Geneva Trust Company SA v D and Ors

Jurisdiction:	Jersey
Judge:	M. J. Thompson
Judgment Date:	06 June 2024
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Text

Between
Geneva Trust Company SA (formerly known as Rawlinson Hunter Trustees SA)
Representor
and
(1) D

and

(2) Fort Trustees Limited
(3) Balchan Management Limited

and

(4) E
Respondents

[2024]JRC128

Before:

M. J. Thompson, Esq., Commissioner, sitting alone

ROYAL COURT

(Samedi)

Companies.

Authorities

D v Rawlinson and Hunter Trustees SA [2018] JRC 132.

Representation of Rawlinson and Hunter Trustees SA and Fort Trustees Ltd and Balchan Management Ltd [2018] JRC 131.

Geneva Trust Company (GTC) SA v D and Ors [2020] JRC 063.

Downes v Marshall [2010] JLR 265.

Incat Equitorial Guinea Ltd and v Luba Freeport Ltd [2010] JLR 435.

Mayo v Cantrade [1998] JLR 173.

Cunningham v Cunningham [2009] JLR 227.

Trico v Buckingham [2019] JRC 163.

FG Hemisphere v DRC Congo [2011] JLR 486.

Chief Officer of States of Jersey Police v Panel of Jurats [2014] 2 JLR Note 15.

Brown v. Barclays Bank PLC (2).

Cummins v Howlands (Furniture) Limited [2014] 2 JLR Note 18.

Royal Court Rules.

Court of Appeal (Civil) (Jersey) Rules 1964.

English Civil Procedure Rules.

Advocate J. Barham **for the Representor**.

Advocate D. James **for the First, Second and Third Respondents**.

The Fourth Respondent not appearing.

THE COMMISSIONER:

Introduction

1 This judgment contains my detailed reasons for refusing to permit the First to Third Respondents (“the Respondents”) to amend their Notice of Appeal dated 22 September 2023 (“the Original Notice of Appeal”). The amendments the Respondents proposed to make to the Original Notice of Appeal were first set out in an Amended Notice of Appeal provided to the Representor on 16 February 2024 (“the Amended Notice of Appeal”).

2 This judgment also contains my reasons for refusing the Respondents permission to file the Amended Notice of Appeal out of time and further, for refusing to permit the Respondents to file fresh evidence in the form of the thirtieth affidavit of Nicole Martin sworn on 22 February 2024.

3 Finally, this judgment deals with the reasons for consequential orders made as a result of refusing the Respondents' preliminary applications and also for refusing, at this stage, the application by Geneva Trust Company (“GTC”) (“the Representor”) for an interim payment and for refusing to order security for costs of the Respondents' Original Notice of Appeal at this stage.

Background

4 The issues I had to determine arise within a long-running set of proceedings relating to the Representor's retirement as trustee of certain trusts. The proceedings have generated a significant number of summonses, hearings, judgments and orders to date. It is also right to recall that there is significant hostility and bitterness between the Representor and the Respondents.

5 The proceedings commenced by the Representor concerned the Representor seeking a blessing to retire as trustee of certain trusts. On 8 November 2017, an Act of Court was issued providing for the Representor's retirement and indemnity. Paragraph 4 of the Act of the Court contained a mechanism for the Representor's fees and expenses if not agreed to be assessed by the Judicial Greffier on the *Alhamrani* basis. This included a provision that if there was an objection to payment other than a quantification or justification of incidence, but rather than an objection as to principle or liability, the matter was to be referred to the Royal Court for further directions.

6 Paragraph 5 of the Act of Court of 8 November 2017 contained directions for determination of an issue between the Representor and the Respondents as to whether an indemnity for fees and expenses had been granted by the First Respondent in favour of the Representor. This issue has never been resolved.

7 On 16 March 2018, the Assistant Judicial Greffier provided his conclusions in relation to a claim for unpaid invoices totalling Swiss Francs 874,524. The Assistant Judicial Greffier taxed the amount of fees due in the sum of Swiss Francs 780,049.66 (the “First Assessment”). This decision was appealed by the Respondents.

8 However, before the Respondents' appeal against the First Assessment was determined, a hearing of a summons issued by the Representor took place on 31 May 2018. At this hearing, the issue of payment of fees and expenses incurred by the Representor after commencement of the First Assessment was raised with the Royal Court. This led to paragraph 4 of the Act of Court of 8 November 2017 to be varied to provide as follows:

> ***"3. In relation to Order 4 of the said Act of Court, ordered that the First Respondent shall pay or procure the payment of the Representor's fees and expenses as assessed by the Judicial Greffier, subject to the current appeal, and the Representor's further fees and expenses since its last invoices presented to the Court as agreed or failing agreement as assessed by the Judicial Greffier on the Alhamrani basis; such payments to be made within 14 days of the same becoming due."***

9 The appeal referred to is the appeal determined by Commissioner Clyde-Smith, as reported in his judgment dated 23 July 2018 [2018] JRC 132. The appeal led to the amount assessed by the Assistant Judicial Greffier being reduced to Swiss Francs 167,339.

10 The ground of appeal that was the basis of the reduction to the First Assessment concerned a trust described in the judgment as the DDT Trust, where the Royal Court concluded that the fees of this trust should not have been assessed by the Assistant Judicial Greffier because the supervision of the assets of the DDT Trust was being undertaken by the Royal Court in Guernsey. The other grounds of the appeal were unsuccessful.

