

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO. 584

Before: Sir Richard McMahon, President

BX

Appellant

-and-

(1) T LIMITED

(2) AX

(3) JX

(4) CX

(5) OX

(6) PX

(7) QX

Respondents

APPLICATION FOR PRIVACY ORDER
(determined on the papers)

Date of Decision: 31 December 2024

Counsel for the Appellant:	Advocate A C Lyne
Counsel for the First Respondent:	Advocate C H Edwards
Counsel for the Second and Third Respondents:	Advocate L Thibeault
Counsel for the Fourth to Seventh Respondents:	Advocate B S Havard

Cases and materials referred to:

BX v T Limited and others [2024] GRC 036 and [2024] GRC 066

In the Matter of K Trust [2020] GCA 090

In the Matter of L Trusts [2024] GCA 061

Salem and Salem v Sequent (C.I.) Limited [2024] GCA 064

Alpha Development Limited v Barclays Wealth Trustees (Guernsey) Limited (unreported, 4 March 2015)

Fuller v Guernsey Financial Services Commission [2024] GCA 083

IFS Investments Ltd v Manor Park (Guernsey) Ltd 2003-04 GLR 77

The Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020

The Financial Services Commission (Bailiwick of Guernsey) Law, 1987

Schmidt v Rosewood Trust Ltd [2003] UKPC 26

The Trusts (Guernsey) Law, 2007

Introduction

1. By an Application dated 27 September 2024, the First Respondent, as Trustee of the W Trust, has applied for a full privacy order. If granted, it would mean the appeal hearing taking place in private, the Court file would be sealed and any written judgment would be anonymised.
2. In support of this Application, there is an Affidavit of one of the directors of the First Respondent, which was sworn on 27 September 2024. The director explains that the Application is to protect the legitimate privacy interests of the Second and Third Respondents. Reference is made to the privacy regime that operated in the proceedings before the Royal Court. The director seeks the continuation of the privacy orders from those proceedings. In doing so, the director stresses that the settlor chose a Guernsey law trust because privacy was a key consideration for the settlor. The Appellant's appeal against the refusal to grant the disclosure orders sought is part of a wider dispute among members of the settlor's family. There has been intense media scrutiny, with some examples being given. As a licensed fiduciary, the First Respondent publishes on its website that strict confidentiality is observed. The Affidavit also explains that there are ongoing proceedings before the Royal Court, but that these are currently stayed.
3. Sitting as a single judge, I directed that the parties should respond to this Application. The First Respondent had initially provided a Skeleton Argument dated 8 October 2024. Responsive Skeleton Arguments were received dated 6 December 2024 on behalf of the Appellant, the Second and Third Respondents and the Fourth to Seventh Respondents. In some instances, reference has been made to the evidence that was before the Royal Court relating to privacy. The First Respondent's Skeleton Argument in reply is dated 20 December 2024.
4. I have noted that none of the parties has requested an oral hearing. In the circumstances, I am therefore prepared, as requested in para. 3 of the Application, to determine this Application on the papers.
5. I have chosen to head this decision in the same style as the Royal Court's judgments (see [2024] GRC 036 and [2024] GRC 066) and will adopt the style used in each when referring to the parties. In the second of those judgments, relating to costs, I have noted that additional information is given about the location of other proceedings, but that other references continue to be anonymised.

Notice of Appeal

6. The Appellant's Notice of Appeal is dated 10 June 2024. It raises three grounds of appeal against the dismissal by Lieutenant Bailiff Marshall KC of the Appellant's disclosure application (as summarised in para. 3 and explained more fully in para. 29 of the first substantive judgment).
7. The first ground relates to the Lieutenant Bailiff having misdirected herself and/or erred in law about the Court's inherent jurisdiction and the threshold for it to be exercised. Various paragraphs in the substantive judgment are highlighted.
8. The second ground similarly refers to the Lieutenant Bailiff misdirecting herself and/or erring in law about how the First Respondent should exercise its dispositive powers. Again reference is made to various paragraphs in the judgment, although there are instances of using actual names rather than the naming convention adopted in the substantive judgment.
9. The third ground appears to be dependent on a conclusion that some other error of law has been demonstrated meaning that it was wrong not to grant the Appellant's application for disclosure. It also refers to paragraphs in the substantive judgment.

