequate reasons for its decision.

**THE TEST FOR SUMMARY JUDGMENT**

32. In order to understand the true nature and scope of the issues on the application for leave to appeal, it is convenient to start by identifying the nature of the hearing in the Royal Court.

33. The question for the Royal Court was whether the Directors were entitled to summary judgment. The jurisdiction to give summary judgment is defined by r. 19 of the Royal Court Civil Rules, 2007. The question is whether "*the plaintiff has no real prospect of succeeding in the claim or issue*" or whether "*the defendant has no real prospect of successfully defending the claim or issue*" and whether there is any "*other compelling reason why the claim or issue should be disposed of at trial*".

34. The applicable legal principles have been examined and explained in *EFG Private Bank (Channel Islands) Ltd v. BC Capital Group SA (in liquidation)* (Royal Court judgment, unreported, 14 July 2014) *Invescap Holdings Ltd v. Douglass* (Royal Court judgment, unreported, 30 July 2014) and *Tranquility Holdings Ltd v. Invista Estate Investment Management (CI) Ltd* (Royal Court judgment 38/2015, unreported, 13 August 2015), by reference to the English decision in *Easyair Ltd v. Opal Telecom Ltd* [2009] EWHC 339 (Ch), at para. 15. We set out below our own summary of those principles, partly in order to clarify certain issues that are relevant in this case, and partly also because there are certain transcription errors in the quotation from *Easyair v. Opal Telecom* in para. 2 of the Judgment below:

(i) In deciding an application for summary judgment, the court must consider whether the party against whom the relief is being sought has a 'realistic' as opposed to a 'fanciful' prospect of success. For these purposes, a 'realistic' prospect of success is one that carries some degree of conviction, *i.e.* one that is more than merely arguable.

(ii) In reaching its conclusion, the court must not conduct a 'mini-trial'. This observation was made in para. 15(iii) of *Easyair v. Opal Telecom* by reference to the decision in *Swain v. Hillman* [2001] 1 All ER 91. For present purposes, it is important to understand what was meant. *Swain v. Hillman* concerned a claim for personal injury in which there was a dispute of fact as to (a) how the injury had occurred, and (b) whether the defendants were in occupation of the relevant premises at the time: *ibid*, at p. 94d – j. Having outlined the nature of those factual disputes, Lord Woolf MR then said this, at p. 95a: "*Those are*

*matters which will have to be considered carefully by the judge at the trial*", adding that an application for summary judgment "*does not involve the judge conducting a mini-trial*": *ibid*, at p. 95b – c. He was thereby deprecating any attempt to resolve reasonably contested issues of fact on a summary application.

(iii) In deciding whether there is a reasonably contested issue of fact, the court is not bound to take at face value and without analysis everything that either party says in its evidence. In some cases, it may be clear that there is no real substance to some or all of the factual assertions made by one or other party, particularly if it is contradicted by reliable, contemporaneous documents. If so, the court can determine those factual questions without a trial.

(iv) However, in reaching its conclusion, the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial. Although a case may turn out at trial not to be particularly complicated, it does not follow that it should be decided without a fuller investigation into the facts than is possible or permissible on an application for summary judgment. Thus, the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

(v) On the other hand it is not uncommon for an application for summary judgment to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if either side's case is bad in law, then it would not be consistent with the overriding objective for the parties to be put to the added expense of a trial, or for court resources to be deployed in conducting the trial, in order to resolve an issue that can fairly be decided summarily.

(vi) If it is possible to show by evidence that, although documentary or oral evidence that would put the available documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment, because in that situation there would be a real, as opposed to a fanciful, prospect of success.

(vii) However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the outcome. There must be a reasonable evidential basis for reaching the conclusion that further relevant, admissible evidence is likely to be available at a trial.

35. It should be emphasised that the references in para. 34(iv) above (and in the case-law on which this summary is based) to a 'fuller investigation' are references to a fuller investigation of the facts. As a matter of principle, there is no warrant for making an *a priori* assumption that any legal argument at trial on a point of law or construction would necessarily be any 'fuller' than it would on an application for summary judgment (unless, of course, it was likely that further relevant evidence would emerge before trial, which is a different point). The 'summary' determination of a point of law or of construction does not connote either hasty or incomplete consideration of the legal arguments. On an application for summary judgment, there will always be full argument from the parties, and careful deliberation by the court. The expression 'summary' judgment simply refers to a judgment which is entered without the need for a trial.