11 I add for the sake of completeness that also on 23 July 2018, reported at [2018] JRC 131, the Royal Court issued a judgment declaring invalid the purported removal of the Representor as trustee of three trusts. It was at paragraph 44 of this judgment that the Court set out its reasons in relation to paragraph 4 of the Act of Court of 31 May to which reference has been made, as follows:

> ***"However, the Court did order D to pay or procure the payment of R & H's fees and expenses as assessed by the Judicial Greffier, subject to the current appeal, and any further fees and expenses since its last invoices were presented, as agreed, or failing agreement, as assessed by the Judicial Greffier on the Alhamrani basis, such payments to be made within fourteen days of the same becoming due.*** Placing that obligation upon D was consistent with the draft orders Advocate Mistry had placed before the Court on his behalf."

12 On 31 July 2019, by letter to by the Assistant Judicial Greffier, the Representor sought an assessment of its fees incurred after the First Assessment.

13 The Respondents filed objections by letter dated 4 October 2019, enclosing the eighteenth affidavit of Nicole Ann Martin and exhibit NAM18.

14 The Representor filed a written response to the Respondents' objections on 1 November 2019.

15 It is also right to record that on 20 April 2020, the Royal Court, presiding over by Commissioner Clyde-Smith, issued a further judgment reported at [2020] JRC 063 ("The 2020 Judgment"), where the Court found that six of the trusts formally administered by the Representor had no assets. This led to the Royal Court stating the following at paragraph 43:

> ***"43. In our view, it is not possible to deal with these nine trusts on a global basis. As paragraph 5 of the order of 315 May 2018 makes clear, each trust has to be treated separately and we accept Advocate James' submission that GTC's claim for fees and expenses for each trust is payable out of the assets of that trust, unless of course it has other arrangements for their discharge. If that trust has no assets at all, then it probably ceases to exist as a trust. In the case of all of these trusts, GTC does hold shares in an overlying company, but if there are no realisable assets at all within the underlying corporate structure, then there is nothing to pay GTC's fees and expenses with and GTC has to bear the loss, unless again it has other arrangements for their discharge. Subject to that GTC cannot expect to be in a better position than it would have been had it continued as trustee or expect the new trustees Fort & Balchan to discharge its fees and expenses out of their own assets or assets procured from another source."***

16 The Assistant Judicial Greffier's assessment, was handed down on 14 September 2023. It is right to observe at this stage that it was not clear why it took nearly four years for the assessment to be carried out. While I accept that many matters in 2020 and 2021 may have been delayed due to covid, even taking this into account, a delay of four years is not acceptable. I therefore invite the Judicial Greffier to conduct a review as to why this delay occurred.

17 On 22 September 2023, the Second Respondent filed the Original Notice of Appeal. A date was fixed on 24 November 2023 for a hearing of the appeal summons. The summons sought that the decision be cancelled and rendered unenforceable in its entirety. The grounds of the appeal in the original summons were:

> *(a) Treatment of trusts with no assets;*
>
> *(b) Expenses following the Representor's retirement as trustee;*
>
> *(c) Previous assessments*.

18 On 1 November 2023, the Representor issued its application for certain payments to be made by the First Respondent ("D") and interim payments to be made by the First and Second Respondents.

19 On 17 January 2024, the hearing date was moved from 25 January to 29 February 2024.

20 On Friday 16 February 2024 at 16:55, Collas Crill for the Respondents wrote by email to the Representor informing the Representor that it would be seeking to amend the appeal summons and the appeal notice and inviting the Representor to consent to the amendments.

21 On Monday 19 February 2024 the Respondents obtained a date fix appointment to issue a summons seeking to amend the appeal summons and appeal notice. This application was supported by the thirtieth affidavit of Nicole Martin sworn on 22nd February 2024.

22 The Amended Notice of Appeal sought to add the First and Third Respondents as appellants and also raised additional grounds under the headings of "expenses following the Representor's retirement as trustee" and *"previous assessments"*, and raised a new ground of claims made during a period of co-trusteeship.

Submissions

23 Advocate James for the Respondents made the following submissions.

24 The Representor was seeking to gain the Court's sympathy because of the length of time it claimed it was seeking its costs; however, this approach had to be contrasted with the Representor taking fourteen months from May 2018 to July 2019 to submit its costs for assessment. Any complaints about prejudice by the Representor had to be set against this period of delay.

25 Advocate James also criticised the Representor for failing to inform the Assistant Judicial Greffier that it had ceased to be trustee. This submission was made in response to a question from the Court as to why the grounds the Respondents now wished to rely on had not been raised earlier. Advocate James was not in a position to advance any explanation in response to this question.

26 In relation to the test on an appeal, the test was that set out in *Downes v Marshall* [2010] JLR 265 as summarised at paragraph 8 to 10 of Commissioner Clyde-Smith's judgment in this matter, reported at [2018] JRC 132. However the Court still retained a jurisdiction to carry out the appeal as a re-hearing where it would be in the interests of justice to do so. The Respondents contended that to the extent necessary, the Royal Court

should be held to retain such a jurisdiction to provide for a necessary safeguard to allow the Court to do justice fairly and proportionately where the individual circumstances warranted such an approach. In support of this approach he relied on the final sentence of paragraph 19(v) of *Incat Equitorial Guinea Ltd v Luba Freeport Ltd* [2010] JLR 435, where Birt, Bailiff stated

> ***"In other words, the court will intervene if it thinks that the Greffier has erred on a matter of principle or has gone wrong in exercising his discretion to the extent that intervention is required in the interests of justice and fairness"***

27 In relation to the Second Assessment, only part of the costs claimed by the Representor had been assessed. This was because in respect of certain costs, the Assistant Judicial Greffier had concluded that he was unable to form a view because he could not understand either how costs had been calculated or re-allocated between different trusts. This was relevant to the lack of finality that conclusion of the present appeal would bring to the taxation process. The argument about the Representor wanting finality therefore cut both ways because there was no finality to the taxation process because of a lack of information provided by the Representor.