10. Both the second and third grounds of appeal refer to the Lieutenant Bailiff's consideration of the evidence.

Legal principles

11. All the Skeleton Arguments acknowledge that there have been several recent cases decided by this Court relating to privacy. Whilst I had granted a full privacy order as a single judge in 2020 (*In the Matter of K Trust* [2020] GCA 090), more recent decisions have shown a departure from those principles. They are also decisions of the plenary court. I will mention these decisions in due order.

12. *In the Matter of L Trusts* [2024] GCA 61, the judgment delivered by Mountfield JA questioned why the hearing had been listed as being held in camera. An oral application was then made to continue the order that had prevailed in the Royal Court, and by reference to affidavit evidence that had been relied on in that Court. That application was not opposed. However, Mountfield JA explained at the outset of the Court's judgment why the principles of open justice are important and the need for an application:

“3. *It follows that a hearing should not be held in private unless there has been an application to do so, supported by sufficient evidence. When we drew this matter to his attention, Advocate Robison acting for the Appellant made an oral application to renew the privacy order, and drew our attention to an affidavit which had been lodged in support of the application made to the Royal Court, setting out in particular the position of the minor parties, and the risk of commercial harm to the Appellant's business, whose business premises and business may be threatened by some potential outcomes of the proceedings (and destabilised) if the fact of the existence of this dispute were to come into the public domain. ...*

5. *However, we draw attention to the fact that the presumption of open justice is an important one, and that applications for privacy orders in the Court of Appeal are not automatic where proceedings have been heard in private in the Court below. Such applications must be made, and evidence must be adduced to support the submission so as to enable this Court to establish that the legal test of necessity has been made out in relation to matters which are to be raised on appeal.”*

13. The next case is *Salem and Salem v Sequent (C.I.) Limited* [2024] GCA 064. As explained in the judgment delivered by Matthews JA, the hearing of the privacy application took place the day before the substantive hearing. A full privacy order was sought. This is an appeal against the decision I took not to recuse myself from hearing a breach of trust claim.

14. The judgment refers to what I set out when Deputy Bailiff in *Alpha Development Limited v Barclays Wealth Trustees (Guernsey) Limited* (unreported, 4 March 2015) as a summary of the principles in para. 22 (as cited in para. 3 of the Court of Appeal judgment):

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

(b) *In exceptional circumstances, the 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.”*

This also relates to the reference to “*the legal test of necessity*” to which Mountfield JA referred in *In the Matter of L Trusts*.

15. Matthews JA next refers to the approach I had taken in *In the Matter of K Trust* before commenting (in para. 8) that:

“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.”

He then recounts the arguments advanced for continuing the privacy regime from the Royal Court, including “*confidential information relating to Guernsey law trusts, the beneficiaries of those trusts (who include minors) and potentially sensitive commercial and financial matters.*” In consequence, the applicant trustees “*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*”, noting that the plaintiffs, who are beneficiaries, were neutral on this question.

16. The Court of Appeal’s conclusions are found in paragraphs 11 and 12:

“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 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.”*

17. The final case in this sequence is *Fuller v Guernsey Financial Services Commission* [2024] GCA 083, in which the Court’s judgment was delivered by Montgomery JA. The privacy application made by the Appellants was refused. This is an appeal against a decision I made in the Royal

Court where a privacy order had been made in accordance with the provisions in force when the appeals were commenced.

