

A renewed application for leave to appeal against a decision of the Lieutenant Bailiff handed down on 21 November 2024. Application to appeal allowed.

[2025]GRC028

**IN THE GUERNSEY COURT OF APPEAL
(CIVIL DIVISION)
Court of Appeal Case No: 595**

12 May 2025

Before:

Wolfe JA

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

Between:

GUERNSEY FINANCIAL SERVICES COMMISSION

Appellant

-and-

WEIGHBRIDGE TRUST LIMITED

Respondent

WOLFFE JA

1. I have before me a renewed application for leave to appeal against a decision of the Lieutenant Bailiff handed down on 21 November 2024 (“the Substantive Judgment”). In that decision she allowed in part an appeal against a decision of the Appellant under the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law 2020 (“the Enforcement Powers Law”). She set aside the Appellant’s decision to issue a public statement pursuant to section 38 of the Enforcement Powers Law. By a further decision dated 28 January 2025, the Lieutenant Bailiff refused leave to appeal.
2. The Appellant is the regulator of the financial services sector in Guernsey. By decision issued on 26 September 2023, the Appellant (acting through a Senior Decision Maker) found that the Respondent failed to meet the minimum criteria for licensing set out in Schedule 1 to the Regulation of Fiduciaries, Administration Businesses, Company Directors etc (Bailiwick of Guernsey) Law 2020. This finding flowed from findings that the Respondent had failed to: (a) act with integrity; (b) act in accordance with its fiduciary interests or in the interests of the beneficiaries of relevant trusts; (c) monitor business activity and relationships; (d) keep proper books and records; (e) ensure appropriate and effective AML/CFT procedures; or (f) manage

conflicts of interest. In light of this finding, the Appellant concluded that it should issue a public statement in respect of the Respondent pursuant to section 38 of the Enforcement Powers Law.

3. The Respondent appealed to the Royal Court under section 106 of the Enforcement Powers Law. The Lieutenant Bailiff allowed that appeal. It was a feature of the appeal before the Lieutenant Bailiff that the Respondent did not dispute the findings of the fact and judgments of misconduct by its one-time personnel. There had, since the date of the conduct in question, been a complete change of management and control of the Respondent. Indeed, the new board had commissioned its own investigation into the prior misconduct; and had provided the fruits of that inquiry to the Appellant. The Appellant had, in that context, decided not to impose any financial penalty on the Respondent but to issue a public statement. It imposed penalties on four individuals, two of these following a settlement.
4. The focus of the appeal before the Lieutenant Bailiff was on whether, in light of the historical misconduct (all of which predated the change in management and control), the Appellant was justified in deciding to issue a public statement directed against the Respondent itself, and, if so, whether it was justifiable to issue a statement in the terms which the Appellant proposed. The Respondent's position was that issuing a public statement (or at least a public statement identifying the Respondent) would inevitably damage its reputation and that this would, in the circumstances, involve an error of law and/or would be unreasonable and/or disproportionate. The Respondent's alternative position was that it was an error of law and/or unreasonable and/or disproportionate for the proposed statement not to clearly identify the actual perpetrators of the misconduct so as to differentiate this from the acts and conduct of the present management of the Respondent.
5. The Lieutenant Bailiff concluded that the decision to issue a public statement was "unreasonable", that being one of the statutory grounds of appeal under section 106. In her decision refusing permission to appeal, the Lieutenant Bailiff helpfully noted the following features of her substantive judgment.
 - (i) She concluded that, "in the light of the singularly exceptional circumstances" of the case, the decision to issue a public statement was unreasonable. In reaching that conclusion she applied the test which she articulated at paragraph 181 of her substantive judgment. That test was: "If a panel of Jurats, instructed in accordance with the *Walters* judgment, were asked to decide whether or not the decision to impose the sanction of a public statement on WTL in all the circumstances of this case was unreasonable, am I confident that they would decide that it was?"
 - (ii) She had, further, concluded that (if that formulation of the test was insufficiently stringent) the decision was unreasonable applying any more stringent test of unreasonableness, because in the circumstances of the case, it would only become reasonable in circumstances where all reasonably possible steps were taken to avoid or minimise the risk of damage to the interests of innocent third parties, so far as that could be done consistent with the proper objectives of issuing a public statement.