28 The question of fairness and justice was relevant to the first ground of the appeal that the assessment was unenforceable because it related to fees and expenses of trusts that had no assets. Advocate James relied on the sentence "If that trust has no assets at all then it probably ceases to exist as a trust" forming part of paragraph 43 of the 2020 Judgment set out in full at paragraph 15 above. He fairly accepted however that the ratio of Commissioner Clyde-Smith's judgment was as set out at paragraph 46:

> ***"The reality in relation to the six remaining trusts that have no material assets is that GTC can only expect its fees and expenses to be paid by D under paragraph 3 of the order of 31st May 2018 and not from the assets of the trusts as currently there are none or from Fort and Balchan."***

29 Nevertheless, the Respondents wish to argue as a ground of appeal that there were no trusts so that fees could not be claimed in respect of any trust where that trust was never constituted due to having no assets. The issue this gave rise to was a jurisdiction question as to whether the Assistant Judicial Greffier could tax costs in respect of trusts that had no assets. If the Respondents were right in their contention, then the Assistant Judicial Greffier had failed to take into account a relevant matter.

30 In relation to the amendment of appeal notices, the Respondents contended that by analogy with the Court of Appeal (Civil) Rules, there was a right of an amendment to an appeal notice without leave, provided the supplementary notice was served at least fourteen days before the hearing date.

31 This led to the submission that the fact that the Court of Appeal allowed amendments to appeal a notice as of right within a certain time, indicated that where a party sought to amend an appeal notice, the scales were tilted significantly further towards allowing amendments compared to amending pleadings.

32 In relation to the amendments sought by the Amended Notice of Appeal, the Respondents contended that the addition of the First and Third Respondents added nothing, but if they could not be joined then the Second Assessment could be enforced against them which would render the appeal nugatory if any part of the appeal was successful.

33 The amendment in terms of previous assessments was simply to provide clarity.

34 The new grounds in respect of a period of co-trusteeship was a matter that was not drawn to the attention of the Assistant Judicial Greffier; yet the Representor could have done so. This ground did not cause any prejudice to the Representor.

35 In relation to the application by the Respondents to amend the notice out of time, there was no prejudice to the Representor in allowing the amendments out of time. There was no deliberate breach. Rather, the First and Third Respondents sought clarity for they would not be bound by the Second Assessment if the appeal were successful.

36 In relation to the application seeking permission to rely on evidence not provided to the Assistant Judicial Greffier, Advocate James submitted that there was no rule or practice direction applicable to the test to be applied to rely on additional evidence on an appeal from the Greffier to the Royal Court. He then referred to applications to admit fresh evidence in appeals to the Court of Appeal, Rule 12(1) of the Court of Appeal (Civil) (Jersey) Rules 1964 provided that the Court has a discretion, but that no further evidence should be admitted except on “special grounds”. The special grounds were that the evidence could not have been obtained with reasonable diligence for use at the hearing, that it would probably have an important influence and the evidence was credible (see *Ladd v Marshall* as applied in *Mayo v Cantrade* [1998] JLR 173). In relation to this analysis, Advocate James also drew to my attention more recent developments in English authorities that emphasised the primary rule was the need to exercise the discretion to permit fresh evidence in accordance with the overriding objective. The guidance therefore in *Ladd v Marshall* which as applied in *Mayo v Cantrade* [1998] JLR 173 no longer applied to the same extent. In relation to the affidavit, what was new were the tables described as Figure 1, Figure 2 and Figure 3, referred to in the affidavit. Apart from these tables, the rest of the material was known to the Representor and went to the same issues.

37 On appeals, the Court of Appeal also had a discretion as to whether to permit a new argument to be run. The Royal Court should take the same approach to appeals before it.

38 Advocate Barham for the Representor made the following submissions.

39 In relation to the application to Amend the Notice of Appeal and file the Amended Notice out of time, while the Court had power to extend time under Royal Court Rule 1/5, any such application should be the subject of evidence. There was no evidence to explain why the matters raised had not been raised before. The Respondents had therefore failed to address the overriding objective, part of which required cases to be dealt with *"expeditiously and fairly"* (see Rule 1/6(2)(d)). The lateness of the application therefore raised a high hurdle for the Respondents.

40 In relation to the amendments, a date fix the application to amend was also sought before the Representor was given any real chance to consider the same.

41 The analogy with the Court of Appeal Rules in relation to amending a notice of appeal did not assist. The Royal Court Rules in relation in relation to appeals from orders or decisions of the Greffier (Rule 20(2) of the Royal Court Rules) set a clear ten day time limit for filing an appeal. The Court of Appeal Rules could not be incorporated by analogy to rules drafted on a different basis. The Court of Appeal Civil Rules also did not assist in any event because the amendments were served less than fourteen days before the date fixed for the hearing of the appeal. This therefore meant that leave was required.

42 It was also relevant to the exercise of discretion that on 22 December 2023 Advocate Barham had written to Advocate James seeking for his interim payment summons and the Respondents' appeal to be heard on the same date. While the Court date was vacated to allow the summonses to be heard together, no response was received from the Respondents until 16 February 2024 and no notice was given of the possibility of the Notice of Appeal being amended.

43 Advocate Barham also contended that notice of appeal was analogous to a pleading in the sense that it gave the Respondent notice of the arguments to be run. In relation to the principles of an amendment of a pleading, Advocate Barham reminded me of the well known case of *Cunningham v Cunningham* [2009] JLR 227 and the Court's observations at paragraph 19 and 21. He emphasised that there was no attempt to engage with the Representor and no evidence filed in support of the application, and no explanation as to why matters had not been raised previously. There was also no assessment in the application by the Respondents of the strength of the new grounds relied upon.