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36. Finally in this context, it is also important to underline the point made by Marshall LB in paras. 114 and 158 – 159 of the Strike-out Judgment. Litigation costs are high, and if it is possible, properly applying the approach outlined in para. 34 above, to determine issues summarily without the added costs of a trial, then it is in the public interest to do so, because it is in the parties' interests and also in the interests of the efficient use of court resources. If a point of law or a point of construction is difficult, that of itself is not necessarily a sufficient reason to refuse to decide it summarily. If all relevant material is available at the interlocutory stage, and the point is of sufficient significance in the context of the case as a whole for it to be resolved at an early stage, then it should be.

**THE TEST FOR LEAVE TO APPEAL**

37. It is common ground that leave to appeal is required by virtue of s. 15(1)(e) of the 1961 Law, since the Order and the Judgment below are interlocutory, and none of the exceptions in s. 15(1)(e)(i) to (iii) applies.

38. The test for deciding whether to grant leave to appeal was also common ground, having been recently confirmed in *ITG Ltd v. Glenalla Properties Ltd* [2022] GCA091, at para 40. In short, leave should not be granted unless the court is satisfied that either (i) the proposed appeal has a real prospect of success, or (ii) there is an issue which in the public interest should be examined by this court. The Directors rely on the first limb only.

**THE TEST ON APPEAL**

39. LPCC submits that the Directors are seeking to appeal against a discretionary decision. They rely in this regard on the judgment in *Butterfield Bank (Guernsey) Ltd v. Q Gsy Ltd* [2021] GRC060, in particular para. 27, for the proposition that any decision whether to grant or refuse summary judgment on the basis that an argument has no real prospect of success is discretionary.

40. In our judgment, it is important to consider what was said in *Butterfield Bank v. Q Gsy*, and the earlier case-law it cited, in context. Whilst it is true to say that a decision whether to determine a case (or an issue) summarily involves an exercise of judgment, it is (like any other judicial power) one that must be exercised on a principled basis. Furthermore, the degree of available discretion may vary from case to case. For example, in some situations a judge may be faced with an application for summary judgment in a case involving contested issues of fact where there is some dispute as to whether there are reasonable grounds for believing that further relevant evidence will emerge in the course of disclosure or through cross-examination. In a case such as that, an appellate court would be slower to interfere with a puisne judge's evaluation, because it is a matter upon which judgments might reasonably differ. By contrast, if an application for summary judgment is made on a point of pure law where there are no grounds for believing that any further relevant and admissible evidence will emerge, then an appellate court may be more willing to intervene if the puisne judge declines to resolve the issue summarily.

41. The applicable test in relation to an appeal against a discretionary decision is not in dispute. As explained in *ITG v. Glenalla*, at para. 44, an appellant has to show that the court below misdirected itself as to the applicable principles, or took into account materially irrelevant factors or disregarded materially relevant factors, or that the decision is plainly wrong.

**GROUND 1**

42. There are three elements in the Directors' argument under Ground 1 (set out in paras. 4 – 5 of the Notice of Appeal). We only pause to emphasise this point because, in the course of oral argument before the Bailiff on 30 November 2023, and in the judgment refusing leave to appeal, Ground 1 was treated as having only one element. In fairness to the parties, we need to address all three:

    (i) The first is the Directors' argument that the Royal Court was wrong to allocate a burden of proof to the Directors (as they allege was done in para. 12 of the Judgment below).

(ii) Secondly, the Directors submit that the Royal Court should have decided the point of construction because the parties had had ample opportunity to present their written and oral arguments, and neither side suggested that any further, relevant evidence was likely to emerge for trial.

(iii) Thirdly, the Directors submit that, if the Royal Court had resolved the point of construction, it would have granted summary judgment on the Counterclaim.

43. The Directors' argument on the first point is founded on the proposition that questions of construction are matters of law, in respect of which no burden lies on either party (unless and to the extent that either party seeks to rely on any relevant surrounding circumstances as an aid to construction, in which case the burden lies on that party to prove them): *Scott v. Martin* [1987] 1 WLR 841, at 846D; *Phipson on Evidence* (20th ed.), at para 6-08, p. 176. Whilst we accept that proposition on its own terms, we reject the Directors' argument in its application to this case (as the Bailiff did last November). The Judgment below did not decide or assume that there was any burden of proof on the Directors in relation to the point of construction. Leave to appeal on that basis is accordingly refused.