- (iii) In any event, she would have set aside the decision for error of law, firstly because the proposed statement did not fulfil the requirement of accuracy and, secondly, because it had been drafted without taking into account a potentially material matter, namely the terms of another public statement which the Appellant proposed to issue in respect of the person who had in fact perpetrated the misconduct. I note that she also concluded that the proposed statement was unreasonable in that it did not take into account the duty, which she found to exist, to minimise the damage to “meritorious innocent third parties”.
6. In refusing the Appellant’s application for leave to appeal, the Lieutenant Bailiff observed that any appeal would have to succeed in respect of each of these grounds. She noted that there was no appeal against her decision not to remit the matter back to the Appellant. She emphasised that her decision was very much one on the facts of this case – where the current owners and controllers of the Respondents had nothing to do with the historical misconduct and had behaved in an exemplary manner. She considered this to be quite exceptional and unlikely to recur.
7. I am not myself convinced that the circumstances of this case are indeed “singularly exceptional” and unlikely to be repeated. Indeed, it seems to me to be quite foreseeable, following the discovery of misconduct in the management of a company, for a new board to be appointed and for that board to undertake an investigation, self-report to appropriate authorities, and take robust steps to address previous failings – with a view, not only to doing the right thing, but to securing a less severe regulatory response. Indeed, in the context of bribery and corruption offences, a company might self-report to the prosecutor with a view to inviting the prosecutor to consider dealing with the matter by way of a deferred prosecution agreement: see the Criminal Justice (Miscellaneous Amendments - Deferred Prosecution Agreements) (Bailiwick of Guernsey) Ordinance 2023. If I am right that the circumstances could indeed arise in other cases, the issues which arise in this case could have a significance beyond the particular circumstances of this case.
8. An appeal lies to this Court, with leave, on a question of law under section 107 of the Enforcement Powers Law. The Lieutenant Bailiff, in her decision on leave to appeal, observed that whilst the correctness of her formulation of the test was susceptible to appeal, if she had applied the correct test, her application of a correct test would be a decision of fact, from which there would be no appeal. That is not an exhaustive statement of the position. It is, for example, well-established that an error of law appeal is not limited to a case where the alleged misconception of law is apparent on the face of the decision under appeal (see, for example, *Edwards v. Bairstow* [1956] AC 14).
9. The Appellant’s proposed grounds of appeal are as follows:
- (i) Ground 1: The Royal Court’s decision was not in accordance with the statutory scheme in section 38, in the following respects:
- 1.1. Failure to take into account all of the factors referred to in section 38 in the assessment of whether the decision was reasonable. The Appellant contends that the Royal Court focused solely on the balance between the

public interest and the financial interests of the Respondent, and failed to have regard to the other factors referred to in section 38.

1.2. The Royal Court is said to have postulated a novel legal test which distorted the analysis under section 38, namely (at paragraph 191) that the Appellant required to take all steps reasonably possible to avoid or minimise damage to the interests of innocent persons.

- (ii) Ground 2: The Royal Court erred in failing to treat the Respondent as a separate legal entity responsible for its conduct as a corporate body. The Appellant refers in particular to a paragraph in the Lieutenant Bailiff's judgment in which she distinguished between the position of a corporate entity and an individual, with the observation that "*whilst a leopard cannot change its spots, a company can change its board of directors*". The Appellant observes that corporate entities may be licensees and accordingly subject to regulation as such. The Appellant suggests that a consequence of the Royal Court's decision would be that a company could, by changing its board of directors, seek to insulate itself from being held responsible for prior misconduct.
- (iii) Ground 3: The Royal Court made an incorrect assessment of the scope of the public interest. The essential error alleged is that the Royal Court required the identification of a specific public interest pertaining to the facts of the case which justified the issue of a public statement. This is said to undermine the applicability of broader principled justifications for issuing a public statement. It is further said to introduce a requirement which is not part of the statutory test, which unlawfully limits the scope of the public interest considerations which may be taken into account and which usurps, so it is said, the Appellant's evaluative role in assessing the public interest.
- (iv) Ground 4: The Royal Court exceeded its jurisdiction by making findings. The Appellant contends that it is implicit in the Royal Court's decision that it rejected findings made by the Appellant and made its own findings about the effect on the Respondent of the issue of a public statement.
- (v) Ground 5: The Royal Court's decision was irrational. The Appellant contends that had the law been properly applied to the facts as found by it, no reasonable tribunal would have reached the conclusion that the issue of a public statement was out with the range of reasonable responses.
- (vi) Ground 6: The Royal Court erred in its description and application of the test for factual unreasonableness. The Appellant contends that the test articulated by the Lieutenant Bailiff, which I have quoted at paragraph 6(i) above, is wrong. The question, says the Appellant, is one for the Court, giving appropriate weight to the Appellant's position as the primary decision-maker, and not a hypothetical third party.