44 Advocate Barham also referred to my decision (as Master) in *Trico v Buckingham* [2019] JRC 163 at paragraph 36. Paragraph 41 of the Nesbit judgment referred to in paragraph 36 of *Trico* in that decision included the following statement:

> ***"There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it.*** These principles apply with even greater rigour to an amendment made after the trial and in the course

of an appeal."

45 It was not enough to say that no prejudice had been suffered and what was required was a good explanation, none of which had been forthcoming.

46 The addition of the First and Third Respondents was said to be particularly significant because its effect could be to deprive the Representor of its ability to enforce the Second Assessment against them which was relevant to the interim payment application. In particular, in relation to the First Respondent, what he was trying to do by adding himself as a party to the Original Notice of Appeal, was to delay the determination of the interim payment summons. Advocate Barham was also critical of the lack of explanation as to why the First and Third Respondents did not appeal within time.

47 In relation to the grounds contained in the Amended Notice of Appeal, the first ground was not a legitimate ground of appeal. The question of enforcement was quite separate and distinct from the question of quantification of the Representor's fees. In any event, the First Respondent was liable by the order of 31 May 2018 to pay such sums as were assessed in respect of all of the trusts. This was in circumstances where the Royal Court was aware that certain of the trusts had no assets. This order had not been appealed. The Assistant Judicial Greffier did not therefore consider any irrelevant matters.

48 The other grounds relied upon only related to the Second Respondent in any event. Adding the First and Third Respondents was not therefore necessary.

49 In relation to expenses following the Representor's retirement as trustee, these issues also could have been raised earlier.

50 In relation to previous assessments, the issue now sought to be raised that fees had already been assessed could have been raised with the Assistant Judicial Greffier.

51 In relation to Ground 4 headed *'Claims made during a period of co-trusteeship'*, this could have been raised previously. The fact that the Second and Third Respondents were co-trustees was also irrelevant as to the reasonableness of costs incurred by the Representor and nothing had been filed which indicated the strength of this new ground and why it had not been raised previously. It was just as arguable that the costs incurred in the period of co-trusteeship could be higher rather than lower.

52 In relation to the application to introduce affidavit evidence, there was no rule or practice direction concerning this, but it was incumbent upon the Respondents to seek directions at an early stage.

53 The Court of Appeal's approach had to be considered in its own context. An appeal against

an order of the Assistant Judicial Greffier was not a re-hearing. Even then, the Court of Appeal had to be persuaded to exercise its discretion by reference to *Mayo*. The reference to the English CPR did not alter matters because the Court still looked at the factors referred to in *Ladd v Marshall*.

54 What was being produced now apart from the tables was also not new evidence because it was not anything that could not have been said to the Assistant Judicial Greffier. However, the Respondents had chosen not to raise the arguments it now wished to raise when it could have done so.

55 What was being raised were existing factual matters and not new arguments of law. The reference to *FG Hemisphere v DRC Congo* [2011] JLR 486 at paragraph 231 did not therefore assist the Respondents.

56 Finally, if amendments were allowed, the Representor would want to file evidence in response.

57 Advocate James, by way of reply, disagreed with the analogy of looking at notices of appeal as being pleadings.

58 Secondly, if the appeal was refused, the Representor would recover fees that they were not entitled to which was prejudicial to the Respondents.

59 Thirdly, he maintained his criticisms of the Representor for failing to draw material information to the attention of the Assistant Judicial Greffier.

60 In relation to what evidence the Representor might file in response, this submission meant that it was not difficult for the Representor to reply to the new grounds of appeal being raised.

61 Finally, it was self-evident that something had gone wrong with the Assistant Judicial Greffier's Second Assessment which was what was at the heart of the appeal.

Discussion and decision

62 To put the application by the Respondents in context, I start by reference to what is the test on an appeal against a taxation decision. This was determined in *Downes v Marshall* [2010] JLR 265 as explained in the *Incat* case referred to above. In my judgment, it does not matter that the taxation is on the Alhamrani basis rather than in respect of litigation costs. The observations at paragraph 19(iv) of *Incat* equally apply where Birt, Bailiff, stated as follows:

> ***"(iv) Because taxation is carried out by the Greffier, he builds up a considerable expertise and familiarity with the process of taxation.*** That facility is not acquired by the court. That is an additional reason for the court to recognize the discretion conferred upon the Greffier and it supports the opinion of Bailhache, Commr. in Reg's Skips Ltd. (5) that it is not for this court to engage in the same line-by-line exercise as that conducted by the Greffier. Appeals should be confined to points of principle."

63 The conclusions of the Court in *Incat* are to be found at 19(v) where Birt, Bailiff, stated as follows:

> ***"(v) It seems to me that the test established in Downes strikes the right balance in matters of taxation.*** It prevents the parties simply seeking a fresh bite of the cherry and hoping that the court will reach a different decision on individual matters from the Greffier; but on the other hand it allows the court to intervene if it thinks that intervention is required in the interests of justice and fairness. It would therefore still allow the court to intervene if, for example, it thought that the Greffier had erred to a material extent on the appropriate ***Factor B rate or, as was contended by the plaintiffs in the present case, had failed to apply the correct rates to a foreign lawyer's bill or had failed to take sufficient steps by way of inspection to enable him to reach a proper conclusion.*** In other words, the court will intervene if it thinks that the Greffier has erred on a matter of principle or has gone wrong in exercising his discretion to the extent that intervention is required in the interests of justice and fairness."