18. The Court of Appeal noted the legislative history and the way in which the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020, which was brought into force in November 2021, reversed the presumption of privacy attaching to an appeal against a public statement as previously found in section 11H(7) of the Financial Services Commission (Bailiwick of Guernsey) Law, 1987, as amended. As noted in para. 11, “*the ordinary principles of open justice should apply to the hearing of appeals, even in the area of financial service regulation, where there will inevitably be reputational consequences from publicity attendant upon any appeal.*” Further, the Court concluded that the “*appeals are free standing processes that were started in September 2024*”, meaning that the transitional provision found in section 140(3) of the 2020 Law did not assist.

19. The judgment also refers to what Lieutenant Bailiff Day had set out in *IFS Investments Ltd v Manor Park (Guernsey) Ltd* 2003-04 GLR 77 about the default position being justice in open court, before also quoting from para. 22 of the *Alpha Development* case, as it had been applied in *In the Matter of L Trusts*, adding (in para. 16): “*There is no question of balance. This is a binary question. Either a hearing in private is necessary, or it is not.*” Paragraph 17 states:

“Furthermore, even if there were any question of balance, the focus would not be on the supposed absence of prejudice to the Respondent. It is a central principle of Guernsey law that the courts should sit in public so that the proceedings can be observed by members of the public and reported on by the media. Transparency improves the quality of justice, enhances public understanding of the process, and bolsters public confidence in the justice system in the Bailiwick. The counterweight to any privacy plea is the wider interest of society in open justice, not the interests of the financial services sector.”

20. In relation to the Royal Court’s privacy order, Montgomery JA explained (in para. 20):

“The privacy decision made by the Bailiff is of equally little weight. We are obliged to consider the case for necessity on the basis of the evidence before this Court. There is no justification for framing the argument as if the Court of Appeal has to find a material change in circumstances before it could order an open court hearing. It is for the party seeking to derogate from the principle of open justice to produce clear and cogent evidence in support of the derogation. It is the duty of the Court of Appeal not merely to review the decision of the Bailiff, but to come to its own independent conclusions on the material based before it.

21. The Court of Appeal concluded that “*no compelling case for privacy has been made out, and that it is in the public interest that the Court sits in public on these appeals and publishes its judgment*” (para. 31). In respect of the order made in the Royal Court, it was noted in the following paragraph that there was no appeal against that element of the proceedings “*and there is no application to lift the existing privacy order in relation to judgment of the Royal Court*”.

Parties’ submissions

22. On behalf of the First Respondent, Advocate Edwards accepts that the applicable test is that of strict necessity. He points out that in the *IFS Investments* case one of the acknowledged exceptions to the general rule of open justice covers trust matters. Referring to my decision in *Re K Trust*, it is suggested that there has been no material change of circumstances, meaning that the privacy regime must continue. In doing so, he refers to what is contained in the director’s Affidavit in support of the privacy application.