10. I have concluded that I should grant leave to appeal on all of these grounds. Since I am granting permission, I will explain my reasons briefly.

11. In *ITG Ltd v. Glenalla Properties Ltd* [2022] GCA 091, the Court stated that leave should not be granted unless it is at least satisfied either: (i) that the appeal has a real prospect of success; or (ii) that even though the appeal does not have a real prospect of success, it raises an issue which in the public interest should be examined by the Court of Appeal. I have concluded that this appeal has a real prospect of success and, in any event, that it raises an issue which in the public interest should be examined by the Court of Appeal.
12. I make two preliminary observations:
- (i) I am obliged to address the application *de novo* and not as an appeal against the Lieutenant Bailiff’s decision refusing leave. It should accordingly not be taken as a discourtesy to her leave judgment if I refer to her reasoning only to the extent that this is helpful in explaining my own assessment of the Grounds of Appeal.
 - (ii) I have, of course, reached no concluded view as to the merits of the Grounds of Appeal. That will be a matter for the Court of Appeal once it has heard full argument.
13. Ground 1.1 contends that in the context of discussing the fourth and eighth Grounds of Appeal before her, the Lieutenant Bailiff treated the issue (particularly at paragraph 176) as a question of balancing the public interest in the issue of a statement with the financial interests of the Respondents. It seems to me that this Ground may properly be considered along with Ground of Appeal 3, which contends that the Lieutenant Bailiff went wrong in focusing (as can be seen at paragraphs 171 and 176) on the specific public interest said to be served by the issue of a statement, whilst discounting what she characterised as “automatically assumed generalities”.
14. The Lieutenant Bailiff, correctly, observes in her leave judgment that it is not appropriate to take a passage in the Substantive Judgment out of context, and states that, when her judgment is read as a whole it is apparent that she was well aware of the factors referred to in section 38. In relation to Ground 3, she states that it is not unreasonable to expect the Appellant to be able to identify “the actual reality, or some content of” the asserted public interest and rejects the proposition that the Appellant can rely on generalities as regards the public interest.
15. It suffices, for the purposes of determining whether to grant permission, that it seems to me that, taking Grounds 1.1 and 3 together, the question of whether the particular passages which the Appellant criticises do disclose an error of approach on the part of the Lieutenant Bailiff, even when read in the context of her judgment as a whole, is one which is sufficiently open to argument to have real prospects of success. In particular, it seems to me to be open to argument that the Appellant is entitled to rely on public interests, of a general nature, which would be served by the issue of a public statement, and that it is also open to argument that the Lieutenant Bailiff took a restrictive approach to the relevant public interest which is not warranted by the statute. The point appears to me to have real prospects of success. It may also be of some general importance.

16. Ground 1.2 focuses on paragraph 191 of the Substantive Judgment. This is directed to the Lieutenant Bailiff's alternative reason, mentioned at paragraph 5(ii) above, for concluding in the Substantive Judgment that the Appellant's decision was unreasonable. In that paragraph she said this:

“Where the decision of a public authority ... involves balancing a public interest ... against the interests of entirely innocent third parties ... but it is accepted that some damage to the latter will be caused, or even that there is just a recognisable risk that it will be caused, then in my judgment any and every ordinary, right-minded person's reaction to accepting the reasonableness of doing so will come with the qualification that, if one is going to do so, it is only right to take all steps reasonably possible to avoid, or at least minimise, the prospects of such damage.”

Further, at paragraph 275, she referred to:

“the duty which I have found must exist, and has not been applied, to minimise ... so far as possible (always consistently with sufficient furtherance of any proper public interest in the issue of such a statement) the risk of thereby causing financial damage to meritorious innocent third parties.

17. The Appellant contends that this “duty”, which is not found in the statute, is liable to distort the assessment of reasonableness. The Lieutenant Bailiff, in her leave judgment, states that these passages did not distort the analysis of the factors going towards an assessment of reasonableness and explains that the word “duty” was used in reference to the specific facts of this case.
18. It suffices for me to observe that it seems to me that it is open to the Appellant to argue, with real prospects of success, that the Lieutenant Bailiff has, in the passages to which I have referred, articulated a requirement, however qualified by reference to cases involving what are said to be “entirely innocent third parties”, which is generalisable to other cases and which is liable, in such cases, to distort the analysis required by the Law. Further, it seems to me that this Ground may require to be considered along with Ground 2, since the application of the postulated “duty” in this case is predicated on the Respondent (or at least the Respondent's current management and owners) being properly characterised as “entirely innocent third party” notwithstanding the continuing corporate personality of the Respondent.
19. Ground 2 is to the effect that the Lieutenant Bailiff erred in the approach which she took to the case in light of the corporate personality of the Respondent. The Appellant makes the point that the statutory regime envisages that corporate bodies may be licensees. If a corporate body fails to meet the minimum criteria for licensing, then it is that corporate body, regardless of any subsequent changes of management or personnel, which has committed the misconduct and which is liable to be sanctioned. The Lieutenant Bailiff's approach requires, it is said, a distinction, which has no warrant in the legislation, to be drawn between the approach taken to a corporate body and an individual.
20. I acknowledge, as the Lieutenant Bailiff observes in her permission judgment, that the issue in the present case is not whether the corporate body qua corporate body has committed misconduct, but whether that body should be sanctioned in a particular way, in light of all the circumstances, including the changes of personnel. I am not myself convinced by the