64 I am clearly bound by that decision unless I consider it to be plainly wrong which is not the case here. To be fair to Advocate James, he did not advance such a contention. However, to the extent that he suggested there was a more general concept of interfering with a taxation on the basis of fairness, that is stretching the conclusions reached by Birt, Bailiff. Intervention on the grounds of fairness is required where the Greffier has gone wrong in exercising his discretion to the extent that intervention is required.

65 In relation to the powers to amend a notice of appeal issued against a decision of the Assistant Judicial Greffier, the Royal Court Rules are silent on the existence of such a power. However, in my judgment the Court's inherent jurisdiction allows such a power to be exercised because without the existence of such a power an appeal might be disallowed and could lead to injustice. As to whether that power should be exercised is however a different question and is at the heart of the issues I had to determine.

66 Overlapping with the power to amend is the power to extend time. Appeals against decisions of the Assistant Judicial Greffier, pursuant to Rule 20/2, must be filed and served within ten days of the making of the order or decision complained of. The Original Notice of Appeal met this requirement.

67 As the time limit for appealing against decisions of the Assistant Judicial Greffier is found within the Royal Court Rules, the Royal Court possesses power to extend the time limit found in Rule 20/2(2) pursuant to Royal Court Rule 1/5 which provides as follows:

> ***"1/5 Power to extend and abridge time***
>
> ***(1) The Court or the Viscount may, on such terms as either thinks just, by order extend or abridge the period within which a person is required or authorized by rules of court or by any judgment, order or direction to do any act in any proceedings*** .
>
> ***(2) The Court or the Viscount may extend any period referred to in paragraph (1) although the application for extension is not made until after the expiration of that period*** .
>
> ***(3) The period within which a person is required by rules of court or by any order or direction to serve, file or amend any pleading or other document may be extended by consent in writing without an order being made for that purpose."***

68 In relation to the reliance by the Representor on the Court of Appeal Rules by way of analogy in relation to amendments, it is true that Rule 6(1) of the Court of Appeal (Civil) Rules 1964 allows for an amendment of a notice of appeal if made by supplementary notice served at least fourteen days before the day fixed for the hearing of the appeal. Otherwise leave is required. In this case, leave would be required, if I were to follow the Court of Appeal Rules, because the amendments were produced within 14 days of the hearing.

69 To resolve whether to allow new grounds of appeal out of time, it is helpful to consider the approach taken by the Court of Appeal when deciding whether or not to extend time for an appeal. In *Chief Officer of States of Jersey Police v Panel of Jurats* [2014] 2 JLR Note 15 by way of example, the Court held as follows:

> ***"Held: When deciding whether to grant an extension, it was well established that the court had to consider (a) the extent of the delay; (b) any explanation for it; (c) the prospects of success; and (d) the risk of prejudice*** (*B v. N*, 2002 JLR N [29], ***applied***; *Crichton v. Parker-Smith*, [2008]JCA039, ***applied).*** If the delay in serving a notice of appeal was short and there was an acceptable excuse for it, an extension of time would not be refused on the basis of the merits of the intended appeal unless the appeal appeared to be hopeless (*Palata Invs.* Ltd. v. Burt & Sinfield Ltd., [1985] 1 W.L.R. 942, ***applied***; *Pitman v. Jersey Evening Post Ltd.*, 2013 (2) JLR 293, ***applied).*** In the present case, time began to run from May 21st, when the finalized judgment was circulated. The delay in the present case of 16 days was material having regard to the 14-day limit in r.6 of the 2000 Rules. The explanation for the delay was therefore of considerable importance. Adherence to procedural deadlines was important and the court would expect a full explanation for any delay. In the present case, no proper explanation had been given for the failure to adhere to

> the procedural time limit. If any of the proposed grounds of appeal had material prospects of success, that would have been taken into account when balancing the applicant's failure to explain the delay, but the proposed ***grounds had no such prospects.*** The application for an extension of time would therefore be dismissed."

70 I regard this guidance as helpful to the approach to be adopted in deciding whether to extend time for the Respondents to file an amended notice of appeal.

71 The above approach also overlaps with the approach taken on amendments to pleadings. While a notice of appeal is not a pleading because a pleading is designed to set out what a party's case is prior to determination of a case, the reason why notices of appeal require grounds to be set is so that the respondent to the appeal and the Court know the issues being raised by the appellant as to why the decision under challenge should be set aside or overturned.

72 In relation to appeals against taxation, it is therefore important that any notice of appeal sets out whether what is alleged is an error of law, a failure to have regard to a relevant matter, having regard to an irrelevant matter or arriving at a conclusion which the Court believes to be wrong to the extent that intervention is required in the interests of justice.

73 The approach on amendments as referred to in *Cunningham* therefore overlaps with the approach taken by the Court of Appeal to allowing extensions of time. Firstly Birt, Bailiff in *Cunningham*, in the context of late applications to amend, at paragraph 17 cited with approval observations of the English Court of Appeal in *Brown v. Barclays Bank PLC (2)*. I regard these observations as being helpful to any exercise of discretion to allow an application to be made out of time made late in the day. The citation from *Brown* is as follows:

> ***"19 This approach had begun to disappear in the latter part of the twentieth century (see e.g.*** *Ketterman v. Hansel Properties*, [1987] A.C. 189, ***per Lord Griffiths at p. 220), and was largely changed in the reforms to English civil procedure embodied in the new Civil Procedure Rules ('CPR').*** Today in England and Wales the courts will take account of the following (amongst other) factors-the strains which litigation imposes on personal litigants, and on particular individuals in litigating companies and other bodies; the expectation that all the issues have already been fully defined; the efficient disposal of the particular case in ways proportionate to the sums involved, its importance, its complexity, and the parties' respective financial positions; the effects on the efficient disposal of other cases; the use of an appropriate share of the court's resources; and similar matters covered by Part 1 of the CPR, in which an 'overriding objective' is encapsulated."