44. The Directors' argument on the second point under this heading is based on the proposition that questions of construction may be suitable for summary determination: *JJW Hotels & Resorts v. Rhodes* [2022] GRC 041, at paras 37 – 41. They say that the particular issue raised in their application for summary judgment is a pure question of construction, and as such it could and should have been determined summarily. As noted above, LPCC's response is to say that the Royal Court's decision involved an exercise of discretion with which this court should not interfere.

45. For the purpose of determining the application for leave, the first step in the analysis is to consider whether the Directors have a reasonably arguable case for saying that the issue was one of pure construction. In our judgment, they do. Indeed, LPCC's Skeleton Argument in the court below effectively acknowledged as much, saying (in para. 3) that its Defence to the Counterclaim was based on a "*proposition of law*" namely that the Indemnities are void by virtue of s. 10 of the PoI Law, and (in para. 15) that the "*central issue*" in the application was "*the scope and effect of section 10*". Accordingly, the Directors' argument under this heading is not only arguable, but correct: the issue raised on the application for summary judgment can only properly be characterised as a pure question of construction.

46. The second step in the analysis is to consider whether the Royal Court could and should have determined the issue summarily. In our judgment, the Directors' argument on this issue is again not just arguable: it is correct. Although it is correct to classify the Judgment below as involving an exercise of discretion, we have reached the conclusion that the Royal Court misdirected itself on the applicable principles.

47. In particular, on the basis of the passages quoted above, it is apparent that the Judgment below proceeded on the basis that there would be an opportunity for 'fuller investigation' at trial, not because any further, relevant evidence was likely to emerge which would impact on the issue of construction, but rather because there would somehow be a greater opportunity for full argument on the point at trial. That interpretation of the Judgment below is further supported by reference to para. 4 of the Royal Court's refusal of leave to appeal, where the decision not to grant summary judgment was explained on the basis that it "*rested on the nature and extent of the law*". In our judgment, that demonstrates that the decision not to resolve the issue of construction summarily was taken on the assumption that the legal argument would necessarily be more extensive at trial.

48. Another way of putting the same point is to say that the Royal Court failed to apply the principle summarised in §34(v) above. LPCC has at no stage suggested that any further evidence is

actually necessary as an aid to the correct interpretation of s. 10. Instead, it relied (in para. 21 of its Skeleton Argument in the Royal Court) on an argument of principle, namely that difficult and novel points of law are not suitable for summary determination. In support of that proposition, it cited the English Court of Appeal judgment in *AC Ward & Sons v. Catlin (Five) Ltd* [2009] EWCA 1098, at para. 35. That authority is not mentioned in the Judgment below, and as such it is not apparent whether LPCC's argument based on it formed any part of the Royal Court's thinking. If it did, we consider that it was wrong. This is partly because it fails to give any proper weight to the proposition outlined in para 34(v) above; and it is partly because what was said in *AC Ward v. Catlin* was not that all novel and difficult questions of law are unsuitable for summary determination as a matter of principle, but rather that the issue in that particular case was inherently unsuitable for summary determination because it involved a novel and controversial issue "*in the common law of negligence*". It is notorious that the question whether a common law duty of care arises in any given case, and if so whether it has been broken, is intensely fact-specific. That line of reasoning has no relevance in a case such as this which turns on a point of statutory interpretation.

49. Similarly, in saying that a 'mini-trial' was undesirable, the Royal Court misunderstood the way in which that expression was being used in *Swain v. Hillman*, as explained in para. 34(ii) above. The Directors were not inviting the Royal Court to conduct a condensed trial of any disputed questions of fact: rather, they were inviting the court to determine an issue of law in respect of which there was no reason to believe that the relevant material available at the interlocutory stage would be any different from that available at trial.

50. Finally on this point, the Judgment below betrayed a misunderstanding of the significance of the issue under consideration. The Royal Court expressly recognised (in para. 1 of the Judgment below) that the issue of construction was "*likely to be important, as it may well go to the root of the action*". In our judgment, that is correct. Not only is it an important point of law in its own right, but its determination is also likely to have a profound impact on the dynamics of the litigation. If the Directors are entitled to an indemnity from LPCC in respect of any liability they might owe to the Shareholder Plaintiffs, that is likely to have a profound impact on the enthusiasm of those Plaintiffs to continue pursuing the claim. The sooner that question is resolved, the better. As such, the importance of the issue should have been regarded as a powerful argument in favour of summary determination, rather than as a reason for declining to deal with the issue summarily, as the Royal Court appears to have done in this case.