23. This Skeleton Argument also refers to the jurisdiction being exercised pursuant to *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, where the Appellant did not have standing to bring the application pursuant to section 69 of the Trusts (Guernsey) Law, 2007 without leave of the Court. However, this appears to overlook that the Lieutenant Bailiff did not grant the leave required but instead decided the application pursuant to the Court's inherent jurisdiction. Advocate Edwards also points out that the Royal Court found that the Appellant was a stranger to the Trust which reinforced the conclusion that the jurisdiction being invoked should not be exercised in the Appellant's favour.
24. The Second and Third Respondents support the privacy application made by the First Respondent as their Trustee. This is hardly surprising when one considers the comments in para. 11 of the judgment delivered by Matthews JA in *Salem and Salem*. Advocate Thibeault suggests that the appeal is also framed on the basis by the Appellant as administrative trust proceedings, which fall within the recognised exception to which Advocate Edwards has referred. He makes an attempt to distinguish *Salem and Salem* by referring to the acknowledgement that the beneficiaries in that case had expressed their neutrality as to whether the appeal should be heard in public or in private, whereas the Second and Third Respondents are strongly opposed to anything other than the privacy order being made to continue in this Court. The proceedings in that case had been initiated by the beneficiaries themselves, unlike in the present case where the Appellant is a stranger to the Trust. In *Salem and Salem*, the proceedings concerned an alleged breach of trust rather than being administrative trust matters. Given the grounds of appeal advanced by the Appellant, in particular referring to the third ground, this was not a situation in which the appeal is narrower than the hearing before the royal Court because the Court of Appeal will have to consider the confidential material.
25. The Appellant opposes the privacy application. It is suggested by Advocate Lyne that the privacy regime in the Royal Court reflected the interim privacy regime that was in place in another jurisdiction (as identified in the second judgment of the Lieutenant Bailiff), which has since changed following an unsuccessful application to the Judicial Committee of the Privy Council for leave to appeal. She submits that the First Respondent has failed to file cogent evidence in support of its application, highlighting the criticisms made in *Salem and Salem* about "could haves" and "maybes". She adds that the current position is that the only beneficiaries of the Trust are adults, so this is not a case in which minor beneficiaries are also involved, needing additional protection. The possibility of minors being added as beneficiaries is premature because that is not currently the position. The decision in the Royal Court awarding costs shows that these proceedings were regarded as hostile and so fall outside the administrative type of proceedings where the Trust bears the costs of all parties.
26. Although they have not been presented as evidence, there are some other media reports included with Advocate Lyne's submissions. In those circumstances, I have taken these reports into account as well as those exhibited to the director's Affidavit.
27. The Fourth to Seventh Respondents, whilst indicating through Advocate Havard that they do not intend to participate actively in the Appellant's appeal (and have not appealed the dismissal of their own disclosure application), also point out that there are no minors or other usually protected parties involved in these proceedings. They also refer to the conclusion made in the costs judgment of the Lieutenant Bailiff as to the costs orders made on the basis that there was hostility between these parties; they were not treated as administrative proceedings (and include within their materials an article recently published by the Second and Third Respondents' Advocates about the Lieutenant Bailiff's costs judgment, which includes citing para. 13 therein). Advocate Havard also highlights the amount of media coverage that has been generated and so is already in the public domain.
28. In the First Respondent's Skeleton in reply, Advocate Edwards drew attention to what the Lieutenant Bailiff had stated in para. 119 of her substantive judgment about the nature of the

jurisdiction she was exercising, being an “*extension of a more recognisable and readily exercised jurisdiction, to order information to be given to beneficiaries*”, which is “*an administrative jurisdiction; it is not a dispute resolution jurisdiction*”. He also comments on the other submissions about the media coverage distinguishing between what is being reported and what could be reported in these proceedings were to be held in public.