74 I note that this extract very much echoes the sentiments of McNeill JA in *Chief Officer of*

Police v Panel of Jurats.

75 Birt, Bailiff also referred to Paragraph 21 of the *Brown* decision. This extract is well-known, but it is nevertheless worth repeating as follows:

> ***"21 Where there is a late application for an amendment to the order of justice (or to the answer or reply) the Jersey courts have to strike a balance which is primarily between the parties to the instant case.*** The burden on the applicant is a heavy one to show, for example, (1) why the matters now sought to be pleaded were not pleaded before; (2) what is the strength of the new case; (3) why an adjournment should be granted, if one is necessary; (4) how any adverse effects on the other party including the effects of any adjournment, any additional discovery, witness statements or experts reports, or other preparation for trial can be remedied; and (5) why the balance of justice should come down in favour of the party seeking to change its case at a late stage of the proceedings."

76 It is also appropriate to refer to the observations at paragraph 18 of *Cunningham*:

> ***"18 Another convenient summary of the relevant considerations can be found in*** *Charlesworth v. Relay Roads Ltd.* ***(3), where Neuberger, J. said this*** ([1999] 4 All E.R. at 401–402):
>
> ***"As is so often the case where a party applies to amend a pleading or to call evidence for which permission is needed, the justice of the case can be said to involve two competing factors.*** The first factor is that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired: a party prevented from advancing evidence and/or argument on a point (other than a hopeless one) will understandably feel that an injustice has been perpetrated on him, at least if he loses and has reason to believe that he may have won if he had been allowed to plead, call evidence on, and/or argue the point. Particularly where the other party can be compensated in costs for any damage suffered as a result of a late application being granted, there is obviously a powerful case to be made out that justice indicates that the amendment should be permitted …
>
> ***On the other hand, even where, in purely financial terms, the other party can be said to be compensated for a late amendment or late evidence by an appropriate award of costs, it can often be unfair in terms of the strain of litigation, legitimate expectation, the efficient conduct of the case in question, and the interests of other litigants whose cases are waiting to be heard, if such an application succeeds.***""

77 Since the above cases, in 2017 the Royal Court amended its Rules to introduce the overriding objective found at Royal Court Rule 1/6. I emphasise in this case Rule 1/6(2)(d) which requires the Court, when dealing with cases justly and at proportionate costs, to

ensure that a case is dealt with ***"expeditiously and fairly"***. The Royal Court, as part of its case management obligations, is also required to enforce compliance with Rules, Practice Directions and orders (Rule 1/6(2)(f)).

78 In the present case, in light of both the remarks in the *Chief Officer of Police* and the *Cunningham* decisions, the questions I have to consider are as follows:

(i) Why the matters now sought to be appealed were not appealed before?

(ii) What is the strength of the new grounds of appeal?

(iii) Why an adjournment should be granted if one is necessary?

(iv) How any adverse effects on the other party to the appeal, including the effects of any adjournment, can be remedied?

(v) Why should the balance of justice come down in favour of the party seeking to amend its notice of appeal long after the timing limit for filing the appeal has expired?

79 In the present case, the application to amend was first raised on 16 February, nearly five months after the Original Notice of Appeal was filed. The request of 16 February 2024 sent by email to Advocate Barham did not contain any explanation as to why the matters had not been raised before. Rather, the email stated:

> *"The amendments ought not to be controversial.* As you will see, they are straight forward and do not significantly change the ambit of the appeal, they therefore cause no prejudice to your client. The amendments can also easily be dealt with within the day already assigned for the hearing."

80 Notwithstanding these observations, the amendments have proved very much to be controversial. However, no explanation was forthcoming from the Respondents as to why the additional grounds raised in the Amended Notice of Appeal were not raised before the Assistant Judicial Greffier. In that regard, Ms Martin, who swore the thirtieth affidavit, had also sworn her eighteenth affidavit where she filed objections for the Respondents in response to the claims for costs filed on behalf of the Representor. She was therefore perfectly placed to provide an explanation.

81 Nor has there been any explanation as to why the amended grounds were not included in the Original Notice of Appeal. This includes explaining why the First and Third Respondents were not parties to the Original Notice of Appeal. An explanation of this was necessary because there was force to the Representor's concern that the addition of the First Respondent is an attempt to avoid the effect of the interim payment application and paragraph 3 of the Act of Court of 31 May 2018, which required the First Respondent to pay or procure the paying of the Representor's fees and expenses as assessed by the Judicial Greffier, as well as further fees and expenses since last invoice presented to the Court as

agreed. There has been no appeal against that order.

82 In relation to the concern of Advocate James that the Second Assessment might be enforced against the First Respondent before any appeal is determined, there are other ways to deal with such a concern such as paying over only undisputed amounts with the balance being held in Court. Given the other available mechanisms to resolve this concern, this did not justify adding the First Respondent as a party to the Notice of Appeal.

83 The applicable tests to which I have referred also required me to look at the strength of the new grounds of appeal. The addition of the First and Third Respondents as parties therefore applied to all the grounds of appeal. I therefore considered I was entitled to look at the strength of the grounds of appeal in the Original Notice of Appeal as the intention is that they were now to apply to the First and Third Respondents, as well as the amendments to the grounds themselves.