proposition, which seems to be advanced in support of the Ground of Appeal, that changes of management fall to be ignored. Nevertheless, it seems to me that the contention that the Lieutenant Bailiff has, in practical effect, treated the changes in the management of the Respondent, and its current probity, as justifying the conclusion that the Respondent is now, in effect, an “entirely innocent third party” such that a public statement is not justified, and that this is not a correct approach to take where the entity is a corporate body with continuing legal personality, is open to argument with real prospects of success.

21. Ground 4 is to the effect that the Lieutenant Bailiff has made findings of her own as regards the effect of a public statement on the Respondent, and that these differed from the findings made by the Appellant. It suffices to say that, in light of the passages referred to in the Note of Appeal, the Ground appears to me to be an arguable one, which, at least along with other Grounds, has real prospects of success.
22. Ground 5 is to the effect that the Lieutenant Bailiff’s decision was irrational in the technical sense that no reasonable tribunal properly directing itself in law could have reached the decision which she reached. As I understand this Ground, it does not, as the Lieutenant Bailiff suggests in her leave judgment, involve an erroneous failure to reflect the nature of the statutory “unreasonableness” ground of appeal. Rather, I take the point that is being made to be the one envisaged in *Edwards v. Birstow*, to which I have referred above, that – so the Appellant contends – on the basis of the factual findings, the Lieutenant Bailiff’s decision was simply not one which was open to a tribunal which had properly directed itself on the law. The argument appears to be predicated on other Grounds of Appeal succeeding. It seems to me that on that hypothesis, this Ground too is one which has real prospects of success.
23. Ground 6 is directed to the test which the Lieutenant Bailiff articulated and applied in deciding that the Appellant’s decision was unreasonable. In reaching that decision, she applied the concept of “factual unreasonableness”, which had been articulated in *Walters v. States Housing Authority* and which has been applied in a number of Royal Court decisions to modern statutory appeal provisions, including section 106 of the Enforcement Powers Law. The Lieutenant Bailiff’s substantive judgment contains an extended analysis of that concept, which culminates in the articulation of the test which I have quoted at paragraph 5(i) above. The Appellant contends that this is not the correct test. It seems to me that this argument has real prospects of success. In any event, there has, so far as I am aware, been no extended consideration in the Court of Appeal of the correct approach to be taken to “*Walters* unreasonableness” and it seems to me that it would serve the public interest for the Court of Appeal to have the opportunity to consider whether the Lieutenant Bailiff’s analysis of that concept is or is not sound.
24. The Lieutenant Bailiff observes, in her leave judgment, that the appeal can only succeed if there is a successful challenge to each of the bases upon which she proceeded and which I have set out at paragraph 5 above; and, further that there is no appeal against her decision not to remit to the Appellant. There are Grounds of Appeal directed to both of the alternative reasons she gave (noted at paragraphs 5(i) and (ii) above) for concluding that the Appellant’s decision to issue a public statement was unreasonable. The third point, set out in paragraph 5(iii), was, by contrast with those set out in paragraphs 5(i) and (ii), concerned not with the principle of whether a public statement should be issued, but with the terms of the draft public statement which the Appellant had decided to issue. In that context, the Lieutenant Bailiff relied on the

failure to comply with the “duty” to minimise the damage to innocent third parties, which is, of course, challenged in Ground of Appeal 1.2. To that extent, it accordingly seems to me that the Appellant does challenge at least part of the reasoning upon which she reached her conclusion on the issue set out in paragraph 5(iii) above. Against that background, it seems to me that, if the Appellant is otherwise successful in the appeal, it may argue that the Lieutenant Bailiff’s decision not to remit the matter for reconsideration of the terms of the public statement falls to be reviewed. In reaching that conclusion, I do not foreclose or prejudge any argument which the Respondent may advance that this course is not open to the Court.