Discussion

29. I have noted that there has been little focus on the terms of the Appellant’s Notice of Appeal. What this concerns is the decision in the Court below to dismiss the disclosure application made by the Appellant (and solely that aspect). It seems that this conclusion was reached relying on the inherent jurisdiction of the Royal Court, which is apparent from the basis of the first ground of appeal. Although the application may have been brought on alternative bases, there was no granting of leave pursuant to section 69(2)(g) of the 2007 Law, and the decision proceeded through applying the Court’s inherent jurisdiction to supervise trusts. Those proceedings were held in private because, as noted in para. 7 of the Lieutenant Bailiff’s substantive judgment, “*it is all to do with trust matters which are essentially private*”. The reservations expressed subsequently do not change the fact that in the Royal Court there has been a privacy order, which has not yet been lifted. It would only be lifted if there were an application or if the Court, of its own motion, thought it should be lifted, at which point all the parties would be able to make their representations as to that view. As explained in *Salem and Salem*, whatever the decision on this application it does not affect the position in the Royal Court. This is a fresh application and has to be considered on the basis of the established principles.
30. Although some reliance has been placed on the position I set out in *Re K Trust* about the need for some change of circumstance, I consider that the three decisions earlier this year by the plenary Court have moved away from that element having any relevance. This is clear from Montgomery JA’s judgment in the *Fuller* case (at para. 20: “*There is no justification for framing the argument as if the Court of Appeal has to find a material change in circumstances before it could order an open court hearing.*”). Instead, this Court has to reach its own decision on the basis of the material placed before it (which does not extend to the reasons why the privacy order was made in the Court below), applying the test of “*strict necessity*”, which had been adopted by this Court. The burden lies on the party to the appeal seeking to derogate from the principle of open justice.
31. I have carefully considered what is contained in the director of the First Respondent’s Affidavit. In doing so, I have considered all the media reporting exhibited and also as attached to the Appellant’s Advocate’s Skeleton Argument. I have also considered the public judgments from the Lieutenant Bailiff that are available on the Guernsey Legal Resources website in order to assess what level of anonymisation has been applied, including the additional information found in the later costs judgment.
32. In my judgment, the First Respondent’s Application does not satisfy the strict necessity test. In particular, I am persuaded that the appeal can be heard with something less than a full privacy order, as sought, in place, which can preserve the matters that might need to be kept confidential so as to secure the proper administration of justice (see, for example, para. 22(g) from the *Alpha Development* judgment). On the basis that this is a fresh application, the order made in the Royal Court is of little relevance and I consider that the evidence in support is not clear and cogent in support of granting the order sought.
33. Comments were made in the Royal Court about reflecting the interim privacy regime elsewhere, whilst it remained in place. Once leave to appeal was refused by the Privy Council, other proceedings have been held in public, but the Royal Court’s privacy order remains in place. That in itself is insufficient to justify granting the Application of the First Respondent and I have not been satisfied from the evidence adduced that the only solution is to grant the Application.

34. The reasoning of the Lieutenant Bailiff is contained in an anonymised public judgment. The naming convention used in that judgment could, I think, be used at the public hearing of this appeal, relying on para. 4 of the Application. I appreciate that this means that there might need to be a level of agreement between the Appellant and all the Respondents to adhere to that, including making available a redacted version of the notice of appeal, as well as potentially putting together the parties' cases using redacted materials. If any aspect of that proves too complicated then, just as in *Salem and Salem* it would be possible to apply to hear any particular aspect of the hearing in private and the plenary Court can decide whether or not to accede to that application. It was for this reason that I have listed the parties in the same anonymised form as in the Royal Court's judgments rather than adopting the style used in *Fuller* of naming the parties.
35. Given that the appeal includes a challenge to the manner in which the inherent jurisdiction has been exercised, and the factors considered before dismissing the Appellant's disclosure application, I am persuaded that this is more akin to an administrative trust proceeding than to what the Lieutenant Bailiff referred to as the "*dispute resolution*" jurisdiction, although the decision to make adverse costs orders will, I suspect, also be engaged in the event that the Appellant's appeal is unsuccessful. However, this Court has to deal with the reality of the case and, where there are no parties who are minors, which would have presented a stronger basis for granting the privacy order sought, I am satisfied that there are ways in which this appeal can be heard in public but using a naming protocol agreed between the parties.
36. Equally, I am satisfied that the grounds of appeal are narrower than the proceedings before the Royal Court. The grounds focus on the reasoning of the Lieutenant Bailiff and, although there may be some need to refer to the evidence that was adduced, which can also benefit from the naming protocol, the grounds refer to errors of law, which in my view will not require the parties to stray outside the way in which these were dealt with in the published substantive judgment.

Conclusion

37. For the reasons I have given, the First Respondent's Application for a full privacy order is dismissed, but I am satisfied that para. 4 of that Application enables me to direct that the same naming convention as used in the Royal Court's judgments can be adopted and used on this appeal. In other words, the Appellant would be identified as "BX", etc.
38. I will formally reserve the costs of this Application. If the parties are able to agree the outcome, it can be set out in a Consent Order, otherwise it is a matter that can be determined by the plenary Court at the conclusion of the appeal.