84 I say this because the First and Third Respondents also wished to advance the argument that the Second Assessment was unenforceable insofar as it included fees and expenses of trusts that had no assets. As set out at paragraph 28 above, Advocate James relied on the sentence in paragraph 43 of the 2020 Judgment where Commissioner Clyde-Smith stated, " **If that trust has no assets at all then it probably ceases to exist as a trust**". However, when taken in context of the remainder of paragraph 43 and when looking at paragraph 46 of the 2020 Judgment, it was clear that the issue that Commissioner Clyde-Smith was determining was that fees and assets incurred in respect of one trust could only be claimed from that trust and could not be claimed from any other trust, absent some other agreement. Commissioner Clyde-Smith was not determining that there were no trusts at all. Accordingly, while the Second Respondent is entitled to pursue this argument in its appeal, I considered that this ground, which the First and Third Respondents now wished to also rely on, was a weak ground and the 2020 Judgment is not support for the position that the First and Third Respondents wished to adopt.

85 Again, no evidence has been adduced as to why this ground was not raised before the Assistant Judicial Greffier, if that were possible, or why it was not raised with the Royal Court prior to the Assistant Judicial Greffier carrying out his assessment.

86 In relation to the second ground, the Respondents appeared to be seeking to broaden the ground to cover not just expenses incurred after the date of the Representor's retirement, but also expenses incurred prior to the date of retirement which refer to periods of time following the retirement. In relation to this ground, no explanation was advanced as to why the issue was not raised before the Assistant Judicial Greffier. In addition, while the additional grounds of appeal referred to expenses, in Figure 1 at paragraph 33 of the thirtieth affidavit of Nicole Martin, she seeks to challenge a whole series of fees rather than expenses. This goes far beyond post-retirement expenses. The distinction between professional fees and expenses was drawn by Advocate Martin in her eighteenth affidavit. It therefore appeared that what is proposed by the Amended Notice of Appeal is to broaden

the second ground to extend to fees.

87 What was also not been addressed by any affidavit in support is that the Representor, although it had retired as trustee, continued to hold trust assets until April 2020 because terms about what security should be provided to the Representor for fees they had incurred could not be agreed. The thirtieth affidavit did not address this point.

88 In relation to ground 3 headed 'Previous Assessments', the amendments sought to broaden the grounds of appeal from invoices previously assessed to invoices which now overlap with invoices which had been previously assessed and dealt with as part of the previous assessments. The impact of this ground of appeal by reference to Figure 2 at paragraph 35 of the thirtieth affidavit, appeared to refer to overlapping fees of approximately Swiss Francs 12,000. This was not a significant sum and bearing in mind the Court's obligation to deal with issues justly and with proportionate costs did not justify an extension of time some five months later.

89 In relation to ground 4, this was an entirely new ground. Again, the Respondents did not explain why this argument was not raised with the Assistant Judicial Greffier by the Respondents. Nor did they explain why it was not raised in the Original Notice of Appeal.

90 I also note that in their letter dated 1 November 2019 filed in reply to the eighteenth affidavit of Nicole Martin in relation to unparticularised entries, Dickinson Gleeson stated as follows:

> *"It is noted that the complaint relates to "no reasonable description of the work".* Reference is then made to Schedule D of Ms. Martin's affidavit which is stated to be a schedule of "unparticularized entries". The invoices referred to at items 4 – 13 relates to time spent by GTC on litigation conducted in the United Kingdom, commonly referred to as the Grant Thornton Proceedings where GTC as the trustee of the TDAT was a named party both as trustee until 4 June 2018 and thereafter as former trustee until 31 October 2018. Throughout that time and as reflected in the time narratives for the invoices, GTC's staff were heavily involved in dealing with the litigation which was time consuming both during the time of its trusteeship and thereafter. The value of the claims were significant and the matters that were required to be dealt with by GTC in that period were time intensive not least because the new trustees, Fort Trustees Limited and Balchan Management Limited together ith [D] made it impossible for GTC to deal with matters other than by way of devoting a significant amount of management time thereto. The Respondents are well aware of the work GTC was involved in and what it was required to do in that period." [Emphasis added]

91 This correspondence does not sit with the assertion at paragraph 42 of the thirtieth affidavit of Nicole Martin that:

> *"It is to be inferred that the AJG completed the Assessment on the basis that the*

fees and expenses incurred by the Representor were incurred by it as sole trustee, not co-trustee."

92 To the extent that Advocate James sought to suggest that the Representor should have made the Assistant Judicial Greffier aware of its retirement, the letter of 1 November 2019 suggests that the Assistant Judicial Greffier was so aware. By the time he carried out his taxation, he also had the benefit of the 2020 Judgment. Again, the Respondents could have raised this point with the Assistant Judicial Greffier at any time after the 2020 Judgment before the taxation was completed. As for the other grounds of appeal I received no evidence to explain why they did not do so, or why this ground was not raised in the Original Notice of Appeal.

93 Pulling these matters together, there was no acceptable excuse for the delay. It also counted against the Respondents for failing to have advanced any explanation for the delay. Advocate James could not even assist me when pressed orally on the matter. The Respondents totally failed to adhere to the procedural deadline of ten days. Nor had the Respondents explained why the grounds were not raised before the Assistant Judicial Greffier as they all could have been. There were also significant challenges with Grounds 1 and 4, with the other grounds seeking to broaden the scope of the Original Notice of Appeal, again without any explanation as to why these matters were not raised in the Original Notice of Appeal. Ground 3 is also disproportionate given that the effect of the ground is only to alter the amounts assessed by 12,000 Swiss Francs which is far less than the costs likely to have been incurred in relation to this appeal.

94 While I could have addressed the unfairness to the Representor of the application to amend only being made a few days before the hearing fixed for the appeal by granting an adjournment and allowing time for evidence in response, this power was not sufficient to outweigh the serious failings of the Respondents and the weaknesses as summarised in the previous paragraph.