51. The third sub-issue under Ground 1 is whether the Directors' argument on the substantive point of construction has a reasonable prospect of success. So far as that is concerned, the Judgment below itself recognised as much. We agree. There is a reasonably arguable case for saying that s. 10 of the PoI Law does not void the Indemnities.

52. For these reasons, we grant leave to appeal in relation to Ground 1, but only in relation to para. 5 of the Notice of Appeal (*i.e.* the second and third issues identified in para. 42 above); and we allow the appeal on the basis that the Royal Court was wrong not to decide the issue of construction summarily. As already noted, we defer judgment on when and how the question of construction ought to be resolved.

**GROUND 2**

53. Under Ground 2, the Directors submit that the Royal Court was wrong not to distinguish this case from the decision in *SPL*. When he was dealing with the matter as the single judge, the Bailiff indicated that this argument did not have a realistic prospect of success (see para. 11 of his judgment of 30 November 2023). His reason was not that *SPL* was necessarily applicable, but rather that the argument was superfluous because in the Royal Court there is no binding authority which entails the need to distinguish an earlier decision in the first place. We agree, and we

would also add that anything said in ***SPL*** about s. 10 of the PoI Law was in any event *obiter*. Leave to appeal on Ground 2 is accordingly refused. That is not to suggest that any argument regarding the effect and the relevance of the decision in ***SPL*** will be prohibited on the hearing of any argument about whether the Directors are entitled to an indemnity: rather, the point is simply that the decision does not strictly need to be distinguished. For the avoidance of doubt, if it had been necessary to decide the point at this stage, we would have accepted the Directors' submission that it is reasonably arguable that ***SPL*** is not applicable, because it was dealing with a claim by a company against its own director rather than (as in this case) an indemnity in relation to claims by the Shareholder Plaintiffs.

**GROUND 3**

54. Under Ground 3, the Directors submit that if (contrary to their argument under Ground 2) ***SPL*** stands as authority for the proposition that s. 10 of the PoI Law precludes a director from invoking the benefit of an indemnity given by his/her company or fund against claims brought by shareholders and/or investors, then to that extent ***SPL*** was wrongly decided and should be disapproved. It would appear that this argument is merely one aspect of the argument that will coalesce around the third issue under Ground 1 above, namely whether the Directors are indeed entitled to rely on the Indemnities. As such, leave to appeal in respect of Ground 3 necessarily follows in light of our ruling on Ground 1.

**GROUND 4**

55. There are two elements in the Directors' argument under Ground 4:

    (i) The first is that the Royal Court wrongly left out of account and did not address in the Judgment below their submissions as to the difference between an indemnity and an exemption.
    (ii) The second is that, if the Royal Court had taken those arguments into account, it would have held that the Indemnities are not voided by s. 10 of the PoI Law.

56. On the face of the Judgment below, the first element is reasonably arguable. The Royal Court did not expressly deal with the point, no doubt because it considered that the whole question of construction needed to be determined at trial. However, the fact that the Royal Court did not address the argument expressly would lead nowhere, unless the Directors also have an arguable case on the substantive issue, which is the second element under this heading.

57. So far as that is concerned, the Directors submit that an exemption clause regulates the liability of a defendant to a plaintiff, potentially preventing the plaintiff from making any recovery at all, whereas an indemnity does not affect the liability of the party indemnified as against the plaintiff, but instead provides the defendant with a potential source of reimbursement for any outlay in respect of such liability. Founding themselves on that distinction, the Directors submit that the purpose behind the legislative control of exemption clauses in the context of companies and investment schemes does not apply to indemnity clauses properly so-called, such as the Indemnities in this case. On that basis, they submit that s. 10 only applies to provisions which have the effect of "*exempting any person … from liability*" which is not what the Indemnities do. The Directors recognise that they should not be able to escape liability for breach of their obligations to the company of which they are directors, and on that basis they have not claimed an indemnity from LPCC in respect of its own mismanagement claim against them. But the Directors submit that s. 10 does not invalidate their contractual entitlement to an indemnity from LPCC in respect of any liability they may be found to owe to the Shareholder Plaintiffs.

58. In our judgment, this point is reasonably arguable purely by reference to the wording of s. 10 and the true nature of indemnities and exemption clauses under the general law. It is also reinforced by reference to ss. 157 – 159 of The Companies (Guernsey) Law, 2008, which draw a clear distinction between exemption clauses (in s. 157(1)) and indemnities (in s. 157(2)), and it do not

invalidate "*qualifying third party indemnity provisions*" (under s. 159(1)). On the basis of the previously pleaded claim, it would appear to have been common ground between the parties that the Indemnities in the Services Contracts fell within s. 159(1).