95 These conclusions also apply to the filing of the thirtieth affidavit of Nicole Martin.

96 In relation to this affidavit, I considered that the approach taken in *Mayo v Cantrade* should also apply to applications to adduce fresh evidence in relation to appeals against taxations carried out by the Assistant Judicial Greffier. Given the approach taken to appeals against such taxations as referred to above, it is important that parties set out the entirety of the submissions they wish to make when claiming costs or objecting to costs of the other party. This is to avoid parties having **"a fresh bite of the cherry"** as referred to in *Incat*. The Respondents in this case did not explain why the matters contained in the evidence could not have been filed with the Assistant Judicial Greffier. In addition, most of the material exhibited was existing material that they could have drawn to his attention if they thought it was relevant. The only differences are the new tables, but those could have been put before the Assistant Judicial Greffier. Otherwise my observations above in relation to the strength of the case in relation to the Amended Notice of Appeal also apply to this affidavit.

97 The reference to the English Civil Procedure Rules on this point did not assist by Advocate James. Since 2017, the Royal Court Rules have also contained the same overriding objective as form part of the English Civil Procedure Rules. The introduction of the overriding objective strengthens rather than weakens the importance of parties conducting litigation efficiently and complying with Rules. The application to admit the thirtieth affidavit therefore ran into the same problems as the application to amend the Original Notice of Appeal and was therefore also refused.

Consequential decisions

98 I next turn to deal with the effect of my decision that I would not allow the Respondents to amend their Notice of Appeal out of time or to file the thirtieth affidavit of Nicole Martin in support. In light of the fact that I was to provide detailed reasons in support of these decisions, I indicated that it would seem to be appropriate to adjourn determination of the Original Notice of Appeal until the Respondents had a chance to consider my reasons, including whether or not to appeal.

99 Advocate Barham however sought to proceed with the appeal and have his interim payment summons determined.

100 Advocate Barham emphasised that the effect of adjourning the Original Notice of Appeal was kicking matters off into the long grass to the prejudice of the Representor. The balance therefore favoured getting on with the Original Notice of Appeal and Respondents ought to have been prepared to deal with that. To the extent the Respondents contend that they were not ready, they had brought matters on their own head by making a late application out of time.

101 If the Court was minded to adjourn proceedings, in the alternative, this should be on the basis of a conditional order, namely that some or all of the amount ordered by the assessment should be paid into Court. This was to reflect the fact that whatever the outcome of the appeal, the Representor was going to receive a significant payment of monies in relation to its costs. Keeping the Representor out of monies due to it affected its cashflow.

102 If an interim payment was ordered, Advocate Barham confirmed this would be transferred to Switzerland and he had no instructions to undertake to repay any amounts awarded by way of interim payment should the Court ultimately determine that the amount due was less than any interim payment.

103 Advocate James emphasised by reference to *Cummins v Howlands (Furniture) Limited* [2014] 2 JLR Note 18 and the importance of proceedings and the likely adverse

consequences to the parties seeking an adjournment, compared with the risk of prejudice to the other party if an adjournment was granted.

104 An adjournment allowed for a single hearing against the Second Assessment because it allowed the Respondents to decide whether or not to appeal the decision I had reached. If there was an appeal, it was only when that appeal had been determined could any appeal against the Second Assessment take place. It also might be that the Respondents chose not to appeal. They would only have a month from the delivery of reasons to seek leave and therefore any delay would not be significant, compared to the delays that had already occurred, if there was no appeal.

105 Refusing an adjournment would restrict by contrast the Respondents' access to justice.

106 He again emphasised that some of the costs of the Representor had still not been assessed because of a lack of information from the Representor. The claims of prejudice did not therefore stand up to analysis.

107 If an interim payment was made there were problems with enforcement because, as had been accepted in a previous security for costs application, it was not straightforward to recover monies in Switzerland. Yet there was no undertaking offered to return any monies.

108 The Representor also had the benefit of monies still being held by Collas Crill. Advocate James however accepted that the sums held by his firm referred to at paragraph 4 of the Act of 20 April 2020 could be paid over if there was no appeal. He also accepted that there was around 13,000 Swiss Francs which did not fall within any challenges the Respondents wished to bring and which should be released.

109 In reply, Advocate Barham criticised the Respondents for not making clear what amounts were in dispute. It was not for the Representor to try to work out the impact of any appeal. There was also some 31,000 Swiss francs still due from the First Respondent which had not been paid and no security had been offered for that sum.

110 In response to these submissions, I concluded it was better to adjourn the appeal to await the outcome of any appeal, if leave were given, against my decision not to allow the Notice of Appeal to be amended out of time and not to allow the thirtieth affidavit of Nicole Martin to be relied upon.

111 I also concluded that to order any form of payment into Court by way of security cut across the observations of Commissioner Clyde-Smith at paragraph 46 of the 2020 Judgment, where he noted that it was a matter for the Representor to pursue the First Respondent by way of summons if the First Respondent did not meet fees that had been assessed, as ordered by paragraph 3 of the Act of Court of 3 May 2018. The order now asked for by the

Representor, if it had been granted, would have had the effect of providing security when the Representor at present did not have the benefit of any such security. In effect, the Representor was trying to obtain security pending appeal. If it wished to make such an application it was entitled to do so, but this should be a separate application and not as the price of granting an adjournment which was justified in order to ensure a single appeal ultimately took place against the Second Assessment of the Assistant Judicial Greffier.

112 Finally, at the conclusion of the hearing submissions and having given my decisions, I reserved costs until delivery of written reasons. I also encouraged the parties to talk to each other and to seek to try to find a way to end their hostilities, if for no other reason than the costs incurred were becoming uneconomic in respect of a fee dispute, if they had not already reached that position.