59. As it happens, we consider that it may be superfluous for the Directors to run Ground 4 as a separate point in the substantive appeal. Instead, as with Ground 3, we consider that the question whether indemnities are conceptually different from exemption clauses for the purpose of s. 10 of the PoI Law will form part of the substantive argument under the third heading of Ground 1, in relation to which we have already indicated that we are granting leave to appeal. In the circumstances, it may be strictly unnecessary also to grant leave in relation to Ground 4, but for the avoidance of doubt we consider that it is reasonably arguable and, in order not to imply any limitation on the scope of the argument on the substantive appeal, we will grant leave to appeal in relation to Ground 4.

**GROUND 5**

60. The Directors' argument under Ground 5 has two elements, namely that the Royal Court was wrong to reach the conclusion, as it did in para. 11 of the Judgment below, (i) that LPCC's 'public policy' argument was relevant and (ii) that it required full argument at trial.

61. In answer to the first element, LPCC points out that it was the Directors themselves who first sought to invoke public policy considerations in support of their interpretation of s. 10, so it does not lie in their mouths to complain that the Royal Court took public policy into account. In our judgment, neither side's argument under this heading leads anywhere. At least to some extent, all legislation is intended to achieve some public good, so public policy considerations are capable of entering any debate about statutory interpretation. It does not really matter which side raised the point first. The relevant question in the present context is not to ask which party sought to initiate the debate about public policy, but whether the public policy considerations that were invoked militate against the summary determination of the issue.

62. That is the second element in the Directors' argument under this heading. In our judgment, it is merely another aspect of the argument in relation to the second sub-issue under Ground 1. In light of the fact that neither side has sought to contend that there was any likelihood that further evidence would emerge which was capable of impacting on the court's assessment of the parties' public policy arguments, the Royal Court was in as good a position at the interlocutory stage to determine any public policy arguments as it would have been at trial, and it should therefore have resolved the issue. As such, although it may be strictly unnecessary to grant leave to appeal under Ground 5 and to determine the issue separately from the grant of leave and the ruling on Ground 1, we will do so for the avoidance of doubt.

**GROUND 6**

63. The Directors' final Ground of Appeal is that the court below failed to give adequate reasons for its decision. In this context, the Directors draw attention to the volume of documentary material before the Royal Court (which comprised three voluminous bundles) and the extensive scope of the written and oral submissions, and they seek to contrast this with the length of the Judgment below, which is 8 ½ pages of text. More specifically, they submit that the Judgment below does not explain (i) why ***SPL*** is not easily distinguished, (ii) why a public policy argument is also relevant and cannot be determined summarily, or (iii) why the Directors' application amounted to a "*mini-trial*" and that "*a 'fuller investigation' is called for*".

64. In agreement with the Bailiff, we reject this line argument. This court has repeatedly emphasised that there is no single model to which all first instance judgments must conform: different circumstances will call for different levels of detail or reasoning, and there is always room in any case for an argument that some more explanation or detail could have been given. In this case, the very terms of the Directors' argument on appeal indicate that they are fully aware of the

grounds on which their application was dismissed in the court below. It may fairly be said that more explanation could have been given, but in our judgment the case does not satisfy the threshold test for overturning a first instance judgment on the ground that it is insufficiently reasoned. Indeed, the very fact that leave to appeal has been granted on the basis that the Royal Court misapplied the applicable principles in relation to the grant of summary judgment indicates that the basis on which the Judgment below was decided is sufficiently apparent on its face.

**CONCLUSION**

65. For the reasons given in this judgment, leave to appeal is granted in respect of –

(i) Ground 1, but only in relation to para. 5 of the Notice of Appeal;
(ii) Ground 3;
(iii) Ground 4; and
(iv) Ground 5.

66. Furthermore, we allow the appeal to the extent of ruling that the Royal Court was wrong in principle to defer until trial the determination of the issue of construction raised by the Counterclaim. That issue ought to have been decided summarily.

67. However, things have moved on since the Royal Court's judgment in August last year and, for the reasons set out in para. 30 above, we do not consider it expedient to determine the issue ourselves at this stage. Subject to further submissions from the parties (in respect of which we will give separate directions) we propose to defer any final ruling on when and how the question of construction ought best to be decided.

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